

March 23, 2023

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Re: Request to Establish a Reply Comment Period for Non-compete Clause NPRM (FTC-2023-0007)

Dear Chair Khan, Commissioner Slaughter, Commissioner Wilson, & Commissioner Bedoya:

The rulemaking process “must allow for public participation and an open exchange of ideas,” proclaimed President Barack Obama’s Executive Order 13563 in 2011.¹ The Commission’s recent extension of the deadline for comments on non-compete clauses is an important step towards that goal.² But it is not enough. As the memo accompanying E.O. 13563 explained, “interested parties” should have “the opportunity to react to (and benefit from) the comments, arguments, and information of others during the rulemaking process itself.”³ To facilitate such open exchange among commenters, we write to request that commenters be

¹ Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 18, 2011). *See also* Office of the Press Secretary, *Executive Order 13563—Improving Regulation and Regulatory Review*, THE WHITE HOUSE (Jan. 18, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/01/18/executive-order-13563-improving-regulation-and-regulatory-review>.

² We also appreciate that the Commission began this proceeding by putting out for comment the original petition for rulemaking filed by Open Markets. But that is no substitute for taking both comments and reply comments: the NPRM goes far beyond the original petition in terms of asking questions and laying the predicate for establishing a rule on non-competes.

³ White House Office of Management and Budget, *Memorandum for the Heads of Executive Departments and Agencies, and of Independent Regulatory Agencies*, 2 (Feb. 2, 2011), https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/memoranda/2011/m11-10.pdf.

given 30 days to file reply comments after all the comments in this proceeding have been made publicly available.⁴

I. The Potential for the FTC to Act without Minority Commissioners Makes Reply Comments Indispensable

Congress intended the FTC not to be composed entirely of members of the President’s party.⁵ Yet this will soon happen for the first time in the FTC’s 109-year history. Commissioner Noah Phillips resigned last October, and Commissioner Christine Wilson announced that she will step down on March 31. Whom the Senate Minority Leader might recommend to the President and whom he might nominate for these two seats—which must, by law, go to non-Democrats⁶—remains a matter of speculation. Once a nomination is made, Senate confirmation could take many months—or even years, as has recently occurred at the FCC.⁷ Chair Khan may not intend to vote on a rule against non-compete agreements without any minority commissioner, but she also may not wait indefinitely for one to be confirmed. The other two Democratic Commissioners have already clearly signaled that they will support the proposed rule.⁸ An agency designed to be bipartisan may well take a monopartisan vote on the most significant rulemaking in its history—with no realistic possibility of dissent.

The advantage of “multi-member independent agencies,” wrote then-Judge Brett Kavanaugh, is that they “benefit from diverse perspectives and different points of view among the commissioners and board members.... The multiple voices and perspectives make it more likely that the costs and downsides of proposed decisions will be more fully ventilated.”⁹

⁴ “Where appropriate, agencies should make use of reply comment periods or other opportunities for receiving public input on submitted comments, *after all comments have been posted.*” ADMIN. CONF. OF THE U.S., RECOMMENDATION 2011-2, RULEMAKING COMMENTS at 4 (2011) (“2011 ASUC Recommendation”), <https://www.acus.gov/sites/default/files/documents/Recommendation-2011-2-Rulemaking-Comments.pdf>. The Federal Communications Commission generally allows 30 days for reply comments after the comment deadline but also generally posts comments to its website within a day or two. The FTC has taken, in some cases, over a week to post comments to regulations.gov after screening them. The FTC should set a reply comment deadline of 30 days plus whatever time it expects to need to make all comments publicly available.

⁵ 45 U.S.C. § 41 (“Not more than three of the Commissioners shall be members of the same political party.”).

⁶ *Id.*

⁷ Christopher Hutton, *FCC nominee Gigi Sohn withdraws nomination after three years amid Manchin opposition*, WASHINGTON EXAMINER (Mar. 7, 2023, 1:42 PM), <https://www.washingtonexaminer.com/policy/technology/manchin-opposes-sohn-fcc-nomination>.

