PREPARED STATEMENT

For the

SENATE COMMITTEE ON THE JUDICIARY

SUBCOMITTEE ON ANTITRUST, COMPETITION POLICY, AND CONSUMER RIGHTS

on
SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT

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Chairman Lee, Ranking Member Klobuchar, and distinguished members of the Subcommittee, thank you for the opportunity to testify this afternoon. I have spent the bulk of my career practicing and studying antitrust law, and I share your view that today's topic regarding Section 5 of the Federal Trade Commission Act is very important. I will be testifying this afternoon on my own behalf. I am not here on behalf of any entity or organization. The views I express are my own.

As I explain in greater detail below, I believe that as a general matter the FTC should not use Section 5 of the FTC Act to prohibit conduct that is permitted by the Sherman Act and the Clayton Act. Use of Section 5 by the FTC in that way would create unavoidable ambiguity about the requirements of the antitrust laws and would thus undermine the important deterrence function of those laws. It would also detract from the FTC's vital role in promoting the sound development of the Sherman Act and the Clayton Act in response to new economic learning and marketplace changes. The purported benefits of a broad use of Section 5 are not sufficient to overcome these and other problems.

I. Background

Let me begin with a brief summary of my background. I am currently Professor of the Practice of Law at Stanford Law School. I joined the Stanford faculty as the Herman Phleger Visiting Professor in 2014 after having practiced law for 43 years. I was appointed Professor of the Practice of Law in 2015.

From 2009 until 2014, I was Senior Vice President and General Counsel of Intel Corporation, where I was responsible for Intel's legal, government affairs and corporate affairs departments. During that period, Intel was involved in substantial litigation before the Federal Trade Commission under Section 5 of the Federal Trade Commission Act. The litigation was settled in 2010.

From 2001 until 2009, I was a partner in the Washington, DC office of WilmerHale LLC, an international law firm. My practice focused on antitrust and competition issues, particularly in the

technology sector; and I was involved in many of the leading antitrust and Section 5 cases during that period. I was chair of the firm's Antitrust and Competition Practice Group during much of that period.

From 1996 until 2001, I was the Principal Deputy Assistant Attorney General for Antitrust and then the Acting Assistant Attorney General in charge of the Antitrust Division at the U.S. Department of Justice. I was centrally involved during that time in most of the Antitrust Division's important civil matters, including its antitrust case against Microsoft, and in the drafting of enforcement guidelines issued jointly by the Department of Justice and the Federal Trade Commission.

Before my time at the Department of Justice, I practiced law at the predecessor to the WilmerHale firm from 1971 until 1996. Much of that work involved counseling and litigation on antitrust matters and representation of clients before the antitrust enforcement agencies.

I have written numerous articles on antitrust and related topics. I have for many years been a Contributing Editor of the Antitrust Law Journal, which is published by the ABA.

II. The Context In Which Section 5 Should Be Considered

As the summary of my background no doubt makes clear, I am deeply committed to the antitrust laws and believe that they contribute importantly to our economic well-being. Like all human endeavors, they are imperfect. But I believe they are very valuable and that they warrant the attention this Subcommittee has chosen to give them.

The premise of the antitrust laws is that economic welfare and economic liberty are best served by robust market competition – not by government regulation. The purpose of the antitrust laws is to prohibit and deter anticompetitive conduct. Although the cases have used various formulations to define that conduct, I think they can in substance be summarized along these lines: Anticompetitive conduct is conduct that is not efficient, does not benefit consumers, and injures or threatens to injure the competitive process (i) by facilitating collaboration among firms that should

instead be competing or (ii) by excluding from the market or weakening rivals that would otherwise provide a material competitive constraint on the remaining firms in the market.

Businesses make millions of decisions every day. There is no way that any one or two or several government agencies could oversee even a small fraction of those decisions. Instead, the important task of protecting market competition depends centrally on the effectiveness of the antitrust laws in deterring anticompetitive conduct. It depends on the ability of the law to create optimal incentives for self-policing by business entities.

The law could of course, to state an absurd hypothetical, deter anticompetitive conduct by outlawing all forms of commercial conduct and providing severe criminal sanctions for those that engage in such conduct. But that would not serve the interests of the antitrust laws – not to mention the interests in liberty and the other values we cherish – because it would deter far more than anticompetitive conduct. The antitrust laws are intended to enable vigorous competition, not to deter it. In order to serve their purposes, therefore, the antitrust laws must deter anticompetitive conduct without deterring other forms of marketplace conduct and competition.

