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**THE FEDERAL TRADE COMMISSION UNDER
CHAIR LINA KHAN: UNDUE BIDEN-HARRIS
WHITE HOUSE INFLUENCE AND SWEEPING
DESTRUCTION OF AGENCY NORMS**

**STAFF REPORT
HOUSE COMMITTEE ON OVERSIGHT AND ACCOUNTABILITY**

TABLE OF CONTENTS

Table of Contents	2
I. Executive Summary.....	3
II. Key Findings.....	6
III. The FTC’s Norm-Wrecking Maladministration of Its Merger Authorities and International Activities Under Chair Khan	7
A. Abuse of Domestic Merger Authorities under Chair Khan: Subverting Due Process and the Rule of Law to Suppress Merger Activity.....	7
1. Executive Order 14036, “Promoting Competition in the American Economy”	7
2. Eliminating Longstanding FTC Merger Policies	9
3. Increased Reliance on Administrative Litigation and Litigation Generally	11
4. Khan Putting a Tax on Mergers and Acquisitions	11
B. The FTC’s International Merger and Competition Activities: Trans-Atlantic Drift Toward Europe under Chair Khan.....	14
1. The EU’s Digital Markets Act	16
2. The FTC’s Role in Diminishing the Indo-Pacific Economic Framework (IPEF) in the Name of Creating New Digital Trade Barriers.....	22
3. The Illumina-GRAIL and Amazon-iRobot Cases	25
4. A Threat to an Independent, Nonpartisan Commission.....	33
IV. Rulemaking at the FTC under Chair Khan: Bulldozing Norms, Bursting Statutory Bounds, and Working without the Facts.....	35
A. The FTC’s Non-Compete Clause Rule—Transforming the Labor Economy	37
B. The FTC’s CARS Rule	37
C. Other Commission Rulemakings under Chair Khan	39
V. The Biden-Harris “Strike Force on Unfair and Illegal Pricing”: The FTC Shilling as a Campaign-Year Political Tool for the Biden-Harris White House.....	40
A. Biden-Harris Administration’s Policies Spurred Rampant Inflation	41
B. The Biden-Harris Administration Politicized the FTC through its “Strike Force”	43
VI. Commission Mismanagement and Staff Implosion at the FTC under Chair Khan	50
VII. Conclusion	54

I. EXECUTIVE SUMMARY

Congress established the Federal Trade Commission (FTC) in 1914 out of concern that antitrust laws previously established were not strong enough to ensure fair markets and fully protect consumers. The FTC is an independent, bipartisan federal commission designed by Congress to police unfair and deceptive trade practices and unfair methods of competition. The current FTC Chair, Lina Khan, has undermined the FTC’s mission through a relentless violation of legal, procedural, historical, and management norms.

The norm-breaking began shortly after the Senate confirmed Lina Khan as an FTC commissioner. The Biden-Harris White House broke precedent by immediately elevating her to chair of the Commission. The Biden-Harris White House then appointed Chair Khan—by executive order—to be a tip of the spear for the Biden-Harris Administration’s whole-of-government campaign to reset U.S. antitrust and competition policy. Specifically, Executive Order 14036 established a White House Competition Council and appointed Chair Khan to this council. Chair Khan accepted this appointment despite being the head of an independent, bipartisan federal commission. The norm-breaking has not subsided since, extending throughout the Commission’s merger-review, international, rulemaking, and management activities. Its singular purpose is to impose left-wing ideology over American markets and companies, disregarding American consumers and mirroring the European models that the Khan FTC strives to imitate. Under Chair Khan, the Commission even has enlisted foreign competition authorities to realize its enforcement goals against American companies.

On February 14, 2023, Commissioner Christine A. Wilson announced her resignation from the FTC in protest to Chair Khan’s abuse of the agency. In a prominent *Wall Street Journal* op-ed, Commissioner Wilson wrote that Chair Khan’s “disregard for the rule of law and due process make it impossible for me to continue serving.”¹ As she explained, “I have failed repeatedly to persuade Ms. Khan and her enablers to do the right thing, and I refuse to give their endeavor any further hint of legitimacy by remaining. Accordingly, I will soon resign as an FTC commissioner.”²

Following Commissioner Wilson’s stunning revelations, the Committee on Oversight and Accountability launched an investigation into Chair Khan’s administration of the FTC.³ The Committee has issued numerous oversight letters to the Commission, requesting relevant

¹ Christine Wilson, *Why I’m Resigning as an FTC Commissioner: Lina Khan’s Disregard for the Rule of Law and Due Process Make It Impossible for Me to Continue Serving*, *Wall Street Journal* (Feb. 14, 2023) [hereinafter “Why I’m Resigning”].

² *Id.*

³ Letter from Hon. James Comer, Chairman, H. Comm. on Oversight & Accountability, to Hon. Lina Khan, Chair, Hon. Rebecca K. Slaughter, Comm’r, and Hon. Alvaro Bedoya, Comm’r, Fed. Trade Comm’n (June 1, 2023).

documents and information.⁴ It has conducted numerous transcribed interviews with top Commission officials.⁵ And, it has surveyed the voluminous reporting of former Commission officials, expert commentators, and others who have assessed the course of the Commission's conduct under Chair Khan.

The Committee can find only one conclusion: Former Commissioner Wilson was right. Chair Khan has abused her authority at the agency, trampling on the due process rights of regulated parties, upending the rule of law, and violating ethics standards she is bound to uphold. The Committee has found that Chair Khan has consistently betrayed the obligation of the Commission to be an independent, bipartisan agency. Rather than fulfill her obligation to ensure the Commission adheres to its independent role, Chair Khan has subordinated the agency to the political will, direction and leftist ideology of the Biden-Harris Administration,⁶ its allies in

⁴ Letter from Hon. James Comer, Chairman, H. Comm. on Oversight & Accountability, to Hon. Lina M. Khan, Chair, Hon. Rebecca K. Slaughter, Comm'r, Hon. Alvaro Bedoya, Comm'r, Fed. Trade Comm'n (Jun. 1, 2023) (investigation into matters raised in Wilson resignation); Letter from Hon. James Comer, Chairman, H. Comm. on Oversight & Accountability, to Hon. Lina Khan, Chair, Fed. Trade Comm'n (Aug. 8, 2023) (FTC activity related to vision care market); Letter from Hon. James Comer, Chairman, H. Comm. on Oversight & Accountability, to Hon. Lina Khan, Chair, Hon. Rebecca K. Slaughter, Comm'r, Hon. Alvaro Bedoya, Comm'r, Fed. Trade Comm'n (Aug. 21, 2023) (FTC engagement with foreign authorities); Letter from Hon. James Comer, Chairman, H. Comm. on Oversight & Accountability, to Hon. Lina Khan, Chair, Fed. Trade Comm'n (Aug. 22, 2023) (FTC activities related to Indo-Pacific Economic Framework (IPEF)); Letter from Hon. James Comer, Chairman, H. Comm. on Oversight & Accountability, to Hon. Lina Khan, Fed. Trade Comm'n (Oct. 22, 2023) (FTC activities regarding Illumina-Grail Merger); Letter from Hon. James Comer, Chairman, H. Comm. on Oversight & Accountability, to Hon. Lina Khan, Fed. Trade Comm'n (Nov. 16, 2023) (matters regarding proposed Motor Vehicle Trade Regulation Rule (CARS Rule)); Letter from Hon. James Comer, Chairman, H. Comm. on Oversight & Accountability, to Hon. Lina Khan, Fed. Trade Comm'n (Nov. 20, 2023) (FTC failures to safeguard confidential corporate information and engagement in improper litigation practices); Letter from Hon. James Comer, Chairman, H. Comm. on Oversight & Accountability, to Hon. Lina Khan, Fed. Trade Comm'n (Feb. 12, 2024) (requests for transcribed interviews of FTC senior officials); Letter from Hon. James Comer, Chairman, H. Comm. on Oversight & Accountability, to Hon. Lina Khan, Fed. Trade Comm'n (Apr. 16, 2024) (FTC involvement in Biden-Harris "Strike Force on Unfair and Illegal Pricing"); Letter from Hon. James Comer, Chairman, H. Comm. on Oversight & Accountability, to Hon. Lina Khan, Fed. Trade Comm'n (May 1, 2024) (FTC activities regarding Amazon-iRobot Merger); *see also* Letter from Hon. Jim Jordan, Ranking Member, H. Comm. on the Judiciary, Hon. Cathy McMorris Rodgers, Ranking Member, H. Comm. on Energy and Commerce, Hon. James Comer, Ranking Member, H. Comm. on Oversight & Accountability, to Hon. Lina M. Khan, Chair, Hon. Noah J. Phillips, Comm'r, Hon. Rohit Chopra, Comm'r, Hon. Rebecca K. Slaughter, Comm'r, Hon. Christine Wilson, Comm'r, Fed. Trade Comm'n (July 29, 2021) (partisan changes in FTC policy, practice and procedure); Letter from Hon. James Comer, Ranking Member, H. Comm. on Oversight & Accountability, to Hon. Lina Khan, Fed. Trade Comm'n (Oct. 19, 2022) (investigation into FTC use of unpaid consultants and experts).

