PUSHING THE BOUNDS OF JUDICIAL DEFERENCE: SOME THOUGHTS ON THE FTC'S NEW UNFAIR METHODS OF COMPETITION POLICY STATEMENT

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INTRODUCTION

American antitrust law protects consumers against anticompetitive conduct primarily through Sections 1 and 2 of the Sherman Act,[1] both of which are concurrently enforced by the Department of Justice ("DOJ") and the Federal Trade Commission ("FTC").[2] In addition to concurrently enforcing the Sherman Act with the DOJ, the FTC is exclusively charged with, among other responsibilities, protecting consumers from "unfair methods of competition" ("UMC") under Section 5 of the eponymous Federal Trade Commission Act.[3] The FTC Act does not define "unfair methods of competition," leaving the analytical bounds of this standard to be determined by the Commission in the first instance. An important question to ask, therefore, is how much deference a reviewing court must accord the FTC when it seeks to interpret and enforce the UMC standard of Section 5.

As detailed below, with the issuance of a new *Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act* in 2022 (hereinafter the "*2022 UMC Policy Statement*"),[4] current FTC leadership appears to believe that this judicial deference is so great that the agency is now free to reject the consumer welfare standard and rule of reason analysis altogether when enforcing Section 5. This belief is likely an overreach, however. A review of the caselaw reveals that while the FTC is entitled to judicial deference when interpreting and enforcing Section 5, this deference is not unfettered. The FTC, as the independent agency charged with enforcing the nation's antitrust laws, must still respect antitrust terms of art and economic fundamentals when invoking Section 5 and, as such, many applications of its new (and indeed) vague

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1 15 U.S.C. §§ 1–2.

2 Both the FTC and the DOJ are also responsible for ensuring that mergers and acquisitions do not "substantially … lessen competition, or . . . tend to create a monopoly" pursuant to Section 7 of the Clayton Act, 15 U.S.C. § 18.

3 15 U.S.C. § 45.

4 *See generally,* Fed. Trade Comm'n, Comm'n File No. P221202, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (Nov. 10, 2022).

interpretation of unfair methods of competition are unlikely to survive judicial scrutiny.

I. BACKGROUND

A. *2015 UMC Policy Statement*

Given the ambiguous nature of the phrase "unfair methods of competition," over the years there have been many calls for the Commission to issue a policy statement to help businesses avoid FTC Section 5 UMC enforcement actions.[5] In 2015, the Obama-era FTC attempted to do just that, issuing a bipartisan *Statement of Enforcement Principles Regarding "Unfair Methods of Competition" under Section 5 of the FTC Act* (hereinafter "*2015 UMC Policy Statement*").[6] While perhaps not the most detailed statement of policy,[7] the Commission set forth three general principles that the agency would use when evaluating potential enforcement of Section 5's UMC standard:

> First, the Commission would be "guided by the public policy underlying the antitrust laws, namely, the promotion of consumer welfare";
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> Second, the Commission would evaluate the challenged act or practice under a framework similar to the rule of reason—i.e., "an act or practice challenged by the Commission must cause, or be likely to cause, harm to competition or the competitive process, taking into account any associated cognizable efficiencies and business justifications"; and
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> Third, the Commission would be "less likely to challenge an act or practice as an unfair method of competition on a standalone basis if enforcement of the Sherman or Clayton Act is sufficient to address the competitive harm arising from the act or practice."[8]

But while this bipartisan policy approach towards UMC enforcement offered some guidance to businesses and did not appear to have hindered antitrust enforcement during either the Obama Administration or the subsequent

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5 *See, e.g.*, William E. Kovacic & Marc Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act*, 76 ANTITRUST L.J. 929, 930 (2010).

6 *See generally*, Fed. Trade Comm'n, Policy Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act, 80 Fed. Reg. 57056 (Sept. 21, 2015).

7 *See, e.g.*, FED. TRADE COMM'N, DISSENTING STATEMENT OF COMMISSIONER MAUREEN OHLHAUSEN, FTC ACT SECTION 5 POLICY STATEMENT (Aug. 13, 2015); Lawrence Spiwak, *FTC Misses Mark with New "Unfair Methods of Competition" Statement,* THE HILL (Sept. 22, 2015, 6:30 AM), http://thehill.com/blogs/pundits-blog/technology/254463-ftc-misses-mark-with-new-unfair-methods-of-competition.

8 *See 2015 UMC Policy Statement*, *supra* note 6.