Antitrust law can serve this deterrence function to the extent that it sends unambiguous signals to the businesses that make those millions of decision each day – signals that enable those businesses to know, sometimes with the help of their lawyers, what conduct is prohibited and what conduct is permitted. If the signals are ambiguous, competition, and thus the objectives of the antitrust laws, will be undermined because businesses will either unwittingly violate the antitrust laws or will not compete vigorously and will refrain from desirable, procompetitive conduct for fear of violating the antitrust laws.

The deterrence function of the antitrust laws provides an important foundation for my comments below regarding Section 5 of the Federal Trade Commission Act. In those comments, I focus entirely on the "unfair methods of competition" prong of Section 5, for which I will hereafter use the shorthand "Section 5." I do not address the separate consumer protection prong of the statute.

III. As a General Rule, Section 5 Should Be Used Only To Enable the Federal Trade Commission To Enforce the Sherman Act and the Clayton Act

There is to my knowledge no dispute that Section 5 authorizes the Federal Trade Commission (the "FTC") to enforce the Sherman Act and the Clayton Act.[1] The unsettled question is the extent, if any, to which Section 5 might properly be thought to provide a basis for separate antitrust-type claims independent of the Sherman Act and the Clayton Act. Such claims are sometimes referred to as "standalone" Section 5 claims.

In my view, it would be unwise for the FTC to use Section 5 as a basis for such separate claims, except perhaps as I explain below in a very small number of carefully articulated and circumscribed contexts. This view is based on 4 related considerations. I described those considerations in some detail in Comments I submitted to the FTC on this subject in 2008 and in a subsequent journal article that largely repeated those Comments.[2] The following is a shorter summary of my views.

a. Unless Tied To The Sherman Act and the Clayton Act, Section 5 Will Inevitably Be Too Ambiguous

The key statutory term, "unfair methods of competition," is on its face almost meaningless, and the few litigated Section 5 cases have done little to clarify its meaning. It would have meaning if the term were construed to prohibit only conduct that violates the antitrust laws. Beyond that, it is hopelessly vague.

To be sure, the statutory language of the Sherman Act and the Clayton Act is also on its face ambiguous. But the critical difference is that those statutes have been construed in a common law-like process by literally thousands of cases over more than 100 years. While there remain, and will always remain, unsettled issues as these broad statutes are applied to a constantly changing array of

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[1] See *FTC v. Indiana Federation of Dentists,* 476 U.S. 447, 454 (1986) (Section 5 "encompass[es]... practices that violate the Sherman Act and the other antitrust laws").

[2] A. Douglas Melamed, Comments Submitted to the Federal Trade Commission, Workshop Concerning Section 5 of the Federal Trade Commission Act (October 14, 2008).

commercial practices, the meaning of the Sherman Act and the Clayton has been settled and is clear over the vast majority of matters that might be thought to affect marketplace competition. There has not been and can never be a comparable body of case law under Section 5, which at most could be the subject of one or a few cases each year, most of which will be settled by consent decree without resolution of the underlying legal issues.

If standalone cases under Section 5, with all its inherent ambiguity, remain a tool in the FTC's enforcement arsenal, the business community will receive ambiguous and unclear signals about what conduct is permitted and what conduct is prohibited. The result will be to undermine the deterrence function of the antitrust laws and thus the ability of those laws to serve their purpose.

I have heard two responses to this concern. Neither in my view is persuasive.

(1) First, some believe that the FTC can solve the ambiguity problem by describing its enforcement intentions with sufficient clarity. While I applaud the FTC's recent effort to do that, I do not believe that the FTC did or can succeed in that endeavor.

In the first place, articulation of enforcement principles by the FTC does not change the underlying law. The FTC, whose personnel of course regularly change, would be free to change its views in the future. While one might imagine a set of enforcement principles that is binding on the FTC, at least with respect to conduct that took place before the principles were officially revoked or replaced, the current Statement of Enforcement Principles does not say that that is its intent; and I think it is unclear whether a statement of such an intent would be effective in making the Principles binding on a future FTC.

The FTC might promulgate formal regulations under the APA that would be binding until repealed, but I would not support any effort to so codify antitrust-type rules. The antitrust laws have gotten much of their strength from their ability to evolve in response to new learning and new commercial practices. To my knowledge, no one suggests such a codification.

