TECHFREEDOM
LAW FOR A DYNAMIC FUTURE

**Comments of**

**TechFreedom**

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**In the Matter of**

*Request for Information on State Laws Having Significant Adverse Effects on the National Economy or Significant Adverse Effects on Interstate Commerce*

Docket No. OLP182

**September 15, 2025**

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## INTRODUCTION

TechFreedom[1] welcomes the opportunity to participate in the joint Department of Justice and National Economic Council effort to identify State laws that significantly and adversely affect the national economy or interstate economic activity. We address the role state attorneys general may, and should, play in enforcing their consumer protection and unfair competition laws, with an emphasis on technology policy.

In general, we believe states should act consistently with the decades of case law developed under Section 5 of the Federal Trade Commission Act ("FTC Act") through the interaction of the Federal Trade Commission ("FTC" or "Commission") with federal courts, and especially the Supreme Court. This is particularly true regarding divergences between state and federal consumer protection law as applied to artificial intelligence technologies.

More generally, states should apply their unfair competition laws consistent with federal courts' modern understanding of Section 5 and federal antitrust law. This is important for the development of all technologies, including AI.

## I. State Consumer Protection Laws, Inconsistently Interpreted, Would Unduly Burden the Development of AI Services in Interstate Commerce

Congress recently considered a ten-year moratorium on the enforcement of "any [state] law or regulation regulating artificial intelligence models, artificial intelligence systems, or automated decision systems."[2] In response, many objected that this would preempt state consumer protection laws. There is broad agreement that consumer protection laws should be technology-neutral, applying to AI no less than any other technology. We agree, but if America is to lead the world in AI services and minimize abusive litigation, it needs a unified approach to applying consumer protection law to AI. To ensure such consistency, Congress must act to preempt the application of state laws to AI and, instead, provide for states to enforce federal consumer protection law in a consistent and responsible manner.

### A. Section 230 Does not Protect Generative AI Services

Section 230 does not bar the enforcement of consumer protection law, either federal or state, insofar as an AI tool is at least partially responsible for the "development" of the content at

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[1] Founded in 2010, TechFreedom is a nonprofit, nonpartisan think tank based in the United States 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.

[2] H.R. 1, 119th Cong. § 43201 (2025), Artificial Intelligence and Information Technology Modernization Initiative (unenacted).

issue.[3] This should, by definition, include *all* "generative AI" tools, which do not merely present answers to users prompts "developed" entirely by third parties (like search engines) but instead create what is, at least "in part," new content.[4]

Most digital services involve content that is developed only by users, not even "in part" by service providers: those services have been shielded from consumer protection liability regarding such content. "Development" would include co-creating content, as AI tools do, but has also been held to include soliciting categories of content that violate federal law, such as race-based housing preferences,[5] and "paying … researchers to acquire telephone records, knowing that the confidentiality of the records was protected by law."[6] Other than these narrow exceptions, courts simply have not had to develop consumer protection doctrine as applied to most digital services. As such, little attention has been paid to the important ways in which state consumer protection laws diverge from federal law—and why applying a patchwork of state consumer protection laws might be problematic.

State attorneys general *should* be able to enforce consumer protection law regarding AI services, so long as they apply the law consistently.

### B. Key Inconsistencies between State and Federal Consumer Protection Law

While state consumer protection laws are often referred to as "Baby FTC Acts," they differ from the FTC Act, and from each other, in key respects, as summarized in the attached law review article.[7] Several key differences stand out:

- **Doctrine**: consumer protection law is complex, involving many complicated doctrinal questions developed by courts over more than a century. Thirty states and the District of Columbia "have explicitly instructed that their [Baby FTC Acts] should be interpreted consistently with the interpretations given by the FTC and the federal

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[3] 47 U.S.C. §§ 230(c)(1) ("No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."); 230(f)(2) ("The term 'interactive computer service' means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server."); 230(f)(3) ("The term 'information content provider' means any person or entity that is *responsible, in whole or in part, for the creation or development* of information provided through the Internet or any other interactive computer service." (emphasis added). Thus, if a site is responsible, even in part, for the development of content, it loses the protection of 230(c)(1).

[4] 47 U.S.C. § 230(f)(3).