⁸ *See generally* Statement of Chair Lina M. Khan, Joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro M. Bedoya Regarding the Notice of Proposed Rulemaking to Restrict Employers’ Use of Noncompete Clauses, FTC File No. P201200, at 5 (Jan. 5, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/statement-of-chair-lina-m-khan-joined-by-commrs-slaughter-and-bedoya-on-noncompete-nprm.pdf (“Chair Statement”).

⁹ PHH Corp. v. Consumer Financial Protection Bureau, 839 F.3d 1, 26-27 (D.C. Cir. 2016) (internal citations omitted) (declaring the Consumer Financial Protection Bureau’s single-director structure unconstitutional).

Scholars have long recognized that “the presence of dissenters provides new information and forces the proponent to articulate a coherent rationale, thus acting as a constraining force.”¹⁰ In doing so, dissents “provide additional information, challenge invalid assumptions, and reduce the propensity for ‘groupthink.’”¹¹ In a letter urging Commissioner Wilson to reconsider her resignation, the former chairman of the Federal Energy Regulatory Commission noted: “the prospect of a dissent curbed any desire I might have had to push beyond my legal authority.”¹² Why? In part because “an effective dissent provides a road map to the court on how an agency abused its authority, ignored or cherry-picked the record or violated due process required by administrative law.”¹³ Further, “the presence of appointees from different administrations reduces the variance of policy and improves accuracy through aggregation.”¹⁴

Commenters cannot be expected to do the work of a minority commissioner or any dissent. But giving commenters the opportunity to review the evidence and arguments presented in the comment stage and file reply comments will at least help to “foster more deliberative decision making.”¹⁵ The likely alternative will be a one-party Commission reviewing a record that consists only of the affirmative cases of commenters, with no rebuttals of those arguments.

¹⁰ Recent Legislation, *Dodd-Frank Act*, 124 HARV. L. REV. 2123, 2128 (2011), https://harvardlawreview.org/wp-content/uploads/pdfs/vol12408_recentlegislation.pdf (citing Lewis A. Kornhauser & Lawrence G. Sager, *Unpacking the Court*, 96 YALE L.J. 82, 101 (1986); Matthew C. Stephenson, *The Strategic Substitution Effect: Textual Plausibility, Procedural Formality, and Judicial Review of Agency Statutory Interpretation*, 120 HARV. L. REV. 528, 536 (2006); Cass R. Sunstein et al., *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 336 (2004)).

¹¹ Sharon B. Jacobs, *Administrative Dissents*, 59 WM. & MARY L. REV. 541, 587 n. 223 (2017), <https://scholar.law.colorado.edu/articles/833> (citing Robert S. Dooley & Gerald E. Fryxell, *Attaining Decision Quality and Commitment from Dissent: The Moderating Effects of Loyalty and Competence in Strategic Decision-Making Teams*, 42 ACAD. MGMT. J. 389, 398-99 (1999)).

¹² Joe Kelliher, *To Resign or Continue Dissenting at the FTC?*, THE WALL STREET JOURNAL (Feb. 20, 2023), <https://www.wsj.com/articles/ftc-wilson-resign-khan-power-dissent-7ac3491e>.

¹³ *Id.*

¹⁴ Recent Legislation, *supra* note 10, at 2128 (citing Kornhauser & Sager, *Unpacking the Court*, 96 YALE L.J. 82, 101 (1986); Matthew C. Stephenson, *The Strategic Substitution Effect: Textual Plausibility, Procedural Formality, and Judicial Review of Agency Statutory Interpretations*, 120 HARV. L. REV. 528, 536 (2006) (noting the “complex internal decisionmaking dynamics” in administrative agencies and multimember courts); Cass R. Sunstein et al., *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 336 (observing a “dampening of differences” when ideological opponents sit on the same panel)).

¹⁵ See *United States v. N.S. Food Prods. Corp.*, 568 F.2d 240, 252 (2d Cir. 1977) (failure of an agency to address comments refuting evidence in the record was arbitrary and capricious).

