A Little More Surreal: Once More Unto the Breach With the FTC

Robert W. McCann

I. Introduction

In thinking about the evolving directions of competition law in the United States, one might come to believe that there is a *sub rosa* Calvinist philosophy at work. Not John Calvin the theologian. Rather, Calvin the comic strip compatriot of Hobbes, who once explained, "I try to make everyone's day a little more surreal."[1]

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[1]Watterson, Bill, *Calvin & Hobbes* (originally published Sept. 27, 1986), collected in Watterson, B., THE COMPLETE CALVIN & HOBBES, BOOK ONE (2005) at 159.

And so, as of the time of this writing, the Federal Trade Commission (FTC or "Commission") has issued a policy statement granting itself the authority to interdict any conduct that it perceives to be "unfair," whether or not the same would be actionable under the antitrust laws as we know them, and to do so with only a modicum of opportunity for the alleged wrongdoer to offer a defense. This action brought back to life a longstanding debate about the scope of powers Congress intended to grant to the FTC more than a century ago.

The FTC's action also comes amid renewed calls, notably from the political right, to curb the regulatory powers of the "administrative state," a cause that seems to have gained traction with the U.S. Supreme Court and some federal courts of appeals. Litigation recently and currently (at this writing) before the Supreme Court not only has curbed the ability of federal agencies to broadly interpret their authorizing statutes but, in the case of the FTC, challenges the very framework under which the agency acts as investigator, prosecutor, judge, jury, and appellate body in its own cases.

This contra-positioned state of affairs has broad implications for future competition, including competition in health care markets—not just mergers and business combinations but also in marketing, referral practices, labor practices, and supply chain arrangements. It will take time for these issues to be tested through the inevitable judicial challenges, but for the moment, this article will explore the positions and arguments underlying the issues and suggest potential consequences for health care organizations.

But to begin, the context of this debate is set within the political shift of the FTC under the Biden Administration and the inconsistent history of the FTC's pursuit of "unfair methods of competition" under the Federal Trade Commission Act from 1914 to the present.

II. THE FTC UNDER THE BIDEN ADMINISTRATION

The political alignment of the FTC shifted overnight with the advent of the Biden Administration, bringing to the fore a much more aggressive view of the Commission's mandate to preserve competition in U.S. markets. This new, more liberal political orientation of the Commission may not change for some time, regardless of the outcome of the 2024 Presidential election.

The five FTC Commissioners are selected by the President for seven-year terms, subject to confirmation by the Senate.[2] By law, no more than three Commissioners may represent any one political party. The President also designates the Chair of the Commission. At the time of President Biden's inauguration, one vacancy existed on the Commission due to the resignation of the prior Chair, a Republican. The President selected Columbia University law professor Lina Khan to fill the former Chair's unexpired term, thereby shifting the political composition to a 3-2 Democratic majority, and immediately upon her confirmation, named Ms. Khan to be the Chair.

Subsequently, the President appointed Alvaro Bedoya, a Democrat, to fill the unexpired term of Rohit Chopra (also a Democrat), who had resigned to become the Director of the Consumer Financial Protection Bureau. With that, the three sitting Democratic Commissioners have terms expiring in 2022, 2024, and 2026.[3] Thus, assuming that President Biden will appoint (or re-appoint) Democrats to successive terms in those seats, the Commission (barring resignations or unexpected vacancies during a post-2024 Republican Presidency) will have a Democratic majority until at least September of 2029.

The FTC Chair is a noted critic of the prevailing "Chicago School" of antitrust enforcement, which judges competitive conduct predominantly by its impact on prices (a proxy for consumer welfare) and not on the basis of the enforcement philosophies that predominated prior to the 1980's, *viz.*, enforcement based on market concentration and social welfare considerations such as the protection of small and

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[2]FTC Act, 15 U.S.C. § 41.

[3]The term of Commissioner Rebecca Kelly Slaughter expired on September 25, 2022, and she may continue to serve until she is reappointed or a successor is confirmed. The terms of Chair Kahn and Commissioner Bedoya expire in 2024 and 2026, respectively. The term of Commissioner Christine Wilson, at this writing the lone Republican on the Commission, expires in 2025. Commissioner Noah Joshua Phillips, a Republican, resigned in October, 2022. Phillips' successor will fill his remaining term, which expires in 2023.

nascent competitors.[4] Under Chair Kahn's leadership, the Commission has embarked on a more aggressive and confrontational posture toward business combinations and dominant firms. Indeed, in a span of less than four months during 2021, the FTC made a series of eight changes to its enforcement policies that signaled broad changes to (and to a significant degree have already affected) the enforcement posture of mergers and other transactions, including in the health care industry.[5]

Among other changes, the 2021 policy actions included the withdrawal of the Commission's 2015 enforcement guidance regarding Section 5 of the Federal Trade Commission Act (FTC Act), the provision that gives the Commission authority to enjoin "unfair methods of competition."[6] Fifteen months later, in October of 2022, the Commission adopted a replacement policy radically changing not only the Commission's interpretation of Section 5 but also its view of the powers granted to the Commission under the FTC Act.

III. SECTION 5 OF THE FTC ACT

The FTC and the U.S. Department of Justice (DOJ) have differing, albeit relatively congruent, authority to enforce the antitrust laws. The two Agencies share authority to challenge mergers under Section 7 of the Clayton Act. Enforce-

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[4]Ms. Kahn came to prominence as the author of an influential law review article that argued in favor of more stringent competitive regulation of technology giants such as Amazon, Apple, Google, and Facebook. Kahn, Lina M., *Amazon's Antitrust Paradox*, 126 YALE L. J. 710 (2017). The title of the article is a play on the title of Judge Robert Bork's influential 1978 book, *The Antitrust Paradox: A Policy at War with Itself,* which is considered a seminal exposition of the Chicago School approach to antitrust law. The Chicago School viewpoint and the criticisms of that philosophy by Ms. Kahn and others are discussed in McCann, Robert W., *Thinking Big: Market Power in Consolidating Health Care Markets*, HEALTH LAW HANDBOOK 2019 EDITION (Alice G. Gosfield, ed. 2019).

[5]These actions and the changing antitrust enforcement environment under the Biden administration are discussed in greater detail in McCann, Robert W., *Turnabout and Fair Play: The Changing Antitrust Enforcement Landscape*, HEALTH LAW HANDBOOK 2022 EDITION (Alice G. Gosfield, ed. 2022).

[6]Press Release, Fed. Trade Comm'n, FTC Rescinds 2015 Policy that Limited its Enforcement Ability Under the FTC Act (Jul. 1, 2021), https://www.ftc.gov/news-events/press-releases/2021/07/ftc-rescinds-1995-policy-statement-limited-agencys-ability-deter.

ment of the Sherman Act is the province of DOJ. The FTC's antitrust enforcement authority arises under Section 5 of the Federal Trade Commission Act,[7] and the scope of that authority is understood to be at least coextensive with the body of federal antitrust laws, including the Sherman Act.[8] However, a long-standing legal debate—now rekindled by the current Commission—exists as to whether the FTC's Section 5 authority is broader, enabling it to prosecute conduct that it defines as anticompetitive but that would *not* otherwise violate the Sherman Act or the Clayton Act.[9]

The authorizing language of Section 5 is broad on its face:

> (a) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.[10]

The statute goes on to specify the manner in which the Commission is to act:

> (b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue . . . a complaint stating its charges in that respect . . .. The person, partnership, or corporation so complained of shall have the right to appear . . . and show cause why *an order* should not be entered . . . *to cease and desist* from the violation of the law so charged in said complaint.[11]

Note (as will be relevant to a later discussion in this

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[7]FTC Act § 5; 15 U.S.C. § 45.

[8]See, *e.g.*, Fed. Trade Comm'n v. Motion Picture Advertising Service Co., 344 U.S. 392 (1953).

[9]This characterization of the FTC's charter is often described as the authority to prosecute "standalone" Section 5 violations.

[10]15 U.S.C. § 45(a).

[11]15 U.S.C. § 45(b) (emphasis added). In 2021, the Supreme Court ruled that Section 13(b) of the FTC Act (15 U.S.C. § 53), which authorizes the Commission to seek equitable relief (*i.e.*, an injunction) in federal court when a person "is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission" does *not* provide authority for the Commission to seek equitable *monetary* relief, such as disgorgement or restitution. AMG Capital Management v. Fed. Trade Comm'n, 141 S. Ct. 1341 (2021).

article) that the remedy specified in the statute for a violation of Section 5 is limited to the issuance of a cease-and-desist order by the Commission.[12]

Section 5(a)'s separate references to "unfair methods of competition" and "unfair or deceptive acts or practices" has been understood as a distinction between competition matters and consumer protection matters, respectively.[13] This interpretation is important because, in 1994, Congress amended Section 5 to codify the standard of proof to be applied in consumer protection cases, but conspicuously did not similarly define a standard of proof for matters concerning "unfair methods of competition":

> (n) The Commission shall have no authority under this section . . . to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause *substantial injury to consumers* which is not reasonably avoidable by consumers themselves and *not outweighed by countervailing benefits to consumers or to competition*. In determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with all other evidence. Such *public policy considerations may not serve as a primary basis for such determination*.[14]

The 1996 amendment is notable in two respects. First, the statutory standard of proof, although applied only to consumer protection matters, is not dissimilar to an articulation of the "Rule of Reason" standard under the Sherman Act.[15] Second, the standard is unambivalent in prohibiting a finding of liability based primarily on the Commission's in-

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[12]Only the Department of Justice has authority to conduct a criminal antitrust prosecution, which must be pursued as a violation of the Sherman Act.

[13]Semantically, one might argue, given the disjunctive language used the second part of this language ("unfair *or* deceptive"), that an unfair act or practice affecting commerce is merely another way to describe an unfair method of competition. But principles of statutory interpretation require that all provisions of a statute be given their own meaning if possible. Hibbs v. Winn, 542 U.S. 88, 101 (2004) ("A statute should be construed so that effect is given to all its provisions."). And thus the two subjects of the Commission's authority bear separate interpretations.

[14]15 U.S.C. § 45(n) (emphasis added).

[15]The "Rule of Reason," an antitrust construct, is a framework for case-by-case analysis of anticompetitive conduct based on specific information about the relevant business, its condition before and after the chal-

terpretation of public policy—as discussed below, an important point in the context of the Commission's new Section 5 enforcement policy.