Trump Administration,[9] the Biden Administration decided to turn back the clock several decades to when the FTC was known as the "National Nanny"[10] and return to an unbounded vision of Section 5 as a standalone mechanism for market intervention.[11]

B. *2022 UMC Policy Statement*

As noted in the previous section, the bipartisan *2015 UMC Policy Statement* appeared to offer some guidance to businesses while not hindering enforcement under both Democratic and Republican administrations. Still, among the first actions of controversial FTC Chair Lina Khan — a noted critic of the consumer welfare standard and rule of reason analysis[12] — was to have the FTC revoke the *2015 UMC Policy Statement*.[13]

According to the Commission, the *2015 UMC Policy Statement* "contravene[d] the text, structure, and history of Section 5 and largely [wrote] the FTC's standalone authority out of existence." Moreover, argued the current Commission, the "the 2015 Statement abrogate[ed] the Commission's congressionally mandated duty to use its expertise to identify and combat unfair methods of competition even if they do not violate a separate antitrust statute." As such, the FTC formally withdrew the *2015 UMC Policy Statement* and promised "to restore the agency['s] … critical mission" of aggressively pursuing standalone UMC cases under Section 5.[14]

True to its promise, on November 19, 2022, the FTC released a new *Policy Statement Regarding the Scope of Unfair Methods of Competition*

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9 *See, e.g.*, FTC v. Qualcomm, Inc., 969 F.3d 974, 986 n.11 (9th Cir.), *reh'g denied en banc*, U.S. App. LEXIS 34011 (2020) ("Because the district court concluded that Qualcomm violated the Sherman Act and thereby violated the FTC Act—which prohibits '[u]nfair methods of competition,' including Sherman Act violations—it did not address whether Qualcomm's conduct constituted a standalone violation of the FTC Act.").

10 *Cf.* J. Howard Beales III & Timothy J. Muris, *Return of the National Nanny,* WALL ST. J. (May 26, 2022, 6:25 PM), https://www.wsj.com/articles/return-of-the-national-nanny-ftc-activists-rulemaking-regulation-banning-mandates-illegal-11653596958.

11 *See* William E. Kovacic & Marc Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act*, 76 ANTITRUST L.J. 929, 934 (2010) (arguing that the dearth of standalone Section 5 cases brought over past several decades is probably attributable to fact that "the Sherman Act proved to be a far more flexible tool for setting antitrust rules than Congress expected in the early 20th century.").

12 *See, e.g.*, Rohit Chopra & Lina Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 U. CHI. L. REV. 357, 359–61 (2020); *but cf.* Lawrence J. Spiwak, *A Change in Direction for the Federal Trade Commission?*, 22 FEDERALIST SOC. REV. 304 (2021); Carl Shapiro, *Antitrust: What Went Wrong and How to Fix It*, 35 ANTITRUST 33 (Summer 2021).

13 *See generally* 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).

14 *Id.*

Under Section 5 of the Federal Trade Commission Act.[15] As detailed below, this new *2022 UMC Policy Statement* marks a substantial departure from established antitrust analysis and precedent, opening the door to expanded (and analytically untethered) FTC intervention into the market.

1. The FTC Rejects the Consumer Welfare Standard and Rule of Reason Analysis

Consistent with Chair Khan's long-stated views,[16] the *2022 UMC Policy Statement* firmly rejects both the consumer welfare standard and rule of reason analysis. In their place, the FTC sets forth the following new analytical paradigm to determine whether conduct constitutes "unfair methods of competition." According to the Commission, it will now use "two key criteria" to determine whether it should prosecute a UMC case under Section 5. First, the Commission will look to see whether the disputed conduct is "coercive, exploitative, collusive, abusive, deceptive, predatory, or involve[s] the use of economic power of a similar nature."[17] Second, the Commission will look to see whether, in its view, the alleged conduct will "tend to negatively affect competitive conditions."[18] After answering both of these questions, the Commission will then weigh these two findings "according to a sliding scale" to determine whether enforcement action is warranted.[19]

2. Analytical Problems with the FTC's New Approach

In rejecting the consumer welfare standard and rule of reason analysis, the FTC's new approach differs significantly from traditional antitrust analysis in several important respects. For example, under traditional antitrust jurisprudence, black-letter law inquiries should focus on harm to competition, not individual competitors.[20] Under the FTC's new UMC approach, however, the Commission will now look to see whether the alleged conduct harms "consumers, workers, or other market participants."[21] Moreover, the FTC will not require any "showing of market power or market definition

15 *See generally 2022 UMC Policy Statement, supra* note 4.

16 *See, e.g.*, Khan & Chopra, *supra* note 12; *see also* Fed. Trade Comm'n, Statement of Chair Lina M. Khan Joined by Commissioner Rohit Chopra and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (July 1, 2021).

17 *2022 UMC Policy Statement, supra* note 4, at 9.

18 *Id.*

19 *Id.*

20 *See, e.g.*, Brunswick Corp. v. Pueblo Bowl-O-Mat*,* 429 U.S. 477, 488 (1977) ("[A]ntitrust laws . . . were enacted for 'the protection of competition not competitors.'" (quoting Brown Shoe v. United States*,* 370 U.S. 294, 320 (1962)).