[5] *See* Fair Housing Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157 (9th Cir. 2008).

[6] Fed. Trade Comm'n v. Accusearch Inc., 570 F.3d 1187, 1200 (10th Cir. 2009).

[7] Henry N. Butler & Joshua D. Wright, *Are State Consumer Protection Acts Really Little-FTC Acts?,* 63 FLA. L. REV. 163 (2011), https://scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=1078&context=flr.

courts to Section 5(a)(1) of the FTC Act."[8] This reflects a broad recognition of the value of the common law built upon Section 5. Twenty states, however, do *not* tie interpretation of their Baby FTC Acts to Section 5 case law. Of these, only five have held that federal FTC case law is persuasive authority for interpreting the state law. This creates the opportunity for significant divergence, especially in the remaining fifteen states (but also those last five).

- **Private Rights of Action**: While the FTC Act includes no private right of action, every state Baby FTC Act does so. This reflects an essential difference: State consumer protection law governs an infinite range of small claims right down to the corner drycleaner overbilling its customers. It makes sense to empower private citizens to sue when they are cheated; state attorneys general simply do not have the resources to police unfair and deceptive practices committed by every business in their state. But the FTC polices larger businesses that affect large numbers of consumers. In this context, the benefits of private rights of action are considerably outweighed by their costs. The FTC must confront larger tradeoffs when it brings consumer protection suits affecting nationwide services, especially digital services. This is grounded in the statute itself: "public enforcement under the FTC Act requires the Commission to consider the public interest in deciding whether to challenge a practice, [but] only a few states include a public interest requirement for private actions."[9]
- **Remedies**: The FTC Act and state Baby FTC Acts "confer different remedies."[10] The FTC Act allows for "injunctions, cease and desist orders, consent decrees, and the disgorgement of profits."[11] In contrast, "at least a dozen" state Baby FTC Acts limit plaintiffs to actual damages, restitution, or equitable relief," while the majority "provide additional remedies, including statutory damages, treble damages, and punitive damages."[12] Additionally, nearly all Baby FTC Acts authorize attorney's fees,[13] and several allow for civil penalties, which are not generally available for first-time violations of the FTC Act, as opposed to violations of clearly defined rules issued by the FTC.
- **Relaxed Common Law Limitations**: The FTC Act and state Baby FTC Acts differ in "the degree to which state legislation and judicial interpretation have relaxed the

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[8] Charles A. Byrd, *A 50-State Survey of Consumer Protection Acts and Their Connections to the Federal Trade Commission Act*, PRO TE: SOLUTIO (Mar. 13, 2019), https://protesolutio.com/2019/03/13/a-50-state-survey-of-consumer-protection-acts-and-their-connections-to-the-federal-trade-commission-act/#:~:text=But%20perhaps%20most%20importantly%2C%2030,%C2%A7%208%2D19%2D6.
[9] Butler & Wright, *supra* note 7, at 173-74.
[10] *Id.* at 174.
[11] *Id.*
[12] *Id.*
[13] *Id.*

common law limitations on consumer protection claims."[14] For example, most Baby FTC Acts do not require the "plaintiff to show that he or she relied on the defendant's allegedly deceptive act or statement[.]"[15] In contrast, "the FTC requires *reasonable* reliance in its definitions of both unfair and deceptive practices." And some "state courts have held that a misrepresentation, absent evidence of other harm to the consumer or that the plaintiff relied on the misrepresentation, is sufficient to demonstrate consumer injury."[16]

### C. A Potential Model for AI Legislation

Many have proposed what federal regulation of AI should look like. Whatever legislation Congress eventually decides to enact, we propose that Congress do something simple now: authorize states to enforce *federal* consumer protection law. When Congress has enacted legislation governing specific issues, from children's privacy [17] to spam [18] and online shopping,[19] it has declared violations of those laws to be violations of Section 5's prohibition of unfair and deceptive acts and practices, and it has empowered states to enforce those provisions through consistent enforcement processes. Here, Congress could recognize a category of violations of Section 5 regarding AI services and empower state attorneys general to bring suit in federal court in such cases. By the same token, to avoid an inconsistent patchwork of state regulation of AI services, Congress should clearly preempt states from enforcing their own, potentially divergent consumer protection laws.

