



**United States of America
Federal Trade Commission**

The Neo-Brandeisian Revolution: Unforced Errors and the Diminution of the FTC

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November 9, 2021

Remarks for the ABA Antitrust Law Section's 2021 Fall Forum

* The views expressed in these remarks are my own and do not necessarily reflect the views of the Federal Trade Commission or any other Commissioner. Many thanks to my Attorney Advisor Adam S. Cella for his assistance in the preparation of these remarks.

Thank you to Jonathan Gleklen, Maureen Ohlhausen, and Henry Su for inviting me to speak today and for organizing this year’s Fall Forum. This endeavor always requires a significant amount of effort but is made even more difficult in the current environment.

I am serving my third stint at the FTC. In law school, I was a law clerk in the Bureau of Competition. I saw firsthand the commitment and talent of the staff under Chairman Janet D. Steiger, perhaps the most beloved FTC leader in FTC history. I returned in 2001 as Chief of Staff to FTC Chairman Timothy J. Muris. And in 2018, I was honored to become a Commissioner.

During my journey from law clerk to Commissioner, I saw the FTC become one of the most respected institutions in America. I watched the agency develop a leading voice internationally. I witnessed the friendship of Democrat Robert Pitofsky and Republican Timothy J. Muris. They shared a vision, forged in the 1989 ABA report on the FTC,¹ that they later implemented as FTC Chairmen. I have seen many other remarkable FTC leaders. But most importantly, I have seen the diligence and expertise of career staff who serve consumers, year after year.

Now we have new leadership. They’ve declared that everything I witnessed was a failure – a 40-year failed experiment.² The Clinton administration, with Anne Bingaman, Joel Klein, Doug Melamed, and Bob Pitofsky – all failures. The Obama administration, with Christine Varney, Bill Baer, Jon Leibowitz, and Edith Ramirez, failures all. My mentor Jim Rill, who rewrote the merger guidelines³ and sparked the creation of the International Competition Network,⁴ is a failure in their eyes.

I disagree. It is the *new* path that is likely to fail. Today, I will discuss four mistakes the Neo-Brandeisians are making that will almost certainly lead to the failure of their agenda. (There are others – like the fact that revolutionaries do not make good bureaucrats – but time is tight.) I disagree with many of their goals, so their failure won’t keep me up at night. Here’s what does keep me awake: I fear damage to the economy and grave harm to the institution and FTC community that I love.

Let’s turn to the four mistakes.

¹ SPECIAL COMMITTEE TO STUDY THE ROLE OF THE FEDERAL TRADE COMMISSION, REPORT OF THE AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW SPECIAL COMMITTEE TO STUDY THE ROLE OF THE FEDERAL TRADE COMMISSION (1989), https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/v12/report_1989-ftp.pdf.

² Remarks by President Biden At Signing of An Executive Order Promoting Competition in the American Economy (July 9, 2021), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/07/09/remarks-by-president-biden-at-signing-of-an-executive-order-promoting-competition-in-the-american-economy/> (“We’re now 40 years into the experiment I believe the experiment failed.”).

³ See U.S. DEP’T. OF JUST. & FED. TRADE COMM’N, 1992 MERGER GUIDELINES, <https://www.ftc.gov/sites/default/files/attachments/merger-review/hmg.pdf> (issued during Jim Rill’s tenure as Assistant Attorney General for the U.S. Department of Justice’s Antitrust Division).

⁴ INTERNATIONAL COMPETITION POLICY ADVISORY COMMITTEE FINAL REPORT TO THE ATTORNEY GENERAL AND ASSISTANT ATTORNEY GENERAL FOR ANTITRUST, <https://www.justice.gov/atr/final-report> (Jim Rill served as co-chair).

Mistake 1: Embracing the Mistakes of the Past

The Book of Ecclesiastes teaches there is nothing new under the sun.⁵ The Neo- Brandeisians prove this to be true. Instead of devising new solutions for their concerns, they are resurrecting past policy mistakes.

First, the Neo-Brandeisians embrace the interventionist regulatory regimes that once governed our transportation sector. They ignore that the economic woes through the 1970s – amid stagflation⁶ – demanded reforms to the bloated regulatory state of that era.⁷ On a bipartisan basis, policymakers concluded that these attempts to regulate competition failed.⁸ The ICC’s regulation of railroads led to mission creep and stunted innovation.⁹ The CAB’s regulation of airlines caused high prices that denied travel to average Americans.¹⁰ There is widespread acknowledgement today that deregulation brought great benefits to consumers.¹¹ Even Chair Khan wrote of the

⁵ *Ecclesiastes* 1:9 (“What has been will be again, what has been done will be done again; there is nothing new under the sun.”).

⁶ David Randall, *The 1970s all over again? Stagflation debate splits Wall St*, REUTERS (Oct. 27, 2021), <https://www.reuters.com/business/1970s-all-over-again-stagflation-debate-splits-wall-st-2021-10-27/>.

⁷ PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 241(a) (5th ed. 2020) (“The 1960s and 1970s were the high point of federal regulation, whether measured by the number of industries that were regulated, the extent of the regulation, or by our overall confidence that government regulation allocated resources better than would ordinary market forces. But beginning in the late 1970s and extending to the present day, the federal government has undergone comprehensive deregulation or removal of certain markets from at least some part of the regulatory process. Federal deregulation of specific markets began during the Carter Administration with statutes that deregulated various parts of the trucking and railroad industries and accordingly reduced explicit antitrust exemptions for various activities.”) (citations omitted).

⁸ Christine S. Wilson & Keith Klovers, *The Growing Nostalgia for Past Regulatory Misadventures and the Risk of Repeating These Mistakes with Big Tech*, 8 J. ANTITRUST ENF’T 10, 14 (2019), <https://academic.oup.com/antitrust/article/8/1/10/5614371>.

⁹ *Id.* at 14-20.

¹⁰ Edward M. Kennedy, *Airline Regulation by the Civil Aeronautics Boards*, 41 J. OF AIR L. AND COM. 607, 608 (“The Board’s practices ... have not been effective in maintaining low prices. It is economically and technologically possible to provide present air service at significantly lower prices, bringing air travel within the reach of the average American citizen.”).

¹¹ See, e.g., Trucking Deregulation in the United States Submission by the United States to the Ibero-American Competition Forum (Sept. 2007), <https://www.ftc.gov/system/files/attachments/us-submissions-occd-2010-present-other-international-competition-fora/ibero-trucking.pdf> (concluding that “deregulation of the trucking industry ... has been entirely beneficial for consumers”); Stephen Breyer, *Airline Deregulation, Revisited*, BLOOMBERG (January, 20 2011), <https://www.bloomberg.com/news/articles/2011-01-20/airline-deregulation-revisitedbusinessweek-business-news-stock-market-and-financial-advice> (“Although the board, supported by the airlines, tried to find plausible explanations for high fares, it ultimately failed to do so. For example, were high fares on popular routes needed to support air service to small communities? If so, why should a grandmother flying New York-Los Angeles pay more to help the business traveler flying Utica-Albany pay less? Empirical investigation showed the amount of any such cross-subsidy was tiny and could take the form of a direct government transition payment instead.”); US General Accounting Office, *Airline Deregulation: Changes in Airfares and Service at Buffalo, New York*, Statement of John H Anderson, Jr., Director, Transportation Issues, Resources, Community, and Economic Development Division, GAO/T-RCED-99-286 at 1 (September, 20 1999), <https://www.gao.gov/assets/t-rced-99-286.pdf> (finding that “[o]ver the years, our work has consistently shown that airline deregulation has led to lower fares and better service for most air travelers” and that these benefits are “largely due to increased competition spurred by the entry of new airlines into the industry and established airlines into new markets.”). But see Tim Wu, *Antitrust via Rulemaking: Competition Catalysts*, 16 COLO. TECH L. J. 33, 35 (2005), <https://ctlj.colorado.edu/wp-content/uploads/2018/03/3-Wu-1.22.18-FINAL.pdf> (citing and

CAB in 2012 that “any regulatory regime can degenerate and wind up stifling competition.”¹² Yet the Cicilline Report, which Chair Khan co-authored, holds up transportation regulations as a model for Big Tech.¹³

Given the breadth of President Biden’s Executive Order,¹⁴ there is little reason to believe this movement will stop with Big Tech. When I note the historical failures, I am told that this time, we’ll do it smartly.¹⁵ Forgive me for being dubious.

