Comments of

TechFreedom

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In the Matter of

Request for Public Comment Regarding Contract Terms That May Harm Fair Competition

Docket ID: FTC-2021-0036

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I. Overview

Founded in 2010, TechFreedom is a non-partisan think tank dedicated to promoting the progress of technology that improves the human condition. To this end, we seek to advance public policy that makes experimentation, entrepreneurship, and investment possible, and thus unleashes the ultimate resource: human ingenuity. Wherever possible, we seek to empower users to make their own choices online and elsewhere.

Since its launch in 2011, TechFreedom has written and spoken often on the FTC's regulation and enforcement of antitrust, competition, and consumer protection laws. We welcome the opportunity to once again comment on rulemakings under Section 5 of the FTC Act's unfair methods of competition authority, specifically regarding a ban on exclusionary contracts.

TechFreedom files these comments in response to the FTC's request for comment in the above-mentioned Docket.[2] This request for comment references the Petition for Rulemaking to Prohibit Exclusionary Contracts ("OMI Petition") filed by Open Markets Institute and other groups and individuals ("Petitioners") in July 2020.[3]

Petitioners ask the FTC to "initiate a rulemaking to prohibit businesses from using exclusive dealing, exclusionary payments, and other similar practices . . . that substantially foreclose rivals from customers, distributors, or suppliers of critical input."[4] Petitioners claim that the FTC can do this by "build[ing] on the implicit rules of fair competition embodied in Sherman Act case law and the FTC's explicit authority to identify and prohibit unfair methods of competition."[5] Petitioners advocate that the Commission, through issuing such a rule, treat as *per se* illegal "exclusive arrangements that result in substantial foreclosure of customer, distributors or suppliers"[6] and adopt three alternative tests for defining substantial foreclosure:[7]

[2] *See* Solicitation for Public Comments on Contract Terms that May Harm Competition, Federal Trade Commission, FTC-2021-0036-0022 (Aug. 05, 2021), https://www.regulations.gov/document/FTC-2021-0036-0022.

[3] Petition for Rulemaking to Prohibit Exclusionary Contracts, Open Markets Institute (Jul. 21, 2020) [hereinafter "OMI Petition"], available at https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/5f1729603e615a270b537c3d/1595353441408/Petition+for+Rulemaking+to+Prohibit+Exclusionary+Contracts.pdf.

[4] *Id.* at 1.

[5] *Id.* at 4.

[6] *Id.* at 74.

[7] *Id.* at 75-81.

- **Dominance test**: A firm with a share of 30% or more of a relevant market "uses exclusivity with all its customers, distributors or suppliers of an essential input";[8] or
- **Quantitative foreclosure test**: a firm has exclusive arrangements with customers, distributors or suppliers that "together account[s] for 30% or more of their relevant market";[9] or
- **Qualitative foreclosure test**: a firm "ties up the top three or more customers, distributors, or suppliers in a concentrated market through exclusivity".[10]

The Petitioners further recommend that the substantial foreclosure test be modified to treat as *per se* illegal "parallel" use of exclusivity in "oligopolistic industries" and advocate for a definition of substantial foreclosure that would find substantial foreclosure when (1) the three leading firms have a combined share of 50% or more of a relevant market and use exclusivity with their customers, distributors, or suppliers; or (2) the three leading firms collectively use exclusivity with customers, distributors, or suppliers of a particular input that together account for 50% of their relevant market; or (3) if the three leading firms tie up the top five or more customers, distributors, or suppliers in a concentrated market.[11] Petitioners advocate that exclusivity that is of a short duration or terminable at will not be treated more leniently than other exclusive arrangements.[12]

Petitioners argue that "removing exclusivity as a competitive weapon for firms with dominance . . . would encourage these corporations to compete on the merits"[13] and claim that through exclusivity agreements "dominant firms . . . coerc[e] and induce[ ] customers, distributors and supplier to foreclose rivals and entrants and suppress fair competition."[14] Through the requested rule, "dominant firms would have to win over customers and distributors by improving their products and competing on price." [15] According to Petitioners, firms that wish to "protect their brands and their investments in distributors and to achieve economies of scale" have "less restrictive alternatives" to doing so.[16]

TechFreedom disagrees: Petitioners have not provided any empirical or theoretical basis in support of their proposed rule. For that reason, the Commission should reject the request of

[8] *Id.* at 75.