21 *2022 UMC Policy Statement, supra* note 4, at 9.

when the evidence indicates that such conduct tends to negatively affect competitive conditions."[22] In fact, the FTC will not even require a formal showing of any "*actual* harm in the specific instance at issue."[23] Thus, as the FTC concedes, the "inquiry will not focus on the 'rule of reason' inquiries more common in cases under the Sherman Act, but will instead focus on stopping unfair methods of competition in their incipiency *based on their tendency to harm competitive conditions*."[24]

But what exactly constitutes a "tendency to harm competitive conditions"? If the FTC will not define relevant markets, determine market power, or require a demonstration of actual harm, then we are left with an extremely subjective enforcement standard—of an already highly subjective statutory standard[25]—that can easily be abused with frivolous enforcement actions from which innocent firms cannot escape liability.

FTC Commissioner Christine Wilson called out this important due process concern in her dissent to the *2022 UMC Policy Statement*. As Commissioner Wilson noted, given the FTC's extremely permissive new analytical framework, "[a]fter a prima facie case has been established, the respondent has little recourse." Indeed, as Commissioner Wilson explains, under the new policy statement's standard:

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22 *Id.* at 10.

23 *Id.* (emphasis in original).

24 *Id.* (emphasis supplied). The FTC's new focus on harm to "consumers, workers, or other market participants" rather than the traditional focus on harm to "competition" overall has broader implications beyond the *2022 UMC Policy Statement*. It is a basic economic maxim that firms are not passive recipients of regulation. Accordingly, if the FTC is now only concerned with harms to "consumers, workers, or other market participants," then firms will correspondingly tailor their pleadings with the agency to make sure these political constituencies are accommodated as they bargain with the FTC to get their deals approved. *See* T. Randolf Beard, George S. Ford, Lawrence J. Spiwak, & Michael Stern, *Eroding the Rule of Law: Regulation as Cooperative Bargaining at the FCC*, Phoenix Ctr. Pol'y Paper No. 49 (Oct. 2015), https://www.phoenix-center.org/pcpp/PCPP49Final.pdf), and published as *Regulating, Joint Bargaining, And The Demise of Precedent*, MANAGERIAL & DECISION ECON. (June 27, 2018), https://onlinelibrary.wiley.com/doi/abs/10.1002/mde.2934. Yet, in a recent op-ed in the Wall Street Journal Chair Khan appears shocked that firms are acting in this very way. L. Khan, *ESG Won't Stop the FTC,* WALL ST. J. (Dec. 21, 2022, 5:10 PM) ("I've heard would-be merging parties [are making] all sorts of commitments to be better corporate citizens if only we would back off from a lawsuit. If only we hold off on suing to block the merger, they promise they will reduce their carbon footprints, give back to the community and so on."). As Ms. Khan has made no bones about her desire to transform the FTC from a dispassionate enforcer of the Nation's antitrust laws to an aggressive omnipotent regulator of the U.S. economy, *see, e.g.*, Chopra and Khan, *supra* note 12; Non-Compete Clause Rule, RIN 3084-AB74 (proposed Jan. 5, 2023) (to be codified at 16 C.F.R. pt. 910), the fact that Chair Khan fails to recognize that firms are responding to the very signals put out by the Commission under her leadership reveals a remarkable naivety about the nature of regulation.

25 *See, e.g.*, E.I. Du Pont de Nemours v. FTC*,* 729 F.2d 128, 137–38 (2d Cir. 1983) ("The term 'unfair' is an elusive concept, often dependent upon the eye of the beholder. A line must therefore be drawn between conduct that is anticompetitive and legitimate conduct that has an impact on competition.").

> A respondent can assert a justification for the conduct but, according to the *Policy Statement*, the Commission's "inquiry would not be a net efficiencies test or a numerical cost benefit analysis" and "the more facially unfair or injurious the harm, the less likely it is to be overcome by a countervailing justification of any kind." For a respondent to be heard, the justification must show that the benefits of the conduct redound to market participants other than the respondent, those benefits must be in the same market where the harm occurs (even though market definition is unnecessary to find competitive harm), and the respondent has the "burden to show that the asserted justification for the conduct is legally cognizable, that it is nonpretextual, and that any restriction used to bring about the benefit is narrowly tailored to limit any impact on competitive conditions."[26]

In other words, as Commissioner Wilson bluntly stated, the FTC has now adopted an "'I know it when I see it' approach that seeks to protect interests beyond those of consumers."[27]

3. FTC Arguments for Judicial Deference

Notwithstanding these analytical and due process problems, the Commission offers up two justifications for its radical departure from traditional antitrust analysis. First, the Commission contends that according to established Supreme Court precedent, "Section 5 reaches beyond the Sherman and Clayton Acts to encompass various types of unfair conduct that tend to negatively affect competitive conditions" and, as such, it may now abandon the consumer welfare standard and rule of reason analysis.[28] Second, given the preceding point, the Commission then argues that because the FTC is an "independent, expert agency," courts must *a fortiori* bless the Commission's new analytical paradigm regarding its "determinations as to what practices constitute an unfair method of competition . . . . "[29]

At the 30,000-foot level, the FTC's arguments certainly have a patina of legitimacy. As a general matter, no one is disputing that (1) Section 5 contains a different standard than the respective standards found in Sections 1 and 2 of the Sherman Act; (2) that this standard (unfair methods of competition) is ambiguous; and, therefore, according to the Supreme Court's *Chevron* doctrine, that (3) the courts should accord the FTC—as the expert agency exclusively charged with enforcing Section 5—deference about how the agency chooses to craft the application and enforcement of this statutory provision.[30] However, what the current FTC leadership fails to accept is that this judicial deference is not unfettered. Indeed, "deference" is not the same as a judicial free pass to abandon the consumer welfare standard and rule of

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[26] Fed. Trade Comm'n, Comm'n File No. P221202, 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," (Nov. 10, 2022) at 5 [hereinafter Dissent of Commissioner Wilson].