One way of regulating competition is through rulemaking. And this is the second mistake of the past that our new leadership will embrace.¹⁶ Never mind pushback from Congress in the 1970s and 1980s that nearly led to the agency’s demise.¹⁷ Remember, this time we are going to do it smartly.

explaining away Steven A. Morrison & Clifford Winston, *Airline Deregulation and Public Policy*, 245 SCIENCE 707, 708 (1989) (finding that increased competition stemming from deregulation had provided travelers and carriers with \$14.9 billion of annual benefits)).

¹² Phillip Longman & Lina Khan, *Terminal Sickness*, WASHINGTON MONTHLY (March/April 2012), <https://washingtonmonthly.com/magazine/marchapril-2012/terminal-sickness/> (“To be sure, any regulatory regime can degenerate and wind up stifling competition, and the CAB of the late 1970s did become too procedure bound, ruled, as it came to be, by contending private lawyers rather than technocrats.”).

¹³ MAJORITY STAFF OF H. COMM. ON THE JUDICIARY, 116TH CONG., INVESTIGATION OF COMPETITION IN DIGIT. MKTS. 380 (2020), https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf (“In the railroad industry, for example, a congressional investigation found that the expansion of common carrier railroads into the coal market undermined independent coal producers, whose wares the railroads would deprioritize in order to give themselves superior access to markets. In 1893, the Committee on Interstate and Foreign Commerce wrote that ‘[n]o competition can exist between two producers of a commodity when one of them has the power to prescribe both the price and output of the other.’ Congress subsequently enacted a provision to prohibit railroads from transporting any goods that they had produced or in which they held an interest.”); *id.* at 382 (“The 1887 Interstate Commerce Act, for example, prohibited discriminatory treatment by railroads.”); *id.* at 383 (“Historically, Congress has implemented nondiscrimination requirements in a variety of markets. With railroads, the Interstate Commerce Commission oversaw obligations and prohibitions applied to railroads designated as common carriers”).

¹⁴ Exec. Order No. 14036, 86 Fed. Reg. 36989 (July 14, 2021), <https://www.govinfo.gov/content/pkg/FR-2021-07-14/pdf/2021-15069.pdf>.

¹⁵ Remarks of Christine S. Wilson, Commissioner, Fed. Trade Comm’n, Hey, I’ve Seen This One: Warnings for Competition Rulemaking at the FTC at 8 (June 9, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591666/wilson_statement_back_to_the_future_of_rulemaking.pdf.

¹⁶ Rohit Chopra & Lina M. Khan, *The Case for “Unfair Methods of Competition” Rulemaking*, 87 U. OF CHICAGO L. REV. 357, 361 (2020), https://www.ftc.gov/system/files/documents/public_statements/1568663/rohit_chopra_and_lina_m_khan_the_case_for_unfair_methods_of_competition_rulemaking.pdf; Press Release, Fed. Trade Comm’n, FTC Acting Chairwoman Slaughter Announces New Rulemaking Group (March 25, 2021), <https://www.ftc.gov/news-events/press-releases/2021/03/ftc-acting-chairwoman-slaughter-announces-new-rulemaking-group>.

¹⁷ See Daniel A. Crane, *Debunking Humphrey’s Executor*, 83 GEO. WASH. L. REV. 1835, 1860 (2015), https://www.gwlr.org/wp-content/uploads/2016/01/83-Geo-Wash-L-Rev-1835.pdf?_sm_pdc=1&_sm_rid=kTMT5MZQDfZ7snWVV5MjRJZDK57QnT5MN6TVsZN; Alex Propes, *Privacy & FTC Rulemaking Authority: A Historical Context*, IAB (Nov. 6, 2018), <https://www.iab.com/news/privacy-ftc-rulemaking-authority-a-historical-context>; Jeffrey S. Lubbers, *It’s Time to Remove the ‘Mossified’ Procedures for FTC Rulemaking*, 83 GEO. WASH. L. REV. 1979, 1989 (2015), https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=2086&context=facsch_lawrev (discussing the difficulty and rarity of FTC rulemaking after 1980).

Third, the Neo-Brandeisians embrace merger policy as it existed into the 1970s. They complain that economic proof and investigations are difficult and costly,¹⁸ and that generalist judges struggle with economic analysis anyway.¹⁹ They ignore that the 2010 Horizontal Merger guidelines have assisted courts in the incorporation of new economic learning while strengthening merger review.²⁰ They favor the 1968 Guidelines, which recommended challenging deals in which each party has a five percent share.²¹ As precedent for the changes, they cite merger cases from the 1960s blocking transactions based on tiny increases in share.²²

But early merger review was a mess. For example, the standards were unpredictable. Justice Stewart wrote that the “sole consistency ... in litigation under [Section 7 is that] the Government

¹⁸ Chopra & Khan, *supra* note 16 at 361 (“In fact, paid expert testimony now is often ‘the whole game in an antitrust dispute.’ Paid experts are a major expense. Some experts charge over \$1,300 an hour, earning more than senior partners at major law firms. Over the last decade, expenditures on expert costs by public enforcers have ballooned. In a system that incentivizes firms to spend top dollar on economists who can use ever-increasing complexity to spin a favorable tale, the eye-popping costs for economic experts can put the government and new market entrants at a significant disadvantage.”).

¹⁹ Lina M. Khan, *The Ideological Roots of America’s Market Power Problem*, THE YALE LAW JOURNAL FORUM (June 4, 2018), <https://www.yalelawjournal.org/forum/the-ideological-roots-of-americas-market-power-problem> (“In today’s formulation, the rule of reason serves as a supposed balancing test of harms and benefits. In practice, gauging the effects of particular conduct ends up turning on the ‘conflicting testimony of the parties’ retained expert economists.’ Indeed, as Rebecca Allensworth notes, the evolution and increasing centrality of the rule of reason approach has meant a ‘delegation of authority from judges and juries to economists,’ who now determine ‘the application, and sometimes even content, of antitrust rules.’”); Lina M. Khan, *The End of Antitrust History Revisited*, 131 HARVARD L. REV. 1655, 1679 (2020), https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=3793&context=faculty_scholarship (“For example, antitrust adjudication has become highly reliant on technical evidence and complex economic analysis, but generalist judges often lack the expertise to independently assess the arguments before them.”).

²⁰ Carl Shapiro & Howard Shelanski, *Judicial Response to the 2010 Horizontal Merger Guidelines*, 58 Rev. of INDUSTRIAL ORGANIZATION 51, 53 (2020), <https://link.springer.com/article/10.1007/s11151-020-09802-x> (“These fears have not been borne out over the past decade. To the contrary, the 2010 Guidelines have continued to be well accepted by the courts and to assist the case law’s (slow) incorporation of new economic learning and agency experience in analyzing the impact of mergers on competition. In particular, we find that the richer explanation of how the Agencies use qualitative and quantitative evidence to assess competitive effects has favorably influenced the case law and strengthened merger enforcement.”).

²¹ U.S. DEP’T. OF JUST., 1968 MERGER GUIDELINES, <https://www.justice.gov/archives/atr/1968-merger-guidelines>

²² *United States v. Aluminum Co. of America (Rome Cable)*, 377 U.S. 271 (1964) (firm with 27.8% share acquired firm with 1.3% share, with pre-merger 4-firm concentration ratio of 76.0%); *United States v. Continental Can Co.*, 378 U.S. 441 (1964) (firm with 29.1% share acquired firm with 3.1% share, with pre-merger 4-firm concentration ratio of 63.7); *United States v. Von’s Grocery Co.*, 384 U.S. 270 (1966) (firm with 4.7% share acquired firm with 4.2% share, with pre-merger 4-firm concentration ratio of 24.4%); *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966) (3 markets, where firm with 11% share acquired firm with 13% share, with premerger 4-firm concentration ratio of under 50%; firm with 5.5% share acquired firm with 5.8% share, with premerger 4-firm concentration ratio under 40%; and firm with 3% share acquired firm with 1.5% share, with premerger 4-firm concentration ratio under 30%); *United States v. Third Nat’l Bank in Nashville*, 390 U.S. 171 (1968) (firm with 33.6% share acquired firm with 4.8% share, with pre-merger 4-firm concentration ratio of 93.2%); *United States v. Phillipsburg Nat’l Bank*, 399 U.S. 350 (1970) (firm with 11.2% share acquired firm with 8.1% share, with pre-merger 4-firm concentration ratio of 74.7%).

always wins.”²³ And early merger review relied on strict structuralism rather than nuanced economic analysis that examines actual harm to consumers.²⁴

On prior occasions, I have used the analogy of Chesterton’s fence.²⁵ Before we tear down today’s frameworks, we should understand *why* we do things the way we do. Without careful assessment, the Neo-Brandeisians are doomed to repeat the mistakes of the past.