Second, it is very unlikely that the FTC could articulate enforcement principles that would both meet the objectives of those who favor a broader reading of Section 5 and avoid the ambiguity problem. One can imagine a narrowly focused statement of principles that would avoid serious ambiguity. For example, as I discuss below, the FTC might state that it intends to use Section 5 with respect to a carefully defined set of practices that are generally known as "invitations to collude." But proponents of using Section 5 beyond the Sherman and Clayton Acts intend something broader and more flexible than the enumeration of one or a handful of precisely defined offenses. I do not see how the FTC can use broader and more flexible terms in a statement of principles without embracing undesirable ambiguity, unless the principles simply incorporate antitrust terms of art and their definitions. To the extent that they incorporate those terms and definitions, they of course are duplicating the Sherman Act and the Clayton Act, not going beyond them.

The Statement of Enforcement Principles issued by the FTC illustrates the problem. Let me say at the outset, that I greatly respect the effort that went into the drafting of that Statement. My concerns about the Statement should not be understood to suggest any doubts about the good faith or thoughtfulness of any of the Commissioners or anyone at the FTC. To the contrary, this is simply a matter about which I think reasonable people can disagree.

The Statement sets forth 3 principles. Although they repeatedly reference the antitrust laws, none of the principles precisely embraces well-defined antitrust principles. For example, even if one assumed that the phrase "promotion of consumer welfare" were unambiguous, which I think it plainly is not, the first principle states only that the FTC will be "guided by" that policy objective. Does "guided by" mean that the FTC is required to prove that every Section 5 case will promote consumer welfare?

The third principle says that the Commission is "less likely" to challenge conduct under Section 5 if enforcement of the Sherman or Clayton Act "is sufficient to address the" harm. Leaving aside the ambiguity of the "less likely" language, does this mean that the FTC will not bring a

standalone Section 5 case if the Sherman or Clayton Act can reasonably be construed to prohibit the conduct at issue? Or does it mean only that the FTC will not bring such a case if it is confident under settled precedent that the conduct will be found to violate the Sherman Act or the Clayton Act? In other words, does this statement mean that the FTC can bring standalone Section 5 cases challenging conduct that is plainly subject to the Sherman Act or the Clayton Acts whenever the FTC disagrees with the pertinent judicial decisions construing those statutes? This ambiguity not only undermines the deterrence effect of the antitrust laws, but also has other problematic institutional implications that I discuss below.

The second of the principles is perhaps the most important with respect to the ambiguity issue. This principle is patently ambiguous when it says that conduct will be evaluated by a framework "similar to the rule of reason." More important, its reference to "harm to competition" is ambiguous in less obvious but very important ways.

This ambiguity can best be explained by summarizing a case in which I was involved for a short time in 2008. My client was a small entity known as N-Data. N-Data had acquired from another party patents that were essential to a public standard. The initial patent holder had committed to the standard-setting body that it would license the patents with no royalty. N-Data subsequently informed the standard-setting body that it would license, instead, on so called FRAND ("fair, reasonable and non-discriminatory") terms. While those terms were intended to be reasonable, the change did appear adverse to the interests of would-be licensees.

The FTC investigated whether the conduct violated the Sherman Act. I was retained near the end of the investigation. The FTC Commissioners were ultimately persuaded that the conduct did not violate the Sherman Act because the conduct alleged did not injure competition. It did not injure competition because it did not affect the competitive process in or the structure of any market. Even on the FTC's theory, the conduct was in substance analogous to an ordinary story of contractual opportunism in which a party to a contract reneges on the deal and tries to hold up the other party.

While there might well be various legal remedies for conduct that can accurately be described in that way, the Sherman Act is not one of them. The FTC Commissioners agreed.

The FTC subsequently decided, however, to bring a standalone case under Section 5. Two of the five Commissioners dissented from that decision. N-Data had long previously told the FTC it would not litigate the matter and thus promptly settled. The FTC's Analysis of the Proposed Consent Order acknowledged case law requiring that conduct can violate Section 5 only if it has an "adverse effect" on "competition." "That requirement," the FTC said, "is satisfied here."[3] The critical point for present purposes is that the FTC made no effort to explain how the conduct could injure competition for Section 5 purposes if it did not injure competition for Sherman Act purposes. Plainly, the FTC majority must have had in mind some notion of harm to competition that is not sufficient under the Sherman Act or the Clayton Act. The reference in the Statement of Principles to "harm to competition" therefore gives small comfort to those looking for unambiguous legal standards.

