



UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Dissenting Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson on the “Statement of the Commission on the Withdrawal of the Statement of Enforcement Principles Regarding ‘Unfair Methods of Competition’ Under Section 5 of the FTC Act”

July 9, 2021

I. Introduction

The statement regarding “unfair methods of competition” under Section 5 of the FTC Act adopted today by the Commission majority (“2021 UMC Statement”) spends seven pages explaining their view that legal precedents do not bind us and not a word explaining what limits to our authority they recognize, if any. Last week, with next to no notice or public input, the majority withdrew the Commission’s 2015 *Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act* (“Bipartisan 2015 UMC Statement”), adopted on a bipartisan basis during the Obama Administration.¹ In so doing, the majority removed clarity for honest businesses that seek to follow the law, which today’s statement addresses only with vague promises that, later, it will “consider” new guidance or rules. Hinting at the prospect of dramatic new liability without any guide regarding what the law permits or proscribes is bad for consumers and bad for our economy—the opposite of what Congress intended when it created the FTC.

We dissent from issuing the 2021 UMC Statement as a Commission statement for three reasons. First, rescinding the Bipartisan 2015 UMC Statement – absent any new guidance about the how the Commission interprets its authority – reduces clarity in the application of the law and threatens to unleash terrific regulatory power never intended by Congress to be exercised by a bare majority of unelected individuals at the FTC. Second, contrary to the claims made in today’s statement, the Bipartisan 2015 UMC Statement is consistent with Section 5 of the FTC

¹ Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act (Aug. 13, 2015), https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf [hereinafter “Bipartisan 2015 UMC Statement”].

Act; unbounded authority is not. Third, the Bipartisan 2015 UMC Statement reflected several core principles of mainstream antitrust enforcement, and withdrawing it runs contrary to sound competition law and policy.

II. The Majority Abandon Clarity and Augur the Exertion of Unchecked Regulatory Power

Rescinding the Bipartisan 2015 UMC Statement removes clarity for honest businesses that seek to follow the law. That statement was based on legal precedent that established modest limits on the use of Section 5.² In particular, the Bipartisan 2015 UMC Statement provides that (1) the Commission will be guided by the public policy of promoting consumer welfare; (2) conduct will be evaluated under a framework similar to the rule of reason, considering both likely harm to competition and procompetitive justifications; and (3) a standalone Section 5 case would be less likely when the competitive harm could be addressed by the Sherman and Clayton Acts.³

The principles embodied in the Bipartisan 2015 UMC Statement have long provided a solid foundation for sound antitrust enforcement. Businesses had guidance about future challenges to conduct under Section 5 of the FTC Act. Today, they are left to wonder, because the Commission failed to enunciate new principles regarding its interpretation of “unfair methods of competition.” The 2021 UMC Statement does not describe the principles or parameters that will guide the Commission going forward. While the majority criticize the Bipartisan 2015 UMC Statement for the absence of clear enforcement principles, the 2021 UMC Statement offers even less.

That silence speaks volumes. The majority could have waited to rescind the Bipartisan 2015 UMC Statement until they had something with which to replace it – and the public could then evaluate their view against the text, structure, and history of the FTC Act – but it appears they prefer unbridled authority to condemn business practices. That is not what Congress intended.⁴ The majority deride the Bipartisan 2015 UMC Statement as an “abrogat[ion]” of “the Commission’s congressionally mandated duty to use its expertise[.]”⁵ It did no such thing, nor do

² See, e.g., Statement of the Federal Trade Commission On the Issuance of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act, at 2 (August 13, 2015), https://www.ftc.gov/system/files/documents/public_statements/735381/150813commissionstatementsection5.pdf, (“There has been much thoughtful dialogue inside and outside of the agency over the course of the last century about the precise contours of Section 5’s prohibition against unfair methods of competition. We have benefited greatly from this ongoing dialogue and from judicial insights through the process of judicial review, and we believe that the principles we have set forth in our Section 5 statement are ones on which there is broad consensus.”); Address by FTC Chairwoman Edith Ramirez, Competition Law Center, George Washington University Law School (Aug. 13, 2015), https://www.ftc.gov/system/files/documents/public_statements/735411/150813section5speech.pdf.