A model for potential bipartisan AI legislation can be found in the Obama administration's discussion draft for the "Consumer Privacy Bill of Rights Act of 2015." [20] That draft synthesized the best ideas from both sides of the aisle and aimed to be a blueprint for bipartisan comprehensive baseline privacy legislation. We consider several key issues.

#### 1. Appropriate Remedies

Importantly, the 2015 Discussion Draft provided for no private right of action,[21] relying instead on "Enforcement by State Attorneys General":

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[14] *Id.* at 174-75.
[15] *Id.* at 175.
[16] *Id.*
[17] Children's Online Privacy Protection Act (COPPA), 15 U.S.C. §§ 6501–6506.
[18] CAN-SPAM Act (15 U.S.C. § 7706(f)).
[19] Restore Online Shoppers' Confidence Act (ROSCA), 15 U.S.C. §§ 8401–8405.
[20] Administration Discussion Draft: Consumer Privacy Bill of Rights Act of 2015, https://www.hunton.com/privacy-and-information-security-law/assets/htmldocuments/uploads/sites/18/2015/03/cpbr-act-of-2015-discussion-draft.pdf.
[21] *Id.* § 403.

> (a) Civil Action.—If the attorney general of any State has reason to believe that the action of a covered entity in violation of Title I of this Act has caused or is causing harm to a substantial number of that State's residents …[22]

This could instead simply refer to Section 5(a) of the FTC Act.

> … such attorney general may bring a civil action on behalf of those residents exclusively in an appropriate district court of the United States. Unless the Commission brings an action … or intervenes and prosecutes an action brought under this section, as described in subsections (b)(2)(A) and (b)(2)(B), the only remedy that may be sought or awarded in any action under this Act is injunctive relief, and nothing in this Act may be construed to provide for any other relief.[23]

### 2. Civil Penalties Should Be Limited

This is generally the right approach. States should not be able to seek civil penalties when they allege that a novel practice involving AI is unfair or deceptive for the same reason that Congress has consistently declined to give the FTC such authority: empowering the FTC to impose civil penalties without fair notice would fundamentally change the balance struck by Congress in crafting the FTC Act. Lawmakers reaffirmed that choice as recently as 2010: the sprawling Dodd-Frank overhaul passed by the House included a provision that would have authorized the Commission to "obtain a civil penalty authorized under any provision of law enforced by the Commission," including Section 5's ban on deception, but Congress ultimately removed that provision.[24]

As one appeals court explained, Congress carefully "counterbalance[d]" the exceptionally "amorphous" standard of Section 5 with a "detailed framework": Section 5(m)(1)(A) authorizes the Commission to obtain civil penalties for violations of FTC *rules* but the Act combines this power with Section 18(a)(1)(B)'s procedural "requir[ement that] the Commission …. give defendants fair notice … through … rules that 'define with specificity' prohibited acts"[25] before being ordered to pay money, whether in the form of restitution[26]

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[22] *Id.* § 202.
[23] *Id.*
[24] H.R. 4173, 111th Cong. § 4950 (2009), https://www.congress.gov/bill/111th-congress/housebill/4173/text/eh.
[25] FTC v. Credit Bureau Ctr., LLC, 937 F.3d 764, 774 (7th Cir. 2019) (quoting 15 U.S.C. § 57a(a)(1)(B)) ("the Commission may prescribe … rules which define with specificity acts or practices which are unfair or deceptive acts or practices …").
[26] *Id.*

or civil penalties.[27] Simply put, civil penalties are not appropriate when applying the broad standards of unfairness and deception to the kind of novel practices that are the essence of innovation in AI.

### 3. Equitable Relief May Be Appropriate

One notable complication has arisen since the 2015 Discussion Draft. At the time, it was generally assumed that the Commission could obtain equitable relief for consumers through its power under Section 13(b) to seek a "permanent injunction" for unfair or deceptive acts or practices. But the Supreme Court rejected this assumption in *AMG Capital Management, LLC v. Federal Trade Commission* (2021).[28] Thus, if Congress wants to authorize state attorneys general to seek equitable relief for consumers in UDAP cases, it must say so explicitly; it cannot simply authorize "injunctive relief." Whatever Congress decides (and there is good reason to ensure that consumers can be made whole when they are harmed by unfair or deceptive practices) the same rule should apply in AI cases as applies across the board.