⁵ Transcribed Interview of Samuel Levine, Director, Bureau of Consumer Protection, Federal Trade Commission, H. Comm. on Oversight & Accountability (July 30, 2024) [hereinafter "Levine Interview"]; Transcribed Interview of Henry Liu, Director, Bureau of Competition, Federal Trade Commission, H. Comm. on Oversight & Accountability (June 25, 2024) [hereinafter "Liu Interview"]; Transcribed Interview of Aviv Nevo, Director, Bureau of Economics, Federal Trade Commission, H. Comm. on Oversight & Accountability (Apr. 29, 2024) [hereinafter "Nevo Interview"]; Transcribed Interview of Maria Coppola, Executive Director, Federal Trade Commission, H. Comm. on Oversight & Accountability (June 3, 2024) [hereinafter "Coppola Interview"]; Transcribed Interview of David Robbins, Director, Office of International Affairs, Federal Trade Commission, H. Comm. on Oversight & Accountability (May 13, 2024) [hereinafter "Robbins Interview"].

⁶ *See, e.g.*, Executive Order 14036, *Promoting Competition in the American Economy* at sec's 2-5, 86 Fed. Reg. 36987 (July 14, 2021).

Congress,⁷ and activist entities.⁸ Finally, the Committee has found that Chair Khan has resorted to means outside the FTC's legal mandate to realize her desired ends, including through collusion with foreign regulatory regimes.⁹

Chair Khan's appointment to the Commission recently expired on September 25, 2024, although she remains in place as chair.¹⁰ Those concerned about the welfare of American consumers, which the Commission is charged to protect, as well as the health of American markets and the restoration of the rule of law at the Commission, have reason for deep concern that Chair Khan could be renominated by the current or next president to continue in her service as commissioner and chair at the agency. Americans can have little hope that fidelity to the norms and standards to which the Commission should adhere will be achieved any time soon if she is.

⁷ See Letter from Hon. Elizabeth Warren, Senator, et al., to Hon. Lina Khan, Chair, Fed. Trade Comm'n, et al., (Sept. 27, 2023); Letter from Hon. Elizabeth Warren, Senator, et al., to Hon. Lina Khan, Chair, Fed. Trade Comm'n (Sept. 28, 2022).

⁸ See, e.g., *A More Perfect Union* at 33-34, Center for American Progress (Jan. 2021).

⁹ See, e.g., Letter from Hon. Lina Khan, Chair, Fed. Trade Comm'n & Hon. Jonathan Kanter, Assist. Attorney General, Dpt. of Justice, to Hon. Katherine Tai, Ambassador, U.S. Trade Representative (Mar. 22, 2023) [on file with Committee Staff].

¹⁰ Press Release, *Lina M. Khan Sworn in as Chair of the FTC*, Fed. Trade Comm'n (June 15, 2021).

II. KEY FINDINGS

- Chair Khan has trampled on principles of due process, respect for the rule of law, and ethical standards to achieve her ideologically fueled ends at the FTC.
- Chair Khan has forsaken Commission independence and bipartisanship to lead the Biden-Harris White House’s left-wing, whole-of-government campaign to reshape American antitrust and competition policy.
- Chair Khan has swept aside principles, practices and policies of merger-review—ones that had served pro-consumer and pro-competitive interests for decades—to launch an intimidation campaign to chill mergers of all kinds.
- On Chair Khan’s watch, the FTC has turned on American companies and turned to European authorities to achieve the Commission’s ends when FTC authorities under U.S. law have not supported Commission-desired outcomes.
- Chair Khan has spearheaded partisan efforts to re-model U.S. antitrust authorities in the image of European laws designed to hurt U.S. companies’ ability to compete in foreign markets.
- Chair Khan has orchestrated wholesale changes in FTC rulemaking practices and policies—enabling extreme Commission overreach at the expense of consumers, regulated businesses, and the public in general.
- Chair Khan has permitted the White House to use the Commission as a shield for Biden-Harris 2024 election interests through Commission leadership of the sham Biden-Harris “Strike Force on Unfair and Illegal Pricing.”
- Chair Khan has sidelined career FTC staff, collapsed their morale, triggered an exodus of critical employees, and destroyed career staff’s confidence in the honesty and integrity of Commission leadership.

III. THE FTC'S NORM-WRECKING MALADMINISTRATION OF ITS MERGER AUTHORITIES AND INTERNATIONAL ACTIVITIES UNDER CHAIR KHAN

Over the decades, perhaps the most prominent and visible role of the Commission has been to protect competitive markets by policing against anti-competitive mergers of American companies. Under Chair Khan's leadership, the Commission's administration of its merger authorities has followed troubling paths. First, Chair Khan has abandoned the Commission's responsibility to protect Americans from anti-competitive mergers while allowing pro-competitive—and, hence, pro-consumer—mergers to proceed. In its place, Chair Khan has steered the Commission to use seemingly all possible levers at all possible times to deter all mergers of any kind, to the detriment of consumers who would benefit from sound mergers and to the detriment of the U.S. economy. Second, the Commission has sought to enlist foreign antitrust authorities to: (1) frustrate mergers of American companies when the Commission, under American law, could not; and, (2) advance the imposition of European over American antitrust priorities through international agreements.

A. Abuse of Domestic Merger Authorities under Chair Khan: Subverting Due Process and the Rule of Law to Suppress Merger Activity

The story of Chair Khan's stewardship over the Commission's merger authorities in strictly domestic terms has been simple and straightforward. Chair Khan's goal has not been to ensure even-handed administration, blocking anti-competitive mergers and allowing pro-competitive, pro-consumer mergers to proceed. Instead, Chair Khan's goal appears to be to deter all kinds of mergers by throwing sand in the gears of every stage of the merger review and approval process. The Committee's review of Chair Khan's administration of these authorities is consistent with former Commissioner Wilson's comments at the time of her resignation. With respect to mergers, the Commission under Chair Khan has run roughshod over due process and the rule of law and has disregarded ethics requirements.