³ See Bipartisan 2015 UMC Statement.

⁴ See *infra* Section III.

⁵ 2021 UMC Statement at 1.

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.⁶ The majority have repeatedly stated their desire to step outside the Commission's congressional mandate to bring and adjudicate cases and instead fashion antitrust regulations.⁷

In addition to being legally dubious,⁸ this is a bad idea.⁹ The 2021 UMC Statement portends Section 5 rulemaking that prohibits conduct that courts currently find legal under the rule of reason, which demands a consideration of business justifications and procompetitive benefits and analyzes effects. Rulemaking should not prohibit procompetitive, efficient conduct that benefits consumers. Neither should rulemaking prohibit conduct that does not cause anticompetitive harm. Regulation should address market failures. To claim authority to fashion regulations while explicitly ignoring the good things they would prevent – looking only at the purported benefits of regulation, and not the costs – is perverse, not to mention inconsistent with American administrative law and sound public policy.

The majority try to assuage the public's concerns of unchecked regulatory power by pointing out the Commission's lack of criminal jurisdiction and the ability to collect treble damages.¹⁰ These observations are red herrings. If they promulgate regulations, the Commission will have the authority to impose massive civil penalties for violations. Threatening precisely those sanctions, the Commission offers no guidance whatsoever on legality, but instead encourages the public to "trust us." That is not good enough.

⁶ Cf. *Gundy v. United States*, 139 S. Ct. 2116 (2019) (Gorsuch, N., dissenting); *Paul v. United States*, 140 S. Ct. 342. (2019) (Kavanaugh, B., statement respecting the denial of cert.). We have serious doubts about our legal authority to fashion antitrust rules in the first place. *See, e.g.*, Christine S. Wilson, Commissioner, Fed. Trade Comm'n, Remarks at the NetChoice "Defining the Digital Market" Event 9-13 (April 27, 2021), <https://www.ftc.gov/public-statements/2021/04/remarks-commissioner-christine-s-wilson-netchoice-defining-digital-market>; Noah Joshua Phillips, Commissioner, Fed. Trade Comm'n, Prepared Remarks at the FTC's Workshop on Non-Compete Clauses in the Workplace 5-7 (Jan. 9, 2020), https://www.ftc.gov/system/files/documents/public_statements/1561697/phillips_-_remarks_at_ftc_nca_workshop_1-9-20.pdf.

⁷ *See* 2021 UMC Statement at 7 (criticizing the Bipartisan 2015 UMC Statement for assuming a case-by-case approach to Section 5 and suggesting "the possibility of the Commission adopting rules to clarify the legal limits that apply to market participants."). *See also* *Reviving Competition, Part 3: Strengthening the Laws to Address Monopoly Power: Hearing Before the H. Comm. on the Judiciary*, 117th Cong. 7 (statement of Rebecca Kelly Slaughter, Acting Chairwoman, Fed. Trade Comm'n).

⁸ *See supra* note 6.

⁹ Christine S. Wilson & Keith Klovers, *The Growing Nostalgia for Past Regulatory Misadventures and the Risk of Repeating These Mistakes with Big Tech*, 8 J. ANTITRUST ENFORCEMENT 10 (2020); Christine S. Wilson, Commissioner, Fed. Trade Comm'n, Remarks at the Federalist Society "The Future of Rulemaking at the FTC" Event (June 9, 2021) <https://www.ftc.gov/public-statements/2021/06/wilson-statement-warnings-competition-rulemaking-ftc>.

¹⁰ 2021 UMC Statement at 3.

III. The Bipartisan 2015 UMC Statement is Consistent with Section 5

The Bipartisan 2015 UMC Statement is consistent with Section 5. By its terms, Section 5 concerns “unfair methods of *competition*” (emphasis added). Interpreting those words in light of how the courts have analyzed competition – including in Section 5 cases – takes the text seriously. Providing flexibility – which Section 5 does – is not the same as letting the FTC do whatever it wants.