[27] *Id.* at 17.

[28] *2022 UMC Policy Statement, supra* note 4, at 1.

[29] *Id.* at 7.

[30] *See* Chevron U.S.A., Inc. v. Natural Res. Defense Council, 467 U.S. 837, 844 (1984).

reason analysis or else abandon antitrust practice in general. As detailed below, the caselaw is clear that the FTC may not plow through the guardrails of economic fundamentals in its pursuit of other objectives.

II. THE FTC'S ABILITY TO DEFINE "UNFAIR METHODS OF COMPETITION" IS NOT UNFETTERED

As support for its central argument that it may abandon the consumer welfare standard and rule of reason analysis, the FTC provides a string cite of cases that purport to hold that the FTC may move "beyond" traditional antitrust analysis.[31] However, just because Section 5 "reaches beyond" the Sherman Act to fill in possible gaps does not *a fortiori* mean the Commission can abandon economic fundamentals.[32] Two cases cited by the Commission in the *2022 UMC Policy Statement* illustrate the point.

The first case is the Ninth Circuit's decision in *Boise Cascade v. FTC*.[33] In *Boise*, the FTC argued that a group of manufacturers engaged in unfair methods of competition in violation of Section 5 via a coordinated pricing scheme which utilized the computation of rail freight charges in determining the price of plywood. The court began its analysis by noting that while the FTC is indeed entitled to deference when enforcing Section 5, Congress gave "the courts the responsibility of ensuring that administrative agencies stay within reasonable bounds."[34]

Turning to the merits, the court then found that the FTC had exceeded those "reasonable bounds."[35] According to the court, the Commission failed to demonstrate either collusion or any harm to competition.[36] As the court admonished, "to allow a finding of a Section 5 violation on the theory that the mere widespread use of [a common industry pricing] practice makes it an incipient threat to competition would be to blur the distinction between guilty and innocent commercial behavior."[37]

The other illustrative case is the Second Circuit's ruling in *E.I. Du Pont de Nemours v. FTC* (commonly referred to as the "*Ethyl*" case).[38] In *Ethyl*, the FTC argued that several manufacturers of anti-knock compounds had engaged in unfair methods of competition in violation of Section 5 when each firm independently and unilaterally adopted at different times some or all of three business practices that were neither restrictive, predatory, nor adopted

31 *See 2022 UMC Policy Statement, supra* note 4, at n.3 and citations therein.

32 *See also* Dissent of Commissioner Wilson, *supra* note 26, at 18 (noting that the legislative history of Section 5 "reveals that Congress designed Section 5's 'unfair methods of competition' prohibition to have economic content.").

33 637 F.2d 573 (9th Cir. 1980).

34 *Id.* at 577 (citations omitted).

35 *Id.* at 582.

36 *Id.*

37 *Id.*

38 729 F.2d 128 (2d Cir. 1983).

for the purpose of restraining competition. The Commission argued that, although the firms' adoption of these practices was non-collusive, by removing some of the uncertainties about price determination the practices collectively had the effect of substantially lessening competition by facilitating price parallelism at non-competitive levels higher than might have otherwise existed.[39]

As in *Boise*, the court in *Ethyl* began its analysis by noting that while the FTC's "interpretation of Section 5 is entitled to great weight" and that the Commission's "power to declare trade practices unfair is broad," it is still the function of the judiciary "ultimately to determine the scope of the statute upon which the Commission's jurisdiction depends."[40] Indeed, noted the court, the Commission's discretion to define Section 5 is not unfettered. As the court explained, "Congress did not . . . authorize the Commission under § 5 to bar any business practice found to have an adverse effect on competition." Rather, the Commission is obligated (and courts are to ensure) that the agency does "not act arbitrarily or without explication but according to *definable* standards that [are] properly applied."[41]

Turning to the merits, upon review the court found that the FTC had failed to articulate these required "definable standards." As the court observed:

> When a business practice is challenged by the Commission, even though, as here, it does not violate the antitrust or other laws and is not collusive, coercive, predatory or exclusionary in character, standards for determining whether it 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.[42]

Thus, reasoned the court, given this "patent uncertainty" about the bounds of UMC enforcement, the Commission "owes a duty to define the conditions under which conduct claimed to facilitate price uniformity would be unfair so that business will have an inkling as to what they can lawfully do rather than be left in a state of complete unpredictability."[43]

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39 *Id.* at 130.
40 *Id.* at 136.
41 *Id.* at 136 (emphasis supplied).
42 *Id.* at 138–39.
43 *Id.* at 139.