1. Executive Order 14036, "Promoting Competition in the American Economy"

The roots of this shift in Commission administration can be seen in President Biden's remarks when announcing his Executive Order (E.O.) 14036, "Promoting Competition in the American Economy."¹¹ This order was issued immediately after the Senate confirmed Chair Khan and President Biden elevated her to chair the Commission. The E.O. established a new

¹¹ 86 Fed. Reg. 36987 (July 14, 2021).

“Whole-of-Government Competition Policy,” including a White House Competition Council.¹² In his remarks announcing the order, President Biden rejected the consumer-welfare-centered approach that had galvanized four decades of bipartisan consensus over how best to administer the antitrust laws.¹³ He also made clear that he was marshaling a whole-of-government effort—executive and independent agencies alike—to chart a radical new course. The heart of the Biden-Harris view is the simplistic idea that “Big is Bad,” even though new mergers can have pro-competitive and pro-consumer effects. Indeed, the Biden-Harris White House hand-picked Professor Tim Wu, a primary advocate of this view and key ally to Chair Khan, to serve on the National Economic Council as Special Assistant to the President for Technology and Competition Policy and help draft E.O. 14036.¹⁴

Chair Khan shares and supports these Biden-Harris White House views. The Biden-Harris White House nominated her as an FTC commissioner and immediately elevated her to FTC Chair after her confirmation, because she shared and supported these views. But as the leader of an independent commission, she should have maintained her distance from coordinating with White House policy. She did not. In fact, E.O. 14036 specifically included the FTC Chair—Chair Khan—on the White House Competition Council it established and tasked her with effectuating multiple Biden-Harris priorities for the Commission.¹⁵ These included: heightened Clayton Act enforcement; review and revision of merger review guidelines; rulemakings on non-compete clauses in employment contracts, data collection and surveillance, internet marketplaces, occupational licensing, third-party repair and self-repair of equipment, prescription drug issues, and real estate brokerage; provision of views on major transactions to other agencies conducting oversight or investigation of, or seeking remedies concerning, those transactions; review and revision of antitrust guidance for human resource professionals; work in concert with the Department of Health and Human Services to address competition issues in generic drugs and biosimilars markets; consultation with the Department of Agriculture on retail concentration and practices in food markets; consultation with the Department of the Treasury on market structure and conditions of competition in beer, wine, and spirits markets; and, consultation with the Department of the Treasury’s Office of Economic Policy on competition in labor markets.

As Chair Khan herself proudly declared before the Economic Club of New York in July 2023, under her leadership, “[t]he FTC is . . . at the forefront of the whole-of-government effort” the Biden-Harris White House has dictated to change antitrust and competition policy.¹⁶ The White House appears to have orchestrated—and Chair Khan willingly cooperated with—Chair Khan’s nomination, elevation to the chair, incorporation into the Council, and assignment of

¹² *Id.*, sec. 2.

¹³ Briefing Room, *Speeches and Remarks, Remarks by President Biden At Signing of An Executive Order Promoting Competition in the American Economy*, The White House (July 9, 2021).

¹⁴ See, e.g., John Cassidy, *The Biden Antitrust Revolution*, The New Yorker (July 12, 2021); Tim Wu, *The Curse of Bigness: Antitrust in the New Gilded Age*, Columbia Global Reports (2018).

¹⁵ 86 Fed. Reg. 36987 (July 14, 2021).

¹⁶ *Remarks of Chair Lina M. Khan as Prepared for Delivery, Economic Club of New York* at 7, Fed. Trade Comm’n (July 24, 2023).

these tasks to effectuate its agenda through what is supposed to be an independent bipartisan commission.

2. Eliminating Longstanding FTC Merger Policies

Following the issuance of E.O. 14036, the FTC swiftly made changes to conform with the order's policy goals. On July 21, 2021, just one week after the order appeared in the Federal Register, Chair Khan and her fellow Democratic commissioners swept aside a 25-year-old FTC policy that relieved merging parties with prior antitrust violations of needs to commit to notice and prior approval of additional mergers if there was no "credible risk" they would attempt another unlawful merger.¹⁷ The FTC policy had been adopted following enactment of the 1976 Hart-Scott-Rodino Act's (HSR Act) robust, statutory pre-merger notification and review requirements. The Commission in that era understandably believed the HSR Act displaced the need to require additional, non-statutory commitments to pre-approval.¹⁸ After all, the HSR Act was intended specifically to provide a fair, efficient and effective reset of the Commission's and the Department of Justice's enforcement of antitrust laws with regard to mergers. But through its reinstatement of requirements beyond those in the HSR Act, the Khan Commission instituted a new "heads we win, tails you lose" anti-merger policy. Either an affected party would have to commit to additional restrictions on future mergers, or the prospect of facing those restrictions would dissuade it from seeking approval of a new merger under Chair Khan's watch.

Shortly thereafter, in September 2021, the Commission withdrew its Vertical Merger Guidelines,¹⁹ not replacing them until December 2023.²⁰ These guidelines had for years provided parties to vertical mergers with certainty over how the Commission would review their mergers and whether it might challenge them. The guidelines' withdrawal left parties to contemplated vertical mergers at a loss as to whether, why, and how the Commission might review and take enforcement action against their mergers if they were proposed. When ultimately issued, along with updates to the Commission's horizontal merger guidelines, the new guidelines significantly expanded the number of mergers that could be considered presumptively problematic by the Commission, substantially expanding market uncertainty and bluntly deterring mergers.²¹ The Commission also struck from its agency mission statement the commitment "that it would enforce its laws 'without unduly burdening legitimate business

¹⁷ Press Release, *FTC Rescinds 1995 Policy Statement that Limited the Agency's Ability to Deter Problematic Mergers*, Fed. Trade Comm'n (July 21, 2021) [hereinafter, "FTC Rescinds 1995 Policy Statement"]; *Statement of the Commission on Use of Prior Approval Provisions in Merger Orders*, Fed. Trade Comm'n, available at https://www.ftc.gov/system/files/documents/public_statements/1597894/p859900priorapprovalstatement.pdf.

¹⁸ See FTC Rescinds 1995 Policy Statement.

¹⁹ Press Release, *Federal Trade Commission Withdraws Vertical Merger Guidelines and Commentary*, Fed. Trade Comm'n (Sept. 15, 2021).

²⁰ *Merger Guidelines*, U.S. Dep't of Justice and Fed. Trade Comm'n (Dec. 18, 2023).

²¹ J. Howard Beales III and Timothy J. Muris, *Achieving Change at the Federal Trade Commission: Success and Failure* at 59, Competitive Enterprise Institute (May 2024) [hereinafter "Beales and Muris"].

activity[.]”²² What was a regulated company to presume, but that the Commission *would* subsequently unduly burden legitimate business activity?