IV. HISTORICAL INTERPRETATION AND ENFORCEMENT OF SECTION 5

The FTC Act was passed (in 1914) in consequence of Congress's fear that the Sherman Act would be undermined by the federal courts' adoption of the Rule of Reason standard, as well as a general Congressional distrust of the economic and social views perceived to be held by the federal judges of that period.[16] Thus, Congress intentionally used the broad "unfair methods of competition" language to define the FTC's authority. The Supreme Court has recognized on several occasions that Section 5 is broader in scope than the Sherman Act. For example, in *Brown Shoe*, the Court held that Section 5 provided authority to enjoin incipient violations of the Sherman Act — conduct not technically in restraint of trade (the operative term of the Sherman Act) but presenting a risk of that result.[17] In *Sperry & Hutchinson*, the Court went somewhat farther, stating that, in measuring a practice against the "elusive" standard of fairness, the FTC may consider "public values beyond simply those

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lenged restraint was imposed, and the restraint's history, nature, and effect. It also considers whether procompetitive attributes of the conduct justify the otherwise anticompetitive effects. State Oil v. Khan, 522 U. S. 3, 10 (1997); United States v. Brown University, 5 F.3d 658, 668-69 (3rd Cir. 1993).

[16]*See* Fed. Trade Comm'n, "Tales from the Crypt," Remarks of Commissioner Leibowitz, Section 5 Workshop (Oct. 17, 2008), http://ftc.gov/bc/workshops/section5/docs/jleibowitz.pdf; Kovacic, William & Marc Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act*, 76 ANTITRUST L. J. 930–32 (2010).

[17]Fed. Trade Comm'n v. Brown Shoe Co., 384 U.S. 316 (1966). The conduct at issue in this case was exclusive dealing arrangements, terminable at will, between Brown Shoe and about one percent of the country's shoe retailers. It is improbable that those arrangements would be considered unlawful today under the Rule of Reason, but the Supreme Court upheld the FTC's position that the contracts infringed Section 5 regardless of whether they violated the Sherman Act. (This decision should not be confused with the earlier and oft-cited merger case, United States v. Brown Shoe Co., 370 U.S. 294 (1962).)

enshrined in the letter or encompassed in the spirit of the antitrust laws."[18]

Notwithstanding this dictum, lower courts were less receptive to a broad reading of the statute. In a series of cases during the 1980s, the federal appeals courts overturned Commission decisions under Section 5 that purported to depart from Sherman Act jurisprudence.[19] In response, starting with its 1984 decision in *General Foods*, the Commission began to pull back its enforcement scope under Section 5, stating: "While Section 5 may empower the Commission to pursue those activities that offend the 'basic policies' of the antitrust laws, we do not believe that power should be used to reshape those policies when they have been clearly expressed and circumscribed."[20]

A subsequent Supreme Court decision cast a further shadow on the idea that "unfairness" can be redressed under the antitrust laws. In *Brooke Group*, the Court stated that: "[e]ven an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws; those laws do not create a federal law of unfair competition or 'purport to afford remedies for all torts committed by or against persons engaged in interstate commerce.' "[21]

Nonetheless, during the 2000's, the FTC re-asserted broad Section 5 authority in challenges to conduct that almost certainly would not have been reached by the Sherman Act and in fact (in some cases) was quite similar to conduct held

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[18]Fed. Trade Comm'n v. Sperry & Hutchinson Co., 405 U.S. 233, 244 (1972).

[19]*See, e.g.*, Official Airline Guides, Inc. v. Fed Trade Comm'n, 630 F.2d 920 (2d Cir. 1980) (rejecting Section 5 challenge to arbitrary but unilateral refusal to deal); Boise Cascade Corp. v. Fed. Trade Comm'n, 637 F.2d 573 (9th Cir. 1980) (overturning finding of unfairness where Commission failed to show evidence of actual collusion in challenge to parallel pricing); E.I. du Pont de Nemours & Co. v. Fed. Trade Comm'n, 729 F.2d 128, (2d Cir. 1984) (unfairness standard does not prohibit otherwise legal and unilaterally adopted price signaling by competitors) (This decision is typically identified as *Ethyl*, the name of the co-petitioner, Ethyl Corporation.)

[20]*In re General Foods Corp.*, Trade Reg. Rep. (CCH) Transfer Binder ¶ 22,142 at 22,987 (F.T.C. 1984).

[21]Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 225 (1993) (citation omitted).

to be legal in earlier decisions of the courts of appeals.[22] These actions were directed particularly toward single firm conduct that was perceived to be injurious to rivals but did not rise to the level of monopolization or attempted monopolization under Section 2 of the Sherman Act, a philosophy consistent with then-current beliefs among some commentators that the federal courts had all but neutered Section 2.[23] All of these matters were settled by consent order; thus, the Commission's aggressive interpretations of its Section 5 authority were not subjected to judicial review.

In 2015, the Commission reversed direction, issuing its *Statement of Enforcement Principles Regarding "Unfair*

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[22]The following actions are illustrative. (a) *In re Negotiated Data Solutions LLC*, No. C-4324 (F.T.C. *compl. filed* Sept. 22, 2008), challenging N-Data's enforcement of certain patents against makers of equipment employing a proprietary Ethernet standard. The FTC acknowledged that the challenged conduct did not rise to the level of a Sherman Act violation. Fed. Trade Comm'n, Statement of the Federal Trade Commission, *In re Negotiated Data Solutions LLC*, No. 0510094 (Jan. 23, 2008). (b) *In re Intel Corporation*, No. 9341 (F.T.C. *compl. filed* Dec. 16, 2009), in which the FTC alleged that Intel engaged in unfair methods of competition by, among other things, using market share-based discounts and bundled discounts. Commissioner Rosch expressly pointed out that in this matter, the Commission was pursuing conduct that arguably resulted in a restraint on consumer choice but did not demonstrably result in reduced output or higher prices. Concurring and Dissenting Statement of Commissioner J. Thomas Rosch, *In re Intel Corporation*, No. 9341 (Dec. 16, 2009). (c) *In re U-Haul International, Inc.*, No. C-4294 (F.T.C. *compl. filed* July 14, 2010), in which the Commission challenged unilateral statements and actions by U-Haul executives that the Commission characterized as invitations for competitors to collude on price. In this regard, the Commission asserted, "It is not essential that the Commission find repeated misconduct attributable to senior executives, or define a market, or show market power, or establish substantial competitive harm, or even find that the terms of the desired agreement have been communicated with precision." Analysis of Agreement Containing Consent Order to Aid Public Comment, *In re U-Haul International, Inc. and AMERCO*, File No. 081 0157 (June 9, 2010).

[23]Kovacic & Winerman, n. 16, *supra*, at 937–39 (suggesting that the Commission's enforcement of Section 5 need not raise the types of "intellectual" concerns that "have propelled Section 2 doctrine in progressively more permissive directions" and arguing that, "[c]ompared to the typical federal court, the FTC offers a superior platform for elaborating competition policy, and particularly for policy toward dominant firms"). For further discussion of the decline in Section 2 enforcement, *see* McCann, *Thinking Big* n. 4, *supra*, at 471-75.

Methods of Competition" Under Section 5 of the FTC Act.[24] The one-page Statement declared that, with respect to acts or practices that may fall outside the scope of the Clayton or Sherman Acts, the Commission "will be guided by the public policy underlying the antitrust laws, namely, the promotion of consumer welfare;" that the act or practice "will be evaluated under a framework similar to the rule of reason;" and that the Commission would not employ Section 5 in situations that could be redressed under the Sherman Act or Clayton Act. In other words, the Commission committed at that time to align its enforcement actions under Section 5 with Sherman Act and Clayton Act jurisprudence and not to pursue a doctrine of "unfairness" based on separate competition principles. Standalone Section 5 enforcement essentially ceased following the adoption of the 2015 Section 5 Statement.[25]

In the most recent reversal of direction, the Commission withdrew its 2015 Section 5 enforcement policy in 2021.[26] In explaining that decision, the Commission stated that the 2015 document "contravenes the text, structure, and history of Section 5 and largely writes the FTC's standalone authority out of existence."[27] The 2021 Withdrawal Statement reviewed the legislative history of the FTC Act at length, on which the Commission based its mandate to reinvigorate Section 5 and its views of the shortcomings of tying Section 5 to Sherman Act Rule of Reason jurisprudence.[28] The Commission stated its intent to "restore the agency to [its] criti-

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[24]Fed. Trade Comm'n, Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (Aug, 13, 2015), https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf (hereinafter "2015 Section 5 Statement").

[25]Post-2015, the Commission brought only one action alleging a standalone Section 5 violation, and that claim was not the principal focus of the ensuing litigation. *See* Complaint, *FTC v. Qualcomm, Inc.*, No. 5:17-cv-00220 (N.D. Cal. Jan. 17, 2017).

[26]Fed. Trade Comm'n, Statement of the Commission On the Withdrawal of the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (July 9, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591706/p210100commnstmtwithdrawalsec5enforcement.pdf ("2021 Withdrawal Statement").

[27]2021 Withdrawal Statement at 1.

[28]2021 Withdrawal Statement at 2-6.

cal mission . . . [*viz*.] to use its expertise to identify and combat unfair methods of competition even if they do not violate a separate antitrust statute."[29]

The 2021 Withdrawal Statement also indicated that the Commission "will consider whether to issue new guidance or to propose rules that will clarify the types of practices that warrant scrutiny" under Section 5.[30] And indeed, sixteen months later, the Commission promulgated a new guidance document to address the void created by the recission of the 2015 Section 5 Statement.[31]

V. THE 2022 SECTION 5 POLICY STATEMENT AND ITS IMPLICATIONS

Compared to other FTC and DOJ guidance documents (*e.g.*, the *Horizontal Merger Guidelines*), the Policy Statement offers even less insight than usual into the rubric that the Commission proposes to follow to bring a standalone Section 5 claim.[32] It is a document of general principles without limiting factors, built on a construct of largely undefined terms.[33]

The Policy Statement's literalist construct for categorizing

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[29]2021 Withdrawal Statement at 1.

[30]2021 Withdrawal Statement at 7.

[31]Fed. Trade Comm'n, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/p221202sec5enforcementpolicystatement_002.pdf (the "Policy Statement").

[32]Although the document is slightly more than 15 pages in length, fully half of it is a defense of the Commission's expansive interpretation of the authority granted to it under Section 5.