II. In General, Reply Comments Are Essential to Democratizing the FTC

Reply comments are necessary regardless of whether a minority commissioner participates. In a memo issued to all staff on “Vision and Priorities for the FTC” shortly after joining the Commission, Chair Khan proclaimed: “we need to further democratize the agency. This means recognizing the agency as a public body whose work shapes the distribution of power and opportunity across our economy.”¹⁶ But “democratizing” the FTC surely cannot mean expanding its powers without an “open exchange of ideas,” and for that, the Commission should have included a reply comment period in the NPRM.

Early in her tenure, Chair Khan declared: “I’d also like us to consider recommendations from the Administrative Conference of the United States on best practices for accepting comments on formal public petitions.”¹⁷ Indeed, the FTC should also consider the ACUS’s recommendations on how to conduct rulemakings in general. The ACUS is an “independent federal agency charged with convening expert representatives from the public and private sectors to recommend improvements to administrative process and procedure.”¹⁸ The ACUS first recommended the use of reply comments for “unusually complex” rulemakings in 1976.¹⁹ In 2011, the ACUS made a similar recommendation:

Where appropriate, agencies should make use of reply comment periods or other opportunities for receiving public input on submitted comments, after all comments have been posted. An opportunity for public input on submitted comments can entail a reply period for written comments on submitted comments, an oral hearing, or some other means for input on comments received.²⁰

Taking reply comments improves the quality of agency decisionmaking. During the Obama administration, officials at the Federal Communications Commission reported that reply comments increased the overall quality of comments because “reply comment periods open initial submissions up to the possibility of being challenged on factual and analytical

¹⁶ FED. TRADE COMM’N, MEMORANDUM ON VISION AND PRIORITIES FOR THE FTC at 2 (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.

¹⁷ FED. TRADE COMM’N, POST-COMMISSION MEETING REMARKS OF CHAIR LINA M. KHAN (2021), https://www.ftc.gov/system/files/documents/public_statements/1592378/post-commission_meeting_remarks_of_chair_lina_m_khan_0.pdf.

¹⁸ ADMIN. CONF. OF THE U.S., <https://www.acus.gov/> (last visited Mar. 13, 2023).

¹⁹ *Procedures in Addition to Notice and the Opportunity for Comment in Informal Rulemaking*, ADMIN. CONF. OF THE U.S. (June 4, 1976), <https://www.acus.gov/recommendation/procedures-addition-notice-and-opportunity-comment-informal-rulemaking>.

²⁰ 2011 ASUC Recommendation, *supra* note 4, at 4.

grounds.”²¹ The FCC should know: the agency adopted a rule requiring reply comments in all rulemakings in 1958.²² Likewise, one leading rulemaking treatise concluded that “comments are much more likely to be focused and useful if the commenters have access to the comments of others.”²³ This is what President Obama had in mind—democracy at its best.

Before joining the Commission, Chair Khan argued that UMC “rulemaking would enable the Commission to establish rules through a transparent and participatory process, ensuring that everyone who may be affected by a new rule has the opportunity to weigh in on it, granting the rule greater legitimacy.”²⁴ She noted a key advantage of rulemaking over adjudication: “the Commission can put forth rules after considering a comprehensive set of information and analysis.”²⁵ For the same reason, Commissioner Slaughter and former Commissioner Chopra both dissented when the Commission, in 2020, published new vertical merger guidelines without seeking additional comment; they argued that the guidelines differed significantly from the draft that had been subject to public comment. “A second comment period would have not only demonstrated the FTC’s commitment to transparency and good government,” wrote Slaughter, “but also provided the opportunity to continue the discussion of topics critical to vertical-merger enforcement and improve the final product.”²⁶ Commissioner Chopra called the decision “imprudent.”²⁷ Just so here.

III. Reply Comments Are Especially Valuable in So Important and Complex a Rulemaking

If the FTC had followed the ACUS’s recommendation, the NPRM would have invited reply comments, given both the “unusual complexity” and exceptional significance of the questions it raises. The FTC proposes a blanket prohibition of non-compete clauses, which apply to

²¹ Steven J. Balla, *Public Commenting on Federal Agency Regulations: Research on Current Practices and Recommendations to the Administrative Conference of the United States* 12 (Mar. 15, 2011), <https://www.acus.gov/sites/default/files/COR-Balla-Report-Circulated.pdf>.