Mistake 2: Going it Alone

The Neo-Brandeisians are not only ignoring the past – they also are ignoring Congress and the judiciary. Disregarding the boundaries imposed by our statutory authority and judicial precedent²⁶ is conveniently characterized as employing all the tools available to the FTC.²⁷ But these actions are more accurately described as unilaterally charting a course for the FTC, which will certainly trigger blowback.

²³ See *United States v. Von's Grocery Co.*, 384 U.S. 270, 301 (1966) (J. Potter dissenting) (“The sole consistency that I can find is that in litigation under [Section 7], the Government always wins.”).

²⁴ Timothy J. Muris, Remarks before George Mason University Law Review's Winter Antitrust Symposium (Jan. 15, 2003), https://www.ftc.gov/public-statements/2003/01/improving-economic-foundations-competition-policy#N_27 (“The [structure-conduct-performance] paradigm was overturned because its empirical support evaporated. Re-estimation of structure-performance equations accounting for efficiency explanations and data problems made the results ‘go away.’ Further, various case studies, particularly involving antitrust cases and investigations, indicated that although some industries appeared to have market structures favorable for the existence and exercise of substantial market power, the industries were, nonetheless, quite competitive. This research made clear that sound theory plus the details of markets and institutional factors are necessary to understand competition.”).

²⁵ Christine S. Wilson, Commissioner, Fed. Trade Comm’n, *Why They Built the Fence: Understanding Modern Antitrust Law*, Global Competition Law Lecture Series (Nov. 19, 2020), https://www.ftc.gov/system/files/documents/public_statements/1587210/remarks_of_commissioner_christine_s_wilson_at_kings_college_london.pdf.

²⁶ See generally Letter from Caleb Kruckenberg, Pacific Legal Foundation to Lina M. Khan, Chair, Fed. Trade Comm’n (Nov. 11, 2021), <https://www.regulations.gov/comment/FTC-2021-0056-0002> (“[T]he ink is hardly dry on the Supreme Court’s unanimous rebuke of the Commission’s decades-long practice of imposing massive fines from businesses without any legal authority. ... Yet the Commission has tried again, this time stretching a different source of authority far beyond the limits enacted by Congress. ... Rather than face future rebukes from the courts, the Commission should rescind or modify its proposed settlement order to comport with the limits of its authority.”) (internal citations omitted).

²⁷ David McLaughlin, *U.S. FTC’s Lina Khan Vows Return to Agency’s Trustbusting Roots*, BLOOMBERG (July 28, 2021) <https://www.bloomberg.com/news/articles/2021-07-29/u-s-ftc-s-lina-khan-vows-return-to-agency-s-trustbusting-roots> (“‘There has been a bit of a missed opportunity, especially over the last few decades, to take full advantage of the institutional tools that Congress granted the agency,’ Khan said in a wide-ranging interview.”).

Consider the HSR Act, a Congressional compromise that gave enforcers advance notice of deals²⁸ and parties the benefit of repose.²⁹ HSR review now faces death by a thousand cuts. We have hit month nine of a “temporary” and “brief” suspension of early termination.³⁰ Letters are sent to parties when their waiting periods expire, warning them to close at their own risk.³¹ Is the investigation ongoing? Is there a set amount of time the parties should wait? No one knows!³² The new prior approval policy will flip the burden of proof and capture many deals below

²⁸ Statement of Commissioner Christine S. Wilson Regarding the Announcement of Pre-Consummation Warning Letters (August 9, 2021), https://www.ftc.gov/system/files/documents/public_statements/1593969/pre-consummation_warning_letters_statement_v11.pdf (“Under the HSR Act, the FTC and the Antitrust Division of the Department of Justice receive premerger notifications for deals that meet certain criteria. The agencies are afforded time and empowered with investigative tools to determine whether notified transactions may harm competition.”); *id.* (“Before the HSR Act was passed in 1976, parties to a transaction could merge at will, but bore the burden of uncertainty: would the government subsequently conclude the deal was anticompetitive and seek to unwind it? From the merging parties’ perspective, the time and resources required to negotiate and implement the merger, and to integrate the two entities, would have been for naught. The pre-HSR landscape was sub-optimal for enforcers, too. With no advance notice of transactions, enforcers had to undertake lengthy and resource-intensive litigation to unwind anticompetitive deals after they were consummated.”). *See also* Kelly Signs, Milestones in FTC history: HSR Act launches effective premerger review, Competition Matters Blog, Fed. Trade Commission (March 16, 2015), <https://www.ftc.gov/news-events/blogs/competition-matters/2015/03/milestones-ftc-history-hsr-act-launches-effective> (“In the words of Congressman Rodino, the wisdom of premerger notification was a lesson learned the hard way: ‘The problem this bill cures is startlingly simple, but it goes to the very foundations of our merger law. Under present law, companies need not give advance notification of a planned merger to the Federal Trade Commission and the Department of Justice. But if the merger is later judged to be anticompetitive, and divestiture is ordered, that remedy is usually a costly exercise in futility—untangling the merged assets and management of the two firms is like trying to unscramble an omelet.’”) (citing 122 Cong. Rec. 25051 (1976)).

²⁹ Statement of Commissioner Christine S. Wilson Regarding the Announcement of Pre-Consummation Warning Letters (August 9, 2021), https://www.ftc.gov/system/files/documents/public_statements/1593969/pre-consummation_warning_letters_statement_v11.pdf (“But these costs, at least traditionally, have brought the benefit of repose.”).

³⁰ Press Release, Fed. Trade Comm’n, FTC, DOJ Temporarily Suspend Discretionary Practice of Early Termination (Feb. 4, 2021), <https://www.ftc.gov/news-events/press-releases/2021/02/ftc-doj-temporarily-suspend-discretionary-practice-early>.

³¹ Press Release, Fed. Trade Comm’n, FTC Adjusts its Merger Review Process to Deal with Increase in Merger Filings (Aug. 3, 2021), <https://www.ftc.gov/news-events/press-releases/2021/08/ftc-adjusts-its-merger-reviewprocess-deal-increase-merger>.

³² *See* Holly Vedova, Adjusting merger review to deal with the surge in merger filings, FED. TRADE COMM’N, COMPETITION MATTERS BLOG (Aug. 3, 2021 12:28PM), <https://www.ftc.gov/news-events/blogs/competition-matters/2021/08/adjusting-merger-review-deal-surge-merger-filings> (“For deals that we cannot fully investigate within the requisite timelines, we have begun to send standard form letters alerting companies that the FTC’s investigation remains open and reminding companies that the agency may subsequently determine that the deal was unlawful. Companies that choose to proceed with transactions that have not been fully investigated are doing so at their own risk. Of course, this action should not be construed as a determination that the deal is unlawful, just as the fact that we have not issued such a letter with respect to an HSR filing should not be construed as a determination that a deal is lawful.”).

statutory thresholds.³³ And sprawling investigations covering non-competition concerns exceed our Clayton Act authority.³⁴

These policy changes impose a gratuitous tax on merger activity – anticompetitive and procompetitive alike. There are costs to interfering with the market for corporate control, especially as we attempt to rebound from the pandemic.³⁵ If new leadership wants the HSR Act rewritten, they should persuade Congress to amend it rather than taking matters into their own hands.

The planned rulemaking binge³⁶ will ignore both Congress and the public. The majority changed our rules of practice to limit stakeholder input and consolidate rulemaking power in the chair's office.³⁷ In Commissioner Phillips' words, these changes facilitate more rules, but not better ones.³⁸ And these rules face significant litigation risk. It's unclear whether the FTC even has

³³ Statement of the Commission on Use of Prior Approval Provisions in Merger Orders (Oct. 25, 2021), https://www.ftc.gov/system/files/documents/public_statements/1597894/p859900priorapprovalstatement.pdf; Dissenting Statement of Commissioners Christine S. Wilson and Noah Joshua Phillips Regarding the Statement of the Commission on Use of Prior Approval Provisions in Merger Orders (Oct. 29, 2021), https://www.ftc.gov/system/files/documents/public_statements/1598095/wilson_phillips_prior_approval_dissenting_statement_102921.pdf (“prior approval flips the burden of proof on its head by placing it on the merging parties rather than on the government”).