[33]The vote to issue the Policy Statement was 3-1 along party lines. Chair Kahn and Commissioners Slaughter and Bedoya issued statements further explaining their views on Section 5. Fed. Trade Comm'n, Statement of Chair Lina M. Kahn Joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro M. Bedoya On the Adoption of the Statement of Enforcement Policy Regarding Unfair Methods of Competition Under Section 5 of the FTC Act (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/Section5PolicyStmtKhanSlaughterBedoyaStmt.pdf; Fed. Trade Comm'n, Statement of Commissioner Alvaro M. Bedoya Joined by Chair Lina M Kahn and Commissioner Rebecca Kelly Slaughter On the Adoption of the Statement of Enforcement Policy Regarding Unfair Methods of Competition Under Section 5 of the FTC Act (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStmtBedoyaStmt.pdf. Commissioner Wilson issued a lengthy dissenting state-

conduct as an "unfair method of competition" is that it must be (a) a method of competition that is (b) unfair.[34]

A. Methods of Competition

The Policy Statement explains that a "method of competition" means some form of conduct in the marketplace undertaken by the actor in question, as opposed to a condition of the marketplace not caused by that person. The conduct must "implicate" competition but may do so indirectly as well as directly. As an example, the document indicates that engaging in some forms of unlawful conduct (*e.g.*, statutory or regulatory violations) might be considered a method of competition (presumably because the conduct could illicitly enhance the actor's competitive position). It gives the example that a misuse of patents might create or exacerbate competitive barriers, but the Policy Statement does not attempt to further define the types of laws that typically would be considered to implicate competition, saying only that a violation of tax laws, for example, would be "unlikely" to be considered a method of competition.[35]

Certainly, the Policy Statement's approach to defining methods of competition places the Commission in a position to examine every aspect of a firm's conduct and search for a relationship between that conduct and the firm's competitive position. Which begs the question, what conduct of a rational economic actor would not be undertaken in order to, at some level, advance their competitive prospects (*i.e.*, implicate competition)?

But understanding how the Commission defines a method of competition under the Policy Statement is likely to prove a more objectively rational exercise than understanding how that method would be determined to be unfair.

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ment that clearly frames the substantive debate over the Commission's new direction. Fed. Trade Comm'n, Dissenting Statement of Commissioner Christine S. Wilson Regarding the "Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act," File No. P221202 (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyWilsonDissentStmt.pdf (hereinafter, "Wilson Section 5 Dissent").

[34] Policy Statement at 8.

[35] *Id.*

B. "Unfair" Conduct

The unfairness rubric of the Policy Statement has two conditions. First, there must be "indicia of unfairness." Indicia of unfairness exist if the conduct in question is "exploitative, collusive, abusive, deceptive, predatory, or involve[s] the use of economic power of a similar nature," or is "otherwise restrictive or exclusionary."[36] Second, the conduct must "tend to negatively affect competitive conditions." This condition is to include conduct that "impair[s] the opportunities of market participants, reduce[s] competition between rivals, limit[s] choice, or otherwise harm[s] consumers."[37]

The Policy Statement then indicates that the two conditions will be weighed on a sliding scale—if the indicia of unfairness are clear, the tendency of the conduct to affect competitive conditions will matter less. And conversely, conduct that is not facially unfair may be deemed to violate Section 5 based on an evaluation of the firm's "size, power, and purpose" and the current and potential future effects of the conduct.[38] Effects on competitive conditions may include effects on workers or on other firms in the market (*i.e.*, competitors), as well as effects on consumers.

In the Policy Statement, the Commission emphasizes that, because the purpose of Section 5 is to arrest incipient threats to competition, evidence of actual harm to competition is not required to establish a violation, nor is it necessary to define a market and or to adduce evidence of market power. Rather the conduct's tendency to impair competition may be judged "*in the aggregate along with the conduct of others* engaging in the same or similar conduct, or when the conduct is examined as part of *the cumulative effect of a variety of different practices by the respondent*."[39]

The Policy Statement makes clear that the opportunities to justify a challenged practice on the grounds of countervailing benefits from the conduct will be highly circumscribed. The Commission's evaluation of efficiency arguments will be

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[36]Policy Statement at 9.

[37]*Id.*

[38]*Id.*

[39]*Id.* at 10 (emphasis added).

subjective.[40] There will be no net efficiencies or numerical cost-benefit analysis. It will be relevant – perhaps essential—that the benefits will be experienced in the same market by the same parties who are potentially harmed by the conduct. Justifications will receive lesser consideration if the Commission ascribes a greater degree of unfairness to the conduct.[41]

The document concludes with a listing of historical examples of unfair methods of competition.[42] Some are obvious, *e.g.*, conduct that violates the Sherman Act or the Clayton Act, but most categories include conduct that, under at least some circumstances, has been deemed lawful.

These include, first, conduct deemed to be an incipient violation of the antitrust laws—defined as conduct by firms lacking market power that, by their conduct, might attain the ability to violate the antitrust laws in the future. This would include:

- Mergers and acquisitions that "have the tendency" to ripen into antitrust violations;
- Serial mergers and acquisitions that collectively may harm competition even if none of them individually violates the antitrust laws;[43] and
- Loyalty rebates, tying, bundling, and exclusive dealing arrangements that "have the tendency" to ripen into antitrust violations.

The examples also include conduct that "violates the spirit of the antitrust laws." This is a longer list of deemed violations that "may not be covered by the literal language of the antitrust laws" and "may depart from prior precedent" under the Sherman and Clayton Acts. Of particular note are the following:

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[40] *Id.* at 11 ("The unfair methods of competition framework explicitly contemplates a variety of non-quantifiable harms, and justifications and purported benefits may be unquantifiable as well.")

[41] *Id.*

[42] *Id.* at 12-16.

[43] This category suggests the possibility of challenging so-called "cross-market" mergers under Section 5, as those mergers definitionally do not violate traditional interpretations of the Clayton Act. *See* McCann, Robert W. and Kenneth M. Vorrasi, *Cross-Market Effects in Hospital Mergers: A Collision if Economic and Legal Theory*, HEALTH LAW HANDBOOK, 2018 EDITION (Alice G. Gosfield, ed. 2018).

- Practices that facilitate tacit coordination, *i.e.*, firms acting in parallel but not by agreement;
- Parallel exclusionary conduct, *e.g.*, the adoption of similar potentially "unfair" practices by a large number of firms in the market;
- Conduct that is "undertaken with other acts and practices that cumulatively may tend to undermine competitive conditions in the market;"
- Using market power in one market to impede competition or to gain an advantage in a related market, a concept historically referred to (in some forms) as "monopoly leveraging;"
- Acquisitions of a nascent competitor that may affect future competition;
- False or deceptive advertising or marketing that tends to create or maintain market power; and
- Discriminatory refusals to deal that tend to create or maintain market power.

C. Implications of the Commission's Position

To state the obvious, the Policy Statement contemplates an antitrust enforcement paradigm built on far different principles than the consumer welfare standard of the last four decades. Although the implications of the Commission's action are myriad and debatable, this article suggests four broad areas of consequence: (1) a return to populist views of competition law in general; (2) greater uncertainty for market participants; (3) the revival of certain dormant legal theories; and (4) generalized condemnation of certain business practices through regulation.

1. *A Revival of Populist Antitrust Views*

The 10,000-foot implication of the Policy Statement is that what is old is (or may be) new again. Both explicitly and inherently, it embraces older, more populist views of antitrust law. Indeed, a great many members of the current antitrust bar were not alive when some of these ideas last were prominent in antitrust jurisprudence. The retro focus of the Policy Statement is clear in the copious historical footnotes that occupy more space in the document than the actual policy itself.

The Commission relies heavily on the 109-year old legislative history of the FTC Act to justify its interpretation of the authority granted to it by the Act. The Commission's view is a static one that does not consider the extent to which the evolution of Sherman Act and Clayton Act jurisprudence since 1914 has inherently addressed the concerns of the FTC Act's advocates, *i.e.*, that the U.S. judicial system could not keep pace with changing economic conditions or adequately protect American markets.[44] Without question, the evolution of the Sherman Act enforcement has been significant over the past century.[45]

Similarly, a large portion of the case law cited as support for the Commission's positions comes from earlier times. More than seven out of every 10 judicial decisions cited in the Commission's document are at least forty years old, and many of the more recent decisions actually are cited for propositions other than the interpretation and scope of Section 5. For example, a large number of the recent cited cases are *Sherman Act* decisions concerning conduct cited by the Commission to illustrate "unfair" practices (which would not seem to lend much support to the Commission's arguments that Section 5 reaches beyond the Sherman Act). Of course, the older decisions cited by the Commission are still good law, in the sense that they have not been overruled. But the truth is that more modern judicial examinations of Section 5 have not consistently given the statute the breadth that the Commission takes from older cases.

For example, the Commission's current positions lean heavily on decisions such as *Sperry & Hutchinson*, in which the Supreme Court opined that the FTC was authorized to consider public values beyond the letter or spirit of the antitrust laws when enforcing Section 5.[46] But, as discussed above, during the 1980's, courts rejected the FTC's attempts

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[44]Commissioner Wilson also argues that the majority's reading of the legislative history is overly selective, for example, in emphasizing statements concerning the protection of small businesses. Wilson Section 5 Dissent at 20.

[45]*See*, *e.g.*, Hovenkamp, Herbert J., "The Rule of Reason" *Faculty Scholarship at Penn Law* 1778 (2018). https://scholarship.law.upenn.edu/faculty_scholarship/1778

[46]Notwithstanding the Court's broad reading of Section 5 in *Sperry & Hutchinson*, the FTC nonetheless *lost* that case. The Court held that the

to bring Section 5 challenges to conduct outside the Sherman Act, out of concern that the agency had failed to put forth adequate standards.[47]

Yet, the Commission cites those very same cases as affirming a broad reading of Section 5,[48] but in doing so ignores the fact that those courts were uniformly unwilling to read Section 5 as a blank check. Indeed, those cases directly reject theories advocated by the Commission in the Policy Statement. For example, in *Ethyl*, a case involving parallel conduct in an oligopolistic segment of the chemical industry, the Second Circuit declined to adopt the FTC's argument that Section 5 can be violated by "non-collusive, non-predatory and independent conduct of a non-artificial nature, at least when it results in a substantial lessening of competition." The court held that, "A test based solely upon restraint of competition, even if qualified by the requirement that the conduct be 'analogous' to an antitrust violation, is so vague as to permit arbitrary or undue government interference with the reasonable freedom of action that has marked our country's competitive system."[49]

Similarly, in *Boise Cascade*, the Ninth Circuit rejected the FTC's assertion that, even without evidence of overt collusion, industry-wide adoption of an artificial method of price-quoting should be treated as a *per se* violation of Section 5. The court stated that to "allow a finding of a section 5 violation on the theory that the mere widespread use of the

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unchallenged finding of the appellate court below was that S&H's conduct violated neither the letter nor the spirit of the antitrust laws and found the FTC's opinion devoid of any standards by which to determine the unfairness of particular competitive practices or consumer interests implicated by S&H's conduct, and accordingly affirmed the decisions below to set aside the FTC's order. 405 U.S. at 245-249. The Court's focus on the absence of standards in *Sperry & Hutchinson* arguably is unhelpful to the FTC given the relatively amorphous standards of the Policy Statement. *See* Section IV.C.2 *infra*.