As former Commissioner Wilson reported, the Commission also began to issue pre-merger-consummation warning letters to merging parties, warning that the Commission would continue to investigate their mergers, with all the uncertainty that entails, even after statutory deadlines for the Commission to complete its reviews had passed.²³ The Commission warned that the parties would, if they dared, complete their mergers at their own risk even after the passage of those deadlines.²⁴ None of these actions could have given parties to proposed mergers reassurance that the Commission would fairly and transparently review and approve their mergers, however pro-competitive and pro-consumer they might be. Indeed, these letters appear intended to chill the proposed mergers and send a message to the broader market intending to deter potential mergers. And, they only add to uncertainty already created by the Commission when, on February 4, 2021, it suspended its practice of allowing early terminations of Hart-Scott-Rodino Act review of proposed mergers.²⁵

The Commission and the Department of Justice in June 2023 proposed changes to the form merging parties must submit to them to kick off the Hart-Scott-Rodino review process.²⁶ The proposed changes would vastly expand paperwork and disclosure requirements for parties to proposed mergers, “requir[ing] essentially all parties to produce . . . information that today can only be requested from a small minority (3 percent) of transactions with a second request.”²⁷ As former top FTC officials J. Howard Beales and Timothy J. Muris report:

By the FTC’s own estimate, the paperwork burden alone would multiply almost four times. . . . This burden would apply to *all* filers including the 86 percent of transactions that, over the past 29 years, *have not even been investigated*, and the nearly 64 percent of transactions in which early termination would have been granted under pre-Biden policy.²⁸

²² *Id.* at 54.

²³ See *Statement of Commissioner Christine S. Wilson Regarding the Announcement of Pre-Consummation Warning Letters*, Fed. Trade Comm’n (August 9, 2021).

²⁴ *Id.*

²⁵ Press Release, *FTC, DOJ Suspend Discretionary Practice of Early Termination*, Fed. Trade Comm’n (Feb. 4, 2021).

²⁶ Press Release, *FTC and DOJ Propose Changes to HSR Form for More Effective, Efficient Merger Review*, Fed. Trade Comm’n (June 27, 2023); see also *Proposed Rulemaking, Premerger Notification: Reporting and Waiting Period Requirements*, 88 Fed. Reg. 42178 (June 29, 2023).

²⁷ Beales and Muris at 58 (emphases in original).

²⁸ *Id.* Recently, the Commission issued its final rule to modify the HSR Act form. While the final rule stepped back from some of the proposed rule’s excesses, it still increases several-fold the paperwork burden the form imposes. See *Premerger Notification; Reporting and Waiting Period Requirements* at 416 (final rule estimate of 105 hours required per filing), Fed. Trade Comm’n (Oct. 14, 2024), online at [Premerger Notification: Reporting and Waiting Period Requirements: Final Rule](#); cf. 88 Fed. Reg. 42178, 42208 (June 29, 2023) (proposed rule estimate of 37 hours required per filing under pre-existing rule).

Making matters worse, with regard to second requests themselves, “the FTC has expanded the scope of second requests to investigate areas ‘not relevant in mainstream antitrust analysis’ that ‘would not support’ litigated challenges.”²⁹

3. Increased Reliance on Administrative Litigation and Litigation Generally

The Commission also has pursued more administrative litigation, which the Commission “almost always wins and can only be challenged by appealing to the Court of Appeals,” and which typically takes “a journey of several years from beginning to end.”³⁰ Additionally, Chair Khan has announced her determination to litigate cases, rather than settle them.³¹ This tactical switch means that, even if the Commission might ultimately lose much of that litigation in court, the process of litigation might drag out conflicts long enough to kill many pro-competitive and pro-consumer deals, simply because the deals cannot close by deadlines reasonable and certain enough to keep the proposed merger-parties committed to them and supporting investment available.

4. Khan Putting a Tax on Mergers and Acquisitions

Chair Khan seems committed to using all the Commission’s powers to throw sand into all the possible gears over proposed mergers, thereby halting many mergers by abuse of process and chilling other potential mergers from even being suggested. As Bilal Sayyed, former director of the Commission’s Office of Policy Planning, suggested early on in Chair Khan’s tenure, “uncertainty has become the crux of [the Commission’s] merger policy . . . uncertainty and delay.”³² Others have trenchantly termed this an “*in terrorem* effect” to chill merger activity.³³

Former FTC commissioner Noah Phillips has characterized the cumulative force of merger policy changes under Chair Khan as a “tax” on mergers and acquisitions (M&A).³⁴ As has often been observed, “the more you tax something, the less of it you get.”³⁵ Thus, former Commissioner Phillips observed, the FTC is “broadcasting hostility to M&A that has a positive branding effect for enforcers and may also have . . . deterrent effect for M&A.”³⁶ This allows the Commission to “sow uncertainty and run up the cost of getting deals done, taxing M&A[.]”³⁷

²⁹ *Id.* at 56.

³⁰ *Id.*

³¹ *See id.*

³² Regulatory Transparency Project, *A Roundtable on Recent Developments at the FTC*, The Federalist Society (Mar. 6, 2023), available at <https://rtp.fedsoc.org/video/a-roundtable-on-recent-developments-at-the-ftc/>.

³³ Beales and Muris at 55 (internal quotation marks omitted).

³⁴ Comm’r Noah Joshua Phillips, *Disparate Impact: Winners and Losers from the New M&A Policy*, Fed. Trade Comm’n (April 27, 2022) (speech delivered at the Eighth Annual Berkeley Spring Forum on M&A and the Boardroom) [hereinafter “The New M&A Policy”].

³⁵ William Dunkelberg, *Taxes: They are Everywhere*, *Forbes* (April 19, 2022).

³⁶ The New M&A Policy at 3.

³⁷ *Id.*

Most worryingly for those concerned about abusive exertions of regulatory power, “these strategies can be accomplished without courts”³⁸—a liberating feature in the eyes of an over-aggressive regulator. In former Commissioner Phillips’s estimation, these adverse consequences do not fall evenly upon all companies, nor do they fall most on large companies. Rather, “the gratuitous taxes on M&A being imposed . . . are regressive, hitting smaller companies the hardest.”³⁹ Thus, “[p]olicies designed in the name of ‘anti-monopoly’ are disproportionately taxing companies that few would consider monopolies, making it harder for them to compete.”⁴⁰

The blizzard of these policies and actions under Chair Khan is not just a matter of concern for mergers and antitrust administration. It is a matter of concern for all federal regulatory administration. Speculating on possible outcomes to Chair Khan’s leadership at the Commission, leading administrative law scholar Adam J. White suggested a number that could ultimately undercut the Commission’s independence or authorities resonate in competition law and policy.⁴¹ But as he ominously and more broadly warned:

[T]here is another possibility, and perhaps a more likely one: namely, that Lina Khan is teaching a new generation of regulators how to wield real power—not by writing rules but by renouncing them. Not by the certainty of clear and enforceable regulations, but by the regulatory uncertainty sown by unclear regulatory policies that succeed in lieu of their actual enforcement.⁴²

As Mr. White concluded, “[p]rogressives might worry that Lina Khan is breaking the FTC. All of us should worry that she is breaking something much more important.”⁴³ That is to say, “[b]y pulling down long-standing rules, overstepping legal bounds, and leveraging the threat of legal uncertainty, Lina Khan is teaching powerful regulators to rule beyond mere rules.”⁴⁴

Meanwhile, the courts have responded to Chair Khan’s disrespect for the rule of law, handing the Khan FTC losses in multiple key cases it has brought in court to challenge mergers. The most stinging may be the Commission’s losses in its marquee cases against tech giants Meta Platforms, Inc. (Meta) and Microsoft Corporation (Microsoft) over their respective attempts to merge with Within and Activision. The Commission lost resoundingly in each of these cases.⁴⁵ Each case sought to break fresh ground favoring types of challenges Chair Khan promotes—in *Meta*, challenges to mergers presenting merely “potential” competition, and in *Microsoft* challenges to vertical mergers (*i.e.*, mergers not between direct competitors, but between

³⁸ *Id.*

³⁹ *Id.* at 4.