²² 47 C.F.R. § 1.213(c) (1958). The FCC’s rule is now codified at 47 C.F.R. § 1.415(c) (2022).

²³ JEFFREY S. LUBBERS, *A GUIDE TO FEDERAL AGENCY RULEMAKING* 321 (American Bar Association, 4th ed. 2006).

²⁴ Rohit Chopra & Lina M. Khan, *The Case for “Unfair Methods of Competition” Rulemaking*, 87 U. CHI. L. REV. 357, 368 (2020).

²⁵ *Id.*

²⁶ Dissenting Statement of Commissioner Rebecca Kelly Slaughter in re FTC-DOJ Vertical Merger Guidelines, FTC File No. P810034, at 1 (June 30, 2020), https://www.ftc.gov/system/files/documents/public_statements/1577499/vmgslaughterdissent.pdf.

²⁷ Dissenting Statement of Commissioner Rohit Chopra Regarding the Publication of Vertical Merger Guidelines, FTC File No. P810034, at 1 (June 30, 2020), https://www.ftc.gov/system/files/documents/public_statements/1577503/vmgchopradissent.pdf.

“one in five American workers—or approximately 30 million workers.”²⁸ The NPRM claims the ban would “increase workers’ total earnings by \$250 to \$296 billion per year.”²⁹ At its heart, the proposed ban on non-competes means regulating labor markets, something that traditionally has been left to the NLRB, or in the case of non-competes, to well-developed state law. The issue is not only complex; it lies far beyond the expertise of the FTC.

This rulemaking raises three complex legal questions; on each, the FTC will set a precedent for any future UMC rulemakings it undertakes—with vast consequences across the economy.

A. Does the FTC Have the Authority to Issue UMC Rules?

The NPRM rests entirely on the assumption that Section 6(g) of the FTC Act confers the authority to make substantive rules defining unfair methods of competition, which the FTC may enforce with civil penalties. The FTC’s interpretation of Section 6(g) would allow the FTC to, in effect, legislate not only on non-competes but on a wide array of issues across most of the economy.³⁰ Non-compete agreements would be only the beginning of the “major questions” of “vast economic and political significance” the FTC could decide by issuing a UMC rule.³¹ This may be one of those “extraordinary cases” in which, as the Supreme Court recently explained, “both separation of powers principles and a practical understanding of legislative intent make us ‘reluctant to read into ambiguous statutory text’ the delegation claimed to be lurking there.”³²

²⁸ *Non-Compete Clause Rule*, Notice of Proposed Rulemaking, 88 Fed. Reg. 3482 (Jan. 19, 2023), <https://www.federalregister.gov/documents/2023/01/19/2023-00414/non-compete-clause-rule> (hereinafter “NPRM”).

²⁹ *Id.*

³⁰ See also 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”, FTC File No. P210100, 2-3 (July 9, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591710/p210100phillipswilsondissentseec5enforcementprinciples.pdf (“[N]or do they cite any sound basis to support their apparent proposition that Congress intended to give a few unelected commissioners of a federal agency limitless authority to enjoin business practices. Nor did Congress vest the Commission with *broad authority to regulate the economy* without an intelligible principle.” (emphasis added)).

³¹ See *West Virginia v. EPA*, No. 20-1530, at *37 (June 30, 2022) (“Under [the major questions doctrine], administrative agencies must be able to point to ‘clear congressional authorization’ when they claim the power to make decisions of vast ‘economic and political significance.’”) (internal quotation marks omitted). See also Exec. Order No. 14,036, 86 Fed. Reg. 36,987 (July 9, 2021), <https://www.federalregister.gov/d/2021-15069/p-73> (encouraging the FTC to engage in rulemaking on data collection, self-repair, prescription drugs, internet marketplaces, occupational licensing restrictions, real estate tying practices, and “any other unfair industry-specific practices that substantially inhibit competition.” (emphasis added)).