III. LESSONS LEARNED FROM OTHER INDEPENDENT AGENCIES' ATTEMPTS TO "REACH BEYOND" ANTITRUST

As noted above, FTC essentially claims that as independent "expert" agency it is free to do what it wants and disregard precedent.[44] But as also noted in the preceding discussion, such a bold assertion simply is not true.[45] Accordingly, if the FTC is going to invoke the "independent agency must be accorded absolute deference" argument, then perhaps a look at how courts viewed other independent agencies' efforts to "reach beyond" the antitrust laws might also be insightful.

A. *Independent Agencies—Including the FTC—Must Account for Antitrust Terms of Art*

Contrary to the current FTC's leadership's desires, independent agencies may not ignore accepted antitrust terms of art. This obligation is particularly binding when that independent agency is responsible for enforcing the Nation's antitrust laws.

The D.C. Circuit's ruling in *Comcast Cable Communications v. Federal Communications Commission* illustrates this point well.[46] In this case, Comcast challenged an FCC ruling that Comcast had unduly discriminated against the Tennis Channel in violation of the program carriage requirements of Section 616 of the Cable Competition and Consumer Protection Act of 1992 by refusing to broadcast the Tennis Channel in the same tier as Comcast's affiliated sports networks. At issue in *Comcast* was whether that ruling was arbitrary and capricious.

By way of background, the FCC Program Carriage regulations seek to promote competition and diversity in video programming by prohibiting certain types of discriminatory conduct by a Multichannel Video Programming Distributor (MVPD). Under this statute, Congress charged the FCC to develop rules,

> to prevent a multichannel video programming distributor from engaging in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors[.][47]

44 *See 2022 UMC Policy Statement, supra* note 4, at 7 ("Congress intended for the FTC to be entitled to deference from the courts as an independent, expert agency" and that the FTC's "determinations as to what practices constitute an unfair method of competition deserve 'great weight' . . . .").

45 *See also* Dissent of Commission Wilson, *supra* note 26, at 9 and discussion therein.

46 717 F.3d 982 (D.C. Cir. 2013).

47 47 U.S.C. § 536(a)(3).

Moreover, Congress mandated that the FCC "provide for expedited review of any complaints made by a video programming vendor pursuant to this section."[48] Pursuant to that mandate, the FCC adopted general rules consistent with the statute's specific directions.[49] The FCC's program carriage rules state in relevant part that:

> No multichannel video programming distributor shall engage in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or non-affiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors.[50]

In other words, the Program Carriage provisions seek to address potential harm arising from the vertical integration of MVPDs into programming by demanding that unaffiliated and affiliated programming be treated similarly.

The Tennis Channel, with which Comcast was unaffiliated, complained that Comcast placed it "on a tier with narrow penetration that is only available to subscribers who pay an additional fee, while Comcast carries its own similarly-situated affiliated networks Golf Channel and Versus (now NBC Sports Network) on a tier with significantly higher penetration that is available to subscribers at no additional charge."[51] (Market definition is required to place the Tennis Channel in the market with "similarly-situated affiliated networks.") The administrative law judge concluded that Comcast had indeed discriminated against the Tennis Channel,[52] and the full Commission later affirmed the ALJ's finding.[53] Comcast appealed to the D.C. Circuit, and, after review, the court ruled that the FCC's decision was arbitrary and capricious.[54]

The D.C. Circuit began its analysis by noting that the parties agreed that Comcast distributed its affiliates more broadly than the Tennis Channel. But the court also noted that the plain language of Section 616 only prohibits discrimination "*based on* affiliation."[55] Thus, reasoned the court, if Comcast treated third-party content providers differently "based on a reasonable business purpose," then there is no violation of Section 616.[56] The court found

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48 47 U.S.C. § 536(a)(4).

49 *See* Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage, FCC 93-457, SECOND REPORT AND ORDER, 9 FCC Rcd. 2642 (1993).

50 47 C.F.R. § 76.1301(c).

51 *See* In re Tennis Channel, Inc. v. Comcast Cable Commc'ns, L.L.C., FCC 12-78, MEMORANDUM OPINION AND ORDER, 27 FCC Rcd. 8508, 8509 (rel. July 24, 2012) ("Tennis Channel Order") at ¶ 1.

52 Tennis Channel, Inc. v. Comcast Cable Commc'ns, Initial Decision of Chief Administrative Law Judge Richard L. Sippel, MB Docket No. 10-204, File No. CSR-8258-P, 26 FCC Rcd. 17160, 17204 at ¶ 101 (Dec. 20, 2011).

53 Tennis Channel Order, *supra* note 51.

54 *Comcast*, 717 F.3d at 961 (D.C. Cir. 2013) (emphasis in original).

55 *Id.* at 985 (emphasis in original).