[47] *See* nn. 19-20 and accompanying text, *supra*.

[48] Policy Statement at 7 ("Even when courts have rejected the Commission's factual conclusions they have consistently reaffirmed the scope of its Section 5 authority.")

[49] *Ethyl*, 729 F.2d at 137. *Compare* Policy Statement at 9, stating that even when conduct is <u>not</u> facially unfair (*i.e.*, coercive, predatory, *etc.*) it may be sufficient to show only a tendency to reduce competition to establish Section 5 liability.

practice makes it an incipient threat to competition would be to blur the distinction between guilty and innocent commercial behavior."[50]

And in *Official Airline Guides*, a case involving a monopolist's unilateral decision to provide its services to certificated airlines but not commuter airlines—to the alleged competitive disadvantage of the commuter airlines—the Second Circuit expressly objected to the idea that the FTC could base enforcement on subjective views of fairness in business conduct: "[E]nforcement of the FTC's order here would give the FTC too much power to substitute its own business judgment for that of the monopolist in any decision that arguably affects competition in another industry. Such a decision would permit the FTC to delve into . . . social, political, or personal reasons for a monopolist's refusal to deal."[51]

Seemingly notwithstanding the evolution of the antitrust laws since 1914, the FTC's Policy Statement hearkens to a time when the U.S. economy was still fearful of the trusts of the 1890's and some in Congress believed that a primary role of the FTC was not so much to protect consumers but to protect "smaller weaker business organizations from the oppressive and unfair competition of their more powerful rivals."[52] This is a far cry from the consumer welfare standard of the 21st century.[53]

2. Uncertainty Around Permitted Conduct

In *Ethyl*, the court went to great lengths to express concern

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[50]*Boise Cascade*, 637 F.2d at 581-82. *Compare* the Policy Statement's identification of parallel exclusionary conduct (*i.e.*, the adoption of similar potentially "unfair" practices by multiple firms) as an unfair method of competition. Policy Statement at 13.

[51]*Official Airline Guides*, 630 F.2d at 927. *Compare* Policy Statement at 13, identifying as "unfair" conduct that violates the "spirit" of the antitrust laws but that may not be covered by the literal language of the antitrust laws or fall into a gap in those laws.

[52]51 Cong. Rec. 8979 (1914) (statement of Rep. Murdock). Mr. Murdock's statement is cited by the FTC four times in the Policy Statement (at nn. 15, 17, 18, and 21).

[53]As Judge Easterbrook famously observed, "Competition is a ruthless process. A firm that reduces cost and expands sales injures rivals—sometimes fatally." Ball Mem'l Hosp., Inc. v. Mut. Hosp. Ins., Inc., 784 F.2d 1325, 1338 (7th Cir. 1986).

with the absence of a definable standard of "unfairness" undergirding the FTC's effort to enjoin conduct of the respondents that was neither facially anticompetitive nor violated the antitrust laws. "[S]tandards for determining whether [such conduct] is "unfair" within the meaning of § 5 must be formulated to discriminate between normally acceptable business behavior and conduct that is unreasonable or unacceptable. Otherwise the door would be open to arbitrary or capricious administration of § 5; the FTC could, whenever it believed that an industry was not achieving its maximum competitive potential, ban certain practices in the hope that its action would increase competition."[54] Indeed, the court framed the matter as a "duty" of the Commission to define the conditions under which conduct would be considered unfair.[55]

Nonetheless, it is hard to miss the absence of standards in the inherently subjective approach to enforcement taken in the Policy Statement. As outlined above, the Commission proposes to use a "sliding scale" methodology to weigh the "indicia of unfairness" surrounding particular conduct against its tendency to negatively affect competitive conditions.[56] However, the indicia of unfairness, are nothing more than undefined labels that the Commission may assign to a firm's conduct—"coercive, exploitative, collusive, abusive, deceptive, predatory, or . . . otherwise restrictive or exclusionary."[57] None of those terms has an intrinsic meaning devoid of context. None of them necessarily has the same meaning when applied across the customs and trade practices of different industries.

Moreover, several of those labels are open to extremely broad definitions. For example, the term "exclusionary" could be applied to almost any form of business conduct, in the sense that a firm's non-collusive decision to deal with a particular business partner of necessity excludes other partners with which the firm might have dealt. The same is true if a firm (*e.g.*, a hospital) decides to vertically integrate (by own-

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[54] *Ethyl*, 729 F.2d at 138-39.

[55] *Id.* at 137.

[56] Policy Statement at 9.

[57] *Id.*

ing medical practices or downstream providers) rather than buy services from other firms in the market.

Similarly, one firm's decision not to do business with another firm based on, *e.g.*, religious beliefs or the political views of that firm's ownership is certainly "restrictive." In fact, if the firm imposing the restriction has market power, the decision might be viewed as "coercive" or "abusive." Such questions are rife within health care as provider organizations and employer groups make business choices around issues such as abortion, contraception, LGBTQ rights, and gender-affirming care. It's really not hard to imagine a situation in which, say, a primary care provider is prevented from making referrals to specialists in a market-dominant medical group that also employs competing primary care physicians because she is for (or against) providing services to gay and lesbian patients and, in a complaint to the FTC, would claim that the medical group is engaged in an unfair method of competition. Who is to say that the political views of the Commission would never intrude into a Section 5 analysis of such a situation?

And with respect to the potential competitive consequences of a firm's conduct, the Commission has made clear in the Policy Statement that its analysis of whether a firm's conduct may "tend[ ] to cause potential harm similar to" harm that falls within the scope of the antirust laws, its analysis "may depart from prior precedent [under] the Sherman and Clayton Acts." The Policy Statement seems to be saying, for example, that the Commission may go after mergers that have been determined to be lawful under the Clayton Act if the Commission nonetheless deems them to create a "tendency," *e.g.*, to impair the prospects of future rivals. But a standard-free departure from established precedent is exactly what troubled the courts in *Ethyl*, *Boise Cascade*, and *OAG*. It will be challenging for any firm to conform its conduct to the law if the foundation of Commission's Section 5 views can shift at any time.

3. Revival of Dormant Legal Theories

Between the lines of the Policy Statement, one can foresee the resurrection of legal challenges based on two theories recently thought to be dead: "monopoly leveraging" and the "essential facilities" doctrine.

Monopoly leveraging is a theory of liability premised on a firm's use of market power in one market to gain an "advantage" (*not* rising to the level of attempted monopoly) in another, competitive market. The Policy Statement foreshadows a revival of this theory in identifying "unfair" conduct to include, "de facto tying, bundling, exclusive dealing, or loyalty rebates that use market power in one market to entrench that power or impede competition in the same or a related market" and "using market power in one market to gain a competitive advantage in an adjacent market by, for example, utilizing technological incompatibilities to negatively impact competition in related markets."[58] The latter statement directly recalls one of the most infamous monopoly leveraging cases, *Berkey Photo*.[59]

Berkey Photo competed with Eastman Kodak Company in, *inter alia*, the provision of photofinishing services. Kodak also supplied photofinishing equipment and supplies to Berkey. Kodak (at that time) had a dominant market position in cameras and film but was not remotely dominant in the photofinishing business. In 1972, Kodak introduced a new "110" pocket-sized camera that used a new type of higher-resolution film, called Kodacolor II. Kodacolor II film required a new and unique developing process, which in turn required specialized developing equipment, which Kodak solely manufactured.

The new 110 camera was wildly successful and, for the first eighteen months after its introduction, Kodak sold Kodacolor II film only in the 110 format. Kodak thus enjoyed a significant head start on the market in terms of not just camera and film sales but also in terms of photofinishing for Kodacolor II users. Berkey asserted (among many other allegations) that Kodak's marketing of the new 110 format camera constituted an impermissible leveraging of Kodak's 110 film monopoly into the markets for photofinishing services and equipment. The Second Circuit agreed, holding that a firm violates Section 2 of the Sherman Act by using its monopoly power in one market to gain a competitive advantage in another, notwithstanding the absence of any

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[58]Policy Statement at 14, 15.

[59]Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, (2d Cir. 1979).

possibility of monopolizing the second market. The court stated, "That the competition in the leveraged market may not be destroyed but merely distorted does not make it more palatable. Social and economic effects of an extension of monopoly power militate against such conduct."[60] Although the Sixth Circuit subsequently followed suit in recognizing a monopoly leveraging theory under the Sherman Act, a number of other courts declined to do so.[61]

Monopoly leveraging made its way into health care litigation in the 1990's, in cases alleging that certain hospitals used their dominance over inpatient services to favor their owned and affiliated post-acute providers over non-affiliated providers.[62] Those actions were brought as monopolization claims under Section 2 of the Sherman Act. But subsequently, "monopoly leveraging" as a theory of *Section 2* liability was effectively discredited by the Supreme Court.[63] However, the Supreme Court's dicta on this matter cannot be read to rule

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[60]603 F.2d at 275.

[61]Fineman v. Armstrong World Industries, Inc., 980 F.2d 171, 24 Fed. R. Serv. 3d 162 (3d Cir. 1992) (rejecting *Berkey*); Alaska Airlines, Inc. v. United Airlines, Inc., 948 F.2d 536 (9th Cir. 1991) (same); General Cigar Holdings, Inc. v. Altadis, S.A., 205 F. Supp. 2d 1335 (S.D. Fla. 2002) (same). The monopoly leveraging theory was embraced by the Sixth Circuit in Kerasotes Michigan Theatres, Inc. v. National Amusements, Inc., 854 F.2d 135, 11 Fed. R. Serv. 3d 1545 (6th Cir. 1988).