³⁴ Clayton Antitrust Act of 1914 § 7, 15 U.S.C. § 18 (“may be substantially to lessen competition, or to tend to create a monopoly.”).

³⁵ Noah Joshua Phillips, Commissioner, Fed. Trade Comm’n, *Competing for Companies: How M&A Drives Competition and Consumer Welfare*, Opening Keynote at The Global Antitrust Economics Conference (May 31, 2019), <https://www.ftc.gov/public-statements/2019/05/competing-companies-how-ma-drives-competition-consumer-welfare> (“Today, we have the advantage of years of experience observing the market for corporate control in action. We know that it can lead firms to consolidate as well as to deconsolidate. It can be a force against concentration. We know that buyers specializing in firm management may be able to increase the efficiency of such firms in ways that benefit consumer welfare. And we know that impairing the proper functioning of this market is anticompetitive. Regulators, including antitrust regulators, should seek to foster its operation. By doing so, we can help to make markets more competitive and to move resources to their highest valued uses. Moving forward, we should (1) look for opportunities to unleash the market forces that spur competition; and (2) tread carefully with proposals that would inhibit it.”).

³⁶ See Press Release, Fed. Trade Comm’n, *FTC Acting Chairwoman Slaughter Announces New Rulemaking Group* (March 25, 2021), <https://www.ftc.gov/news-events/press-releases/2021/03/ftc-acting-chairwoman-slaughter-announces-new-rulemaking-group> (“It is also time for the Commission to activate its unfair methods of competition rulemaking authority in our increasingly concentrated economy, and I am excited for this new rulemaking group to explore all the possibilities.”).

³⁷ Dissenting Statement of Commissioner Christine S. Wilson Open Commission Meeting on July 1, 2021 at 3-7 (July 1, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591554/p210100wilsoncommmeetingdissent.pdf.

³⁸ Dissenting Statement of Commissioners Christine S. Wilson and Noah Joshua Phillips Regarding the Commission Statement On the Adoption of Revised Section 18 Rulemaking Procedures at 6 (July 9, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591702/p210100_wilsonphillips_joint_statement_rules_of_practice.pdf.

substantive competition rulemaking powers.³⁹ We could ask Congress to clarify this authority⁴⁰ – but that would take too long.

Leadership also intends to ignore judicial precedent regarding the scope of Section 5. The majority recently withdrew the bipartisan⁴¹ Section 5 Policy Statement,⁴² viewing it as too restrictive.⁴³ The now-rescinded Bipartisan Section 5 Policy statement enunciated three fundamental principles: (1) the Commission will be guided by the public policy of promoting consumer welfare; (2) conduct will be evaluated considering both likely harm to competition and procompetitive justifications; and (3) a standalone Section 5 case would be less likely when the competitive harm could be addressed by the Sherman and Clayton Acts.⁴⁴ When the FTC pushed the limits with standalone Section 5 cases in the 1980s, courts of appeals three times rejected those attempts.⁴⁵ This overreach is especially concerning given the Supreme Court’s unanimous

³⁹ Miles W. Kirkpatrick, *FTC Rulemaking in Historical Perspective*, 48 ANTITRUST L. J. 1561, 1561 (“One of the most important aspects of the Magnuson-Moss Act was its granting, or confirmation, depending upon your reading of the law at that time, of the FTC’s rulemaking powers.”); Remarks of Christine S. Wilson, Commissioner, Fed. Trade Comm’n, *Hey, I’ve Seen This One: Warnings for Competition Rulemaking at the FTC* at 8 (June 9, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591666/wilson_statement_back_to_the_future_of_rulemaking.pdf.

⁴⁰ Neil Averitt, *A caution light for competition rulemaking*, FTCWATCH (October 18, 2021), https://www.mlexwatch.com/ftcwatch/articles/13773/neil-averitt-commentary-a-caution-light-for-competition-rulemaking?nl_pk=296d0080-d4ca-4fb3-a637-1a9f7baa0e7b&utm_source=newsletter&utm_medium=email&utm_campaign=ftcwatch (“A few test cases are entirely in order. Petroleum Refiners may hold up as an authority after all. The policy arguments are certainly strong. But for safety’s sake, it would be good to confine these test cases to just a couple of rules and ones that aren’t crucial to the agency’s mission. ... [T]he agency might want to add a request for rulemaking clarification whenever it asks Congress for restored power to seek restitution.”).

⁴¹ Democrat Chairwoman Ramirez and Commissioners Brill and McSweeney, together with Republican Commissioner Wright, supported issuing the bipartisan Section 5 Policy Statement.

⁴² Statement of the Federal Trade Commission On the Issuance of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act, at 2 (August 13, 2015), https://www.ftc.gov/system/files/documents/public_statements/735381/150813commissionstatementsection5.pdf.

⁴³ 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), https://www.ftc.gov/system/files/documents/public_statements/1591498/final_statement_of_chair_khan_joined_by_rc_and_rks_on_section_5_0.pdf (“In our view, the 2015 Statement abrogates 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. Accordingly, because the Commission intends to restore the agency to this critical mission, the agency withdraws the 2015 Statement.”).

⁴⁴ 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.

⁴⁵ *Boise Cascade Corp. v. FTC*, 637 F.2d 573 (9th Cir. 1980); *Off. Airline Guides, Inc. v. FTC*, 630 F.2d 920 (2d Cir. 1980); *E.I. du Pont de Nemours & Co. v. FTC*, 729 F.2d 128 (2d Cir. 1984).

AMG decision⁴⁶ – why invite another rebuke? The judiciary will not view kindly the FTC’s disregard for statutory language,⁴⁷ actual evidence of harm,⁴⁸ and the Constitution.⁴⁹

Certain proposals also threaten to ignore state level authority and the work of state attorneys general. For example, Commission leadership supports rulemaking initiatives for non-competes and other unfair contract terms.⁵⁰ First, this rhetoric mischaracterized the ability of current antitrust laws to address labor antitrust concerns.⁵¹ But just as importantly, these proposals do not take into account the work of state attorneys general to protect their citizens from illegal non-competes, no-poach, and similar agreements.⁵² This idea of FTC rulemaking also does not

⁴⁶ *AMG Capital Management, LLC v. Federal Trade Commission*, 141 S. Ct. 1341, 1350-51 (2021).

⁴⁷ *Id.* at 1347 (“Several considerations, taken together, convince us that § 13(b)’s ‘permanent injunction’ language does not authorize the Commission directly to obtain court-ordered monetary relief. For one thing, the language refers only to injunctions.”).

⁴⁸ *United States v. Baker Hughes Inc.*, 908 F.2d 981, 992 n.13 (D.C. Cir. 1990) (criticizing the DOJ for failing to “maximize its scarce resources when it allows statistics alone to trigger its ponderous enforcement machinery.”).

⁴⁹ Richard J. Pierce, Jr., Lyle T. Alverson Professor of Law, George Washington University Law School, Fed. Trade Comm’n, Non-Competes in the Workplace: Examining Antitrust and Consumer Protection Issues 309 (Jan. 9, 2020) (analyzing FTC rulemaking and commenting “let me start with the nondelegation doctrine because I -- there are now five Justices who are on record as saying they are open to the possibility of figuring out a new way of applying it.”); Remark of Noah Joshua Phillips, Commissioner, Fed. Trade Comm’n, Non-Compete Clauses in the Workplace: Examining Antitrust and Consumer Protection Issues at 6-7 (Jan. 9, 2020), https://www.ftc.gov/system/files/documents/public_statements/1561697/phillips_-_remarks_at_ftc_nca_workshop_1-9-20.pdf (discussing concerns regarding the non-delegation doctrine as it applies to FTC rulemaking).