[9] OMI Petition at 76.

[10] *Id.* at 77.

[11] *Id.* at 78.

[12] *Id.* at 79.

[13] *Id.* at 80.

[14] *Id.*

[15] OMI Petition at 80.

[16] *Id.*

the OMI Petition. Where the FTC will seek public comment on all petitions for rulemaking filed with the FTC, the Commission should require, as a condition to using Commission resources to review and evaluate such comment, and engage the public on questions of importance, that any petitioner provide something more than bare assertions of anticompetitive conduct. The Petitioners have failed to do that here.

II. The FTC Has No Authority to Establish Substantive Rules on Exclusive Agreements as Unfair Methods of Competition

The OMI Petition calls upon the FTC to issue specific substantive rules under the Administrative Procedure Act proscribing certain practices as unfair methods of competition.[17] But the FTC has no such power. The Petition invokes Section 6(g) of the FTC Act, one of the "additional powers" conferred upon the FTC in the original FTC Act of 1914.[18] However, if Congress had intended the FTC to make substantive or legislative rules — rules with the force and effect of law — it would have provided that violations of such rules could be punished with some kind of sanction. Such was the convention guiding Congress in how it distinguished grants of substantive rulemaking authority from grants of purely procedural rulemaking authority, according to the exhaustive study of legislation enacted in the Progressive and New Deal eras conducted by Columbia Law Professor Thomas Merrill, one of America's leading administrative law scholars.[19] In fact, the original FTC Act did not even authorize sanctions for violations of the Act itself; instead, the FTC could issue only a cease-and-desist order — which is no sanction at all. The FTC could not even enforce that order itself; it must ask a court to do so.

As our attached comments further explain, to read Section 6(g) as a grant of substantive rulemaking power would broadly flout both the Act's context and the Constitution. When Congress passed the FTC Act in 1914, both the non-delegation doctrine (barring Congress from handing legislative power to executive agencies) and the removal power (ensuring that the president has broad authority to remove executive-branch officers at will) were broader and more rigid than they are today. Even aside from Section 6(g), the FTC Act tested these boundaries by letting the FTC enforce a broad "unfair methods" standard case-by-case and by granting the FTC's commissioners "for-cause" removal protection. The portion of Section 6(g) at issue here, meanwhile, lies buried in a long section detailing the FTC's power simply

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[17] *Id.* at 4 (*citing* Nat'l Petroleum Refiners Ass'n v. FTC, 482 F.2d 672 (D.C. Cir. 1973)).

[18] Federal Trade Commission Act of 1914, Pub. L. No. 63-203, § 6(g) 38 Stat. 717 (1914) (codified as amended at 15 U.S.C. § 46(g).

[19] *See* Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: the Original Convention*, 116 HARV. L. REV. 467 (2002), https://bit.ly/3D0yoSd.

to gather and report information in furtherance of its duties. As a matter of statutory interpretation, therefore, to read Section 6(g) as a grant of substantive (*i.e.*, legislative) rulemaking authority is to assume that Congress implanted, in a single vague sentence in an otherwise unrelated section, a sweeping assault on the non-delegation doctrine. That's an untenable assumption. And as a matter of constitutional law, the proposed reading of Section 6(g) *still* violates the non-delegation doctrine, a conclusion made all the clearer by the Supreme Court's recent decision in *Gundy v. United States*.[20]

Our comments distinguish from the FTC Act each of the statutes at issue in the cases cited by *National Petroleum Refiners*, the principal case invoked by those who claim Section 6(g) confers substantive rulemaking powers. We also explain the irrelevance of amendments to the FTC Act made after *National Petroleum Refiners*. The only relevant Congressional action confirms that Congress understood a statute exactly parallel to FTC Act *not* to confer substantive rulemaking authority.