³² *West Virginia v. EPA*, No. 20-1530, at *24 (June 30, 2022) (quoting *Util. Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014)); see NPRM, *supra* notes 28 and 29 and associated text.

This question is highly complex. The FTC has not invoked Section 6(g) to issue a rule in over half a century.³³ In their statement on issuance of the NPRM, the majority confidently declares that “the FTC is operating under clear statutory authority”³⁴ and that the D.C. Circuit’s 1973 *National Petroleum Refiners v. FTC* decision “represents the current state of the law.”³⁵ The NPRM does not bother to invite comment on this claim.³⁶ It should have. If the Commission is wrong, no UMC rule will survive. Assessing this question requires understanding the text and history of the original FTC Act, the way statutory interpretation has changed since 1973, and the way the current Supreme Court understands the Constitution’s separation of powers.³⁷

³³ *National Petroleum Refiners Association v. FTC*, 340 F. Supp. 1343, 1344 (D.D.C. 1972); Posting of Minimum Octane Numbers on Gasoline Dispensing Pumps, Trade Regulation Rule, 36 Fed. Reg. 23871 (1971); FTC Men’s and Boy’s Tailored Clothing Rule, 16 C.F.R. § 412 (1968). The latter was “was never enforced and was withdrawn in the 1990s.” FED. TRADE COMM’N, PREPARED REMARKS OF COMMISSIONER NOAH JOSHUA PHILLIPS ON NON-COMPETE CLAUSES IN THE WORKPLACE: EXAMINING ANTITRUST AND CONSUMER PROTECTION ISSUES at 5 (2020) (citing Notice of Rule Repeal, 59 Fed. Reg. 8527 (1994)), https://www.ftc.gov/system/files/documents/public_statements/1561697/phillips_-_remarks_at_ftc_nca_workshop_1-9-20.pdf. See also CHOPRA & KHAN, *supra* note 24, at 369 n.54 (“The FTC has issued an antitrust rule only once in its history. Discriminatory Practices in Men’s and Boys’ Tailored Clothing Industry, 16 CFR Part 412 (1968).”).

³⁴ Chair Statement, *supra* note 8, at 5 (Jan. 5, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/statement-of-chair-lina-m-khan-joined-by-commrs-slaughter-and-bedoya-on-noncompete-nprm.pdf (“Chair Statement”).

³⁵ Chair Statement, *supra* note 8, at 4 n. 12, citing *National Petroleum Refiners Ass’n v. FTC*, 482 F.2d 672 (D.C. Cir. 1973).

³⁶ See NPRM ¶¶ 389-90.

³⁷ Dissenting Statement of Commissioner Christine S. Wilson Regarding the Notice of Proposed Rulemaking for the Non-Compete Clause Rule, FTC File No. P201200-1, 9-11 (Jan. 5, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/p20100noncompetewilsondissent.pdf; Berin Szóka & Corbin Barthold, *The Constitutional Revolution That Wasn’t: Why the FTC Isn’t a Second National Legislature*, TECHFREEDOM (June 27, 2022), <https://techfreedom.org/wp-content/uploads/2022/06/FTC-UMC-Rulemaking-Authority-TF-Version.pdf>; Corbin K. Barthold, *National Petroleum Refiners v. FTC: A Tale of Two Opinions*, TRUTH ON THE MARKET (Apr. 27, 2022), <https://truthonthemarket.com/2022/04/27/national-petroleum-refiners-v-ftc-a-tale-of-two-opinions/>. See also Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 556 (2002), <https://bit.ly/3D0yoSd> (“The legislative history of the [FTC Act] ... provides significant evidence that Congress did not intend to grant legislative rulemaking authority to the FTC.”); Final Transcript at 296, Fed. Trade Comm’n, Non-Competes in the Workplace: Examining Antitrust and Consumer Protection Issues (Jan. 9, 2020), <https://www.ftc.gov/system/files/documfull.pdf> (Professor Richard J. Pierce called the decision “laughable” by today’s standards); Maureen K. Ohlhausen & James Rill, *Pushing the Limits? A Primer on FTC Competition Rulemaking*, U.S. Chamber of Commerce, 10-11 (Aug. 12, 2021), https://www.uschamber.com/sites/default/files/ftc_rulemaking_white_paper_aug12.pdf (“[M]odern statutory interpretation takes a far difference approach than the court in *National Petroleum Refiners*.”); Maureen K. Ohlhausen & Ben Rossen, *Dead End Road: National Petroleum Refiners Association and FTC ‘Unfair Methods of Competition’ Rulemaking*, TRUTH ON THE MARKET (July 13, 2022), <https://truthonthemarket.com/2022/07/13/dead-end-road-national-petroleum-refiners-association-and-ftc-unfair-methods-of-competition-rulemaking/> (“Thus, the road to UMC rulemaking, which the agency