Again, one can imagine a statement of principles that solves the ambiguity problem by incorporating antitrust meanings. Then-Commissioner Wright proposed such a solution with respect to the harm-to-competition requirement in a Proposed Policy Statement that he issued in 2013.[4] That proposal would have specified that Section 5 can be violated only by conduct that causes or is likely to cause "significant harm to competition *as that term is understood under the traditional federal antitrust laws*" (emphasis added). If all of the elements of a Section 5 offense were so circumscribed, Section 5 would not create an ambiguity problem, but it would also then not extend beyond the reach of the antitrust laws.

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[3] Analysis of Proposed Consent Order To Aid Public Comment at 5, In the Matter of Negotiated Data Solutions LLC (January 23, 2008).

[4] Joshua D. Wright, Proposed Policy Statement Regarding Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (June 19, 2013).

(2) Some have emphasized that only the FTC can enforce Section 5 and that the only remedy for Section 5 is a "cease and desist" order issued by the FTC. Because there are no treble damages for Section 5 violations, it is suggested, there should be no fear that businesses will be unfairly punished for engaging in conduct that they did not understand to be unlawful or that businesses will be deterred from engaging in procompetitive conduct for fear of violating an ambiguous Section 5. Of course, if that were true, the prospect of standalone Section 5 enforcement would also not deter anticompetitive conduct.

There are two problems with this argument. First, the premise that remedies for violating Section 5 are inconsequential is incorrect. The FTC has for decades taken the position that its authority to issue "cease and desist" orders permits it to enter broad injunction orders that require parties to take a wide range of actions to rectify alleged harm and to ensure that they will not engage in the future in what the FTC regards as conduct similar to that alleged to have violated Section 5. Businesses sometimes find the prospect of such intrusive or sweeping restrictions on how they conduct their business to be far more worrisome than the prospect of treble damage liability.

Second, if it were true that the prospect of standalone Section 5 enforcement has no meaningful deterrence effect, the availability of such enforcement would be of little value. The FTC has brought only a few standalone Section 5 cases over the years. If those cases had no effect on the market beyond their direct effect on the parties, they would contribute little if anything to the promotion and protection of competition.

Disconnecting Section 5 from the deterrence function raises a more subtle and fundamental concern as well. As I explained above, I believe that antitrust law can best serve its purposes if it is part of a law enforcement regime based on reliable enforcement of sound, unambiguous principles that will create incentives for business entities to engage in robust competition. As the Antitrust Modernization Commission put it, "[r]ather than create a regulatory scheme, antitrust laws establish a

law enforcement framework that prohibits private . . . restraints that frustrate the operation of free-market competition."[5]

By contrast, to the extent that Section 5 is focused on forward-looking remedies intended to constrain the behavior of the directly affected parties but not to deter anticompetitive conduct by others, it becomes a kind of government regulation of business conduct. The FTC appeared to acknowledge the regulatory nature inherent in an expansive view of Section 5 when it said recently in a different context that certain remedies for violations of the Sherman Act or the Clayton Act are not available in "standalone Section 5 matters" because those matters couple broader substantive authority with "more limited, and typically forward-looking, remedies."[6] Because antitrust is about protecting decentralized marketplace competition, it should be based on law enforcement and should resist temptation to slip into a kind of forward-looking government regulation.[7]

b. Standalone Section 5 Authority Could Impair the Development of the Sherman Act and the Clayton Act

The Sherman Act was enacted in 1890. The Clayton Act was enacted in 1914. The Supreme Court has called them "the "Magna Carta of free enterprise."[8] These laws have stood the test of time and commanded that kind of broad respect in large part because they have evolved in response to new learning and new economic developments. The antitrust enforcement agencies have been essential participants in that evolution. The cases they have brought, the amicus briefs they have filed, and the enforcement guidelines they have issued have helped shape the law by bringing to the courts the agencies' expertise about competition matters, informed by academic learning and enforcement experience.

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5 Report and Recommendation of the Antitrust Modernization Commission 3 (2007).

6 Statement of the Commission, Withdrawal of the Commission's Policy Statement on Monetary Equitable Remedies in Competition Cases at 2 n.6 (July 31, 2012).

7 Resisting that temptation will also have the benefit of making it easier for the United States government to persuade foreign governments not to use their competition laws as vehicles for industrial policy or other forms of government regulation.