⁴⁰ *Id.*

⁴¹ See Adam J. White, *The Power Broke Her*, Commentary (March 2024).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ See *Federal Trade Commission v. Meta Platforms Inc.*, 654 F. Supp. 3d 892 (N.D. Cal. 2023); *Federal Trade Commission v. Microsoft Corp.*, No. 23-CV-02880-JSC, 2023 WL 4443412 (N.D. Cal. July 10, 2023) [hereinafter “Microsoft Opinion”].

companies upstream and downstream of each other in the respective markets). Yet in each case the Commission’s efforts to advance Chair Khan’s priorities, and especially to advance them against U.S. tech giants, fell flat. The court in *Microsoft* went so far as to stress that the FTC had not even “raised serious questions regarding whether the proposed merger is likely to substantially lessen competition[.]”⁴⁶

The Commission’s losses in court under Chair Khan prompted the chief executive of the Chamber of Progress, a self-described “center-left tech policy industry coalition,”⁴⁷ to express concern that Chair Khan’s losses in court “are making [the FTC’s] threats look more like a paper tiger.”⁴⁸ The *New York Times* has reported that the Commission’s losses “raise questions about Ms. Khan’s ability to carry out her ambitious goal . . . as political pressure mounts and patience wanes for the 34-year-old academic.”⁴⁹

It was the ethics controversy over Chair Khan’s refusal to recuse herself from participation in the Meta-Within case that provoked former Commissioner Wilson’s blazing resignation from the Commission. While legal director of the left-wing Open Markets Institute, Khan in 2017 signed a letter to the FTC’s acting chair stating that Facebook, now Meta, “should not be able to amass any greater power through acquisition”—*i.e.*, mergers.⁵⁰ In 2018, Khan stated, “if Facebook tomorrow announces that it’s acquiring another company, I would hope the FTC would look at that very closely and block it. Making sure that it’s not just out there expanding its power is really important.”⁵¹ In her later role as counsel on the House Judiciary Committee, Khan co-authored the Committee’s Majority Staff Report on competition in digital markets, which concluded Facebook was positioned to abuse market power to “control the technology of tomorrow.”⁵²

Knowing Khan’s record, at her Senate confirmation hearing, Senator Mike Lee (R-Utah) pressed her on whether she could be trusted to avoid the appearance of partiality if she were to be confirmed as an FTC commissioner. According to Khan, she could be so trusted: “If it were to arise, I would seek the guidance of the relevant ethics officials at the agency and proceed accordingly.”⁵³

⁴⁶ Microsoft Opinion at 51.

⁴⁷ Press Release, *Introducing Chamber of Progress: A New Industry Coalition Promoting Technology’s Progressive Future*, Chamber of Progress (Mar. 29, 2021).

⁴⁸ Cecilia Kang, *F.T.C.’s Court Loss Raises Fresh Questions about Its Chair’s Strategy*, *New York Times* (July 11, 2023).

⁴⁹ *Id.*

⁵⁰ See Dissenting Statement of Commissioner Christine S. Wilson, *In the Matter of Meta Platforms, Inc., Mark Zuckerberg, and Within Unlimited, Inc.* at 6, Docket No. 9411, Fed. Trade Comm’n.

⁵¹ *Id.* at 6-7.

⁵² Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, U.S. House of Representatives, *Investigation of Competition in Digital Markets, Majority Staff Report and Recommendation* at 387 (2020).

⁵³ Nomination Hearing, U.S. Senate Committee on Commerce, Science, and Transportation (April 20, 2021) (minute 2:45:55), available at <https://www.commerce.senate.gov/2021/4/nomination-hearing>.

She did solicit the guidance of the Commission’s Designated Agency Ethics Official (DAEO) in the *Meta-Within* case. She did not, however, follow the DAEO’s recommendation that she recuse herself.⁵⁴

B. The FTC’s International Merger and Competition Activities: Trans-Atlantic Drift Toward Europe under Chair Khan

The Committee is also deeply concerned by the FTC’s drift towards Europe in its policy goals and enforcement stratagems. Under Chair Khan, the Commission appears to be working to ensure U.S. businesses implement burdensome European Union (EU) regulations that are not required under U.S. law. The FTC also has relied on European authorities to effectuate its enforcement goals where its authorities under U.S. law likely do not provide the FTC’s desired outcomes. The FTC has faced pressure from congressional Democrats, the White House, and left-wing advocacy groups to pursue policy changes that mirror European regulations, especially those in the digital trade and competition space. The EU’s regulatory regime has an outsized, adverse effect on American corporations. European regulators are currently attacking American businesses and Americans’ right to free speech through onerous content censorship regulations.⁵⁵ As a prime example, the EU threatened Elon Musk, the owner of the social media platform X, for sharing a video of an interview with former President Donald Trump.⁵⁶

Several high-ranking officials in the Biden-Harris Administration, as well as their allies in Congress, have taken actions to model the American economy and role of government after the European example. Secretary of the Treasury Janet Yellen has helped author and advocate for an agreement with the Organization for Economic Cooperation and Development’s global minimum tax.⁵⁷ Congress has rejected that agreement, but the Biden-Harris Administration has tried to use it as leverage to raise U.S. corporate taxes or permit foreign nations to tax the equivalent on U.S. multinational companies.⁵⁸ In another telling example, the Commerce Department has sought to emulate European export controls for firearms.⁵⁹ Additionally, in March 2024, the Securities and Exchange Commission (SEC) published under the leadership of Biden-Harris-appointed Chair Gary Gensler carbon disclosure rules that would impose

⁵⁴ See Order Denying Petition for Recusal, *In the Matter of Meta Platforms, Inc., Mark Zuckerberg, and Within Unlimited, Inc.*, Docket No. 9411, Fed. Trade Comm’n (Feb. 1, 2023); see also Dissenting Statement of Commissioner Christine S. Wilson, *In the Matter of Meta Platforms, Inc., Mark Zuckerberg, and Within Unlimited, Inc.*, Docket No. 9411, Fed. Trade Comm’n (Feb. 1, 2023).

⁵⁵ See Mark Scott, *EU takes shot at Musk over Trump interview – and misses*, Politico (Aug. 13, 2024).

⁵⁶ *Id.*

⁵⁷ See David Lawder, *Yellen defends global corporate minimum tax deal amid Republican criticism*, Reuters (Apr. 30, 2024); Rachel Treisman, *Yellen believes U.S. will get on board with global minimum corporate tax – eventually*, NPR (Jul. 19, 2022); Alan Rappeport, *Yellen Won a Global Tax Deal. Now Comes the Hard Part*, The New York Times (Jun. 6, 2021).

⁵⁸ See Fatima Hussein, *Yellen’s global tax plan meets resistance abroad and at home*, AP News (May 23, 2022).

⁵⁹ Email from [Redacted], Stop US Arms to Mexico, to Ezra Kagan, Department of Commerce, et al., (Nov. 27, 2023, 1:17 PM) [on file with Committee staff]; Email from Ezra Kagan, Department of Commerce, to [Redacted], Stop US Arms to Mexico, et al., (Nov. 27, 2023, 8:49 AM) [on file with Committee staff].