### 4. Notice to, and Intervention by, the Commission

The 2015 Discussion draft includes another important safeguard:

> (b) Federal Trade Commission.—
>
> (1) Notice to Federal Trade Commission.—At least 30 days prior to initiating any action under subsection (a), an attorney general shall provide the Commission with a copy of the entire court complaint and written disclosure of substantially all material evidence and information the attorney general possesses.
>
> 2) Upon receiving notice from an attorney general of a proposed civil action, the Commission may—
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> (A) intervene as a matter of right as a party to that civil action;

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[27] 15 U.S.C. § 45(l) (violation of a final order); 15 U.S.C. § 45(m)(1)(B). "Where the Commission has determined in a litigated administrative adjudicatory proceeding that a practice is unfair or deceptive and has issued a final cease and desist order, the Commission may obtain civil penalties from non-respondents who thereafter violate the standards articulated by the Commission. To accomplish this, the Commission must show that the violator had 'actual knowledge that such act or practice is unfair or deceptive and is unlawful' under Section 5(a)(1) of the FTC Act." *A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority*, FTC (May 2021), https://www.ftc.gov/about-ftc/mission/enforcement-authority.

[28] 141 S.Ct. 1341 (2021).

> (B) intervene as a matter of right as a party to that civil action and assume lead responsibility for the prosecution of the action; or
>
> (C) permit the attorney general to proceed with the action without direct Commission participation.[29]

These are sensible safeguards. They allow the FTC to ensure the development of a consistent body of case law regarding AI consumer protection issues. It is essential to do this upfront, at the beginning of legislation, because of how rapidly AI technology is developing: companies need clarity about their legal obligations, which incentivizes them to quickly settle lawsuits even when they lack legal merit, or to adjust the development of their technology. Thus, the mere bringing of a suit can have significant effects, even if the suit is problematic.

> (3) In the event that an attorney general believes that immediate action is necessary to protect the residents of the State from a substantial harm, the attorney general may request that the Commission expedite its review of the proposed action, and the Commission. shall afford such request appropriate consideration as the circumstances may warrant.[30]

This is a reasonable counterbalance to the Discussion Draft's limits on action by state attorneys general.

> (4) In any action brought under Title II of this Act, the district court, and any courts that review the district court's decision, shall accord substantial weight to the Commission's interpretations as to the legal requirements of this Act.[31]

This is the essential provision to ensure consistent application of consumer protection law.

### 5. State Investigations

Finally, this section preserves the investigative powers of state attorneys general:

> (c) Investigatory Powers.—Nothing in this section may be construed to prevent the attorney general of a State from exercising the powers conferred on such attorney general by the laws of such State to conduct investigations or

[29] 2015 Discussion Draft § 202(b)(1)-(2).
[30] *Id*. § 202(b)(3).
[31] *Id*. § 202(b)(4).

> to administer oaths or affirmations or to compel the attendance of witnesses or the production of documentary and other evidence.[32]

We have significant concerns that these powers may be abused in cases involving AI in ways that do not apply to privacy legislation. Specifically, states have begun using consumer protection law to try to influence the *content* of AI services. At a minimum, the FTC should have the same power to intervene in such investigations as it does in enforcement actions. Additional safeguards would be well warranted to prevent abusive investigations intended to jawbone AI companies into changing the content generated by their models. Ideally, this would include making it easier for companies that feel that they are the target of such an investigation to raise First Amendment objections in federal court.

### 6. Technology-Neutrality Is Essential

One other provision of the 2015 proposal is particularly worth including in federal legislation regarding AI:

> In enforcing this Act, the Commission shall not require the deployment or use of any specific products or technologies, including any specific device software or hardware.[33]

### 7. Preemption

Preemption is critical to the legislative framework we propose. Yet here, the 2015 Discussion Draft is least apposite: it preempted "any provision of a statute, regulation, or rule of a State or local government, with respect to those entities covered pursuant to this Act, to the extent that the provision *imposes requirements* on covered entities with respect to personal data processing" but it did not "limit the enforcement by an attorney general or other official of a State of any State consumer protection law of general application and not specific to personal data processing."[34] Here, it is state consumer protection law that should be preempted—but replaced with federal law with respect to specific AI services. Thus, Congress should preempt the application of state laws to AI services—at least, those employed nationwide or involving more than a certain number of users.