While some arguments were filed on this question in comments on the petition for rulemaking, doubtless some new legal arguments will be raised in comments on both sides of this question. Reply comments will provide responses to those arguments. It remains unclear whether courts will view non-competes as properly UMC or UDAP.³⁸ A full record will allow the FTC to fully consider issuing a rule that addresses non-competes as both. While this would require more process, it would help ensure that the Commission does not lose entirely.

B. What Constitutes a Method of Competition?

Devoting just four sentences to this question, the FTC’s 2022 policy statement defines UMC broadly as “conduct undertaken by an actor in the marketplace—as opposed to merely a condition of the marketplace.”³⁹ But Congress likely intended something narrower: conduct that “suppress[es] competition *by destroying rivals*,” as Justice Louis Brandeis, an architect of the FTC Act, wrote in a 1920 decision.⁴⁰ Indeed, the Wheeler-Lea Act of 1938 added the term unfair and deceptive acts and practices to the FTC Act precisely because courts had construed “unfair methods of competition” narrowly.⁴¹ In this view, the evidence needed to support a UMC rule must focus on exclusion or foreclosure of rivals, or perhaps agreements or invitations to adopt practices that facilitate coordination, not general effects on economic growth, labor mobility, and firm entry.

Reply comments would help the Commission better understand this legal question while also ensuring that commenters can focus on the evidence that courts may require. Moreover, reply comments would help the FTC determine whether some or all of what it proposes to regulate is truly a method of competition. If courts determine the FTC is actually regulating an act or practice, courts may require the FTC to follow the rulemaking process prescribed in the Magnuson-Moss Act for UDAP rules and to show that the rule satisfies Section 5(n),

wisely never tried to travel down in the almost 50 years since *National Petroleum Refiners*, is essentially a dead end.”).

³⁸ See TechFreedom, Comments on Non-Compete Clause Rulemaking at 5, FTC-2023-0007-3959 (Feb. 16, 2023), <https://techfreedom.org/wp-content/uploads/2023/02/FTC-Non-Compete-Forum-Comments-2-16-2023.pdf> (“Such opportunistic behavior can be ameliorated through a rule issued under the authority conferred by the Magnuson-Moss Act governing unfair and deceptive act practices—rather than attempting to make a rule governing unfair methods of competition.”).

³⁹ FED. TRADE COMM’N, POLICY STATEMENT REGARDING THE SCOPE OF UNFAIR METHODS OF COMPETITION UNDER SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT at 8, No. P221202 (2022).

⁴⁰ *FTC v. Gratz*, 253 U.S. 421, 422 (1920) (Brandeis, J.) (emphasis added).

⁴¹ See Hon. R. E. Freer, Commissioner, The Wheeler-Lea Act, Remarks before the Annual Convention of the Proprietary Association (May 17, 1938), https://www.ftc.gov/system/files/documents/public_statements/676351/19380517_freer_whe_wheeler-lea_act.pdf (explaining the history and impetus of the Wheeler-Lea Act).

i.e., that it “causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.”⁴²

C. What Makes a Method of Competition Unfair?

The FTC Act does not define unfairness in the context of methods of competition.⁴³ The applicable case law is decades old. The NPRM spends three short paragraphs summarizing Supreme Court cases decided between 1934 and 1968 and three barely more recent appellate decisions.⁴⁴ While the Commission recently issued a policy statement on this point, it did not seek public comment, and even that statement leaves many questions unresolved. Understanding how the FTC should define unfairness in this context will require careful analysis of case law and the legislative record behind the FTC Act.