8 United States v. Topco Assocs., 405 U.S. 596, 610 (1972).

Broad standalone Section 5 authority threatens to diminish the FTC's contribution to the development of the antitrust laws. If the FTC has such authority, it will be sorely tempted from time to time to bring hard, uncertain, cutting edge cases in administrative proceedings rather than in federal court and under Section 5 rather than under the antitrust laws. The third principle in the FTC's recently-issued Statement of Enforcement Principles suggests as much. It says that the FTC is less likely to proceed under Section 5 if the Sherman or Clayton Act is "sufficient" to address the problem it perceives. If that principle means that Section 5 will not be used whenever the antitrust laws could be brought to challenge the conduct at issue, the problem addressed in this subpart will not arise. But I suspect the Statement does not mean that and that it means, instead, that the FTC might bring under Section 5 cases that could be brought under the other statutes but that the FTC fears it would lose under those statutes, perhaps because the theory is novel or the facts hard to prove or the judicial precedents contrary to the FTC's view of what the law should be. Every time the FTC brings a case under such circumstances, it passes up an opportunity to help the antitrust laws evolve in a direction it thinks wise and to that extent hinders the development of those laws.

The FTC's important 2013 Supreme Court victory in the *Actavis* case regarding so-called reverse payments in the pharmaceutical industry illustrates the point.[9] The FTC brought that case under the Sherman Act, after several prior, unsuccessful efforts to persuade the courts to recognize the competitive harm caused by some reverse payment arrangements. That victory has changed the legal landscape in the hugely important health care industry and embodied an important evolution of Sherman Act doctrine. The new legal principles, which are yet to be fully elaborated in the lower courts, have provided a basis for ongoing public and private enforcement of the Sherman Act in this important area and have enhanced the deterrence benefits of the antitrust laws. Almost none of that would have been achieved if the FTC had succumbed to what I imagine would have been a powerful

[9] FTC v Actavis, Inc., 570 U.S, 756 (2013).

incentive to bring a standalone Section 5 case instead of doing the much harder work of attacking reverse payments under the Sherman Act.

c. The FTC Should Not Apply Competition Law Standards Different From Those Applied By The Justice Department

The antitrust laws are enforced by both the Justice Department and the FTC. The substantive standards they are required to apply are the same.[10] While there are differences from time to time in the choices the agencies make in the exercise of their discretion, neither agency can successfully challenge under the antitrust laws conduct that is found to comply with the substantive requirements of the antitrust laws enforced by the other.

The agencies avoid costly duplication of enforcement efforts by allocating different matters to the different agencies. As a general matter, the allocation is based on the industry that is most importantly affected by the matter. Thus, for example, the FTC handles pharmaceutical matters, and the Justice Department handles communications matters. Although different industries are handled by different agencies, all are subject to the same substantive legal standards.

That could change if Section 5 were construed to go beyond the Sherman and Clayton Acts. In that event, conduct that might be treated as lawful by the Justice Department can be regarded as unlawful by the FTC; and industries subject to FTC oversight would rightly believe that they are subject to different laws and are not being treated equally compared to other industries. Sometimes, of course, Congress decides that different industries should be subject to different rules, but Congress made no such determination here. Whatever one thinks Congress might have intended by Section 5, a matter that I address below, there is no suggestion that it intended through Section 5 for different industries to be subject to different substantive competition law standards.

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[10] Only the Justice Department brings criminal proceedings for antitrust violations, but only a narrow, defined set of antitrust violations are subject to criminal prosecution. There is virtually no ambiguity as to when a matter should be referred to the Justice Department for possible criminal prosecution.

The standards for issuance of a preliminary injunction in merger cases differ somewhat, but the ultimate standards for determining the lawfulness of mergers are the same.

It might be argued that this is not a real problem because, if the Justice Department decides that certain conduct should not be challenged under the Sherman Act or the Clayton Act, it could refer the matter to the FTC. In that way, the argument goes, all firms will ultimately be subject to the same standards.

There are two problems with this argument. First, I doubt that the Justice Department would regularly refer potential Section 5 matters to the FTC. For one thing, the Justice Department would not want to surrender jurisdiction over a firm or an industry. Experience shows that each of the agencies uses its prior work in an area as a rationale for expanding its jurisdiction over the area. Also, because it is not charged with enforcing Section 5 and would not be in the loop on internal FTC thinking about possible new ways to enforce Section 5, the Justice Department would be much less likely than the FTC to identify matters that, while not suitable for Sherman or Clayton Act enforcement, are nevertheless good candidates for Section 5 enforcement. The Justice Department is especially unlikely to refer matters to the FTC if it believes that they can properly be challenged under the antitrust laws or that the antitrust laws wisely do not prohibit the conduct in question.