The 2021 UMC Statement incorrectly claims that the Bipartisan 2015 UMC Statement “negates the Commission’s core legislative mandate[.]” The majority spill much ink to make a simple point: Section 5 reaches beyond the Sherman Act and the Clayton Act.¹¹ On this, there is no disagreement between us and the majority; or, for that matter, between the majority and the Bipartisan 2015 UMC Statement. That statement clearly says that “Section 5’s ban on unfair methods of competition encompasses not only those acts and practices that violate the Sherman or Clayton Act, but also those that contravene the spirit of the antitrust laws and those that, if allowed to mature or complete, could violate the Sherman or Clayton Act.”¹² Thus, when the majority fault the Bipartisan 2015 UMC Statement for “tethering Section 5 to the Sherman and Clayton Acts[.]” they are attacking a strawman.¹³ The question, which the majority fail to answer, is not whether Section 5 reaches beyond Sherman and Clayton Acts, but how far beyond.

The 2021 UMC Statement provides a blinkered history lesson based largely on snippets of legislative history that paint an incomplete – and, as legislative history often does, unreliable – picture. While the majority get some things right – e.g., that Congress intended Section 5’s prohibition of “unfair methods of competition” to go beyond the Sherman Act as interpreted in 1914 – they ignore those parts of the legislative debate that discuss the law’s limits.¹⁴ Faced with

¹¹ 2021 UMC Statement, at 2-4.

¹² Bipartisan 2015 UMC Statement. The 2021 UMC Statement also brushes aside the FTC’s standalone Section 5 enforcement of invitations to collude as a seemingly meaningless development unworthy of serious recognition. The Bipartisan 2015 UMC Statement respects this expansion of the Sherman Act by requiring evaluation “similar to” the rule of reason. Joshua D. Wright & Angela M. Diveley, *Unfair Methods of Competition After the 2015 Commission Statement* 8, THE ANTITRUST SOURCE (Oct. 2015), https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/oct15_wright_10_19f.authcheckdam.pdf (“The Statement’s ‘similar to’ is intended to preserve the Commission’s ability to reach invitations to collude and, importantly, to provide an analytical framework that includes consideration of this type of expected harm to competition.”). The now well-known prohibition on invitations to collude likely prevents countless overtures to engage in per se illegal conduct, an impact that should not be underestimated.

¹³ 2021 UMC Statement at 2. If their criticism refers to the Bipartisan 2015 UMC Statement’s guidance that “the Commission is less likely to challenge an act or practice as an unfair method of competition on a standalone basis if enforcement of the Sherman or Clayton Act is sufficient to address the competitive harm arising from the act or practice,” no reasonable reading of that language supports the conclusion that the Bipartisan 2015 UMC Statement tethered or otherwise confined Section 5’s scope to those other statutes. If anything, it clearly suggests otherwise by acknowledging a role for Section 5 when the Sherman and Clayton Acts are insufficient.

¹⁴ In so doing, the majority succumb to the well-known mistake of treating legislative history like “a crowded cocktail party and looking over the heads of the guests for one’s friends.” *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) (paraphrasing Judge Harold Leventhal).

a standard as vague and potentially unbounded as “unfairness,” Democrat and Republican lawmakers alike were rightfully concerned about giving the FTC too *much* power. For example, one senator warned that the term “unfair competition” could give the FTC “the absolute power . . . of arbitrarily determining whether any act submitted to it is or is not unfair competition[.]”¹⁵ Another questioned the constitutionality of the proposed law, as it provided no “guide of law” to determine unfairness and “substitute[d] for a government of law the government of a board of five men.”¹⁶ Lawmakers also worried that the FTC would apply Section 5 to protect some competitors from their more efficient rivals, to the detriment of consumers.¹⁷

Section 5’s defenders responded with reassurances that fairness was about protecting competition and the public, not competitors. Senator Cummins, cited by the majority, stated that Section 5 is concerned “not merely with unfairness to the rival or competitor”, but with “unfairness to the public”; and “[n]o sane, sensible man ever suggested that mere underselling constitutes unfair competition.”¹⁸ As at least one commentator has argued, this back-and-forth indicates that Section 5’s proscription of “unfair methods of competition” should reach only those methods that are likely to exclude equally or more efficient competitors from a market.¹⁹ By failing to grapple with – indeed, by completely ignoring – this inconvenient part of the legislative history, the 2021 UMC Statement presents a distorted view of what Congress envisioned for Section 5.