[62]Key Enters. v. Venice Hospital, 703 F. Supp. 1513 (M.D. Fla. 1989), *reversed,* 919 F.2d 1550 (11th Cir. 1990), *reh'g granted and opinion upheld*, 979 F.2d 806 (11th Cir. 1992), *order vacated,* 9 F.3d 893 (11th Cir. 1993); M & M Medical Supplies, et al. v. Pleasant Valley Hospital, et al., 981 F. 2d 160 (4th Cir. 1992) (expressing no opinion on the question but assuming for purposes of remand that monopoly leveraging is a separate violation of Section 2); Advanced Health-care Services, Inc. v. Radford Community Hospital, et al., 910 F.2d 139 (4th Cir. 1990) (overturning a grant of summary judgment on a monopoly leveraging claim on substantially similar facts as *M & M Medical Supplies*, assuming for purposes of remand (but not holding) that monopoly leveraging was a cognizable cause of action under Section 2).

[63]Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 415 n. 4 (2004). The Court held, in effect, that monopoly leveraging is not a different claim from attempted monopolization under Section 2, stating that (a) the "leveraging" in question must itself be anticompetitive and (b) there must be a "dangerous probability of success" of monopolizing the second market.

out the use of monopoly leveraging as basis for a Section 5 claim.

The difficulty of the monopoly leveraging theory is that its evil exists in the eye of the beholder. It relies on the inherently undefined concept of an "advantage" as a basis of liability, and begs the necessary (in a traditional antitrust sense) question of whether a firm's advantage (however defined) is in fact the result of superior business acumen, risk-taking, or other basis generally presumed to be procompetitive and to be encouraged. (For example, Kodak's "advantage" over Berkey was that it invented and thereby solely possessed a new photographic technology.) Monopoly leveraging is a true liability risk for the health care industry in which many markets have strong or dominant hospitals or health systems with smaller, more competitive upstream and downstream providers.

The "essential facility" doctrine is a particular subcategory of Section 2 theory on refusals to deal. It posits that through monopolistic control of a "facility" (*i.e.*, a means of production or a productive input) that is essential to competition, and through a refusal to make that facility available to competitors on reasonable terms, the defendant destroys or impairs the competitors' ability to compete in the marketplace. The doctrine has its roots in two cases involving *concerted* refusals to deal that were challenged under section 1 of the Sherman Act.[64] The extension of the doctrine to *unilateral* refusals to deal has always been theoretically controversial, given that concerted action is more circumscribed under the Sherman Act, and because the Sherman Act generally has not been interpreted to require a firm to do business with its competitors.[65]

The Policy Statement identifies "discriminatory refusals to deal which tend to create or maintain market power" as an

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[64]Associated Press v. U.S., 326 U.S. 1 (1945); U. S. v. Terminal R. R. Ass'n of St. Louis, 224 U.S. 383 (1912).

[65]U.S. v. Colgate & Co., 250 U.S. 300 (1919); *Trinko,* 540 U.S. at 408; *see also* Surgical Care Center of Hammond, L.C. v. Hospital Service Dist. No. 1 of Tangipahoa Parish, 2001-1 Trade Cas. (CCH) ¶ 73215, 2001 WL 8586 (E.D. La. 2001), *aff'd*, 309 F.3d 836 (5th Cir. 2002) (hospital's refusal to enter into a transfer agreement with a competing ambulatory surgery center, which agreement was a legal necessity for licensure of the ASC, held not to be a violation of the Sherman Act).

unfair method of competition, citing the Supreme Court's 1985 decision in *Aspen Skiing* for support.[66] Health care provider relationships frequently present situations that may be characterized as refusals to deal by a firm with market power (typically, a hospital).

Aspen Skiing[67] arose from a unilateral decision by the defendant, which controlled three of the four skiing mountains in Aspen, Colorado, to discontinue a multiday ski lift ticket arrangement with the plaintiff (which controlled the smaller fourth mountain) unless the defendant received a larger share of the combined revenue from the operations. (The arrangement allowed skiers to ski any of the four mountains interchangeably.) This action ultimately led to the discontinuation of the multiarea ticket, and thereafter, the defendant refused to maintain any joint marketing relationship with the plaintiff, even one in which the plaintiff would buy the defendant's lift tickets at retail and sell them in a package.

The Court held that the defendant's conduct constituted unlawful monopolization under Section 2 of the Sherman Act. The Court's opinion, although not a model of clarity, generally has been understood to say that a refusal to deal by a monopolist is predatory if three inter-related conditions are satisfied: (1) the motive for the refusal is to prevent competition in the relevant market, (2) the refusal has no efficiency justification (which, in effect, is the same thing as the first condition), and (3) the refusal to deal has the effect of maintaining or increasing the monopolist's power. Lower courts understandably struggled with this approach in attempting to distinguish between predatory conduct and aggressive but legitimate competitive motives.[68]

However, in *Trinko*, the Supreme Court significantly nar-

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[66]Policy Statement at 16.

[67]Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985).

[68]Courts have frequently commented on the concern that overextending the reach of Section 2 (*i.e.*, by failing to distinguish merely aggressive business conduct that may actually be procompetitive from predation) could chill innovation and risk-taking by firms with market power. Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc., 549 U.S. 312, 325 (discussing the risk of chilling procompetitive behavior with too lax a liability standard under Section 2); Re/Max Intern., Inc. v. Realty

rowed the ruling in *Aspen Skiing*. The question in *Trinko* was whether Verizon violated Section 2 of the Sherman Act by breaching its statutory obligation (under the Telecommunications Act of 1996) to make its telephone network available to competitors. (In this case, the competitor was AT&T, of which the plaintiff, Trinko, was a customer.) Verizon's failure to make its network available to AT&T on reasonable terms was an established fact, as Verizon previously had been found to have violated the Telecommunications Act requirement in a separate FCC administrative proceeding. Thus, the sole question was whether the same conduct could give rise to liability under Section 2.

The Supreme Court held that the allegations regarding Verizon's conduct did *not* state a claim under Section 2. In its opinion, the Court devoted considerable discussion to the risks inherent in forcing a lawful monopolist to share its monopoly with competitors. The Court observed that such forced sharing distorts the competitive incentive that the antitrust laws were designed to promote.[69] The Court cited (and reinvigorated) its 1919 holding in *Colgate* that the antitrust laws do not restrict the right of an entirely private business to exercise discretion as to the firms with which it will deal.[70]

The Court distinguished *Aspen Skiing* as "at or near the boundary of Section 2 liability" and constituting a "limited exception" to the general rule that a firm has no duty to cooperate with competitors.[71] The Court explained that, to fall within the exception, the conduct in question must involve: (1) the termination of a voluntary "and thus presumably profitable" course of dealing; (2) the sale of publicly marketed services; and (3) a refusal to sell even at retail prices.[72]

The Court declined to recognize the existence of an "es-

One, Inc., 924 F. Supp. 1474 (N.D. Ohio 1996), judgment aff'd in part, rev'd in part, 173 F.3d 995 (6th Cir. 1999) (plaintiff in a Section 2 case must show that the challenged conduct is "more than unfair, impolite, or unethical").

[69]540 U.S. at 407-08.

[70]*Id.* at 408.

[71]*Id.*at 409.

[72]*Id.* In this regard, the Court appears to have overlaid a predatory pricing standard upon the sphere of unilateral refusals to deal—*i.e.*, there must be a short-term loss of profitability with the intent of ending compe-

sential facilities" cause of action distinct from the monopolization and attempted monopolization strictures of Section 2. "[Our] conclusion would be unchanged even if we considered to be established law the "essential facilities" doctrine crafted by some lower courts . . . We have never recognized such a doctrine, . . . and we find no need either to recognize it or to repudiate it here. . . . To the extent respondent's "essential facilities" argument is distinct from its general § 2 argument, we reject it."[73]

Here, again, it appears that the Commission may view Section 5 as a vehicle to pursue a theory that the courts do not recognize under Section 2, which has implications for health care. For example, it seems reasonable to believe that a case similar to *Surgical Care Center of Hammond* (n. 65, *supra*) would be deemed to involve an "unfair method of competition" under the interpretation of Section 5 described in the Policy Statement.

4. Commission Rulemaking

In withdrawing the 2015 Section 5 Statement, the Commission alluded to the possibility of future rulemaking to prohibit certain specific unfair methods of competition under Section 5.[74] The Commission took its first step in this direction in early 2023.

Rulemaking in the area of unfair methods of competition represents further movement away from case-by-case decision-making (*i.e.*, as under a Rule of Reason standard) and demotion of business justifications and potential competitive benefits in favor of broad-brush conduct rules and prohibitions. The health care industry is all-too familiar with the consequences of regulation of its business practices, and in particular can attest that regulatory schemes tend to entrench the status quo, rather than encourage new business methods and adaptation to changing times.

A particularly apt historical example concerns governmental reaction to antitrust challenges to hospitals' downstream referral practices in the 1990's. As a consequence of *Venice*

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tition between the plaintiff and defendant and with the expectation of an ability to recoup the losses after the plaintiff is eliminated as a competitor.

[73] *Id.* at 410-11 (citations omitted).

[74] 2021 Withdrawal Statement at 7.

Hospital and its progeny,[75] the federal government and many states adopted laws to enshrine patients' rights to choose a downstream provider and to promote greater transparency in the downstream referral process. For example, in the Balanced Budget Act of 1997, Congress required Medicare-participating hospitals to provide a list of local, Medicare-certified home health agencies to patients requiring home care services and to disclose whether the hospital has a financial interest in any home health agency or other entity to which it makes referrals.[76] Today, this type of regulation is wholly at odds with efforts to encourage providers to develop more clinically efficient delivery networks and accept financial risk, which necessitates being selective in the choice of downstream provider partners, and by definition limiting patient choice.

Free choice regulations also are in tension with more recent Medicare rules imposing financial penalties on hospitals having excessive readmission rates, as those rules likewise create a stake for hospitals in the quality of the downstream providers to which their patients are referred.[77] And most recently, many providers found their efforts to respond to the Covid-19 pandemic hamstrung by inflexible telemedicine regulations that entrenched historical views of how that market segment should operate.

