

June 30, 2021

The Honorable Lina Khan  
Chairwoman  
Federal Trade Commission  
600 Pennsylvania Avenue, NW  
Washington, DC 20580



cc: Commissioners Noah Philips, Rebecca Slaughter, Rohit Chopra and Christine Wilson

**Re: Comments for July 1 Open Commission Meeting in re Unfair Methods of Competition Policy Statement**

Dear Madam Chairwoman:

Thank you for the opportunity to comment on the Commission's plan, at its July 1 open meeting, to "vote on whether to rescind the policy statement issued by the Commission in 2015[.]"<sup>1</sup> The Policy Statement gives substance to the open-ended term "unfair methods of competition," in Section 5. 15 U.S.C. § 45(a)(1). Abruptly revoking the Policy Statement would create non-delegation, removal-power, and notice problems. As such, the Commission should, at the very least, proceed through notice and comment before rescinding the Statement.

Start with non-delegation. *Gundy v. United States*, 139 S. Ct. 2116 (2019), is the Supreme Court's most recent statement on how much authority Congress may delegate to executive agencies, consistent with the constitutional imperative that Congress hold "all legislative Powers." U.S. Const. Art. I § 1. *Gundy* upholds the broad "intelligible principle" test, under which Congress's power to delegate authority is broad indeed. Only eight justices heard the case, however, and only four justices endorsed the regnant standard. In a brief concurrence, Justice Alito expressed his "support" for "reconsider[ing] th[at] approach," if and when a majority of the Court wishes to do so. *Gundy*, 139 S. Ct. at 2131. Justice Kavanaugh, who did not participate in *Gundy*, has expressed just such a willingness. See *Paul v. United States*, 140 S. Ct. 342 (2019) (Statement of Kavanaugh, J., respecting the denial of certiorari). And Justice Ginsburg, one of the four justices to stand by the "intelligible principle" standard in *Gundy*, has been replaced by Justice Barrett.

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<sup>1</sup> Federal Trade Commission, *FTC Announces Agenda for July 1 Open Commission Meeting*, <https://bit.ly/2SBcxPT> (June 24, 2021).

Justice Gorsuch’s dissent in *Gundy*—a dissent joined by Chief Justice Roberts and Justice Thomas; and a dissent Justices Alito, Kavanaugh, and Barrett are likely to find attractive in a future case—thus warrants more attention than an average dissent. If the executive branch may make “laws,” Justice Gorsuch notes, they will “not be few in number,” nor “the product of widespread social consensus,” nor “likely to protect minority interests,” not “apt to provide stability and fair notice.” *Gundy*, 139 S. Ct. at 2135. Executive “lawmaking” would also enable both the legislature and the executive to evade accountability, each branch blaming the other for the consequences of open-ended legislation implemented through detailed agency rules. *Id.* For these and other reasons, Justice Gorsuch urges the Court to end its “intelligible principle misadventure” and insist that “Congress, and not the Executive Branch, make the policy judgments” that are implemented through agency action. *Id.* at 2141.

As the Policy Statement itself recognizes, “Congress chose not to define the specific acts and practices that constitute unfair methods of competition in violation of Section 5.”<sup>2</sup> Wisely, therefore, the Policy Statement attempts to cabin the Commission’s discretion, ensuring that the Commission will “be guided,” in its enforcement of the “statute on a flexible case-by-case basis,” subject to judicial review, “by the public policy underlying the antitrust laws, namely, the promotion of consumer welfare.” *Id.* The Policy Statement also endorses the rule-of-reason standard, and observes that the Commission will be “less likely to challenge an act or practice” if “the Sherman or Clayton Act is sufficient to address” it. *Id.*

The Policy Statement was issued before the Supreme Court decided *Gundy*. We now know, because of *Gundy*, that the Policy Statement may well be a *necessary* narrowing of the Commission’s authority—a narrowing that ensures that the Commission is not exercising greater authority than the legislature may permissibly delegate. In other words, the Court, going forward, may well decide that a phrase like “unfair methods of competition” flouts the constitutional ban on non-delegation. (“The term ‘unfair’ is an elusive concept, often dependent upon the eye of the beholder.” *E.I. Du Pont De Nemours & Co. v. FTC*, 729 F.2d 128, 137-38 (2d Cir. 1984).) Should the Commission begin to test the outer boundary of the phrase “unfair methods of competition,” it could in fact wind up presenting the Court the very case in which it narrows the ambit of permissible legislative delegation. Indeed, as Commissioner Phillips observed last year, the term “unfair methods of competition” in Section 5 is “almost the exact wording” as “codes of fair competition,” the term struck down

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<sup>2</sup> Federal Trade Commission, *Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act*, <https://bit.ly/3qAhW67> (Aug. 13, 2015).

under the non-delegation doctrine in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 553 (1935) (Cardozo, J., concurring).<sup>3</sup>

The wielding of legislative power by the Commission is particularly problematic because the Commission is not just any agency. Rather, it is an *independent* agency, with principal officers not subject to removal by the President. The Commission is thus unaccountable to *either* the legislative *or* the executive branch. The Court recently made clear that *Humphrey's Executor v. United States*, 295 U.S. 602 (1935)—the decision that blessed the FTC's independent structure—should be “take[n] ... on its own terms,” *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2200 n.4 (2020). *Humphrey's Executor* stands on the assumption that the FTC is merely a “legislative ... aid” that “mak[es] reports and recommendations to Congress.” *Seila*, 140 S. Ct. at 2200. When, therefore, the Commission seeks to implement sweeping policy changes on its own—when, that is, it goes far beyond making “reports and recommendations to Congress”—it undermines the legitimacy of its independence. This is especially so in the context of antitrust. Congress is at this very moment actively considering whether to amend or update those laws. Aggressive action by the FTC to implement a broad new conception of “unfair methods of competition” would circumvent those democratic deliberations. To some, no doubt, that is the whole point. But deliberately evading both the political branches is not, in our system of government, a legitimate tactic for ramming through sweeping new policies.

Given these serious constitutional concerns, the Commission should, at the very least, engage in notice and comment before rescinding the Policy Statement. The only reason not to go that route would be if the Commission intends immediately to bring enforcement actions under an innovative new understanding of the term “unfair methods of competition”—a move that would simply inflame, rather than dampen, the constitutional problems at hand. *See E.I. Du Pont*, 729 F.2d at 139 (“the Commission owes a duty to define [what conduct] would be unfair so that businesses will have an inkling as to what they can lawfully do rather than be left in a state of complete unpredictability.”). Engaging in notice and comment, by contrast, would promote the values of process, accountability, and public buy-in that the Commission needs if it is to act legitimately as an independent agency in a system of representative government. What's more, engaging in greater deliberation, before taking action, would bolster the value of such policy statements more generally. After all, any statements the Commission might issue in the future will only be as strong, stable, and reliable as are the precedents, set by the Commission today, for what it takes for each such statement to be revoked. If the standard is low, no future statement will be worth the paper it's written on.

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<sup>3</sup> Noah Phillips, *Non-Compete Clauses in the Workplace: Examining Antitrust and Consumer Protection Issues* (Jan. 9, 2020), <https://bit.ly/2U7jGrv>.