⁵⁰ Letter from Chair Lina M. Khan to Chair Cicilline and Ranking Member Buck at 2 (Sept. 28, 2021), <https://docs.house.gov/meetings/JU/JU05/20210928/114057/HHRG-117-JU05-20210928-SD005.pdf> (“The FTC has heard concerns about noncompete clauses at its open meetings, and the Commission recently opened a docket to solicit public comment on the prevalence and effects of contracts that may harm fair competition. As we pursue this work, I am committed to considering the Commission’s full range of tools, including enforcement and rulemaking.”). *See also* New Decade, New Resolve to Protect and Promote Competitive Markets for Workers, Remarks of Commissioner Rebecca Kelly Slaughter As Prepared for Delivery at FTC Workshop on Non-Compete Clauses in the Workplace at 1 (Jan. 9, 2020), https://www.ftc.gov/system/files/documents/public_statements/1561475/slaughter_-_noncompete_clauses_workshop_remarks_1-9-20.pdf (“I also want to thank the advocates and academics— including those participating today—who have raised awareness about and contributed both research and new ideas to the discussion concerning non-compete provisions in employment contracts. State attorneys general and their staff have also been at the forefront of this issue by investigating and initiating legal action to end unjustified and anticompetitive non-compete clauses in employment contracts.”). *See generally* Open Markets Institute et al., Petition for Rulemaking to Prohibit Worker Non-Compete Clauses, (posted by the Fed. Trade Comm’n on July 21, 2021), <https://www.regulations.gov/document/FTC-2021-0036-0001> (Open Market Institute’s petition to prohibit worker non-compete clauses).

⁵¹ *See* Christine S. Wilson, Commissioner, Fed. Trade Comm’n, Testimony Before the House Judiciary Committee, Subcommittee on Antitrust, Commercial and Administrative Law, Hearing on Reviving Competition Part 4: 21st Century Antitrust Reforms and the American Worker (September 28, 2021), https://www.ftc.gov/system/files/documents/public_statements/1596880/commissioner_wilson_hearing_on_reviving_competition_part_4_-_21st_century_antitrust_reforms_and_the.pdf (discussing how antitrust laws as they exist today: (1) embody concepts like monopsony and prohibit anticompetitive agreements like no-poach agreements and unreasonable non-competes; and (2) support challenges to anticompetitive conduct that harms labor).

⁵² *See, e.g.*, Press Release, Wash. State Office of the Attorney General, AG Ferguson announces fast-food chains will end restrictions on low-wage workers nationwide (July 12, 2018), <https://www.atg.wa.gov/news/news-releases/ag-ferguson-announces-fast-food-chains-will-end-restrictions-low-wage-workers>; WASHINGTON STATE ATTORNEY GENERAL’S OFFICE, NO-POACH INITIATIVE 3 (June 2020), <https://agportal->

consider that states function as laboratories of democracy, a phenomenon championed by Louis Brandeis.⁵³ Louis Brandeis hated big government,⁵⁴ and Neo-Brandeisians would do well to remember this aspect of his legacy.

Finally, leadership is ignoring the preference of Congress that we remain bipartisan.⁵⁵ Bipartisanship and collegiality historically have set the FTC apart.⁵⁶ But this fabric has been shredded⁵⁷ – which is detrimental to our mission.

The FTC is an independent agency – but it is not an island. We cannot ignore our Congressional appropriators and oversight committees, and we cannot ignore legal precedent.

s3bucket.s3.amazonaws.com/uploadedfiles/Another/News/Press_Releases/NoPoachReport_June2020.pdf; Press Release, A.G. Schneiderman Announces Settlement With Jimmy John's To Stop Including Non-Compete Agreements In Hiring Packets (June 22, 2016) <https://ag.ny.gov/press-release/ag-schneiderman-announces-settlement-jimmy-johns-stop-including-non-compete-agreements>.

⁵³ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (J. Brandeis dissenting) (“To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment.”).

⁵⁴ Jeffrey Rosen, *The Curse of Bigness*, THE ATLANTIC (June 3, 2016) <https://www.theatlantic.com/politics/archive/2016/06/the-forgotten-wisdom-of-louis-d-brandeis/485477/> (“Louis Brandeis, who was confirmed to the Supreme Court exactly 100 years ago, was America’s greatest critic of bigness since Thomas Jefferson. Denouncing big banks as well as big government as symptoms of what he called a ‘curse of bigness,’ Brandeis was determined to diminish concentrated financial and federal power, which he viewed as a menace to liberty and democracy.”).

⁵⁵ Hearing on Transforming the FTC: Legislation to Modernize Consumer Protection, 117th Cong. (2021), <https://www.congress.gov/117/meeting/house/113972/documents/HHRG-117-IF17-Transcript-20210728.pdf> (“BILIRAKIS: Thank you, Madam Chair. Appreciate it very much. During Joseph Simons’ confirmation hearing to be FTC Chair, Senators had the opportunity to ask him whether he would commit to running the FTC in a bipartisan manner. ... Chair Khan, since the Senate did not have the opportunity to ask you will you run the FTC – again, will you commit to doing it in a bipartisan fashion, where you will consult and coordinate with all commissioners, and ensure they have the resources of the commission available to them on all pending business? Please answer yes or no. KHAN: Certainly, Congressman. I think this is a really fascinating moment for a new emerging bipartisan consensus, especially around some of the concerns relating to concentration of economic power in the digital markets. And I’m always keen to find areas of shared agreement with my colleagues.”).

⁵⁶ Nominations to the Federal Trade Commission: Hearing Before the S. Comm. on Commerce, Science, and Transportation, 105th Cong. 67 (Feb. 14, 2018), <https://www.govinfo.gov/content/pkg/CHRG-115shrg39877/pdf/CHRG-115shrg39877.pdf> (“Senator WICKER. ... My time is up. Let me just say I’m glad to see at least three of you, and possibly all of you, talk about bipartisanship and the great tradition we have in this Commission of not lining up 3 to 2 on so many issues as we’ve seen elsewhere. So let me say that I heartily endorse that kind of sentiment coming from a bipartisan panel today, and I hope that tradition can continue to provide examples for future boards and future candidates to talk about in a positive manner in the future.”).

⁵⁷ See Letter from Ranking Members Jim Jordan, Cathy McMorris Rodgers, and James Comer to Lina Khan, Chair, Fed. Trade Comm’n (July 29, 2021), <https://republicans-judiciary.house.gov/wp-content/uploads/2021/07/2021-07-29-JDJ-CMR-JC-to-FTC.pdf> (“We write with serious concerns about the partisan actions of the Federal Trade Commission’s (FTC) Democratic Commissioners to consolidate agency power, unilaterally assert and expand regulatory authority, and abandon bipartisan and open processes. This ill advised power grab departs from existing FTC practice and tradition and will make the FTC more powerful and less transparent. These partisan changes will position the Biden FTC to reshape radically the American economy and, ultimately, harm American consumers, workers, small businesses, and traditions of free enterprise.”).

Mistake 3: Shunning the Agency's Actual Experts

The FTC is filled with dedicated staff. And we consistently rank at or near the top of “Best Places to Work” among mid-sized federal agencies.⁵⁸ But current leadership has sidelined and disdained our staff. We’ve had notable departures,⁵⁹ and more are coming.⁶⁰ Without good people, we can’t achieve our mission.

So why this brain drain?

First, the Chair early on forced staff to cancel public appearances.⁶¹ When staff participate in external events, it enhances their expertise and job satisfaction while educating stakeholders about our agenda. But this win-win scenario now violates the rules.

Second, important staff work has been sidelined. Our Office of International Affairs works with global counterparts to promote best practices and minimize conflicting outcomes in investigations. Our Office of Policy Planning engages in key policy initiatives.⁶² These staff members are now

⁵⁸ Press Release, Fed. Trade Comm’n, FTC Tops the List of “Best Places to Work” Among Mid-Size Federal Agencies (Dec. 12, 2018); Press Release, Fed. Trade Comm’n, FTC Again Named One of the Best Places to Work in the Federal Government (Dec. 17, 2019) (“The FTC ranked second overall out of 25 mid-sized agencies surveyed ...”); PARTNERSHIP FOR PUBLIC SERVICE, *Federal Trade Commission*, <https://bestplacestowork.org/rankings/detail/?c=FT00> (showing FTC’s #2 overall rank in 2020 best places to work for midsize agencies).

⁵⁹ Benjamin Din, *Morning Tech*, POLITICO (Oct. 1, 2021), <https://www.politico.com/newsletters/morning-tech/2021/10/01/broadband-dreams-hit-a-snag-797978> (“Maneesha Mithal, associate director of the FTC’s privacy unit, and Daniel Kaufman, deputy director of the FTC’s consumer protection bureau, resigned from the agency this week after decades of service ...”).