But in January, 2023, the FTC proposed new regulations under Section 5 that would prohibit virtually all forms of employment-related non-compete agreements.[78] This action followed on the heels of the FTC's announcement of settlements of Section 5 actions against three companies and

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[75]Note 62, *supra*.

[76]P.L. 105-33, § 4321, codified at 42 U.S.C. §§ 1395xx(ee)(2), 1395cc(a)(1), and 1320b-16.

[77]42 U.S.C. § 1395ww(q).

[78]Fed. Trade Comm'n, Notice of Proposed Rulemaking (Non-Compete Clause Rule) (posted Jan. 5, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/p201000noncompetenprm.pdf (the "Proposed Non-Compete Rule" or sometimes, the "Proposed Rule").

multiple executives for imposing non-compete restrictions on their workers.[79] Both sets of actions are quite unprecedented.

The settlements involved brief (three-page) complaints that, consistent with the tenor of the Policy Statement, contain only conclusory allegations that the use of the non-competes "is unfair and has the tendency or likely effect of harming competition, consumers, and workers, including by: (i) impeding the entry and expansion of rivals . . ., (ii) reducing employee mobility, and (iii) causing lower wages and salaries, reduced benefits, less favorable working conditions, and personal hardship to employees."[80] In the Complaints and accompanying documents, the Commission provided no assessment of actual anticompetitive effects resulting from the non-competes or of the reasonableness of the non-competes in the context of the specific markets and employees at issue. The complaints took no note of court opinions limiting the application of Section 5 to employee non-compete agreements.[81]

Similar to the approach in the FTC's recent cases, the Proposed Rule would treat all employee non-compete agreements (express or *de facto*) as *per se* violations of Section 5, with exceptions only in certain cases involving the sale of a business. The rule, if adopted in its proposed form, would apply retroactively as well as prospectively, and employers would be required to notify employees with non-compete obligations that they are no longer bound to them. Given the Commission's lack of enforcement experience in this area (save for the three cases settled the day before announcement of the Proposed Rule) and the fact that employee non-

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[79] *In re Prudential Security, et al.,* FTC File No. 2110026 (Complaint and Proposed Decision and Order posted Jan. 4, 2023); In *re O-I Glass, Inc.*, FTC File No. 2110182 (Complaint and Proposed Decision and Order posted Jan. 4, 2023), https://www.ftc.gov/legal-library/browse/cases-proceedings/2110182-o-i-glass-inc-matter; *In re Ardagh Group, S.A.*, FTC File No. 2110182 (Complaint and Proposed Decision and Order posted Jan. 4, 2023), https://www.ftc.gov/legal-library/browse/cases-proceedings/2110182-ardagh-group-et-al-matter.

[80] O-I Glass Complaint, ¶ 8.

[81] Snap-On Tools Corp. v. Fed. Trade Comm'n, 321 F.2d 825 (7th Cir. 1963) (holding that non-compete clauses are legal under Section 5 unless unreasonable in duration and scope and holding, further, that even if such a clause were unreasonable in geographic scope, the court would not treat it as a *per se* violation of the antitrust laws).

competes are lawful to some degree in 47 states, the proposed rule represents a "radical departure" from legal precedent.[82]

Numerous commenters, as well as Commissioner Wilson, have suggested that the Proposed Rule is likely to face a variety of legal challenges based on arguments: that the FTC lacks authority under Section 5 to regulate in the area of competition (as opposed to consumer protection); that the Proposed Rule exceeds the Commission's authority under the "major questions" doctrine (discussed *infra*); that the Proposed Rule constitutes an improper delegation of legislative power to the Commission; and that, in general, the Commission's statements of basis and purpose are conclusory and substantively anemic, thereby rendering the Proposed Rule arbitrary and capricious.[83] Nonetheless, one can expect these questions to remain unresolved while the Rule is subject to public comment, possible revision, and final publication, and then potentially protracted legal challenges—as to which the issues discussed below in Section V will be fully relevant.

D. The FTC Act and Not-for-Profit Corporations

To the extent the FTC's expanded use of its standalone authority under Section 5 is directed toward health care providers, its authority in certain cases will be circumscribed by the FTC Act itself. The FTC's jurisdiction over corporations and associations extends only to such entities "organized to carry on business for [their] own profit or that of [their] members."[84] To be outside of the FTC's jurisdiction, there must be a sufficient nexus between the conduct in question and an organization's public purpose and the profits earned must be devoted to public, rather than private,

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[82]Fed. Trade Comm'n, Dissenting Statement of Commissioner Christine S. Wilson Regarding the Notice of Proposed Rulemaking for the Non-Compete Clause Rule, File No. P201200-1 (Jan. 5, 2023) at 1 (hereinafter, "Wilson NPRM Dissent").

[83]All of these issues are discussed in Commissioner Wilson's 14-page dissent, id.

[84]15 U.S.C.A. § 44. This limitation does not extend to the FTC's ability to enforce Section 7 of the Clayton Act against nonprofit organizations. *See* Fed. Trade Comm'n v. University Health, Inc., 938 F.2d 1206 (11th Cir. 1991).

interests.[85] Hospitals and other providers may cross this line when they pursue diversified business relationships and participate in for-profit ventures.[86] Although there is little question that the FTC's jurisdiction under Section 5 does not extend to the conduct of *e.g.*, nonprofit charitable hospitals acting solely as such, joint ventures, partnerships, and associations between nonprofit hospitals and private individuals (e.g., physicians) or for-profit organizations, and for-profit subsidiaries, are another matter, and the FTC has exerted jurisdiction over, *e.g.*, PHOs on many occasions. Accordingly, it is foreseeable that conduct in the form of provider collaborations may be challenged under a standalone "unfairness" theory under Section 5 even in cases where harm to competition (as traditionally understood) may not be evident.

Whether or how the FTC might enforce its Proposed Non-Compete Rule against nonprofit health care organizations is a puzzling question. It would seem that, in general, the Proposed Rule could not be enforced with respect to employees of nonprofit providers engaged in the delivery of health care services or otherwise in furtherance of a provider's charitable purposes, but might be enforceable against employees engaged in unrelated business activities or joint ventures. This would require definitional line-drawing by the Commission, particularly as it may concern employees who act in multiple capacities.

V. LEGAL CHALLENGES TO THE FTC'S STATUTORY AND CONSTITUTIONAL AUTHORITY

Unsurprisingly, the change in direction announced by the Policy Statement (as well as the Proposed Rule) generated some stark reactions from those in the antitrust bar who counsel and defend business clients.[87] The new Policy also brought new (or renewed) focus to questions concerning both

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[85] In re College Football Ass'n, 117 F.T.C. 971, 1994 WL 16011007 (1994).

[86] *See* California Dental Ass'n v. Fed. Trade Comm'n, 526 U.S. 756, 766–68, (1999) (application of the jurisdictional requirement is not formulaic nor is there a substantiality requirement).

[87] A few headlines suffice to show those reactions: Gris, Ben, *et al.*, "The FTC Abandons (The Rule Of) Reason" (Nov. 22, 2022), https://www.shearman.com/en/perspectives/2022/11/the-ftc-abandons-the-rule-of-reason; Duffy, Jeffry W., *et al.*, "Federal Trade Commission's Historic Attempt To

the scope of the FTC's authority under the FTC Act, as well as the fundamental constitutionality of the FTC's prosecutorial and adjudicatory process.

A. The Major Questions Doctrine

The promulgation of the Policy Statement roughly coincided with the announcement of the Supreme Court's opinion in *West Virginia v. Environmental Protection Agency,*[88] a decision that could be a significant obstacle to the FTC's effort to broaden the scope of its injunctive authority under Section 5 or to promulgate broad rules concerning competitive conduct within the scope of Section 5, including the Proposed Non-Compete Rule. In *West Virginia*, the question was whether a particular provision of the Clean Air Act gave the EPA authority to adopt emission standards for existing coal- and natural gas-fired power plants that would have the effect, over time, of "generation shifting," *i.e.*, requiring coal-fired plants to convert to natural gas and requiring both coal- and gas-fired plants to convert to renewable energy sources such as wind and solar. Prior to the promulgation of these standards, the statute at issue had been used only to require existing power plants to adopt technologies that would reduce pollution from their *existing* coal- or gas-powered operations. In other words, the Court was asked to decide whether the statute gave the EPA (in its own words) authority to pursue a "broader, forward-thinking approach to the design of . . . regulations that would improve the *overall power system*" rather than simply to regulate the emissions performance of individual producers.[89] Notably, the EPA's interpretation of the particular statutory provisions was one that it had never before asserted.

The Court concluded that the matter lay within the "major

Drive A Mack Truck Through The Sherman Act" (Nov. 23, 2022), https://www.bakerlaw.com/alerts/federal-trade-commission-historic-attempt-drive-mack-truck-through-sherman-act; Sokler, Bruce D., *et al.*, A Dose of Steroids: Chair Kahn's FTC Releases Expansive Policy Statement on Unfair Methods of Competition" (Nov. 16, 2022), https://www.mintz.com/insights-center/viewpoints/2022-11-14-dose-steroids-chair-khans-ftc-releases-expansive-policy.

[88]West Virginia et al. v. Environmental Protection Agency et al., No. 20-1530, 2022 WL 2347278 (U.S. Feb. 28, 2022)

[89]80 Fed. Reg. 64703 (Oct. 23, 2015) (emphasis added).

questions doctrine," under which an agency's assertion of broad authority that (a) it has not historically relied upon, and (b) is of substantial economic and political significance, provided a "reason to hesitate before concluding" that Congress intended such an implicit delegation of authority.[90] Labeling the EPA's generation shifting rules "a 'transformative expansion in [its] regulatory authority' "[91] the court concluded that the agency required "clear Congressional authorization" for its position[92] but the Court found such evidence lacking; indeed, the Court noted that, under the rules in question, the Agency had adopted a regulatory program "that Congress had conspicuously and repeatedly declined to enact itself."[93]

West Virginia (and the prior jurisprudence cited by the Court in that decision) is expected to be one basis upon which to challenge the FTC's assertion of broader authority to pursue "unfair" methods of competition under Section 5—if not under the Policy Statement generally, then certainly with respect to specific regulatory and enforcement initiatives taken under the Policy Statement. The question of whether the Policy Statement itself is a "transformative expansion" of the FTC's authority juxtaposes the statutory language and legislative history against the evolution of the antitrust laws and the uneven history of Section 5 enforcement.