56 *Id.*

that the Tennis Channel failed to present sufficient evidence of harm to support a claim of discrimination under the statute.

For example, the court found that in contrast to the detailed evidentiary submission by Comcast that showed it would have to bear significant costs if it added the Tennis Channel to the same tier as its affiliates, the Tennis Channel "showed no corresponding benefits that would accrue to Comcast by its accepting the change."[57] Similarly, the court found that the Tennis Channel offered no analysis "on either a qualitative or quantitative basis" to show that Comcast would receive a net benefit from the allegedly discriminatory conduct. As a result, concluded the court, the Tennis Channel had not shown that the discrimination was unreasonable.[58] *Comcast* thus sends an unmistakable message that when evaluating claims of discrimination and anticompetitive harm, a reviewing court will judge harshly independent agency decisions that lack serious economic analysis—even under statutes that go beyond the antitrust laws.[59]

Then-Judge (now-Justice) Brett Kavanaugh's extensive concurrence in *Comcast* is also helpful in elucidating how courts should approach interpreting statutes that seek to advance competition policy objectives through means other than antitrust. Judge Kavanaugh specifically refuted the argument that in passing Section 616, Congress abandoned the long-standing consumer welfare standard requirement that a complainant must demonstrate harm to *competition* in favor of a requirement that it simply showing harm to an individual *competitor*. As Judge Kavanaugh noted, Section 616 sets up a two-part test: a MVPD has violated Section 616 if (1) it discriminated among video programming networks on the basis of affiliation; and (2) the discrimination unreasonably restrained an unaffiliated network's ability to compete fairly.[60] As Judge Kavanaugh explained, because the "phrase 'unreasonably restrain' is of course a longstanding term of art in antitrust law," it follows that "Section 616 incorporates antitrust principles governing unreasonable restraints. . . ." Established legal precedent dictates that when "a statute uses a term of art from a specific field of law, [a court must] presume that Congress adopted 'the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken.'"[61] In other words, reasoned Judge Kavanaugh, "the goal of antitrust law (and thus of Section 616) is to promote consumer welfare by protecting competition, not by protecting individual competitors."[62] He elaborated:

57 *Id.*

58 *Id.* at 985–86.

59 *Cf.* Cincinnati Bell Tel. Co. v. FCC, 69 F.3d 752, 760 (6th Cir. 1995) (reversing administrative agency's decision because the order contained no "expert economic data or [analogies] to related industries in which the claimed anticompetitive behavior has taken place" but instead justified its conclusions as "simply 'common sense.'").

60 *Comcast,* 717 F.3d at 989 (citing 47 U.S.C. § 536(a)(3)).

61 *Id.*

62 *Id.* at 992.

> It is true that Section 616 references discrimination against competitors. But again, the statute does not ban such discrimination outright. It bans discrimination that *unreasonably restrains* a competitor from competing fairly. By using the phrase "unreasonably restrain," the statute incorporates an antitrust term of art, and that term of art requires that the discrimination in question hinder overall competition, not just competitors.[63]

Judge Kavanaugh also specifically rejected the argument that Section 616 does not require a demonstration of market power. As noted above, Judge Kavanaugh pointed out that because Section 616 specifically uses the antitrust term of art "unreasonably restrain," any application of Section 616 must incorporate antitrust principles and precedent. After providing a lengthy exegesis of the relevant caselaw, Judge Kavanaugh pointed out that:

> Vertical integration and vertical contracts become potentially problematic only when a firm has market power in the relevant market. That's because, absent market power, vertical integration and vertical contracts are *procompetitive.* Vertical integration and vertical contracts in a competitive market encourage product innovation, lower costs for businesses, and create efficiencies—and thus reduce prices and lead to better goods and services for consumers.[64]

Thus, concluded Judge Kavanaugh, because "Section 616 incorporates antitrust principles and because antitrust law holds that vertical integration and vertical contracts are potentially problematic only when a firm has market power in the relevant market, it follows that Section 616 applies only when a video programming distributor has market power in the relevant market."[65]

Rather than abandon the consumer welfare standard in passing Section 616, Congress embraced it. As explained by Judge Kavanaugh,

> Section 616 thus does not bar vertical integration or vertical contracts that favor affiliated video programming networks, absent a showing that the video programming distributor at least has market power in the relevant market. To conclude otherwise would require us to depart from the established meaning of the term of art "unreasonably restrain" that Section 616 uses. Moreover, to conclude otherwise would require us to believe that Congress intended to *thwart* procompetitive practices. It would of course make little sense to attribute that motivation to Congress.[66]

And in this particular case, Judge Kavanaugh argued that Commission failed to make such a showing. Indeed, because the Agency defined the relevant geographic market for video programming as national, Judge Kavanaugh pointed out that it was difficult for Comcast to have market power with only a 24% market share.[67]

Judge Kavanaugh's concurrence is particularly applicable to the FTC's *2022 UMC Policy Statement*. When the FTC rescinded the bi-partisan *2015*

63 *Id.* (emphasis in original).