⁶⁰ Josh Sisco, *Staff Exits Complicate FTC Chief Lina Khan’s Agenda*, THE INFORMATION (Oct. 5, 2021), <https://www.theinformation.com/articles/staff-exits-complicate-ftc-chief-lina-khans-agenda> (“And a spate of senior staff departures – with many more likely to come – means its new chair Lina Khan may not have enough bodies to tackle her stated goals, including dismantling parts of Amazon, for some time.”); Bruce Love, *A Real Disquiet: FTC Staff Attorneys Are Job Hunting*, NATIONAL L. J. (July 13, 2021), https://www.law.com/nationallawjournal/2021/07/13/a-real-disquiet-ftc-staff-attorneys-are-job-hunting/?cmp=share_twitter (“Seeing a pile of resumes already, several leaders of law firm antitrust practices are predicting many more government attorneys heading for private practice in the coming months as a new-look Federal Trade Commission forms under the leadership of chairperson Lina Khan. ... While some staff turnover in the wake of an administration change is routine, law firm leaders said the number of agency lawyers seeking out career options outside the FTC appears to be high now and they are anticipating more later in the year.”).

⁶¹ Leah Nylen & Betsy Woodruff Swan, *FTC staffers told to back out of public appearances*, POLITICO (July 6, 2021), <https://www.politico.com/news/2021/07/06/ftc-staffers-public-appearances-498386> (“Less than a week into Lina Khan’s tenure as Federal Trade Commission chair, her chief of staff ordered the agency’s staff to cancel all public appearances...”); *id.* (“In a follow-up message two days later, Howard said that any staff who were scheduled for public events should cancel those appearances. ‘I want to make clear that for any situations where staff are currently scheduled to do a public event and thus need to contact event organizers to withdraw their participation, the message they should convey is that they are sorry they can no longer participate due to pressing matters at the FTC,’ she wrote.”).

⁶² Office of Policy Planning ran the Hearings On Competition and Consumer Protection in the 21st Century. Press Release, Fed. Trade Comm’n, *FTC Announces Hearings On Competition and Consumer Protection in the 21st Century* (June 20, 2018), <https://www.ftc.gov/news-events/press-releases/2018/06/ftc-announces-hearings-competition-consumer-protection-21st>.

reviewing merger filings,⁶³ which is not their comparative advantage. An “all hands on deck” approach is okay when necessary – but I doubt that it is. Merger filings have increased⁶⁴ – but DOJ is not facing similar difficulties. I suspect that policy changes are the larger driver of this development.⁶⁵

Third, the Neo-Brandeisians have trashed staff for superficial analysis,⁶⁶ mischaracterized the scope of staff’s investigations and then labeled those investigations flawed and ineffective,⁶⁷ and requested that the Inspector General conduct a review of staff’s investigations⁶⁸ – not an effective method of rallying the troops.

Fourth, Neo-Brandeisians apparently believe that because government officials can move to the private sector, their decisions are motivated by the interests of future employers.⁶⁹ In reality,

⁶³ Memorandum from Lina Khan, Chair, Fed. Trade Comm’n to Commission Staff and Commissioners (Sept. 22, 2021), https://www.ftc.gov/system/files/documents/public_statements/1596664/agency_priorities_memo_from_chair_lina_m_khan_9-22-21.pdf (“The current deal volume is imposing huge demands on our staff, and I’m very grateful to the merger shops for the heavy load they are carrying, as well as to the attorneys from OPP and OIA who have graciously stepped up to help”).

⁶⁴ See, e.g., Remarks of Chair Lina M. Khan Regarding the Proposed Rescission of the 1995 Policy Statement Concerning Prior Approval and Prior Notice Provisions (July 21, 2021), https://www.ftc.gov/system/files/documents/public_statements/1592338/lk_remarks_for_1995_rescission_-_final_-_1230pm.pdf (“The FTC is a significantly under-resourced agency, tasked with enforcing antitrust and consumer protection laws economy-wide—even as its staff count remains roughly 50 percent less than it was in 1980. A recent surge in merger filings is stretching these resources even further, resulting in an enormous burden on the agency staff.”) (citation omitted); David McLaughlin & Anna Edgerton, *FTC’s Khan Says Merger Wave Is Straining Agency Resources*, BLOOMBERG (July 28, 2021), <https://www.bloomberg.com/news/articles/2021-07-28/ftc-s-khan-says-merger-wave-is-straining-agency-resources> (covering Chair Khan’s remarks to a panel of the House Energy & Commerce Committee).

⁶⁵ Statement of Commissioner Christine S. Wilson Regarding the Announcement of Pre-Consummation Warning Letters (Aug. 9, 2021), https://www.ftc.gov/system/files/documents/public_statements/1593969/pre-consummation_warning_letters_statement_v11.pdf (“Merger filings have increased, and dedicated FTC staff are working hard to assess the deals notified in those filings. But one plausibly could wonder if the FTC is struggling to review transactions in a timely manner not only because of filing volume, but also because something else is afoot”).

⁶⁶ See, e.g., Dissenting Statement of Commissioner Rohit Chopra In the Matter of AbbVie, Inc. / Allergan plc at 19, File No. 1910169 (May 5, 2020), https://www.ftc.gov/system/files/documents/public_statements/1574583/191-0169_dissenting_statement_of_commissioner_rohit_chopra_in_the_matter_of_abbvie-allergan_redacted.pdf (“During my two years as a Commissioner, I have expressed concerns that the FTC makes many of its decisions based on superficial evidence, rather than a close examination of the underlying dynamics in an industry.”).

⁶⁷ *Id.* at 3 (“Commissioners and FTC officials have questioned whether this fully remedies competitive harms. However, the agency continues to defend its work, and, in my view, largely believes the status quo is working just fine. But, it isn’t. The FTC’s strategy of focusing on whether pharmaceutical companies have any overlaps in their drug product lineup is narrow, flawed, and ineffective.”).

⁶⁸ *Id.* at 18 (“Request that the Inspector General conduct a programmatic review of our merger investigations in biomedical, consumer technology, and other innovation markets.”).

⁶⁹ THE ROOSEVELT INSTITUTE, UNSTACKING THE DECK: A NEW AGENDA TO TAME CORRUPTION IN WASHINGTON at 4, (May 2018), <https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI-Unstacking-the-Deck-201805.pdf> (“Third, the revolving door—where individuals move between government service and special interests—contributes to “cultural capture,” where officials in federal government agencies see their interests as more closely aligned with the entities they regulate, rather than the interests of the public.”); Prepared Opening Statement of Commissioner Rohit Chopra Before the United States House of Representatives Committee on Energy and Commerce

many staff are sympathetic to the goals of leadership – but, as one staffer lamented to me, leadership hasn't taken the time to ask.

Fifth, staff have become a convenient scapegoat. Exhibit A: politicians are shifting blame for gas price increases to the FTC.⁷⁰ Many factors contribute to rising gas prices, including the stated goal of this Administration to transition away from oil and gas.⁷¹ But leadership has embraced the political message that flawed merger review has facilitated collusive practices among gas stations.⁷² I worked with Peter Richman, whose shop reviews these mergers, during my tenure as a law clerk. I *guarantee* that Peter Richman is not letting harmful deals through. (Exhibit B is having the Office of Public Affairs take the blame for publishing the prior approval policy without the dissents of sitting Commissioners.⁷³)

Sixth, leadership routinely fails to solicit the advice of our experienced staff.⁷⁴ I do not always *agree* with staff, but I *always* benefit from their perspective.

Subcommittee on Consumer Protection and Commerce Hearing on Transforming the FTC: Legislation to Modernize Consumer Protection at 2 (July 28, 2021), https://www.ftc.gov/system/files/documents/public_statements/1592970/prepared_opening_statement_of_commissioner_rohit_chopra_transforming_the_ftc_legislation_to.pdf (“Congress should examine whether to revisit laws regarding post-employment restrictions for senior FTC officials.”).

⁷⁰ Zeke Miller, *Biden team is seeking ways to address rising energy prices*, AP NEWS (Aug. 11, 2021), <https://apnews.com/article/joe-biden-business-health-coronavirus-pandemic-prices-c56b5ffcef37223caaac19e3b3428392> (“Biden’s National Economic Council director, Brian Deese, asked the FTC head, Lina Khan, to ‘monitor the U.S. gasoline market and address any illegal conduct that might be contributing to price increases for consumers at the pump.’”).