IV. Withdrawing the Bipartisan 2015 UMC Statement Is Contrary to Sound Competition Law and Policy

Although broader in scope than the Sherman and Clayton Acts, Section 5’s prohibition of unfair methods of competition is no different from the other antitrust laws in its singular focus: competition.²⁰ Turning away from established mechanisms, like the rule of reason, for evaluating competition is the wrong move, and it will hurt consumers.

Applying a framework similar to the rule of reason, as the Bipartisan 2015 UMC Statement did, means that the Commission will look carefully at the facts to determine the effect of a company’s

¹⁵ 51 Cong. Rec. 11,103 (1914) (remarks of Sen. Charles Thomas).

¹⁶ *Id.* at 11,114 (remarks of Sen. James Reed).

¹⁷ *See, e.g., id.* at 11,601 (remarks of Sen. William Borah) (“Would a commission say that that was unfair competition—that because a large business could afford . . . to sell at the lower price it was unfair for them to sell at the lower price simply because smaller concerns could not afford to sell for that price?”). The proposals in The House Judiciary Committee’s Majority Staff Report raise precisely these concerns. *See infra* note 25.

¹⁸ *Id.* at 11,105, 12,815.

¹⁹ William Kolasky, “*Unfair Methods of Competition*”: *The Legislative History Underlying Section 5 of the FTC Act 2* (Washington Legal Foundation Working Paper, Paper No. 189, 2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2524362.

²⁰ Nothing in the 2021 UMC Statement suggests that the majority claim otherwise. If they do, we would hope that they would make their position clear to the public as quickly as possible, and explain what else “unfair methods of competition” captures.

conduct. Despite the majority’s description of the rule of reason as “unwieldy” and “unadministrable,”²¹ that has been the law for over a century.²² Justice Louis Brandeis endorsed it in 1918 in his famed decision in *Chicago Board of Trade*,²³ and a unanimous Supreme Court reiterated it just days ago when it handed deserving college athletes a victory in *Nat’l Collegiate Athletic Ass’n v. Alston*.²⁴

We are concerned that the majority’s hostility to the rule of reason signals a desire to exclude consideration of business justifications and efficiencies when assessing the legality of scrutinized conduct. Failing to take into account the benefits of conduct to consumers (and denying businesses the opportunity to defend themselves) opens the door to condemning procompetitive conduct to the detriment of everyday Americans. Were that the law, the FTC would be free to condemn a better product or lower price that hurts no one but competitors—the very essence of competition.²⁵ Divorcing “unfair methods of competition” from the need to examine the facts regarding the conduct at issue is a dangerous step in the direction of potentially subjecting all conduct not captured by the Sherman or Clayton Acts, but disliked by a majority of commissioners, to per se illegality.

Rejecting the Bipartisan 2015 UMC Statement’s embrace of the consumer welfare standard and decades of antitrust jurisprudence is likewise misguided.²⁶ The consumer welfare standard has

²¹ 2021 UMC Statement at 5.

²² See *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 62 (1911).

²³ *Bd. of Trade of City of Chicago v. United States*, 246 U.S. 231 (1918).

²⁴ 141 S. Ct. 2141 (2021). The majority took some liberties in the 2021 UMC Statement in citing purported criticisms of the rule of reason by prominent legal thinkers. See 2021 UMC Statement at 5 n. 31. The language quoted from Justice Breyer’s dissent in *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.* was limited to the challenges of applying the rule of reason to resale price maintenance specifically, and not about the rule of reason generally. 551 U.S. 877, 916 (2007). And the article by then-Professor Richard Posner criticizes the rule of reason as formulated in 1977. And what solution did Professor Posner recommend in that same article? For a start, that courts “adopt Professor [Robert] Bork’s position that the essential spirit of the Rule [of Reason] is to condemn only those practices that are, on balance, inefficient in the economic sense.” Richard A. Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision*, 45 U. CHI. L. REV. 1, 16 (1977).