Ultimately, we conclude Section 6(g) confers no power to issue "substantive" or "legislative" rules — only "procedural" and "interpretive" rules. The Administrative Conference of the United States, the official organ of the federal judiciary, has been clear: "An agency should not use an interpretive rule to create a standard independent of the statute or legislative rule it interprets. That is, noncompliance with an interpretive rule should not form an independent basis for action in matters that determine the rights and obligations of any member of the public."[21] Thus, the FTC cannot issue the substantive rule the petitioners seek.

III. Petitioners Provide No Theoretical or Empirical Basis for Their Proposed Market Share or Customer "Tie Up" Thresholds

Petitioners' proposed rule would prohibit the use of exclusive agreements by a single firm when that single firm has a market share of 30% or more, or when the top three firms in an industry collectively have a market share of 50% or greater.[22] (Under the alternative collective test, it is unclear whether all firms in the industry would be prohibited from using exclusive agreements, or just the top three firms.) The OMI Petition provides no empirical or theoretical basis for these market share percentages. However, the 30% share is substantially lower than the market shares identified in the Petition for matters where a court, or agency, found liability for the use of actual or *de-facto* exclusive agreements. The OMI Petition identifies and narrates certain facts of recent litigated cases and agency settlements

[20] 139 S. Ct. 2116 (2019).

[21] ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, AGENCY GUIDANCE THROUGH INTERPRETIVE RULES (2019), available at https://bit.ly/3F0FrfH.

[22] OMI Petition at 75-81.

where courts or agencies found single firms to have entered into exclusionary agreements inconsistent with the Sherman Act, FTC Act, or Clayton Act. None of these matters support Petitioners' proposed 30% market share test as an indicator of market power sufficient to preclude use of exclusive agreements.

A. Litigated Cases

In *United States v. Microsoft*, the OMI petition indicates that Microsoft had a market share, in the relevant market, of over 90%, and foreclosed competition with 14 of the top 15 internet service providers (93%).[23] In *United States v. Visa*, the petition indicates that Visa had a market share, in the relevant market, of 47%; collectively, Visa and Mastercard had a market share of 73%; the parties practices collectively foreclosed access to 73% of the market.[24] In *LePages v. 3M*, the petition indicates that 3M had a market share, in the relevant market, in excess of 90%.[25] In *United States v. Dentsply*, the petition indicates that Dentsply had a market share, in the relevant market, of over 75%, and foreclosed access to 23 dental product dealers.[26] In *ZF Monitor v. Eaton Corp*., the petition indicates that Eaton had a market share, in the relevant market, of more than 80%, and foreclosed access to 90% of the relevant market to its competitors.[27] In *McWane v. FTC*, the petition indicates that McWane had a market share of 90% to 100%, and foreclosed access to at least 50% to 60% of the relevant market.[28] In *Qualcomm v. FTC*, the petition indicates that Qualcomm had a market share of 100% of the relevant market.[29]

In the FTC challenge to (and settlement regarding) *Mylan Labs's* use of exclusive agreements, the petition indicates that Mylan's exclusive agreements allowed it to maintain a monopoly position — a market share well in excess of 30% — and foreclose access to all sources (100%) of a necessary input.[30] In the FTC challenge to (and settlement with) *Intel's* use of practices the FTC found exclusionary, the petition indicates that Intel had a long-term market share position in the market for personal computers and server central processing units of

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[23] *Id.* at 14-15. The Petition fails to mention that the court in *Microsoft* agreed with defendants that a showing of market share alone does not always indicate market power, and a more detailed look into the competitive landscape is often required. *United States v. Microsoft*, 253 F.3d 34, 54 (D.C. Cir. 2001).

[24] OMI Petition at 16.

[25] *Id.* at 17.

[26] *Id.* at 18.

[27] *Id.* at 19-20.

[28] *Id.* at 20-21.