⁷¹ Debate transcript: Trump, Biden final presidential debate moderated by Kristen Welker, USA TODAY (Oct. 23, 2020), <https://www.usatoday.com/story/news/politics/elections/2020/10/23/debate-transcript-trump-biden-final-presidential-debate-nashville/3740152001/> (“[1:28:17] Biden: I would transition from the oil industry. Yes. [1:28:19] Trump: Oh, transition. [1:28:21] Biden: It is a big statement because I would stop-- [1:28:22] Welker: Why would you do that? [1:28:24] Biden: Because the oil industry significantly — but here's the deal — [1:28:27] Trump: That’s a big statement. [1:28:31] Biden: Well, if you let me finish the statement, because it has to be replaced by renewable energy over time. Over time. And I’d stop giving to the oil industry-- I’d stop giving them federal subsidies. You won’t give federal subsidies to the gas and, excuse me, to solar and wind. Why are we giving it to the oil industry? [1:28:52] Trump: We actually do give it to solar and wind —”); Press Briefing by Press Secretary Jen Psaki, THE WHITE HOUSE (Oct. 6, 2021), <https://www.whitehouse.gov/briefing-room/press-briefings/2021/10/06/press-briefing-by-press-secretary-jen-psaki-october-6-2021/> (“MS. PSAKI: ... Certainly, we all want to keep gasoline prices low, but the threat of the crisis — the climate crisis — certainly can’t wait any longer.”).

⁷² Protecting Americans at the gas pump through aggressive antitrust enforcement, FED. TRADE COMM’N, COMPETITION MATTERS BLOG (Sept. 21, 2021 10:54:AM), (“[T]he FTC has typically sought to resolve anticompetitive deals by requiring merging companies to divest fuel stations in overlapping local markets. Chair Khan is concerned that this policy may have increased consolidation more broadly, at the metro, regional, or national level, creating conditions ripe for price coordination and other collusive practices.”).

⁷³ @FTC, Twitter (Oct. 25, 2021, 5:12 PM), <https://twitter.com/FTC/status/1452744799312830468?s=20> (“The Office of Public Affairs unfortunately issued the prior approval policy release prematurely and plans to update immediately upon receipt of the dissenting statement from minority Commissioners. We regret the error.”).

⁷⁴ See, e.g., Dissenting Statement of Commissioner Christine S. Wilson Open Commission Meeting on July 1, 2021 at 2, https://www.ftc.gov/system/files/documents/public_statements/1591554/p210100wilsoncommnmeetingdissent.pdf (“Unfortunately, the format the Chair has chosen for this meeting omits our knowledgeable staff ...”).

Seventh, leadership fails to give credit where it is due. The Division of Privacy and Identity Protection worked countless hours over the course of two years on a 6(b) study and corresponding report addressing internet service providers' privacy practices.⁷⁵ But the Chair publicly stated at the open Commission meeting on October 21 that she would "like to thank the staff of the Office of Policy Planning who under the direction [of their Acting Director] spent long hours reviewing the data and compiling this report."⁷⁶

Eighth, two of my Democrat colleagues rewarded staff's two-year in-depth investigation of internet service providers ("ISPs") by immediately and publicly recommending that authority be transferred back to the Federal Communications Commission.⁷⁷ This recommendation is dismissive of staff's longstanding ability to protect broadband consumers under the FTC's general consumer protection and competition authority, including through the application of the agency's privacy and data security expertise. Save for roughly three years when the Open Internet Order was in effect, the FTC has long policed unlawful conduct in this space.⁷⁸ And it was the FTC, along with six states, that sued ISP Frontier Communications for failing to provide customers internet services at speeds promised.⁷⁹ The push for net neutrality at the expense of a light-touch regulatory framework for internet services creates a game of regulatory ping pong that could undermine investment in America's internet infrastructure at a time when we are

⁷⁵ Press Release, Fed. Trade Comm'n, FTC Seeks to Examine the Privacy Practices of Broadband Providers (Mar. 26, 2019), <https://www.ftc.gov/news-events/press-releases/2019/03/ftc-seeks-examine-privacy-practices-broadband-providers>; A LOOK AT WHAT ISPS KNOW ABOUT YOU: EXAMINING THE PRIVACY PRACTICES OF SIX MAJOR INTERNET SERVICE PROVIDERS, FTC STAFF REPORT (Oct. 2021), https://www.ftc.gov/system/files/documents/reports/look-what-isps-know-about-you-examining-privacy-practices-six-major-internet-service-providers/p195402_isp_6b_staff_report.pdf.

⁷⁶ Open Commission Meeting – October 21, 2021, FED. TRADE COMM'N (Oct. 21, 2021), <https://www.ftc.gov/news-events/audio-video/video/open-commission-meeting-october-21-2021>.

⁷⁷ Remarks of Chair Lina M. Khan Regarding the 6(b) Study on the Privacy Practices of Six Major Internet Service Providers, File No. P195402 (Oct. 21, 2021), https://www.ftc.gov/system/files/documents/public_statements/1597790/20211021_isp_privacy_6b_statement_of_chair_khan_final.pdf ("It's worth noting, of course, that the Federal Communications Commission has the clearest legal authority and expertise to fully oversee internet service providers. I support efforts to reassert that authority and once again put in place the nondiscrimination rules, privacy protections, and other basic requirements needed to create a healthier market."); Remarks of Rebecca Kelly Slaughter Regarding the FTC Staff Report – A Look at What ISPs Know About You: Examining the Privacy Practices of Broadband Providers (Oct. 21, 2021), https://www.ftc.gov/system/files/documents/public_statements/1597814/slaughter_isp_report_statement_10-20-21.pdf ("This report demonstrates a prevalence of unavoidable and unfair behavior across the internet economy. While it certainly supports better oversight of ISPs by the FCC through a revived Net Neutrality regime, I think it also shows the value of clear rules on data abuses, including limits on collection and use, to protect people's rights.").

⁷⁸ See Comment of Acting Chairman Maureen K. Ohlhausen, Fed. Trade Comm'n, In the Matter of Restoring Internet Freedom (July 17, 2017), https://www.ftc.gov/system/files/documents/public_statements/1231563/mko_rif_comment_7-17-2017_final.pdf; Comment of the Staff of the Federal Trade Commission, In the Matter of Restoring Internet Freedom (July 17, 2017), https://www.ftc.gov/system/files/documents/advocacy_documents/comment-staff-bureau-consumer-protection-bureau-competition-bureau-economics-federal-trade/ftc_staff_comment_to_fcc_wc_docket_no17-108_7-17-17.pdf.

⁷⁹ Press Release, Fed. Trade Comm'n, FTC Sue Frontier Communications for Misrepresenting Internet Speeds (May 19, 2021), <https://www.ftc.gov/news-events/press-releases/2021/05/ftc-sues-frontier-communications-misrepresenting-internet-speeds>.

aggressively seeking to close the digital divide.⁸⁰ And the case against Frontier demonstrates that ceding FTC oversight of ISPs could lead to consumer harm.⁸¹ Why acquiesce to a removal of jurisdiction, particularly considering the agency’s privacy and data security expertise, and especially after this in-depth study of industry practices?

New leadership’s mantra is to protect “consumers, workers and honest businesses.” Respecting the FTC workforce would be a great first step.

Mistake 4: Fostering Confusion and Maximizing Discretion

The fourth mistake of leadership is their choice to foster confusion and maximize discretion. For starters, the FTC repealed the Vertical Merger Guidelines,⁸² but DOJ did not.⁸³ The new guidelines were universally accepted as a significant improvement over the previous non-horizontal guidelines.⁸⁴ This divergence is the antithesis of good government and provides ammunition to those who seek to consolidate antitrust enforcement at DOJ.⁸⁵

⁸⁰ Investments decreased from 2014 to 2016 coinciding with FCC’s classification of broadband providers as common carriers. See PATRICK BROGAN, BROADBAND INVESTMENT CONTINUED TRENDING DOWN IN 2016, USTELECOM (Oct. 31, 2017), <https://ustelecom.org/research/broadband-investment-continued-trending-down-in-2016/> (“U.S. broadband providers invested approximately \$76.0 billion in network infrastructure in 2016 down from approximately \$77.9 billion in 2015 and \$78.4 billion in 2014. From 1996 through 2016, the broadband industry has made capital investments totaling \$1.6 trillion. The start of the decline, the first since the recession ended in 2009, coincided with FCC’s 2015 decision to reclassify broadband providers as common carriers under Title II of the Communications Act.”). Investment increased in 2017 after a change in policy. See Patrick Brogan, *Preliminary Data Show Continued Upward Momentum for Broadband Investment*, USTELECOM (June 10, 2019), <https://www.ustelecom.org/preliminary-data-show-continued-upward-momentum-for-broadband-investment/> (“U.S. broadband provider capital investment increased by approximately \$3 billion in 2018, continuing the positive momentum shift that began in 2017 when the FCC initially signaled its intention to restore a forward-looking regulatory framework for broadband.”).