European-style reporting requirements on U.S. companies.⁶⁰ The SEC also sits on the International Organization of Securities Commissions, which recently endorsed the International Sustainability Standards Boards disclosure standards.⁶¹ The Biden-Harris goal appears to be to establish a global threshold for sustainability reporting and provide cover for national jurisdictions considering mandatory environmental, social and governance (ESG) regulations.⁶²

The FTC has spent taxpayer dollars and used its resources to ensure EU regulations opposed by the U.S. business community are effectuated and protected. This is evidenced in the FTC’s involvement in the EU’s Digital Markets Act (DMA). The DMA “enacts strict compliance requirements and draconian fines that will force many of America’s most innovative and successful companies to reduce risk-taking and rein in research and development budgets.”⁶³ Fines under the DMA are inordinate, with companies found in violation paying “up to 10% of the company’s total worldwide annual turnover, or up to 20% in the event of repeated infringements.”⁶⁴ The European Commission (EC) is enabled to designate companies as “gatekeepers” under the DMA, allowing further regulation.⁶⁵ To date, six companies have been designated gatekeepers; of the six companies, five are American: Alphabet Inc. (Google); Amazon.com, Inc. (Amazon); Apple Inc. (Apple); Meta; and Microsoft.⁶⁶ As is discussed below, the FTC followed the DMA closely and even sent staff to Europe to oversee its implementation.

The FTC’s advocacy for the DMA was further demonstrated in its concerns with the “Proposed Digital Trade Chapter” in the Indo-Pacific Economic Framework for Prosperity (IPEF), which Congressional Democrats viewed as “t[ying] Congress’s and regulators’ hands and” in “conflict with President Biden’s whole-of-government effort to promote competition,” citing the DMA as an example of legislation that would be adversely affected by the proposed terms of the IPEF.⁶⁷ The U.S. legislation that was allegedly threatened by the IPEF’s proposals mirrors the DMA.⁶⁸ As the U.S. Trade Representative (USTR) had negotiated it, the Khan FTC feared the agreement would conflict with left-wing policy goals, so it worked behind closed doors to undermine the agreement.

⁶⁰ See *Comparing the SEC Climate Rules to California, EU and ISSB Disclosure Frameworks*, Cooley (Mar. 18, 2024).

⁶¹ See Press Release, *IOSCO endorses the ISSB’s Sustainability-related Financial Disclosures Standards*, International Organization of Securities Commissions (Jul. 25, 2023).

⁶² See Denise Lugo, *IOSCO Endorses Global ESG Rulemaker’s New Climate and Sustainability Disclosure Standards*, Thomson Reuters (Jul. 26, 2023).

⁶³ Saxby Chambliss & Ken Conrad, *Europe’s Digital Markets Act: A cautionary tale for U.S. policymakers*, Roll Call (Oct. 5, 2023).

⁶⁴ *The Digital Markets Act: ensuring fair and open digital markets*, European Commission (accessed Sept. 10, 2024).

⁶⁵ *Id.*

⁶⁶ *Id.*; *DMA designated Gatekeepers*, European Commission (accessed Sept. 10, 2024).

⁶⁷ [On file with Committee] & Letter from Hon. Elizabeth Warren, Senator, et al., to Hon. Katherine Tai, Ambassador, U.S. Trade Representative (Apr. 21, 2023).

⁶⁸ See S.2992 American Innovation and Choice Online Act, 117th Congress (Oct. 18, 2021).

The FTC’s IPEF-related actions under Chair Khan reinforce questions as to whether the Chair is following the Commission’s mandate of nonpartisanship, impartiality, and independence.

1. The EU’s Digital Markets Act

The DMA itself went into force on May 2, 2023, and into full effect on March 7, 2024. It has proven to be detrimental to U.S. tech companies.⁶⁹ On March 25, 2024, the EU announced that Google, Meta, and Apple were being investigated for possible breaches under the DMA.⁷⁰ On June 24, 2024, Apple became the first company charged under the DMA.⁷¹ Apple is currently delaying a software update that includes AI for iPhone users in the EU due to “regulatory uncertainty.”⁷² Then, on July 1, 2024, the EU accused Meta of unfair practices under the DMA for offering ad-free, paid subscriptions.⁷³ The companies face fines worth 10 percent of global revenues.⁷⁴ Amazon is also being scrutinized under the DMA.⁷⁵

The EU Parliament passed the DMA on July 5, 2022 to establish “a level playing field” for *European* online platforms versus foreign competitors, such as those from the United States.⁷⁶ The EU seeks to accomplish this by targeting a handful of companies—mostly U.S. tech companies⁷⁷—designated as “gatekeepers.”⁷⁸ On March 30, 2023, the FTC publicly announced it would send staff alongside DOJ’s Antitrust Division “to assist with implementation of” the DMA.⁷⁹ The FTC “engages with competition and consumer protection agencies in other countries, directly and through international networks, to halt deceptive and anticompetitive

⁶⁹ Press Release, Designated gatekeepers must now comply with all obligations under the Digital Markets Act, European Commission (Mar. 7, 2024); Policies, Digital Markets Act, Council of the European Union (accessed Sept. 26, 2024).

⁷⁰ Foo Yun Chee, Bart H. Meijer, *Apple, Google, Meta targeted in EU’s first Digital Markets Act probes*, Reuters (Mar. 25, 2024).

⁷¹ Adam Satariano & Tripp Mickle, *Apple is First Company Charged Under New E.U. Competition Law*, The New York Times (June 24, 2024).

⁷² Samuel Stolton & Mark Gurman, *Apple Won’t Roll Out AI Tech in EU Market Over Regulatory Concerns*, Bloomberg (June 21, 2024).

⁷³ Kelvin Chan, *European Union accuses Facebook owner Meta of breaking digital rules with paid ad-free option*, AP News (July 1, 2024); Dan Milmo, *Meta accused of breaking EU digital law by charging for ad-free social networks*, the Guardian (Jul. 1, 2024).

⁷⁴ William Gavin, *First Apple and Microsoft. Now Meta is in Europe’s antitrust hot seat*, QZ.com (July 1, 2024).

⁷⁵ *Supra*, note 70.

⁷⁶ *EU Digital Markets Act and the Designation of Six Gatekeepers: Implications for the Technology Sector*, Armstrong Teasdale (Sept. 19, 2023); *What is the Digital Markets Act*, European Council (accessed Sept. 19, 2024), available at [https://www.consilium.europa.eu/en/policies/digital-markets-act/#:~:text=The%20Council%20adopted%20the%20DMA,innovation%20in%20the%20digital%20economy;Texts%20Adopted,Digital%20Markets%20Act,European%20Parliament%20\(July%205,%202022\),available%20at%20https://www.europarl.europa.eu/doceo/document/TA-9-2022-0270_EN.html](https://www.consilium.europa.eu/en/policies/digital-markets-act/#:~:text=The%20Council%20adopted%20the%20DMA,innovation%20in%20the%20digital%20economy;Texts%20Adopted,Digital%20Markets%20Act,European%20Parliament%20(July%205,%202022),available%20at%20https://www.europarl.europa.eu/doceo/document/TA-9-2022-0270_EN.html).

⁷⁷ Kelvin Chan, *Europe’s Digital Markets Act is forcing tech giants to make changes. Here’s what that will look like*, AP News (Mar. 6, 2024).

⁷⁸ *Supra*, note 69.