[29] *Id.* at 31. The OMI Petition fails to recognize that Qualcomm was not found liable for a violation of 5 of the FTC Act in this matter. FTC v. Qualcomm, 969 F.3d 974, 986-988, n.11 (9th Cir. 2020).

[30] OMI Petition at 21-22.

75% to 85%[31] and foreclosed access to "at least 60% of the market."[32] In the FTC challenge to (and settlement with) *Transitions Optical's* use of exclusive agreements, the petition indicates that Transitions Optical had a market share of 80%, and foreclosed access to 40% of the relevant market.[33] In *United States v. United Regional Health Care System*, the DOJ challenged the use of exclusive agreements where the defendant had a 90% share in one relevant market, and a market share of "at least" 65% in another market.[34] In *Pool Corp*., the FTC challenged the use of exclusive agreements where the respondent had a market share of "approximately 50%" of a national market, and market shares of 80% or higher in local markets.[35] In *IDEXX Labs*, the FTC challenged the use of exclusive agreements where the respondent had a market share of 70%, and foreclosed access to 85% of the market.[36] In the FTC's challenge to *Cardinal Health's* use of de-facto exclusive agreements, Cardinal Health foreclosed access to 100% of the supply of certain radiopharmaceutical inputs necessary to operate radiopharmacies.[37]

In the FTC's challenge to *Victrex's* use of exclusive agreements in the market for implant-grade polyetheretherketone, Victrex had a market share of 90%.[38] The OMI Petition also references a private action — *Dial Corp. v. News Corp*. — where the judge rejected News Corp's motion for summary judgment to a challenge to its use of exclusive agreements, where it had a market share of over 90%.[39]

None of these cases support a proposition that a firm with a market share of 30% or more, or a firm (or leading firm) operating in an industry where the leading three firms have a market share of 50% or more, should be precluded from use of exclusive agreements, or that the use of such agreements creates the risk of substantial foreclosure.

B. Pending Cases

The OMI Petition also cites a number of "pending cases" as well. None of these, with one exception, assert monopolization or monopoly maintenance through use of actual or *de facto* exclusive agreement where the market share of the defendant is anywhere near 30%. In *FTC*

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[31] *Id.* at 22.

[32] *Id.* at 24.

[33] *Id.* at 24-25.

[34] *Id.* at 25-26.

[35] *Id.* at 26-27.

[36] OMI Petition at 27-28.

[37] *Id.* at 28-29.

[38] *Id.* at 29.

[39] *Id.* at 30.

v. Surescripts, the FTC has challenged Surescripts' use of exclusive agreements in a market where it had a market share of 95% prior to engaging in any alleged exclusionary practices, and where its use of exclusive contracts foreclosed access to 80% of the relevant market.[40] In *FTC v. Vyera*, the FTC is challenging the use of exclusive agreements in a market where Vyera has a market share of 100%.[41]

In the European Commission's challenge to Google's use of agreements that encouraged *de-facto* exclusivity in the market for general search engines on smart mobile operating systems, the OMI Petition notes that Google's market share was 90%, and 80% or more in certain European countries, and foreclosed access to "at least 40% to 50%" of the smart-phones sold in Europe.[42] In the *Keurig Green Mountain* single serve coffee antitrust litigation, challenging Keurig's use of exclave contracts, the petition notes that Keurig has a market share of nearly 90% in the market for single-cup brewers, and a market share of 73% in the market for coffee pods for its single-cup brewing machines.[43] In the *Epipen* litigation, challenging the use of exclusive agreements by Mylan after it became worried about potential entry by Sanofi, the petition notes that Mylan had a market share of 99% (prior to the use of allegedly exclusive agreements) in a market for epinephrine auto-injection devices.[44]