⁸¹ Press Release, Fed. Trade Comm’n, FTC Sue Frontier Communications for Misrepresenting Internet Speeds (May 19, 2021), <https://www.ftc.gov/news-events/press-releases/2021/05/ftc-sues-frontier-communications-misrepresenting-internet-speeds>.

⁸² Press Release, Fed. Trade Comm’n, Federal Trade Commission Withdraws Vertical Merger Guidelines and Commentary (Sept. 15, 2021), <https://www.ftc.gov/news-events/press-releases/2021/09/federal-trade-commission-withdraws-vertical-merger-guidelines>.

⁸³ Press Release, Antitrust Div., Dept. of Justice, Justice Department Issues Statement on the Vertical Merger Guidelines (Sept. 15, 2021), <https://www.justice.gov/opa/pr/justice-department-issues-statement-vertical-merger-guidelines>.

⁸⁴ See, e.g., Dissenting Statement of Commissioner Rohit Chopra Regarding the Publication of Vertical Merger Guidelines, File No. P810034 (June 30, 2020), https://www.ftc.gov/system/files/documents/public_statements/1577503/vmgchopradissent.pdf (“I appreciate that the Federal Trade Commission and the U.S. Department of Justice rescinded the old, outdated 1984 Guidelines. I welcome the sentiment from my colleagues that they are likely to challenge more vertical mergers that might have otherwise not drawn scrutiny.”).

⁸⁵ See, e.g., Mike Lee, Opinion, *Just one agency should enforce antitrust law*, WASHINGTON EXAMINER (June 17, 2019), <https://www.lee.senate.gov/2019/6/just-one-agency-should-enforce-antitrust-law> (“Moreover, given the different policies and procedures each agency follows, some industries are subject to a different standard of review just due to an accident of history that determined which agency would have jurisdiction.”). See also One Agency Act, S. 633, 117th Cong. § 4 (2021); One Agency Act, H.R.2926, 117th Cong. § 4 (2021); THE HOUSE JUDICIARY REPUBLICAN AGENDA FOR TAKING ON BIG TECH (July 6, 2021), <https://republicans-judiciary.house.gov/wp-content/uploads/2021/07/2021-07-06-The-House-Judiciary-Republican-Agenda-for-Taking-on-Big-Tech.pdf> (“The

Even if DOJ rescinds the guidelines, we still do not know how the FTC will analyze vertical mergers. But the majority’s statements are concerning. Two leading experts wrote that the majority’s description of EDM was “flatly incorrect” and that “the majority appears not to have consulted with their own economists.”⁸⁶ The experts also described the majority’s discussion of efficiencies and statutory text as “baffling.”⁸⁷ Leadership would have benefited from consulting with staff, but the Neo-Brandeisian arguments are Twitter-tested, so they do not need staff *or* these experts.

As I mentioned, the majority also rescinded the Section 5 policy statement.⁸⁸ I have no better idea than you how this new-found freedom will be employed.⁸⁹ Without limiting principles, we can challenge any conduct that three Commissioners find objectionable.

And finally, Commission leadership has made clear its dislike of the consumer welfare standard.⁹⁰ This standard works because it is administrable, predictable, and credible.⁹¹ Injecting additional goals will undermine credibility and predictability while leading to subjectivity and politicization.

Stakeholders will have little patience for an agency that fails to deliver on the good government principles of transparency, predictability, and accountability.

* * *

Some may view these remarks as an attack on Neo-Brandeisians and FTC leadership. That is not my intention. I value the Commission’s traditional, collegial approach to decision making. But

current system of splitting antitrust enforcement between the Department of Justice and the Federal Trade Commission is inefficient and counterproductive. The arbitrary division of labor empowers radical Biden bureaucrats at the expense of Americans. This proposal will consolidate antitrust enforcement within the Department of Justice so that it is more effective and accountable.”).

⁸⁶ Carl Shapiro & Herbert Hovenkamp, *How Will the FTC Evaluate Vertical Mergers?*, PROMARKET (Sept. 23, 2021), <https://promarket.org/2021/09/23/ftc-vertical-mergers-antitrust-shapiro-hovenkamp/>.

⁸⁷ *Id.*

⁸⁸ *Supra* note 41-45 and accompanying text.

⁸⁹ Dissenting Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson on the “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/1591710/p210100phillipswilsondissentsec5enforcemenprinciples.pdf (“Today, they are left to wonder, because the Commission failed to enunciate new principles regarding its interpretation of ‘unfair methods of competition.’ The 2021 UMC Statement does not describe the principles or parameters that will guide the Commission going forward. While the majority criticize the Bipartisan 2015 UMC Statement for the absence of clear enforcement principles, the 2021 UMC Statement offers even less.”).

⁹⁰ Lina M. Khan, *Amazon's Antitrust Paradox*, 126 Yale L. J. 710, 716 (“This analysis reveals that the current framework in antitrust – specifically its equating competition with “consumer welfare,” typically measured through short-term effects on price and output – fails to capture the architecture of market power in the twenty-first century marketplace.”).

⁹¹ Christine S. Wilson, Thomas J Klotz & Jeremy A. Sandford, *Recalibrating the Dialogue on Welfare Standards: Reinserting the Total Welfare Standard into the Debate*, 26 Geo. Mason L. Rev. 1435 (2019).

collegiality doesn't mean acceding to actions that I believe are wrong. And collegiality doesn't mean that I remain silent.

My views are frequently portrayed as part of a partisan story line. But antitrust enforcement traditionally has not been partisan.

And I am not opposing change. Antitrust is not meant to be static – as industries and economics evolve, so too does antitrust. I am a big fan of 6(b) studies and merger retrospectives to inform how we refine our approach. But policy shifts must be informed by robust dialogue and due regard for the past.

If my intention is not to attack, then what motivates me?

First, I am speaking for those who cannot speak out. So I speak for the dedicated FTC staff. They have been through transitions, and they will do what is asked. They deserve respect, not disdain.

I speak for American consumers. There are millions of people in this country – particularly the most economically vulnerable – who will be harmed if antitrust law stops focusing on increased innovation, low prices, and high quality.

And I speak for the antitrust bar. Many of you tell me you're troubled by developments at the FTC – but you fear retaliation if you speak out. For the same reason, I speak for the business community.

And second, I speak out because I am fighting for what I hold dear.

I fight for the integrity of the FTC and its staff. The agency is a community of good people united by the shared goal of protecting consumers. We are more than the sum of our parts, and we accomplish so much with so little – I am proud of this “little engine that could.”

If the people, the FTC community, and the agency's good work are to endure, we must heed the past and remember that overreach nearly destroyed the agency. I am concerned when those who wield the power do not share this concern. But Chair Khan recently said that when identifying the top ten threats to the agency, overreach is not on the list.⁹²

I fight for the integrity of antitrust, which must be administrable, predictable, and credible, not subjective and politicized.

I fight for the rule of law and due process. The ends do *not* justify the means; process matters, and no one is above the law.

I fight for free markets because command and control economies fail. Always.

⁹² Nancy Scola, *Lina Khan Isn't Worried About Going Too Far*, INTELLIGENCER (Oct. 25, 2021), <https://nymag.com/intelligencer/article/lina-khan-ftc-profile.html> (“Khan worries about the ‘existential stakes of underreaching.’ Going too far? Doing too much? ‘When identifying the top ten threats to this agency, that’s not on the list.’”).

And for economic liberty, because free markets beget free people.⁹³

For these reasons, I do not plan to stop speaking out any time soon.

⁹³Milton Friedman, *Free markets for free men*, CHICAGO BOOTH REVIEW (Oct. 17, 1974), <https://review.chicagobooth.edu/economics/archive/free-markets-free-men> (“So I believe that you cannot really say that free men make free markets. They may or may not. But you can say with great certainty that free markets make free men and that controlled markets destroy free men.”).