⁷⁹ Press Release, *FTC, Justice Department, and European Commission Hold Third U.S.- EU Joint Technology Competition Policy Dialogue*, Fed. Trade Comm’n (Mar. 30, 2023).

business practices that affect U.S. consumers.”⁸⁰ The Committee sought to understand how “assist[ing] with the implementation of” the DMA⁸¹ aligns with the FTC’s legislative purpose or mission, since the DMA is designed not to protect U.S. consumers but to protect European companies from mostly American competition. Chair Khan was given an opportunity to address these concerns during congressional testimony on April 18, 2023, but she testified that the decision was merely motivated by “international cooperation.”⁸²

Chair Khan’s sentiment regarding “international cooperation” by offering American assistance in implementing a European legal framework that stifles American growth is not ubiquitous in the federal government. The EU’s regulatory regime has drawn criticisms from both Republicans and Democrats in Congress for its distinctly anti-American, protectionist tilt.⁸³ Indeed, sectors of the Biden-Harris Administration itself have raised concerns about the DMA’s effects on American business. In 2021, Secretary of Commerce Gina Raimondo stated the DMA “will disproportionately impact U.S. based tech firms.”⁸⁴ The United States Trade Representative (USTR) labeled the Digital Markets Act a digital trade barrier in 2023.⁸⁵ In part due to these concerns, the Committee sent a request to the FTC for documents and communications in August 2023 seeking to better understand the FTC’s intentions and goals for the liaisons with the EU, including its participation in the implementation of the DMA.⁸⁶ It is not lost on the Committee that while the FTC has been supporting EU efforts to adopt laws now being turned on U.S. tech competitors to European companies, the FTC has been failing consistently in proceedings against those same U.S. companies under U.S. laws. In response to the Committee’s request in August, the FTC produced a few dozen documents, including email exchanges between the FTC and EU authorities.

The emails and documents revealed a very high interest at the FTC in the DMA. There was sustained email traffic as well as several meetings between the FTC and EU regarding the DMA in 2022 and 2023. The emails from the FTC also show the Commission, including the Chair, followed the DMA as it progressed through the European Parliament’s process and participated in high-level conversations with their EU counterparts regarding its implementation. In February 2023, for example, emails between the FTC’s Office of International Affairs (OIA)

⁸⁰ International, *Competition and Consumer Protection Agencies Worldwide*, Fed. Trade Comm’n (accessed September 27, 2024).

⁸¹ *Supra*, note 79.

⁸² Innovation, Data, and Commerce Subcommittee Hearing: “Fiscal Year 2024 Federal Trade Commission Budget”, House Committee on Energy and Commerce (Apr. 18, 2023).

⁸³ See Letter from Hon. J. Luis Correa, Member of Congress, et al., to Joseph R. Biden, President, United States of America (Dec. 15, 2023), available at <https://drive.google.com/file/d/1nPYCDYR1Tw69XmeqtpihoFcZyFwxJotR/view>.

⁸⁴ Samuel Stolton, *Raimondo: U.S. has ‘serious concerns’ about EU digital rules*, Politico (Dec. 17, 2021).

⁸⁵ See *2023 National Trade Estimate Report: Foreign Trade Barriers*, Office of the U.S. Trade Representative (Mar. 31, 2023).

⁸⁶ See Letter from Hon. James Comer, Chairman, H. Comm. on Oversight & Accountability, to Hon. Lina Khan, Chair, Fed. Trade Comm’n (Aug. 21, 2024).

Director Maria Coppola and her counterparts in the EU show the parties planned to meet in Washington in March 2023 to discuss the DMA.⁸⁷

From: Coppola, Maria [Redacted]@ftc.gov>
Sent: 23 February 2023 15:06
To: [Redacted]@ec.europa.eu; [Redacted]@cma.gov.uk; [Redacted]
[Redacted]@accc.gov.au>
Cc: [Redacted]@ftc.gov>; [Redacted]@ftc.gov>
Subject: FTC brownbag Spring Meeting week

Dear colleagues

We look forward to welcoming you to DC the last week of March. There is so much interest in the DMA and DMUs that I wondered if you'd be willing to do a joint "brownbag" talk at the FTC? This would be an informal talk to FTC and DOJ staff that runs an hour. The best day would be Wednesday, March 29 at 12:15 at FTC HQ, but if you're willing to do it and that time doesn't work, please let me know.

Many thanks
Maria

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Source: Email on file with Committee staff.

Director Coppola met with European Commission (EC) officials overseeing the implementation of the DMA as well as the Digital Services Act (DSA)—the regulatory measure used to threaten Elon Musk.⁸⁸ Around the same time, in March 2023, Chair Khan was briefed by FTC staff on the DMA ahead of meetings with the EU's Commissioner for Competition, Margreth Vestager.⁸⁹ The parties announced "planned liaisons" on March 30, 2023, to coordinate implementation of the DMA.⁹⁰

To better understand the FTC's involvement in the DMA, the Committee conducted a transcribed interview on June 3, 2024, with Director Coppola.⁹¹ As the head of OIA, Director Coppola works with competition and consumer protection agencies around the world in order to "promote cooperation and convergence toward best practices."⁹² Director Coppola testified that she selected an FTC employee "to engage on the Digital Markets Act." She stated:

⁸⁷ Email from Maria Coppola, FTC, to [Redacted], EU, et al., (Feb. 23, 2023) [on file with Committee staff].

⁸⁸ *Id.*

⁸⁹ Email from FTC staff, to [Redacted], EU, (Mar. 20, 2023, 11:33 PM) [on file with Committee staff].

⁹⁰ *Supra*, note 79.

⁹¹ *Supra*, note 5.

⁹² *Bureau & Offices, Office of International Affairs, Fed. Trade Comm'n* (accessed Jun. 7, 2024), available at <https://www.ftc.gov/about-ftc/bureaus-offices/office-international-affairs>.

Q. Did the FTC send staff to the European Commission to engage on the Digital Markets Act?

A. Yes, we did.

Q. How many staff?

A. One.

Q. Did you choose the staff member?

A. I made the recommendation, yes. I chose—yes.⁹³

Director Coppola claimed that it was the FTC’s idea to send staff to the EU but characterized the agency’s position on the DMA as neutral.⁹⁴ Coppola explained that “the primary goal was to understand how the Digital Markets Act was being applied...” in case the FTC were provided “similar authority.”⁹⁵ She stated:

Q. How would you characterize that staff member’s engagement?

A. So that person from my office was detailed to the European Commission for 3 months, as we—you know, we’ve detailed staff to the European Commission many times. The specific—the primary goal was to understand how the Digital Markets Act was being applied, and that was for two reasons: One, there was a lot of interagency discussions about the Digital Markets Act, and it became pretty clear that we didn’t really understand it; we didn’t really know it; it was pretty complex; and so, that we could be, you know, kind of the experts when other parts of government wanted to understand it.

And then, two, certainly, the first time that I can remember in my field, you know, we saw these legislative proposals that were, like, cut and paste from European legislation. And **so we also wanted to inform ourselves about how it operated in practice** in case we ended up with that, with similar authority. So that was the driving force, and—yeah.⁹⁶

⁹³ Coppola Interview at 56-57.

⁹⁴ *See id.* at 59.

⁹⁵ Coppola Interview at 57-58.

⁹⁶ *Id.* at 58 (emphasis added).

Director Coppola’s justification about staff “inform[ing] [them]selves” about the DMA, however, does not explain why the FTC began sending liaisons to the EU to help with the *implementation* of the DMA, as was stated in the FTC’s March 2023 press release.⁹⁷

In fact, by the time high-ranking FTC and EU officials met in Washington to discuss the DMA, FTC and EU staff had been discussing the topic for several months. The European Parliament adopted the DMA on July 5, 2022, and Director Coppola reached out the next day to schedule a meeting about the regulation’s implementation.⁹⁸ That email shows, in fact, the FTC did not have a neutral stance on Europe’s regulation, as was described by Director Coppola in her transcribed interview with the Committee.⁹⁹ Instead, Director Coppola *congratulated* EU officials on the passage of DMA and DSA and expressed: “We are very *enthusiastic* here in Washington, and look forward to the final step with the Council.”¹⁰⁰ In 2022, FTC staff suggested using the Joint Technology Competition Policy Dialogue as the format to discuss the DMA’s implementation.¹⁰¹

⁹⁷ *Supra*, note 79 (emphasis added).