Second, referrals of potential Section 5 matters to the FTC would not solve the matter. The Justice Department would not refer a matter to the FTC until it had determined that antitrust enforcement was inappropriate. Thus, referrals would mean that companies would be subject to sequential and largely duplicative investigations at the two enforcement agencies. The referral solution would thus replace the unfairness and arbitrariness of having businesses subject to FTC oversight governed by different substantive rules with the unfairness and arbitrariness of having businesses subject to Justice Department oversight required to endure sequential, duplicative and burdensome investigations that businesses in other industries are not required to endure. And such duplicative reviews would of course increase aggregate legal compliance and legal process costs.

d. The Process for Adjudicating Section 5 Cases Is Problematic

Most alleged violations of the antitrust laws are litigated in Article III courts, in proceedings that begin at the District Court level. The Justice Department and private plaintiffs bring antitrust cases only in federal court. The FTC is also authorized, although not required, to bring antitrust cases in federal court and did so in, for example, the *Actavis* case.

By contrast, standalone Section 5 disputes must be litigated in administrative proceedings at the FTC. The administrative proceedings are commenced when the FTC Commissioners issue an administrative complaint. The complaint is followed by a hearing before an administrative law judge, who writes a recommended decision. That decision is then reviewed de novo by the FTC Commissioners, who write the final FTC decision. Judicial review is available in a Court of Appeals after the final FTC decision, but judicial review of the facts found by the FTC Commissioners is confined to the narrow "substantial evidence" test. For all practical purposes, except in extreme cases, the FTC Commissioners have the final say about the facts.

Administrative adjudication of antitrust issues is a flawed process. It is inferior to federal court litigation for the task of generating competition law decisions that are sufficiently reliable and well-founded that they can be counted upon to send appropriate signals to economic actors about the requirements of the law.

The problem, in a nutshell, is that in administrative litigation before the FTC, the Commissioners both act as prosecutors in deciding whether to issue a complaint and sit as judges in deciding whether the allegations in that same complaint are well-founded. The Commissioners are judges in their own cause; and despite their integrity and good faith, there are unavoidable problems in their dual role.

The FTC Commissioners quite appropriately have a stake in their policy objectives and in the objectives of the FTC as a whole, and they appropriately issue complaints alleging illegal conduct only when they believe that those complaints are well-founded. They are, however, also subject to

the ubiquitous and well-documented human phenomenon that has come to be known as "confirmation bias" – the tendency to construe subsequent events or information (such as the record in an adjudicative hearing) as confirming their prior beliefs (such as those on which a decision to issue a complaint was based or those that support more generally the FTC's enforcement agenda). Therefore, because the FTC Commissioners are the fact-finders in administrative proceedings, the facts in those proceedings are not found by a truly independent tribunal.

Under these circumstances, one would expect that the FTC Commissioners would decide a disproportionate number of cases in favor of the allegations in the complaint and against the defendant (or "respondent," as a defendant is called in FTC administrative proceedings), especially in those cases involving non-merger competition issues, which the FTC brings entirely as a matter of discretion. The data show precisely that. A study summarized in my 2008 Comments found that the Commissioners decided, in favor of the complaint and against the defendant, in *every* such case that was litigated on the basis of disputed facts since 1984.[11] And the Commissioners sometimes did that in spite of contrary rulings by the administrative law judges, who were not involved in the decision to issue the complaint; the administrative law judges ruled in favor of the defendants in one-fourth of those cases.[12] A more recent study, using slightly different data, found that "since 1995, the FTC has found a violation in every case in which it has voted on a complaint."[13]

Some have responded that these data might reflect, not confirmation bias in administrative adjudication, but rather high quality decisions by an expert agency about when to issue a complaint. But flawless case selection cannot reasonably be thought to be the explanation. Decisions whether to issue a complaint are made after a largely ex parte process. Putative defendants have no opportunity

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[11] The study refers to all such cases since 1982. It turns out, however, that the FTC ruled in favor of the defendant in one case in 1984. The FTC has not ruled entirely in favor of the defendant in any such case in the more than 31 years since then.

[12] The study also found that the FTC ruled against the defendant in all litigated consumer protection cases, in nearly 80 percent of all litigated of any type, and in 95 percent of all litigated Sherman Act and consumer protection cases decided between 1983 and 2007, the last year for which data were available.