In *Marion Diagnostic Center v. Becton, Dickenson*, a private suit challenging exclusive dealing agreements, the OMI Petition indicates Becton had a market share of 55% and 60% in the two relevant markets allegedly monopolized through use of such agreements.[45] In *Le v. Zuffa*, the OMI petition indicates that plaintiff alleged that UFC used exclusivity provisions to limit competition; according to the petition, UFC has a 90% share of the relevant market.[46] In *Pfizer v. Johnson and Johnson*, where Pfizer is challenging J&J's use of exclusive contracts and bundling in the sale of Remicade, a drug used to treat autoimmune disorders, OMI's petition indicates that J&J has a market share of 90%; notably, J&J had this same share for nearly two decades prior to its use of the allegedly exclusionary contracts and bundling practices.[47] According to OMI's Petition, in *Shire v. Allergan*, Shire alleges that Allergan has bundled its drug Restasis with other drugs, to exclude Shire from the market for treatments for dry eye

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[40] *Id.* at 32-33.

[41] *Id.* at 34.

[42] OMI Petition at 35-36.

[43] *Id.* at 36-37.

[44] *Id.* at 37-38.

[45] *Id.* at 38-39.

[46] *Id.* at 40-41.

[47] *Id.* at 41-42.

disease, Medicare Part D. Allergan allegedly has a market share of 90% in that alleged relevant market.[48]

In *Iderstine v. Live Nation*, the OMI Petition indicates that plaintiff alleged that Live Nation used long-term exclusive dealing contracts with music venues to gain and maintain market share; according to the petition, Live Nation has a market share of 60% in the concert promotion industry, and 70% share in the market for primary ticketing for major concerts.[49] According to the OMI Petition, in *Fusion Elite All Stars v. Varsity Brands*, the plaintiff alleges that Varsity Brands used exclusive agreements and loyalty programs to entrench its monopoly position in the market for "All-Star [Cheer] Competitions" and "All-Star Apparel", markets in which the defendant allegedly had market share of 90% and 80%.[50] In the *Dairy Processing Agreements* litigation, the OMI Petition indicates that the Dairy Farmers of America has allegedly used exclusive agreements with one seller of dairy products to force non-members to join the DFA. The OMI Petition notes that DFA had a share of approximately 30%.[51]

Once again, these cases do not support a proposition that a firm with a market share of 30% or more, or a firm (or leading firm) operating in an industry where the leading three firms have a market share of 50% or more, should be precluded from use of exclusive agreements, or that the use of such agreements creates the risk of substantial foreclosure.

IV. Because Vertical Agreements Provide Substantial Scope for Efficiencies They Are, and Should Be, Subject to Rule-Of-Reason Analysis

The OMI Petition advocates for the prohibition — per se illegality — of exclusive agreements under certain conditions. Under well-established precedent, *per se* illegality is "confined to restraints . . . 'that would always or almost always tend to restrict competition and decrease output.'"[52] Certain agreements *among competitors* — so-called naked agreements in restraint of trade — are so likely to be anticompetitive that they are unlawful *per se*. However, ". . . easy labels do not always supply ready answers. . ."[53] and the rule of reason is

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[48] OMI Petition at 42-43.

[49] *Id.* at 44-45.

[50] *Id.* at 45-46.

[51] *Id.* at 46-47.

[52] Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877, 886 (2007) (quoting Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 723 (1988)).

[53] Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 01, 07-08 (1979).

the "traditional framework of analysis under . . . the Sherman Act. . ."[54] "Per se treatment is applied "only after courts have had considerable experience with the type of restraint at issue … and only if courts can predict with confidence that it would be invalidated in all or almost all instances under the rule of reason."[55] The burden of proof in a monopolization case rests upon the plaintiff to show that the defendant's conduct had an anticompetitive effect.[56] The plaintiff must also show that the conduct had the requisite anticompetitive effect, or that the conduct did not just harm a competitor but harmed competition as a whole.[57] Once the plaintiff meets his burden, a defendant may show a procompetitive justification.[58] Done successfully, the burden shifts back to the plaintiff to rebut the procompetitive justification or demonstrate that the anticompetitive harm outweighs the proffered justification.[59]

Significant economic research finds that vertical agreements, including exclusive agreements, can be pro-competitive.[60] "Vertical restraints are generally less harmful than

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[54] Continental T.V. v. GTE Sylvania, 433 U.S. 36, 49 (1977); Microsoft, 253 F.3d at 58-59; *see also* Am. Needle, Inc. v. NFL, 560 U.S. 183, 203 (2010).