There is no doubt, of course, that the wording of the authorizing statute is capable of very broad interpretation:

> The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

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[90] *W. Va. v. EPA,* Slip Op. at 17, quoting FDA v. Brown & Williamson Tobacco Corp., 529 U. S. 120, 159 (2000). The Court explained that the major questions doctrine "refers to an identifiable body of law that has developed over a series of significant cases all addressing a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted." Slip Op. at 25.

[91] *Id.* at 20, quoting Utility Air Regulatory Group v. EPA, 573 U. S. 302, 324 (2014).

[92] *Id.* at 19.

[93] *Id.* at 20.

The legislative history of the FTC Act includes many statements that can be read as support for a broad reading of this mandate to define and enjoin unfair methods of competition. But as noted above, there are also good arguments that the concerns of the Act's sponsors have been overtaken by the evolution of antitrust jurisprudence under the Sherman Act and the Rule of Reason. And as Commissioner Wilson has written, there is much in the legislative history of Section 5 that would point toward a more restrained interpretation of the FTC's mandate.[94] Moreover, legislative history is seldom a compelling basis in and of itself for later judicial interpretations of statutory language. "Judges interpret laws rather than reconstruct legislators' intentions. Where the language of those laws is clear, we are not free to replace it with an unenacted legislative intent."[95]

It may also be relevant that Congress, in 1995, did not impose the same standard of proof on the Commission's prosecution of unfair methods of competition that it imposed (by Section 5(n)) on the Commission's prosecution of unfair or deceptive practices, *i.e.*, its consumer protection mandate. This observation can cut both ways. On the one hand, it could be understood as an expression of Congress' intent that the same standards of proof would *not* apply to competition matters under Section 5. On the other hand, Congress' codification of an "unfairness" test in the consumer protection context was a direct response to the FTC's efforts to condemn a wide variety of conduct as unfair or deceptive practices through rulemaking, using public policy as a substitute for economic analysis or direct evidence of consumer harm.[96] In other words, at that time, the Commission was pursuing unfair and deceptive practices in much the same way that it now proposes to pursue unfair methods of competition, and thus one could conclude that the Policy Statement is in fact contrary to Congress' historically expressed view of unfairness.

But if the status of the Policy Statement under the "major

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[94]Wilson Section 5 Dissent at 17-20.

[95]INS v. Cardoza-Fonseca, 480 U.S. 421, 452–53 (1987) (Scalia, J., concurring)

[96]Wilson Section 5 Dissent at 15-17; Kovacic & Winerman, n. 16, *supra*, at 946 n. 75.

questions doctrine" is debatable, there would appear to be a much less ambiguous case concerning the Proposed Non-Compete Rule. By the Commission's own acknowledgement, the Proposed Rule will affect the status of some 30 million workers in the United States across virtually every sector of the economy. The Proposed Rule would negate private contractual agreements and significantly affect employee-employer relationships. For example, it has been suggested that employers in many sectors of the economy will become less willing to provide training to new employees who are unconstrained from taking their knowledge to a competitor. And the Proposed Rule represents an area that the FTC has not regulated historically and that historically has been the province of the state law. These facts raise tangible barriers to an argument that the broad, but non-specific, wording of Section 5 represents clear Congressional authority to regulate non-compete agreements.

B. Constitutional Challenges to the FTC's Authority

The FTC has long been criticized for the seeming unfairness of the manner in which Section 5 cases are adjudicated. A Section 5 case begins with a complaint authorized by vote of the Commission. It is tried before an administrative law judge (ALJ) who is selected by the Commission. Before the ALJ, the case is prosecuted by the FTC staff. The first level of appeal from the ALJ is before the same Commission. Having voted out the complaint in the first instance, the Commissioners also sit in judgment of the case on appeal. Historically, the Commission has lost very few cases before itself; in virtually all of the very few instances in which an FTC ALJ has ruled for the respondent in a Section 5 proceeding, the Commission has reversed.

Only after appeal to the Commission does the respondent have recourse to the federal courts. Specifically, the Commission's decision may then be appealed directly to a federal court of appeals. The court's review of matters of law is plenary; however, the FTC's findings of fact "if supported by ev-

idence" are determinative.[97] Under this standard (generally referred to as the "substantial evidence" standard), the reviewing court looks to the existing administrative record and asks whether it contains "sufficien[t] evidence" to support the agency's factual determinations.[98] As the U.S. Supreme Court has observed, "the threshold for such evidentiary sufficiency is not high."[99] It requires only such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[100] If there is sufficient evidence to support the Commission's decision, the appellate court must affirm, even if it would have weighed the factual evidence differently.

In merger cases, the divergence of the FTC's processes from ordinary litigation are stark. Most mergers of consequence require compliance with federal premerger notification requirements. The requisite notification form is filed with both the FTC and the Antitrust Division of the U.S. Department of Justice (DOJ). Through a process that is largely opaque,[101] the two agencies divvy up the filings for review. A matter reviewed and ultimately challenged by the FTC follows the process described above *i.e.*, a hearing before an ALJ, whose decision is reviewed by the Commission.[102] In contrast, a matter reviewed and ultimately challenged by

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[97]15 U.S.C. § 45(c). There is some limited authority for the arguably logical proposition that when the Commission overrules the ALJ and substitutes its own findings of fact, the appellate court "should carefully scrutinize the Commission's determinations of fact, and therefore its conclusions based upon those facts." In re Detroit Auto Dealers' Assn., 955 F.2d 457, 469 (6th Cir. 1992), citing Thiret v. Fed. Trade Comm'n, 512 F.2d 176, 179 (10th Cir. 1975); American Cyanamid Co. v. Fed. Trade Comm'n, 363 F.2d 757, 772-73 (6th Cir. 1966); Universal Camera Corp. v. NLRB, 340 U.S. 474, 493 (1951).

[98]Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229, (1938) (emphasis deleted).

[99]Biestek v. Berryhill, 139 S. Ct. 1148, 1154 (2019).

[100]*Consolidated Edison*, 305 U.S. at 229.

[101]Some criteria are discernable from recent history. For example, health care provider mergers are usually (but not always) reviewed by the FTC. Mergers in the insurance industry are usually (but not always) reviewed by DOJ. Mergers of companies that provide health care services but also operate health insurance plans can go either way.

[102]The process is sometimes short-circuited by reliance on the outcome of a preliminary injunction hearing in federal court. If the parties to a

DOJ is heard in federal district court, whose decision is reviewed by a federal court of appeals

The constitutionality of the FTC's unique adjudicatory process is being challenged in proceedings against the FTC (as well as in proceedings against the Securities and Exchange Commission, which has procedures substantially similar to those of the FTC). The cases pose both procedural and substantive questions.

In late 2022, the Supreme Court heard arguments in two cases presenting a threshold procedural question—namely, whether a party challenging the constitutionality of an agency's review process must follow that same process to raise the constitutional questions. In other words, must a challenge to the legality of the FTC's review process be heard in the first instance by an FTC ALJ and, if appealed by the petitioner or the agency, be heard on appeal by the Commission, whose decision may be reviewed by a federal appeals court, but only under the substantial evidence standard.

As potentially illogical as that scenario may seem, it is a question that will be settled by the Supreme Court. The case raising this issue with respect to the FTC concerns a merger between a manufacturer of equipment for law enforcement agencies (Axxon Enterprise) and a smaller competitor (Vievu).[103] Although the merger was too small to require formal premerger notification, the FTC took notice and began an investigation that continued for a year and a half. At that point, Axxon offered to divest Vievu and provide the spin-off with a significant amount of working capital, an offer that was rejected by the Commission. Instead, the Commission demanded that Axxon turn Vievu into a "clone" of itself, including by providing Vievu with Axxon's intellectual prop-

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challenged transaction will not voluntarily agree to refrain from closing, the FTC will seek a preliminary injunction in federal district court to prevent the closing pending the outcome of the Commission's own hearing and review process. In many cases, if the injunction is granted by the district court, the parties will abandon the merger rather than endure the lengthy Commission hearing process that virtually always favors the Commission.

[103] *Axxon Enter., Inc. v. Fed. Trade Comm'n*, No. 21-86 (U.S., *cert. granted* Jan. 24, 2022, *argued* Nov. 7, 2022).

erty, and threatened to initiate an administrative proceeding if Axxon declined to do so.[104]

At that point, Axxon turned to the federal district court, filing a complaint challenging the constitutionality of the FTC's adjudicatory process. Axxon argued that the FTC's ALJs are appointed and hold office in violation of the Appointments Clause.[105] Axxon further argued that the combination of investigatory, prosecutorial, adjudicative, and appellate functions within a single agency, and the uncodified and opaque process through which the FTC and DOJ arbitrarily assign merger investigations to either an FTC administrative-enforcement track or a DOJ court-enforcement track, violate the Due Process Clause.[106] Axxon asked the court to preliminarily enjoin the FTC administrative proceedings pending resolution of its constitutional claims.

The Commission opposed Axon's motion on jurisdictional grounds, arguing that the FTC Act's judicial review provision for cease-and-desist orders implicitly ousts district

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[104]Axxon Enter., Inc. v. Fed. Trade Comm'n, 986 F.3d 1173, 1177 (9th Cir. 2021).

[105]U.S. Constitution, Article II, Section 2. Somewhat simplified, Axxon's Appointments Clause argument is as follows: The Constitution vests the President with the executive power to appoint and remove Officers of the United States. This is understood to mean that an Officer must be removable either directly by the President or by another Officer over whom the President has removal power. Pursuant to the Supreme Court's ruling in Lucia v. Sec. & Exch. Comm'n, 128 S. Ct. 2044 (2018), FTC administrative law judges are Officers of the United States (albeit inferior officers) based on their scope of duties and authority. FTC ALJs are appointed under the authority of the Office of Personnel Management and, pursuant to the Administrative Procedure Act, the ALJs can be removed only for cause as determined by the Merit Systems Protection Board. 5 U.S.C. § 7521(a). MSPB members in turn cannot be removed by the President at will, but rather only for inefficiency, neglect of duty, or malfeasance in office. *Id.* § 1202(d). This two-layer good-cause protection afforded the ALJs means that even if the President were to determine that an ALJ was not faithfully executing her office, the decision to remove the ALJ is committed to a Board whose members cannot be removed at will by the President for failing to carry out his instructions. This, argues Axxon, is the same situation that the Supreme Court found unconstitutional in Free Enterprise Fund v. Public Company Accounting Oversight Board, 561 U.S. 477, 492-508 (2010).