[13] David A. Balto, "Can the FTC Be a Fair Umpire," The Hill (August 14, 2013).

for discovery of inculpatory third party evidence on which the FTC might rely or exculpatory third party evidence of which the FTC might be unaware. Nor do they have an opportunity to cross-examine witnesses against them, many of whom are motivated by commercial self-interest and hindered by incomplete knowledge of pertinent facts. There is no reason to think that the pre-complaint process at the FTC is likely to result in flawless decisions regarding the issuing of complaints under Section 5.

There are other reasons to conclude that the litigation statistics summarized above cannot be entirely explained by the expertise of FTC Commissioners. First, a decades-long undefeated streak would suggest a level of perfection that defies human nature. Second, if FTC case selection were understood to be flawless, defendants would settle rather than litigate; yet many choose to litigate. Third, the FTC, and its sister agency at the Department of Justice, have much less success when they litigate cases in federal court and facts are found by an independent tribunal.

In fact, studies show that federal Courts of Appeals overturn FTC decisions far more frequently than decisions of District Courts, even though their review is largely confined to matters of law. A study co-authored by Commissioner Wright, when he was a law professor and before he became a Commissioner, found that FTC decisions are reversed more frequently than are District Court antitrust decisions and that FTC decisions are more likely to be appealed than District Court decisions, presumably because litigants have greater confidence that the appellate court will find reversible error in FTC decisions.[14] Another study found that the FTC was reversed by the Court of Appeals in 20 percent of its cases, compared to only 5 percent for District Court judges.[15]

One would expect the FTC and its Commissioners to get it right most of the time because they are deeply knowledgeable. But they are not flawless, and the lopsided litigation results at the Commission level (by contrast to the results of decisions by administrative law judges, District Court

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[14] Joshua D. Wright & Angela M. Diveley, "Do Expert Agencies Outperform Generalist Judges? Some Preliminary Evidence from the Federal Trade Commission" (2013).

[15] David A. Balto, supra note 6.

judges, and federal Court of Appeals judges in cases brought by the FTC or the Justice Department) cannot be explained by FTC expertise. The problem is that, in administrative litigation, the FTC Commissioners function as both prosecutors and judges.

IV. The Benefits of Construing Section 5 Broadly Do Not Outweigh the Costs

I am aware of three arguments in favor of construing Section 5 more broadly than the antitrust laws. In my view, they do not justify an expansive view of Section 5.

(1) It is widely understood that Congress did not intend by Section 5 to confine the FTC's cease and desist authority to conduct that violates the Sherman Act or the Clayton Act. Indeed, the Supreme Court stated in dicta in 1972 that Section 5 authorized the FTC to "proscribe an unfair competitive practice, even though the practice does not infringe either the letter or the spirit of the antitrust laws."[16]

Read most broadly, however, this notion means only that the FTC has the authority to construe Section 5 to reach matters beyond the reach of the antitrust laws, not that it must do so. It does not answer the key question as to how the FTC ought to exercise whatever authority it is deemed to have.

Moreover, the notion that Section 5 was intended to authorize the FTC to proscribe conduct not forbidden by the antitrust laws as they were construed in 1914 sheds little light on whether it gives the FTC authority to go beyond the antitrust laws as they are now construed, 100 years later. To answer that question, and indeed to answer the more fundamental question of what Congress intended to be the limits of the authority granted by Section 5, one would have to look more carefully at Section 5 and its legislative history.

I have not personally studied the legislative history of Section 5, but I am aware of one recent study that I think is directly relevant to this matter. Bill Kolasky, a prominent, long-time Washington, DC antitrust lawyer and former Deputy Assistant Attorney General in the Antitrust

[16] FTC v. Sperry & Hutchison, 405 U.S.233 (1972).

Division of the Justice Department, wrote a detailed study of the legislative history of Section 5 in 2014.[17] He found that, while Section 5 was intended to authorize the FTC to prohibit anticompetitive practices in their incipiency, before they became full-blown Sherman Act violations, Congress intended to limit that authority by three governing principles: Section 5 gives the FTC authority to outlaw exclusionary practices, but not exploitative practices; Section 5 is intended to protect competition, not individual competitors; and Section 5 proscribes only practices that exclude equally efficient competitors. Few, if any, of the standalone Section 5 cases brought by the FTC in recent years are consistent with these principles.