[55] Leegin, 551 U.S. at 886.

[56] Microsoft at 58-59 ("[I]t must harm the competitive process and thereby harm consumers." (emphasis omitted)).

[57] *Id.*

[58] *Id.* at 59.

[59] *Id.*

[60] *See, e.g.*, Victor J. Tremblay & Carol Horton Tremblay, NEW PERSPECTIVES ON INDUSTRIAL ORGANIZATION (2012) 551; Alden F. Abbott & Joshua D. Wright, *Antitrust Analysis of Tying Arrangements and Exclusive Dealing*, in Keith Hylton, ANTITRUST LAW AND ECONOMICS (2010); Patrick Rey & Thibaud Verge, *Economics of Vertical Restraints*, in Paolo Buccirossi, HANDBOOK OF ANTITRUST ECONOMICS (2008) 353, 384 ("The first lesson that can be drawn . . . is that no simple conclusion can be derived on whether an particular type of vertical restraint is pro- or anticompetitive. Both price . . . and nonprice restraints (e.g., exclusive dealing . . .) can either increase or decrease economic welfare. . ."); Francine LaFontaine & Margaret Slade, *Exclusive Contracts and Vertical Restraints: Empirical Evidence and Public Policy*, in Paolo Buccirossi, HANDBOOK OF ANTITRUST ECONOMICS (2008) 391, 408-409 (". . . the empirical evidence concerning the effects of vertical restraints on consumer well-being is surprisingly consistent. Specifically, it appears that when manufacturers choose to impose such restraints not only do they make themselves better off but they also typically allow consumers to benefit from higher quality products and better service provision."); Patrick Rey & Jean Tirole, *A Primer on Foreclosure*, in Mark Armstrong and Robert Porter, 3 HANDBOOK OF INDUSTRIAL ORGANIZATION (2007) 2145, 2201 ("Vertical or horizontal foreclosure may be socially beneficial in certain circumstances. [I]t may enhance innovators' benefit from R&D efforts and thus foster their incentives to innovate or develop new products . . . [I]ntegration may improve coordination between firms, for example by providing better incentives to monitor their efforts."); Stephen Martin, ADVANCED INDUSTRIAL ECONOMICS (1993) 327, 350 (vertical restraints may serve to certify product quality, may serve to induce retailers to carry a greater range of products, or may be a response to uncertainty. . . Vertical restraints are a multifaceted phenomenon. . . It is not correct that vertical restraints are everywhere and always have an efficiency motive. Nor is it correct that vertical restraints are everywhere and always a consequence of or a support for market power.").

horizontal restraints and may provide substantial scope for efficiencies."[61] Thus, vertical agreements, with the possible exception of alleged tying agreements, including exclusive agreements with customers, suppliers, or distributors, whether challenged under the Sherman Act or Clayton Act, are evaluated under the rule-of-reason.[62] Tying agreements, even when not evaluated under a full-blown rule of reason, require the plaintiff to show the defendant has market power in the tying good.[63] The rule of reason analytical framework[64] was purposefully designed to engage in the sort of factual analysis where presumptions of anticompetitive harm – such as that suggested in the OMI Petition – are not supported by broad experience, or sufficient empirical or theoretical analysis.

Petitioners' proposed rule would circumvent this analytical framework. Any rule designed to prohibit exclusionary contracts *per se* would require circumventing the rule of reason and prohibiting potentially procompetitive or competitively benign conduct. OMI would have market share (or customer count) be the sole determinant of anticompetitive exclusionary contracts;[65] this is not supported by any legal or economic analysis. Substantial foreclosure is a factual question, and should not be (and is not) subject to a legal presumption of harm at market share thresholds or customer count thresholds. The Commission acted somewhat similarly in the 1970s, finding various vertical agreements illegal (including exclusive

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[61] European Commission, Guidelines on Vertical Restraints, Brussels SEC (2010) 411, at 5, available at https://ec.europa.eu/competition/antitrust/legislation/guidelines_vertical_en.pdf.