²⁵ The House Judiciary Committee’s Majority Staff Report – published last fall after the committee’s investigation of the GAFAs companies – proposes this approach by removing the recoupment prong from predatory pricing test and banning product improvements that benefit consumers at the inconvenience of rivals. See MAJORITY STAFF OF H. COMM. ON THE JUDICIARY, 116TH CONG., INVESTIGATION OF COMPETITION IN DIGIT. MKTS. 397-398 (2020), https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf (“Courts, however, have introduced a ‘recoupment’ requirement, necessitating that plaintiffs prove that the losses incurred through below-cost pricing subsequently were or could be recouped. Although dominant digital markets can recoup these losses through various means over the long term, recoupment is difficult for plaintiffs to prove in the short term. Since the recoupment requirement was introduced, successful predatory pricing cases have plummeted. The Subcommittee recommends clarifying that proof of recoupment is not necessary to prove predatory pricing or predatory buying, overriding the Supreme Court’s decisions[.]”) (citations omitted); *id.* at 398 (“recommending that Congress consider whether making a design change that excludes competitors or otherwise undermines competition should be a violation of Section 2.”).

²⁶ The abandonment of the consumer welfare standard suggested by the withdrawal of the Bipartisan 2015 UMC Statement is reaffirmed by the Commission’s simultaneous change to Section 0 of the Commission’s Rules of

long been the lodestar of our antitrust laws, embraced and explained by courts and the antitrust enforcement agencies alike.²⁷ And for good reason: it is administrable and promotes predictable outcomes that seek to permit procompetitive (and condemn anticompetitive) conduct.²⁸

Some argue that antitrust should jettison the consumer welfare standard so that it can promote other interests like protecting competitors and jobs, or reducing income inequality.²⁹ To some extent, this critique is simply misplaced, based on a caricature of consumer welfare as based wholly on price. In reality, the standard is not narrowly focused on price to the exclusion of other factors that benefit consumers. Antitrust enforcement based on consumer welfare considers product quality, product variety, service, and innovation.³⁰

But leaving that aside, just as the Commission today declines to explain precisely its view of the standards for Section 5, critics of the consumer welfare standard offer no guidance on the full array of competing interests they believe antitrust should vindicate, or how to weigh those interests. Their vision is a farrago of vague and competing values that will undermine the law's predictability, credibility, and administrability, while facilitating politicized outcomes. Agencies and courts alike will serve (at least) two masters, and thus none. Worst of all, consumers will be denied the benefits of competition.³¹ But even though we (and the public) remain in the dark, we

Practice. There, the Commission struck language that the Bureau of Competition's "activities seek to ensure price competition, quality products and services and efficient operation of the national economy." See 16 CFR § 0.16 (2000).

²⁷ See, e.g., 1 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 114 (5th ed. 2020); Christine S. Wilson, Thomas J. Klotz & Jeremy A. Sandford, *Recalibrating the Dialogue on Welfare Standards: Reinserting the Total Welfare Standard into the Debate*, 26 GEO. MASON L. REV. 1435 (2019); Noah Joshua Phillips, Commissioner, Fed. Trade Comm'n, Post Hoc, Ergo Propter Hoc 1 (Oct. 17, 2018), https://www.ftc.gov/system/files/documents/public_statements/1416803/phillips_-_us_chamber_of_commerce_10-17-18_0.pdf.

²⁸ 1 AREEDA & HOVENKAMP, *supra* note 27, at ¶ 110; Wilson et al., *supra* note 27, at 1443-52.