## II. State Unfair Competition Laws, Improperly Interpreted, Would Unduly Burden Interstate Commerce, Especially Novel Technologies

Competition law is a key aspect of how evolving technologies are governed, including AI. Section 5 of the FTC Act empowers the Commission to prevent unfair methods of competition

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[32] *Id*. § 202(c).
[33] *Id.* § 201(d).
[34] *Id.* § 401.

(UMC). [35] Many states have adopted similar (or the same) prohibitions on unfair competition. [36] Courts interpreting state unfair competition laws often look to the interpretation of the FTC Act by federal courts for guidance.[37]

State laws prohibiting unfair competition may impact the business decisions and operations of firms operating outside of a particular state. Because of these interstate effects, the federal agencies responsible for antitrust policy and economic policy have an interest in a proper and uniform interpretation of state unfair competition law, consistent with federal law.

### A. Former FTC Chairs and Commissioner Have Been Critical of an Overly Broad Application of the FTC's Prohibition on Unfair Methods of Competition

FTC Commissioners of both parties have rejected overly broad interpretations of the FTC's authority to identify conduct as UMC.

- **FTC Chairman Robert Pitofsky:** "[O]ne must be very, very cautious about using Section 5. It is not a roving mandate to the Commission to go around doing good from an antitrust point of view."[38]
- **FTC Commissioner Joshua Wright:** "[C]onduct challenged under Section 5 'must have an anticompetitive effect. That is, it must harm the competitive *process* and thereby harm consumers. In contrast, harm to one or more *competitors* will not suffice.'"[39]
- **FTC Acting Chair and Commissioner Maureen Ohlhausen:** "[T]he FTC [should] consider several important factors to discern when consumers and

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[35] 15 U.S.C. § 45. There is no private right of action for violations of Section 5.

[36] For example, California's Unfair Competition Law prohibits "any unlawful, unfair or fraudulent business act or practice" and "unfair, deceptive, untrue or misleading advertising." Cal. Bus. & Prof. Code § 17200. In Cel-Tech Communications v. Los Angeles Cellular Telephone Co., the California Supreme Court held that, where a plaintiff claims to have suffered injury from a direct competitor's unfair act or practice, "the word 'unfair' … means conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." 20 Cal. 4th 163, 186-187 (1999).

[37] In devising "a more precise test" for what is "unfair," the *Cel-Tech* court looked to Section 5 of the Federal Trade Commission Act because "'of the similarity of language and obvious identity of purpose of the two statutes.'" 20 Cal. 4th at 185. The court recognized that "'decisions of the federal court on the subject [of what is unfair competition] are more than ordinarily persuasive.'" *Id*.

[38] Comments of then-FTC Chairman Robert Pitofsky, Transcript, Federal Trade Commission Workshop, Section 5 of the FTC Act as a Competition Statute at 64 (Oct. 17, 2008).

[39] Statement of FTC Commissioner Joshua D. Wright on the Proposed Policy Statement Regarding Unfair Methods of Competition under Section 5 of the Federal Trade Commission Act (Jun. 19, 2013) at 7 (quoting United States v. Microsoft Corp., 253 F.3d 34, 58 (D.C. Cir. 2001) (en banc) (per curiam)) (cleaned up).

> competition would be better off with a definition of UMC [Unfair Methods of Competition] that goes beyond the antitrust laws …. [T]he FTC should use its UMC authority only in cases of substantial harm to competition … only where there is no procompetitive justification for the challenged conduct or where such conduct results in harm to competition that is disproportionate to its benefits …. UMC enforcement must be grounded in robust economic evidence [and tied to] promoting and protecting consumer welfare …. *The FTC should not use UMC to rehabilitate a deficient Sherman or Clayton Act claim."*[40]

### B. The Federal Trade Commission Act's Prohibition on Unfair Methods of Competition is Broader Than, but Not Divorced From, the Sherman Act

The following cases each identify a significant concern with a broad application of the FTC Act untethered from the Sherman Act that could be adopted by a state court in interpreting state unfair competition law.