[62] Leegin, 551 U.S. at 906-07; Continental T.V., 433 U.S. at 49.

[63] *See* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 18 (1984) (finding that a plaintiff in a tying case must show that a seller has market power and "used their market power to force their patients to accept the tying arrangement.").

[64] The rule of reason analytical framework requires a plaintiff to prove ". . . that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market." Ohio et al. v. American Express Co., 138 S. Ct. 2274, 2284 (2018). This means that the plaintiff must show that the challenged restraint has anticompetitive effects — either directly or indirectly. *Id.*. at 2284-85 ("The rule of reason requires courts to conduct a fact-specific assessment of 'market power and market structure . . . to assess the [restraint]'s actual effect' on competition." (quoting Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768 (1984)). Direct evidence of anticompetitive effects means showing actual detrimental effects on competition, including reduced output, increased prices, or decreased quality in the relevant market. *Id.* at 2284. Indirect effects mean showing ". . . proof of market power <u>plus</u> some evidence that the challenged restraint harms competition." *Id.* (emphasis added). When the plaintiff has met this requirement, the defendant must show a procompetitive rationale for the restraint." *Id.* If the defendant successfully puts on a procompetitive defense, the plaintiff can show that the procompetitive efficiencies could be achieved through less anticompetitive means. *Id.* A similar balancing approach is applied under the rule of reason to monopolization claims. Microsoft, 253 F.3d at 59. In order for conduct to be deemed exclusionary, the plaintiff must demonstrate anticompetitive effect. *Id.* at 58 ("That is, it must harm the competitive process and thereby harm consumers. In contrast, harm to one or more competitors will not suffice.").

[65] OMI Petition at 71.

agreements) without meaningful analysis. These cases were misguided and subject to significant criticism as a waste of the Commission's scarce resources.[66]

While some exclusive agreements can result in substantial foreclosure and have anticompetitive effects,[67] the proposed rulemaking would prohibit, *per se*, certain exclusive contracts that result in procompetitive effects and enhance the competitive process, and thereby benefit consumers. That the FTC Act's prohibition on unfair methods of competition is broader than the Sherman Act does not give the FTC unbounded authority to find conduct that would not violate the Sherman Act or Clayton Act to be unfair or illegal under the FTC Act.[68]

V. Conclusion

Conduct deserves *per se* treatment only when the effect of such conduct is likely to be anticompetitive, or, in the language of the FTC Act, an unfair method of competition. OMI's petition fails to provide empirical or theoretical support for a rule that prohibits, as *per se* illegal, actual or *de facto* exclusive agreements by a firm with a market share of 30% or more, or in an industry where the top three leading firms have a market share of 50% or more. Similarly, the petition fails to provide empirical or theoretical support for a rule that prohibits uses of exclusive agreements where either a single firm uses exclusive agreements with the top three industry customers or the leading three firms in an industry use exclusive agreements with the top five industry customers.

In contrast to Petitioners' advocacy that a rule would "provide guidance to business and the public,"[69] the proposed rule is unworkable as a form of guidance to market participants. For example, in the context of so-called "parallel" conduct, the rule would require one firm to know the business practices of its competitors (and to know their market position); in the

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[66] See Wesley J. Liebeler, Bureau of Competition: Antitrust Enforcement Activities, and Kenneth Clarkson, Timothy J. Muris, and Donald Martin, Exclusionary Practices: Shopping Centers, in Kenneth Clarkson and Timothy J. Muris, THE FEDERAL TRADE COMMISSION SINCE 1970: ECONOMIC REGULATION AND BUREAUCRATIC BEHAVIOR (1981).