²⁹ See, e.g., BARRY C. LYNN, CORNERED: THE NEW MONOPOLY CAPITALISM AND THE ECONOMICS OF DESTRUCTION (2010); SENATE DEMOCRATS, A BETTER DEAL: CRACKING DOWN ON CORPORATE MONOPOLIES 2 (2017) [hereinafter A BETTER DEAL], available at <https://www.democrats.senate.gov/imo/media/doc/2017/07/A-Better-Deal-on-Competition-and-Costs-1.pdf> (proposing new merger standards that "will prevent not only mergers that unfairly increase prices but also those that unfairly reduce competition" and "will ensure that regulators carefully scrutinize whether mergers reduce wages, cut jobs, lower product quality, limit access to services, stifle innovation, or hinder the ability of small businesses and entrepreneurs to compete").

³⁰ See, e.g., U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES 2 (2010), <https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf> (effects considered in merger analysis "can also be manifested in non-price terms and conditions that adversely affect customers, including reduced product quality, reduced product variety, reduced service, or diminished innovation"). See also Wilson et al., *supra* note 27, at 1447.

³¹ See 1 AREEDA & HOVENKAMP, *supra* note 27, at ¶ 111; Wilson et al., *supra* note 27, at 1453-55; Noah Joshua Phillips, Commissioner, Fed. Trade Comm'n, Should We Block This Merger? Some Thoughts on Converging Antitrust and Privacy 11-16 (Jan. 30, 2020), https://www.ftc.gov/system/files/documents/public_statements/1565039/phillips_-_stanford_speech_10-30-20.pdf; Noah Joshua Phillips, Commissioner, Fed. Trade Comm'n, Remarks at the Mentor Group Paris Forum 11-17 (Sept. 13, 2019), https://www.ftc.gov/system/files/documents/public_statements/1546405/phillips_-_paris_forum_9-13-2019.pdf.

have little doubt that efforts to distance Section 5 from the consumer welfare standard are a recipe for bad policy and adverse court decisions.

The 2021 UMC Statement hints at an original meaning of “unfair methods of competition” that it fails to describe, but suggests is a law without limit. We are not so sure. First, while early Sherman Act decisions like *Standard Oil* surely animated Congress in adopting the FTC Act, as one of the articles cited in the 2021 UMC Statement notes, Section 5 has played a small role in developing competition policy in the U.S. precisely because “the Sherman Act proved to be a far more flexible tool for setting antitrust rules than Congress expected in the early 20th century.”³² Interpretations from the judiciary, including multiple Supreme Court cases, “suggested that the Sherman Act would reach an especially wide range of business behavior.”³³ Over 100 years later, “the courts recognize the Sherman Act’s expanded reach, with extensive precedent developed through actions by the antitrust enforcement authorities, including the FTC, and private parties.”³⁴ In our tenure, for example, the FTC has brought a substantial number of monopolization cases in industries ranging from gene sequencing and pharmaceuticals to high technology.³⁵

Second, unlike those in academia, the FTC will have to defend its interpretation of Section 5 in court, where it should expect a hostile reception if it cannot offer clear limiting principles. (Another reason still that removing guidance while failing to replace it is a bad idea.) Since the Supreme Court last articulated the scope of Section 5, the Commission has failed successfully to

³² William E. Kovacic & Marc Winerman, *Competition Policy & the Application of Section 5 of the Federal Trade Commission Act*, 76 ANTITRUST L.J. 929, 934 (2010) (“Several factors explain why Section 5 has played so small a role in the development of U.S. competition policy principles. Probably the most important is that the Sherman Act proved to be a far more flexible tool for setting antitrust rules than Congress expected in the early 20th century.”).

³³ *Id.*

³⁴ Maureen K. Ohlhausen, Commissioner, Fed. Trade Comm’n, Remarks on Section 5: Principles of Navigation 4 (July 25, 2013), https://www.ftc.gov/sites/default/files/documents/public_statements/section-5-principles-navigation/130725section5speech.pdf.