The Supreme Court has recognized that the scope of Section 5's prohibition on unfair methods of competition reaches beyond other federal antitrust laws "to stop in their incipiency acts and practices which, when full blown, would violate those Acts."[41]

Granted this authority by the courts, the FTC originally applied Section 5 broadly. In *FTC v. Brown Shoe*, the Commission challenged an arrangement under which Brown Shoe provided special business services to retail shoe stores in exchange for their promise to deal primarily in Brown Shoe shoes and not to handle directly competitive product lines.[42] The Supreme Court found that the arrangement "foreclosed Brown's competitors from selling to a substantial number of retail shoe dealers" and thereby conflicted with the central policies of both Section 1 of the Sherman Act and Section 3 of the Clayton Act.[43] The Court held that the FTC need not prove that the effect of the practice "may be to substantially lessen competition or tend to create a monopoly" because Section 5 empowered the agency "to arrest trade restraints in their incipiency without proof that they amount to an outright violation of § 3 of the Clayton Act or other provisions of the antitrust laws."[44]

In time, the Commission's action against Brown Shoe, and the Supreme Court's opinion upholding the Commission, came to be heavily criticized as bad economics and as protective of

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[40] Maureen Ohlhausen, *Section 5 of the FTC Act: Principles of Navigation*, 2 JOURNAL OF ANTITRUST ENFORCEMENT 1, 9-10, 13 (2014) (emphasis added).

[41] Fed. Trade Comm'n v. Motion Picture Adver. Serv. Co., 344 U.S. 392, 394-395 (1953); *see also* Fed. Trade Comm'n v. Sperry & Hutchinson Co., 405 U.S. 233 (1972) (holding that the FTC has the power to define and prohibit unfair competitive practices outside the letter or spirit of the antitrust laws).

[42] 384 U.S. 316 (1966).

[43] *Id*. at 319, 321.

[44] *Id*.

competitors, rather than protective of competition.[45] Indeed, the vertical contractual agreements at issue in *Brown Shoe* are now generally recognized as efficiency-enhancing regardless of whether a firm has market power.[46] But, the Supreme Court has not reversed its *Brown Shoe* decision applying the FTC Act to condemn ordinary vertical agreements.

In the 1980s, three appellate court decisions rebuked the Commission's efforts to expand the definition of unfair methods of competition beyond the Sherman Act. *Official Airlines Guides v. FTC* rejected the agency's claims under Section 5 where the effects of the challenged conduct were outside the market in which the respondent competed.[47] The Second Circuit reviewed an FTC order requiring the sole provider of published airline flight schedule information to publish listings of connecting flights of commuter airlines. Agreeing that the failure to publish those listings was arbitrary and had an adverse effect on competition between those air carries whose flight schedules were published and those whose were not, the court nonetheless reversed the Commission's holding that such arbitrary conduct by a monopolist causing injury in a market in which it does not operate was unlawful under Section 5.[48] The court recognized that "*enforcement of the FTC's order … would give the FTC too much power to substitute its own business judgment for that of the monopolist in any decision that arguably affects competition in another industry."*[49]

In *Boise Cascade v. FTC*, the Ninth Circuit overturned an FTC decision that a plywood manufacturer violated Section 5 by adopting a non-collusive delivered price system which charged customers a "west coast" freight factor regardless of the shipping destination.[50] The Commission had found an anticompetitive effect could be presumed from the industry-wide use of an artificial pricing system. The court disagreed: absent evidence of overt collusion, the FTC could not remedy "a complete absence of meaningful evidence in the record that price levels …

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[45] *See, e.g.,* Herbert J. Hovenkamp, *The Federal Trade Commission and the Sherman Act*, 62 FLA. L. REV. 871, 874-75 (2010) ("in the *Brown Shoe* decision, the Supreme Court upheld an FTC order … where there was no realistic expectation of harm to competition" and "the decision injured rather than benefitted consumers"); John Peterman, *The Federal Trade Commission v. Brown Shoe Company*, 18 (2) J.L. & ECON. 361 (1975); see generally, William E. Kovacic & Mark Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act,* 76 ANTITRUST L. J. 929, 941 (2010) ("The FTC's record of appellate litigation involving applications of Section 5 that go beyond prevailing interpretations of the other antitrust laws is uninspiring.").