(2) Section 5, it might be argued, should be construed to fill gaps in the antitrust laws – that is, to proscribe anticompetitive conduct that the antitrust statutes literally do not reach. It is, however, hard to think of truly anticompetitive conduct that is both likely to injure competition in interstate commerce and literally beyond the reach of the antitrust laws. Congress has in some instances created antitrust exemptions, but the general language of Section 5 cannot properly be read to circumvent those Congressional determinations. Indeed, any application of Section 5 to conduct that is beyond the reach of the Sherman Act and the Clayton Act would raise the issue whether Congress intended that the antitrust laws not be applied to the conduct at issue.

There is one kind of conduct that is beyond the reach of the Sherman and Clayton Acts and that might fit the bill: so-called "invitations to collude." These are cases in which one party invites a competitor to enter into a price fixing arrangement or some other agreement that would be a per se violation of the Sherman Act and the other party rejects the invitation. The unsuccessful invitation is beyond the reach of Section 1 of the Sherman Act because no agreement was entered into. The invitation could be regarded as an unlawful attempt to monopolize under Section 2 of the Sherman Act if the parties would together, if they agreed, have monopoly power. But if the parties would not

[17] William Kolasky, "'Unfair Methods of Competition': The Legislative Intent Underlying Section 5 of the FTC Act," Washington Legal Foundation, Critical Legal Issues Working Paper Series, No. 189 (December 2014).

be significant enough to have monopoly power even if they acted in concert, the unsuccessful invitation would not violate Section 2.

The FTC has brought a handful of standalone Section 5 cases in such situations. These cases cannot be reconciled with the principles identified in the Kolasky study and might therefore be beyond the authority of the FTC. Purely as a policy matter, however, I think the prospect of the FTC using Section 5 in cases of invitations to collude is itself unlikely to create the kinds of problems that I have discussed above. The legal principles regarding invitations to collude can be precisely defined and circumscribed, and the conduct would appear to have no redeeming value. There might be one or a few other, similar matters of which I am unaware where the principles can be precisely stated and circumscribed, where the conduct is unambiguously undesirable, and where enforcement of Section 5 would not create worrisome ambiguity about the reach of the law. But I think construing Section 5 to permit FTC enforcement over a broader, less precisely defined universe of conduct would be very problematic.

(3) Ultimately, the case for an expansive reading of Section 5 seems to comes down to whether the statute should be used to proscribe conduct that is within the reach of the Sherman Act or the Clayton Act but that the FTC fears will not be found to violate those statutes because the legal theory is unprecedented or the courts have embraced contrary precedent or the facts are unclear. As explained above, however, I do not think the FTC should use Section 5 to circumvent what the FTC regards as bad precedent or to avoid difficult Sherman Act or Clayton Act litigation. The FTC should instead work within those laws and endeavor to improve them where it thinks there is a need to do so.

Some have argued, to the contrary, that antitrust doctrine is hampered by the courts' fear of abuse by private plaintiffs and that the FTC should use Section 5 because its scope need not be restricted by concerns about private plaintiff abuse. While there is some truth to the premise that fear of private plaintiff abuse has affected antitrust doctrine, the premise does not support the conclusion.

In the first place, the premise is overstated. While the courts have expressed concern about abuse by private litigants, they have more frequently and more recently expressed broader concerns about the burdens of discovery in antitrust cases and the consequences of ambiguous or difficult-to-apply antitrust standards. These concerns are applicable to both government and private antitrust cases. Moreover, the courts have used other, more precisely focused tools to deal with problems caused specifically by private antitrust litigation, such as tightened requirements for private party standing, class actions, and pleading.

The private plaintiff rationale cannot justify in general a broad reading of Section 5. If the private plaintiff rationale did justify special rules for government cases, it would do so only with respect to specific aspects of substantive antitrust doctrine that have been constrained because of, and would be different absent, concerns about private litigation. I am aware of no effort to identify such aspects of antitrust doctrine or to construe Section 5 specifically to address them.

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As I stated at the outset, I believe strongly in the need for sound, robust antitrust laws. I understand at a basic level the urge to have the FTC preserve a broad discretionary tool that might enable it to go after occasional episodes of bad conduct that it fears for one reason or another cannot be proscribed by the antitrust laws. But I believe that the larger responsibility of the FTC is to keep its eye on the prize – to focus on what legal regime will send the most useful and least ambiguous signals to guide the millions of business decisions that are made every day and on how the FTC can best further the development and evolution of that legal regime.