³⁵ *See, e.g.*, FTC Press Release, FTC Charges Broadcom with Illegal Monopolization and Orders the Semiconductor Supplier to Cease its Anticompetitive Conduct (July 2, 2021), <https://www.ftc.gov/news-events/press-releases/2021/07/ftc-charges-broadcom-illegal-monopolization-orders-semiconductor>; FTC Press Release, FTC and NY Attorney General Charge Vyera Pharmaceuticals, Martin Shkreli, and Other Defendants with Anticompetitive Scheme to Protect a List-Price Increase of More Than 4,000 Percent for Life Saving Drug Daraprim (Jan. 27, 2020), <https://www.ftc.gov/news-events/press-releases/2020/01/ftc-ny-attorney-general-charge-vyera-pharmaceuticals-martin>; FTC Press Release, FTC Challenges Illumina’s Proposed Acquisition of PacBio (Dec. 17, 2019), <https://www.ftc.gov/news-events/press-releases/2019/12/ftc-challenges-illumina-proposed-acquisition-pacbio>; FTC Press Release, Reckitt Benckiser Group plc to Pay \$50 Million to Consumers, Settling FTC Charges that the Company Illegally Maintained a Monopoly over the Opioid Addiction Treatment Suboxone (July 11, 2019), <https://www.ftc.gov/news-events/press-releases/2019/07/reckitt-benckiser-group-plc-pay-50-million-consumers-settling-ftc>; FTC Press Release, FTC Charges Surescripts with Illegal Monopolization of E-Prescription Markets (Apr. 24, 2019), <https://www.ftc.gov/news-events/press-releases/2019/04/ftc-charges-surescripts-illegal-monopolization-e-prescription>.

litigate a standalone Section 5 case.³⁶ As Bill Kovacic and Marc Winerman explain, a successful use of Section 5 “ha[s] not been for lack of trying. In the 1970s the Commission premised several cases on distinctive Section 5 theories. Three of these matters – *Boise Cascade*,³⁷ *Official Airline Guides*,³⁸ and *Ethyl*³⁹ – resulted in court of appeals decisions. All were adverse to the agency.”⁴⁰ The FTC also brought the *Abbott Laboratories* case in the 1990s, but again lost, this time before the district court.⁴¹ When discussing the Commission’s track record, Kovacic and Winerman observe, “[i]n each instance, the tribunal recognized that Section 5 allows the FTC to challenge behavior beyond the reach of the other antitrust laws. In each instance, the court found that the Commission had failed to make a compelling case for condemning the conduct in question.”⁴² The 2021 UMC Statement laments that the FTC has used Section 5 only once since the Bipartisan 2015 UMC Statement was issued.⁴³ Tellingly, the majority fail to note that in the one case involving a standalone Section 5 claim issued following the Bipartisan 2015 UMC Statement, *Qualcomm Inc. v. FTC*, the Commission lost on appeal.⁴⁴

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Today, we lament the majority’s rejection of longstanding antitrust foundations that have provided the basis for administrable, predictable, and credible enforcement, including the rule of reason and the consumer welfare standard. Going forward, we fear a rash of cases and rulemakings untethered from sound law and economics and hostile to procompetitive conduct. Consumers will lose the benefits of competition, and honest businesses will lose clarity regarding the boundaries of lawful conduct. The only winners of the Commission’s rescission of the Bipartisan 2015 UMC Statement are inefficient rivals and those who seek to politicize antitrust.

³⁶ We acknowledge the successful use of Section 5 in the 1960s. *See* *FTC v. Texaco, Inc.*, 393 U.S. 223 (1968); *Atl. Refining Co. v. FTC*, 381 U.S. 357 (1965); and *FTC v. Brown Shoe Co.*, 384 U.S. 316 (1966).

³⁷ *Boise Cascade Corp. v. FTC*, 637 F.2d 573 (9th Cir. 1980).

³⁸ *Off. Airline Guides, Inc. v. FTC*, 630 F.2d 920 (2d Cir. 1980).

³⁹ *E.I. du Pont de Nemours & Co. v. FTC*, 729 F.2d 128 (2d Cir. 1984).

⁴⁰ Kovacic & Winerman, *supra* note 32, at 1014.

⁴¹ *See* *FTC v. Abbott Labs.*, 853 F. Supp. 526 (D.D.C. 1994).

⁴² Kovacic & Winerman, *supra* note 32 at 942.

⁴³ 2021 UMC Statement at 5.

⁴⁴ *FTC v. Qualcomm Inc.*, 969 F.3d 974 (9th Cir. 2020).