[46] *See* Leegin Creative Leather Products v. PSKS, Inc., 551 U.S. 877 (2007) (minimum vertical price agreements); State Oil Co. v. Khan, 522 U.S. 3 (1997) (maximum vertical price agreements); Continental T.V. Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977) (vertical territorial restrictions).

[47] 630 F.2d 920 (2nd Cir. 1980).

[48] *Id*. at 924, 927.

[49] *Id*. (emphasis added).

[50] 637 F.2d 573 (9th Cir. 1980).

reflect an anticompetitive effect" by relying on a presumption of effect or a by holding the conduct to be unlawful *per se*.[51] Notwithstanding that *Brown Shoe* had recognized the FTC's unique power to outlaw incipient trade restraints, allowing a finding of Section 5 liability would *"blur the distinction between guilty and innocent commercial behavior."*[52]

Lastly, *E.I Dupont de Nemours & Co v. FTC* vacated a Commission order that had found a violation where certain common practices were adopted, unilaterally, by four leading domestic producers and sellers of lead antiknock gasoline.[53] The common practices included so-called price-signaling behavior, including selling at uniform delivered prices, giving advance notice of price increases beyond what was required in contracts with customers, and using most-favored nation clauses.[54] The Commission concluded that these practices violated Section 5 because they contributed substantially to uniform, super-competitive prices by facilitating systematic price-matching.[55] The Second Circuit vacated, noting the insufficient showing of a lessening of competition, and expressed concern that the FTC's principal of liability failed to "discriminate between normally acceptable business behavior and conduct that is unreasonable or unacceptable," and that this failure which could "open … the door … to the arbitrary and capricious administration of §5."[56]

In an earlier case, the FTC did not rely on the incipiency doctrine that some district courts and state courts have relied on when interpreting the FTC Act. In *General Foods Corp.*,[57] the FTC rejected complaint counsel's argument that Section 5 could reach anticompetitive conduct by a firm with substantial market power even if there was no dangerous probability that the firm could achieve monopoly power. The Commission explained:

> While Section 5 may empower the Commission to pursue those activities which offend the 'basic principles' of the antitrust laws, we do not believe that power should be used to reshape those policies when they have been clearly expressed and circumscribed …. To distinguish between an attempt to monopolize and an incipient attempt on the basis of potential market power is to engage in such fine distinctions as to challenge … the competitor trying to conform its conduct to the law. *If the conduct at issue here cannot reach the*

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[51] *Id*. at 579.

[52] *Id*. at 582 (emphasis added).

[53] 729 F.2d 128 (2nd Cir. 1984).

[54] *Id*. at 130.

[55] *Id.*

[56] *Id.* at 138. See also Fed. Trade Comm'n v. Abbott Laboratories, 853 F. Supp. 526, 535-36 (D.D.C. 1994) ("The Second Circuit stated that some workable standard must exist for what is or is not to be considered an unfair method of competition under §5. Otherwise, companies subject to FTC prosecution would be the victims of 'uncertain guesswork rather than workable rules of law.'").

[57] 103 F.T.C. 204 (1980).

*early threshold of doubt under the Sherman Act, we will not condemn it under the [FTC] Act.*[58]

### C. The Administration Should Urge Federal and State Courts and Legislatures to Interpret State Unfair Competition Laws Consistent with Modern Interpretations of the FTC Act and Federal Antitrust Laws

The Administration should urge federal and state courts and legislatures to interpret state unfair competition laws consistent with modern interpretations of the FTC Act and modern Sherman Act and Clayton Act case law. In support of this, the Department of Justice and National Economic Council (and the Federal Trade Commission) should advocate for aligning state unfair competition law with modern federal antitrust law and modern interpretations of the FTC Act.

## CONCLUSION

By ensuring a consistent national approach to consumer protection and competition law, the Administration can help advance the development of technologies that improve the human condition while also protecting consumers from unfair and deceptive acts and practices as well as unfair methods of competition. State attorneys general can play a valuable role, provided they apply the same body of law as the FTC and Department of Justice.

Respectfully submitted,
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[58] *Id*. at 365-66 (emphasis added, footnote omitted).