[106]U.S. Constitution, Amendment V.

courts of jurisdiction over structural constitutional challenges to the FTC Act. The relevant provisions (Section 5(c) and (d)) of the FTC Act provide:

> (c) Any person, partnership, or corporation required *by an order of the Commission to cease and desist from using any method of competition or act or practice* may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside.[107]
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> (d) Upon the filing of the record with it the jurisdiction of the court of appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission *shall be exclusive*.[108]

On the basis of this statutory language, the district court dismissed Axon's complaint for lack of subject-matter jurisdiction and accordingly denied Axon's preliminary injunction motion as moot.

Axxon appealed to the Ninth Circuit, arguing that the plain language of Section 5(c) limited the exclusive jurisdiction of the courts of appeals only to matters in which the Commission has issued a cease-and-desist order. Axxon argued that because its constitutional challenge concerned no Commission order of any kind, the reservation of exclusive jurisdiction to the courts of appeal under Section 5(d) was inapplicable.

The appellate court nonetheless affirmed, ruling that the FTC Act contained an *implied* preclusion of district court jurisdiction.[109] The court reached this conclusion based on its interpretation of the so-called *Thunder Basin* factors, an analytical framework derived from a trio of Supreme Court decisions addressing the question of whether statutory provisions for exclusive review of agency actions in the courts of appeals preclude district court jurisdiction over matters be-

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[107] FTC Act, § 5(c); 15 U.S.C. § 5(c) (emphasis added).

[108] FTC Act, § 5(d); 15 U.S.C. § 5(d) (emphasis added).

[109] Axxon Enter. v. Fed. Trade Comm'n, 986 F.3d 1173 (9th Cir. 2021).

yond the straightforward legality of an order by the agency in question.[110]

The Thunder Basin factors comprise a two-part analysis, the second part of which has three distinct components, and all of which are balanced by the courts in the context of the particular case.[111] The first part of the analysis asks whether the statute providing for an administrative review process evinces a fairly discernable intent to preclude district court jurisdiction. This question is always (it appears) answered in the affirmative, as statutes with provisions like Sections 5(c) and (d) of the FTC Act impliedly preclude the original jurisdiction of the district courts over at least *some* types of claims. This conclusion functionally shifts the analysis to the second part of the Thunder Basin analysis.

The questions comprising the second part of the analysis are:

- Whether the plaintiff can obtain meaningful judicial review within the statutory scheme (*i.e.*, if compelled to pursue its claim through the administrative review process in the first instance). Some decisions have desig-

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[110]Thunder Basin Coal Co. v. Reich, 510 U.S. 200 (1994) (holding that the administrative review scheme established by the Mine Safety and Health Amendments precluded federal district court jurisdiction over a mine owner's claim that requiring a challenge to the agency's interpretation of certain provisions of the statute to be pursued under the administrative review process established by the statute would deprive the mine owner of constitutional due process rights); *Free Enterprise Fund* n. 105, *supra* (holding that the district court's jurisdiction over accounting firm's challenge to the constitutionality of the Public Company Accounting Oversight Board—operated under the oversight of the Securities and Exchange Commission—was *not* precluded by the administrative review process established under the Securities Exchange Act); Elgin v. Dept. of Treasury, 567 U.S. 1 (2012) (holding that the administrative review provisions established under the Civil Service Reform Act precluded district court jurisdiction over a terminated federal employee's complaint based on the asserted unconstitutionality of the statute authorizing the employee's removal).

[111]For example, the D.C. Circuit has explained that the three factors comprising the second part are not "three distinct inputs into a strict mathematical formula" but rather are "general guideposts useful for channeling the inquiry into whether the particular claims at issue fall outside an overarching congressional intent." Jarkesy v. Sec. & Exch. Comm'n, 803 F.3d 9, 17 (D.C. Cir. 2015).

nated this as the most important of the three questions.[112]

- Whether the claim is "wholly collateral" to the statutory scheme.[113] This question is often re-phrased as whether the claim is the "vehicle by which" the plaintiff seeks to prevail on the merits of its claim before the agency.[114]
- Whether the claim is outside the agency's expertise.[115]

The Supreme Court granted *certiorari* on the question of whether Congress impliedly divested federal district courts of jurisdiction over constitutional challenges to the FTC's structure, procedures, and existence by granting the courts of appeals jurisdiction to "affirm, enforce, modify, or set aside" the Commission's cease-and desist orders. The Court declined to review a second question presented by Axxon, namely whether, on the merits, the structure of the FTC is constitutional.

Before the Supreme Court, Axxon asserted that it cannot obtain meaningful judicial review through the administrative process because (a) its constitutional injury flows from being subjected to an "unaccountable and unconstitutional" agency; (b) the injuries it would suffer are antecedent to and independent of any final agency order; and (c) those injuries are irreparable, in that "[i]rreparable harm occurs almost by definition when a person or entity demonstrates a likelihood that it is being regulated on an ongoing basis by an unconstitutionally structured agency."[116]

Further, Axxon asserted that its claim is in fact "wholly collateral" to the statutory review scheme because it is not

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[112]E.g., Hill v. Sec. & Exch. Comm'n, 825 F.3d 1236, 1245 (11th Cir. 2015); Bebo v. Sec. & Exch. Comm'n, 799 F.3d 765, 774 (7th Cir. 2015).

[113]*Thunder Basin*, 510 U.S. at 212, *citing* Heckler v. Ringer, 466 U.S. 602, 618 (1984).

[114]*Elgin*, 567 U.S. at 22. There, the Court observed that the petitioners, by prevailing on their constitutional claims, would receive the exact relief—reinstatement and back pay—that they would receive if they prevailed in an administrative proceeding, and thus their constitutional claims were not wholly collateral to the statutory scheme.

[115]*Thunder Basin*, 510 U.S. at 212, *citing* Heckler v. Ringer, 466 U.S. 602, 618 (1984).

[116]Reply Brief for Petitioner, *Axxon Enter., Inc. v. Fed. Trade Comm'n*, U.S. No. 21-86 (Sept. 7, 2022) at 7 (*quoting* Doe Co. v. CFPB, 849 F.3d 1129, 1136 (D.C. Cir. 2017) (Kavanaugh, J., dissenting)*).*

substantively intertwined with the merits of its antitrust dispute with the FTC. Axxon filed its suit against the FTC before the FTC initiated any formal proceeding against Axxon and, in any event, the relief sought by Axxon (resolution of alleged structural and due process deficiencies in the FTC's operations) would not resolve the FTC's claims that Axxon's acquisition of Vievu violated the Clayton Act. The contrary view, argued by the FTC in *Axxon*, is that the collateral nature of a claim is a procedural question—*i.e.*, if the constitutional claim has been raised in response to an agency proceeding, it is not a collateral claim. This approach was adopted by the Ninth Circuit below, concluding that the constitutional claim was in reality the vehicle by which Axxon sought to prevail on the merits and thus could not be considered a collateral claim under the Supreme Court's decision in *Elgin.*[117]

Finally, Axxon argued that the FTC's antitrust expertise does not make the agency competent to resolve constitutional claims. On this point, the Ninth Circuit below agreed, holding that, "[t]he due process and Appointments Clause claims do not turn on the antitrust merits of the case, so there is little room for the FTC to bring its expertise to bear."[118] Or, as more colloquially stated by Axxon, "The power of an umpire to call balls and strikes does not include the power to declare the distinction arbitrary or throw the commissioner out of the league."[119]

The Court has not ruled in this matter as of this writing.[120] Reports of the arguments in the case suggest that the Court may be inclined to rule for Axxon.[121] But of course a favorable ruling means only that Axxon will be able to pursue its

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[117]*Axxon*, 986 F.3d at 1185-86. The procedural approach to the question has been followed in other circuits. *See, e.g.*, cases cited in the Ninth Circuit opinion, *id.*

[118]*Id.* at 1187.

[119]Axxon Reply Brief, n. 116, *supra*, at 11.

[120]For argument, *Axxon* was consolidated with *Securities and Exchange Commission v. Cochran*, No. 21-1239 (U.S. *cert. granted* May 16, 2022), a case presenting similar questions with respect to the administrative processes of the SEC.

[121]*See, e.g.*, Liptak, Adam and E. Livni, *Supreme Court Seems Poised to Streamline Challenges to Agency Power*, NEW YORK TIMES (Nov. 7, 2022), *available at* www.nytimes.com/2022/11/07/us/supreme-court-agencies-sec-f

claims in federal district court – it will not resolve the substance of those claims. Answers to the long-standing constitutional questions about the structural and operational fairness of the FTC's processes are likely to take several more years to resolve. And this assumes, of course, that Congress will not enter the fray to resolve the issues legislatively. Given the highly partisan "administrative state" rhetoric lurking underneath, the manner in which Congress might intervene would depend heavily on the balance of power in the House and Senate, and the political affiliation of the President at the time a proposal to amend the FTC Act is considered.

VI. CONCLUSION: A BIT MORE SURREAL

Inevitably, the status of the Commission's new regulatory and enforcement initiatives will be determined by the course of public comment, (potentially) by Congressional action, and, most importantly, by judicial decision. But these processes are seldom fast-moving and it should be borne in mind that the Commission exerts great leverage in its investigations and enforcement decisions by holding the prospect of lengthy and expensive administrative proceedings over the heads of prospective respondents. And for now, the Commission has given scant guidance to firms that wish to compete aggressively without facing a Section 5 complaint. For those reasons, hospitals and health care organizations contemplating partnerships, business combinations, or contentious competitive situations face a level of legal uncertainty materially greater than in the recent past and will need to weigh their organization's tolerance for risk.

Also, the FTC is an independent agency and it is not easily swayed by the political winds. The 2024 elections almost certainly will not change the political makeup of the Commission and, as noted, the Commission will likely continue to have a Democratic majority through at least 2029. Even if the courts are not entirely receptive to the Commission's expanded views of Section 5, the Commission is likely to

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tc.html; Stohr, Greg, *Supreme Court Hints It Mat Back Court Challenges to SEC, FTC*, US LAW WEEK, (Nov. 7, 2022), *available at* news.bloomberglaw.com/us-law-week/supreme-court-signals-it-may-allow-court-challenges-to-sec-ftc.

continue pushing the enforcement envelope in the directions envisioned by the Policy Statement.