64 *Id.* at 990 (emphasis in original).

65 *Id.* at 991.

66 *Comcast,* 717 F.3d at 991 (emphasis in original).

67 *Id.* at 992 (citing Tennis Channel Order, *supra* note 51, at ¶ 87).

UMC Statement (and its adherence to a rule of reason analysis and the consumer welfare standard), Chair Khan argued that that "Congress enacted the Federal Trade Commission Act *to reach beyond* the Sherman Act and to provide an alternative institutional framework for enforcing the antitrust laws."[68] And as noted *supra*, the Commission adopted Chair Khan's hostile view towards the consumer welfare standard in full in the *2022 UMC Policy Statement* by stating that it would abandon any rule of reason analysis.[69] But while the FTC Act is, of course, not the Sherman Act (or Clayton Act for that matter), it is still an antitrust law and tethered to antitrust principles and, therefore, the Commission must respect basic antitrust principles as embodied in current caselaw. That caselaw requires antitrust enforcement to proceed using a rule of reason approach—including defining the relevant markets at issue and demonstrating actual harm—under the consumer welfare standard.

B. *Courts Have Chastised Other Independent Agencies for Abandoning the Consumer Welfare Standard when Conducting Competitive Inquiries.*

The *2022 UMC Policy Statement* marks a deliberate and unambiguous decision by the FTC to discard the consumer welfare standard when enforcing Section 5. But it should be noted that courts have chastised other regulatory agencies when they attempted to abandon the consumer welfare standard when adjudicating competition issues under the ubiquitous "public interest" standard which can be found in a host of "public utility" statutory regimes, including, but certainly not limited to, the Federal Power Act[70] the Communications Act[71] and, of particular relevance, even the Federal Trade Commission Act.[72]

Like the current FTC, these administrative agencies also often argued that the "public interest" standard permits them to go beyond the antitrust laws without any constraints to remedy various perceived societal ills. The courts, however, did not agree. In the immortal words of Justice Potter Stuart, the fact that Congress may have included the "public interest" standard in a regulatory statute is not "a broad license to promote the general public welfare."[73] For this reason, the courts have provided some important guidance—

68 *See* Khan, Chopra, & Slaughter Statement, *supra* note 16, at 2–3 (emphasis supplied).

69 *See 2022 UMC Policy Statement*, *supra* note 4, at § II.B.

70 *See, e.g.*, 16 U.S.C. § 824b.

71 *See, e.g.*, 47 U.S.C. § 310.

72 15 U.S.C. § 45(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 . . . 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, ...").

73 NAACP v. Federal Power Comm'n, 425 U.S. 662, 669 (1976) (rejecting arguments the Federal Power Commission must affirmatively promote equal employment opportunity and nondiscrimination in the employment practices of the firms it regulates under the Federal Gas and Power Acts).

particularly when an agency is tasked with conducting a competitive analysis—on the boundaries of the public interest standard.[74]

While independent administrative agencies are certainly not required to agree with antitrust enforcement agencies' competitive analyses, they are not permitted to ignore antitrust considerations either.[75] Courts have long "insisted that [administrative] agencies consider antitrust policy as an important part of their public interest calculus."[76] As such, assertions that no relationship exists between antitrust and economic regulation are incorrect. As Supreme Court Justice Felix Frankfurter stated seventy years ago, "[t]here can be no doubt that competition is a relevant factor in weighing the public interest."[77]

Given this requirement, it is little wonder that any application of the public interest standard requires a focus on the interests of the *public,* and not the interests of individual *competitors* who may seek to use the regulatory process to hamstring their rivals.[78] For example, in the 1981 case of *Hawaiian Telephone v. FCC*,[79] the D.C. Circuit remanded an FCC grant of Section 214 authority for service between the U.S. mainland and Hawaii because it found that the Commission had engaged in an *ad hoc* approach that improperly aimed at "equalizing competition among competitors."[80] The D.C. Circuit stated that the FCC's public interest analysis must be more than an inquiry into "whether the balance of equities and opportunities among competing carriers suggests a change."[81] The court found that it was "[a]ll too embarrassingly apparent that the Commission has been thinking about competition, not in terms primarily as to its benefit to the public, but specifically with the objective of equalizing competition among competitors."[82]

Subsequent decisions reiterate the importance that consumer welfare analysis plays in the public interest standard. In 1995, various parties

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74 For a detailed analysis, see T.M. Koutsky and L.J. Spiwak, *Separating Politics from Policy in FCC Merger Reviews: A Basic Legal Primer of the "Public Interest" Standard*, 18 COMMLAW CONSPECTUS 329 (2010).

75 *See, e.g.*, United States v. FCC*,* 652 F.2d 72 (D.C. Cir. 1980).