IV. Skipping Reply Comments Increases the FTC’s Risk of Losing in Court

The FTC is on a remarkable losing streak. In 2021, the Supreme Court unanimously rejected the FTC’s authority to obtain monetary redress under its longstanding interpretation of Section 13(b) of the FTC Act.⁴⁵ The decision, based on the text and structure of the Act, illustrates just how easily the FTC could lose on Section 6(g). The FTC has also recently lost three major antitrust merger cases.⁴⁶

Any rule issued by the FTC in this proceeding is sure to be litigated and may well wind up at the Supreme Court. As noted above, the courts could strike down the rule for many reasons. Knowing that it will face closer judicial scrutiny than ever before, the Commission would be wise to create a robust record, and that is only possible if stakeholders have the opportunity to respond to initial comments. Having a truly “comprehensive set of information and analysis,” as Chair Khan put it in lauding rulemaking over adjudication,⁴⁷ is smart litigation strategy.

⁴² 45 U.S.C. § 45(n).

⁴³ *Cf.* 47 U.S.C. § 45(n) (defining unfairness in the context of acts and practices).

⁴⁴ NPRM ¶¶ 403-05 (citing *Atlantic Refining Co. v. FTC*, 381 U.S. 357 (1965); *Federal Trade Commission v. Texaco Inc.*, 393 U.S. 223 (1968); *Shell Oil Company v. FTC*, 360 F.2d 470 (5th Cir. 1966); *FTC v. Keppel Bro.*, 291 U.S. 304 (1934); *E.I. Du Pont De Nemours & Co. v. FTC*, 729 F.2d 128 (2d Cir. 1984); *FTC v. Motion Picture Adv. Co.*, 344 U.S. 392 (1953); *L.G. Balfour Company v. FTC*, 442 F.2d 1 (7th Cir. 1971); *Hastings Mfg. Co. v. FTC*, 153 F.2d 253 (6th Cir. 1946); *United States v. American Tobacco Company*, 221 U.S. 106 (1911); *Newburger, Loeb Co., Inc. v. Gross*, 563 F.2d 1057 (2d Cir. 1977)).

⁴⁵ *AMG Capital Mgmt. v. FTC*, 141 S. Ct. 1341 (2021).

⁴⁶ *Illumina, Inc.*, Docket No. 9401 (2022); *Altria Grp., Inc.*, Docket No. 9393 (2022); *FTC v. Meta Platforms Inc.*, 5:22-cv-04325-EJD (N.D. Cal. Feb. 3, 2023) (order denying the FTC’s motion for preliminary injunction).

⁴⁷ *See* CHOPRA & KHAN, *supra* note 24, at 369.

V. Conclusion

What Commissioner Slaughter said about the benefits of seeking additional comment on the vertical merger guidelines is even more true here: “the benefits ... far outweigh an immaterial delay in the final issuance of the [rule].”⁴⁸ As Commissioner Wilson said of this very proceeding, “I think having... a reply comment period on the noncompete... rule is an excellent idea. I had not thought of that until the commenters raised it, which highlights one of the benefits of these open meetings.”⁴⁹

We look forward to submitting our comments and, if given the opportunity, to participating in “the open exchange of ideas” that a reply comment round would make possible.

Sincerely,

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⁴⁸ Dissenting Statement of Commissioner Rebecca Kelly Slaughter in re FTC-DOJ Vertical Merger Guidelines, FTC File No. P810034, at 1 (June 30, 2020), https://www.ftc.gov/system/files/documents/public_statements/1577499/vmgslaughterdissent.pdf.

⁴⁹ *Open Commission Meeting—March 16, 2023*, FTC, <https://kvgo.com/ftc/open-commission-meeting-march-16-2023> (Commissioner Wilson’s statement starts at 38:57).

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