[67] The OMI Petition suggests that firms with over 30% market share in a relevant market that use exclusionary contracts have engaged in substantial foreclosure. OMI Petition at 75. The rule of reason burden-shifting framework was purposefully designed to engage in the sort of factual analysis where presumptions such as that suggested by OMI fail. *See* Herbert Hovenkamp, *The Rule of Reason*, 70 FLA. L. REV. 81, 121-22 (2018) ("The entire debate about antitrust "modes of analysis" is at bottom about presumptions, burdens of proof, and appropriate judicial responses to concerns about plausibility and location of the evidence. Antitrust cases are complex. . . As relatively fewer things are presumed in the plaintiff's favor and the evidentiary demands become greater, we are moving into rule of reason territory.").

[68] *See* Official Airline Guides v. FTC, 630 F.2d 920, 927 (2d Cir. 1980); Boise Cascade Corp. v. FTC, 627 F.2d 573 (9th Cir. 1980); E.I. Du Pont de Nemours & Co. v. FTC, 729 F.2d 128 (2d Cir. 1984).

[69] OMI Petition at 4.

context of single firm conduct, it requires the firm to understand the market position of its customers, distributors, or suppliers. Similarly, the rule relies entirely on market share calculations. Market share calculations are uncertain, the definition of a relevant market is uncertain, and market position and customer demand — what products are substitutable — are rarely static and consistent over different periods of measurement. Such knowledge is rarely in the understanding of a firm that may be affected by the rule. The likely effect of such a rule would be to curtail efficiency-enhancing agreements because of uncertainty regarding application of the rule.

And that appears to be an intended effect of the proposed rule: to ignore the efficiency justifications associated with exclusivity. These benefits are no less real for so-called dominant firms than for non-dominant firms. *Per se* treatment of firm conduct avoids and precludes an analysis of the competitive effect of the challenged conduct. This is justified in the context of naked horizontal restraints, but even agreements among competitors that are not naked restraints are subject, under the rule of reason, to more careful and searching analysis, as the antitrust laws recognize that some horizontal agreements are efficiency-enhancing. The proposed rule would treat potentially efficiency-enhancing vertical agreements more harshly than efficiency enhancing horizontal agreements. This is inconsistent with the economic literature, which is replete with theoretical and empirical support for vertical agreements, including exclusive agreements, to be efficiency-enhancing. It is also inconsistent with the history of FTC and DOJ investigations over the last 30 or so years: while occasionally finding exclusive agreements to be anticompetitive, the agencies have also undoubtedly identified agreements that were efficiency enhancing and pro-competitive, and thus not subject to challenge. Petitioners' position that "dominant firms' justifications for exclusivity are unpersuasive"[70] is simply conclusory and itself unpersuasive in imagining that exclusive contracts are always entered into as an alternative to "producing high-quality products"[71] because they allow "attractive margins to retailers and distributors."[72]

A rule like that proposed by Petitioners would also place the practices of the Commission in conflict with the practices of the Department of Justice by making *per se* illegal conduct that is not treated as *per se* illegal by the Department of Justice (or the federal courts).

For these reasons, the Commission should reject the position advocated for by the Petitioners. The Commission would better serve the public by working with the Department of Justice to provide the public a guidance document explaining the conditions in past

[70] *Id.* at 2.

[71] *Id.* at 3.

[72] *Id.*

matters when vertical agreements between a single firm and its trading partners were likely to be investigated and potentially challenged by the federal antitrust agencies.

The FTC and the Department of Justice have investigated many firms for monopolization, or engaging in unfair methods of competition, over the last 30-40 years. To the extent the Commission wishes to proceed with a rule prohibiting the use of exclusive agreements, the Commission (and, in support of its sister agency, the Department of Justice) should make public, in a way that protects the legitimate confidentiality concerns of actual and potential respondents, the facts of those investigations, and the disposition of those investigations. Evidence that the Commission (and the Department of Justice) have not challenged, or not investigated, the use of exclusive agreements where the proposed rule's thresholds were met, would be significant to allowing the public to provide informed guidance on any rule the FTC proposes, and evaluating whether the proposed rule is likely to capture pro-competitive or competitively neutral use of exclusive agreements.

Respectfully submitted,

__________/s/_____________
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