76 *See, e.g.*, *id.* at 82 (in evaluating transactions, FCC must in the exercise of its responsibilities "make findings related to the pertinent antitrust policies, draw conclusions from the findings, and weigh these conclusions along with other important public interest considerations."); N. Natural Gas Co. v. FPC*,* 399 F.2d 953, 961 (D.C. Cir. 1968) (stating that antitrust laws are a tool that a regulatory agency can use to bring "'understandable content to the broad statutory concept of the 'public interest.'" (internal citation omitted)). *See also* United States v. AT&T, 498 F. Supp. 353, 364 (D.D.C. 1980) (Green, J.) ("[I]t is not appropriate to distinguish between Communications Act standards and antitrust standards …. [because] both the FCC, in its enforcement of the Communications Act, and the courts, in their application of the antitrust laws, guard against unfair competition and attempt to protect the public interest.").

77 FCC v. RCA Commc'ns Inc., 346 U.S. 86, 94 (1953); *see also N. Natural Gas Co.,* 399 F.2d at 961 (noting that "competitive considerations are an important part of the 'public interest'" standard).

78 *See, e.g.*, *Brunswick Corp.*, 429 U.S. 477.

79 498 F.2d 771 (D.C. Cir. 1974).

80 *Id.* at 774–76.

81 *Id.* at 776.

82 *Id.* at 775–76.

challenged the FCC's approval of the acquisition of McCaw Cellular licenses by AT&T by arguing that the FCC should have imposed the antitrust Modified Final Judgment (MFJ) restrictions applicable to the Regional Bell Operating Companies (RBOCs) on the merged firm.[83] Citing *Hawaiian Telephone,* the D.C. Circuit rejected the merger opponents' arguments and found that the application of the MFJ restrictions to the merged entity would "serve the interests only of the RBOCs rather than those of the public."[84] Writing for the unanimous court, Judge Douglas Ginsburg ruled that when the Commission considers whether a proposed merger serves the public interest, the "Commission is not at liberty . . . to subordinate the public interest to the interest of 'equalizing competition among competitors. '"[85]

CONCLUSION

By any reasonable standard, the FTC's *2022 UMC Policy Statement* is not an analytically serious document.[86] Not only does the *2022 UMC Policy Statement* reject years of antitrust precedent, abandon adherence to economic first principles, and raise significant due process concerns, but it also exudes a remarkable regulatory hubris by the Commission in its belief that the FTC can act with judicial impunity when enforcing Section 5. But while it is easy to scoff at the *2022 UMC Policy Statement*, its adoption has real world consequences: until any enforcement action made pursuant to the *2022 UMC Policy Statement* is sorted out by the courts (a process which could take years), businesses great and small will be forced to look over their shoulders in deep uncertainty as to what perceived slights or disfavored business decision might invoke the FTC's wrath. Or worse, businesses will intensify efforts to curry the favor of the current FTC leadership rather than focusing on investing. innovating, and aggressively competing for the patronage of consumers.[87]

83 SBC Commc'ns Inc. v. FCC, 56 F.3d 1484, 1490 (D.C. Cir. 1995).

84 *Id.* at 1491.

85 *Id.* (quoting *Hawaiian Telephone,* 498 F.2d at 776) (emphasis supplied); *see also* W. Union Tel. Co. v. FCC, 665 F.2d 1112, 1122 (D.C. Cir. 1981) ("[E]qualization of competition is not itself a sufficient basis for Commission action."). One of the counter-arguments to this position is the often misguided notion that the naked "protection of competitors" is the analytical equivalent to attempting to promote tangible new entry into a market currently dominated by a monopoly incumbent. It is not. As Joe Farrell—the FTC's former Chief Economist—argued, it is "important that the playing field should be leveled upwards, not downwards" because "rules that forbid a firm from exploiting efficiencies just because its rivals cannot do likewise" harm, rather than improve, consumer welfare. J. Farrell, *Creating Local Competition*, 49 FED. COMM. L.J. 201, 212 (1996). In highly concentrated industries, the focus of policy should be on regulation that promotes competitive entry, rather than regulation that protects competition. The latter will often turn into the mere protection of the private interests of competitors.

86 *See* Dissent of Commission Wilson, *supra* note 26, at 2 ("Instead of a law enforcement document, it resembles the work of an academic or a think tank fellow who dreams of banning unpopular conduct and remaking the economy.").

87 *See* discussion, *supra* note 24.

So, as we wait for the courts[88] (or a change in FTC leadership) to sort this out, let us hope that Congress will take an active oversight role to ensure the Commission does not abuse its power and become, once again, the "National Nanny."

88 As this article was going to press, the FTC filed a complaint against Amazon for allegedly violating the Nation's antitrust laws. *See* Federal Trade Commission et al. v. Amazon.com, Inc., Complaint, Case No. 2:23-cv-01495 (W.D. Wash. Sept. 26, 2023). Among the assorted counts, the FTC alleged that Amazon engaged in unfair methods of competition in violation of Section 5 of the FTC Act. (See Counts II and IV). Given the weakness of the FTC's Sherman Act claims, we should not be surprised if the FTC pushes its new approach to UMC enforcement (which, by design, has a much lower standard of proof) as the litigation plays out.