⁹⁸ Email from Maria Coppola, FTC, to [Redacted], EU, et al., (July 6, 2023) [on file with Committee staff].

⁹⁹ *Id.*

¹⁰⁰ *Id.* (emphasis added).

¹⁰¹ Email from [Redacted], FTC, to [Redacted], DOJ, [Redacted], EU, et al., (Sept. 15, 2022) [on file with Committee staff].

Message

From: Coppola, Maria [REDACTED]@ftc.gov]
Sent: 7/6/2022 3:31:50 PM
To: [REDACTED]@europarl.europa.eu
CC: [REDACTED]@europarl.europa.eu; [REDACTED]@europarl.europa.eu; [REDACTED]@europarl.europa.eu; [REDACTED]@europarl.europa.eu; [REDACTED]@ftc.gov]; [REDACTED]@ftc.gov]; [REDACTED]@eeas.europa.eu; [REDACTED]@eeas.europa.eu]; [REDACTED]@ftc.gov]
Subject: Meeting at the FTC

Dear [REDACTED]

Congratulations on passing the DMA and DSA. We are very enthusiastic here in Washington, and look forward to the final step with the Council.

Commissioner Slaughter would be delighted to meet with the EP's ECON delegation led by Irene Tinagli when you are in Washington. My understanding is that you are here July 18-21, and the delegation seven senior EU lawmakers, and includes Vice-Chair Stéphanie Yon-Courtin, who is an old friend from her days at the French authority.

May I suggest you coordinate with [REDACTED], who works with Commissioner Slaughter, to find an appropriate time?

My understanding is that the topics you'd like to address include:

- FTC's work in digital markets
- Whole-of-government approach to competition policy
- Competition law enforcement in times of economic upheaval, supply chain disruptions, etc.

If there are other topics I've left out, please let me know. On our end, I think we will be looking to understand implementation of the DSA/DMA, any challenges you anticipate, and other issues on the horizon for ECON.

Warm regards
Maria Coppola
Acting Director, Office of International Affairs

Source: Email on file with Committee staff.

The Joint Technology Competition Policy Dialogue is a series of summits for the FTC, DOJ, and EC to discuss trade, economic, and technology issues.¹⁰² Email exchanges between FTC, DOJ, and EC staff regarding the joint dialogues from October 2022 through March 2023 discuss the DMA.¹⁰³ Several of the joint dialogues in that timeframe include staff meetings about the DMA. On September 15, 2022, FTC staff sent an email to EC staff stating, "In terms of other topics to discuss, we are also interested in discussing DMA implementation and remedies."¹⁰⁴ As DOJ confirmed in an email on February 1, 2023, in preparation for another

¹⁰² *Supra*, note 79.

¹⁰³ Email from [Redacted] FTC, to EU staff, et al., (Oct. 4, 2022) [on file with Committee staff]; Email from [Redacted], EU, to [Redacted], FTC, [Redacted], DOJ, [Redacted], EU, et al., (Oct. 6, 2024) [on file with Committee staff]; *Draft Agenda, EU-US Joint Technology and Competition Policy Dialogue Technical and bilateral meetings – 13 and 14 October 2022, Brussels*, [on file with Committee staff]; Email from [Redacted], EU, to Maria Coppola, FTC, et al., (Mar. 1, 2023) [on file with Committee staff].

¹⁰⁴ *Supra*, note 101.

meeting, “We like the FTC’s suggestion of digital platform strategies and doing an update on DMA.”¹⁰⁵

Chair Khan appears to have followed developments that culminated with the passage of the DMA since 2021. Emails from the EU to the FTC show that Chair Khan met with a European Member of Parliament (MEP) in December 2021.¹⁰⁶ The MEP is described in an email as “closely involved in EU draft legislation regulating Big Tech companies.”¹⁰⁷ The European officials thanked the FTC for providing “useful input to the European Parliament’s deliberations on the DMA, DSA, and Big Tech antitrust regulation.”¹⁰⁸ Chair Khan and her FTC colleagues agreed that the meeting was very productive.¹⁰⁹

2. The FTC’s Role in Diminishing the Indo-Pacific Economic Framework (IPEF) in the Name of Creating New Digital Trade Barriers

The Indo-Pacific Economic Framework (IPEF) was launched by the United States in May 2022 with several partner nations, including Australia, Indonesia, Japan, the Republic of Korea, New Zealand, Vietnam, and others. The purpose of the IPEF was to deepen economic ties with these nations, counter China’s growing influence, and protect U.S. companies from unfair treatment in foreign jurisdictions.¹¹⁰ The Department of Commerce and U.S. Trade Representative (USTR) led negotiations on the United States’ behalf. The IPEF framework included supply chains, energy, anti-corruption, and taxes. The IPEF also contained digital trade chapters similar to those negotiated in the United States-Mexico-Canada Agreement.¹¹¹ Those chapters would have barred foreign governments from requiring U.S. data to be stored on foreign servers, such as China’s, or requiring U.S. companies to hand over proprietary source code like algorithms.¹¹²

By January 25, 2023, portions of the digital trade chapters had cleared the interagency process to form U.S. positions on them, but these chapters were abruptly tabled, prompting bipartisan condemnation and widespread concerns from U.S. businesses.¹¹³ It appears that some portions of the digital trade chapters were tabled because the FTC opposed them. The Committee was concerned by the FTC’s actions in concert with European regulators and by

¹⁰⁵ Email from [Redacted], DOJ, to [Redacted], EU, [Redacted], FTC, et al., (Feb. 1, 2023) [on file with Committee staff].

¹⁰⁶ Email from [Redacted], EU Parl., to Randolph Tritell, FTC, et al., (Mar. 8, 2022) [on file with Committee staff].

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Email from Randolph Tritell, FTC, to [Redacted], EU Parl., et al., (Mar. 9, 2022) [on file with Committee staff].

¹¹⁰ *FACT SHEET: In Asia, President Biden and a Dozen Indo-Pacific Partners Launch the Indo-Pacific Economic Framework for Prosperity*, The White House (May 23, 2022).

¹¹¹ David Lawder, *US drops digital trade demands at WTO to allow room for stronger tech regulation*, Reuters (Oct. 25, 2023).

¹¹² *Id.*; Press Release, U.S. Senate Committee on Finance, *Wyden Statement on Ambassador Tai’s Decision to Abandon Digital Trade Leadership to China at WTO* (Oct. 25, 2023).

¹¹³ Briefing from USTR staff to Committee staff (Jun. 12, 2024).

reports of possible interference by the FTC in IPEF and sent a request for information to the FTC on August 22, 2023.¹¹⁴

In response to the Committee’s August 2023 inquiry, the FTC produced to the Committee a letter sent jointly with the Department of Justice (DOJ) Antitrust Division to USTR in March 2023.¹¹⁵ The joint letter criticized USTR’s positions on competition and digital trade and suggested that the provisions could undermine “the development of sound antitrust laws.”¹¹⁶ The FTC and DOJ also demanded greater participation in IPEF negotiations: “Because digital matters are at the center of our antitrust enforcement efforts, we are eager to ensure that our discussions about the draft competition chapter take place alongside our work on the proposed digital chapter.”¹¹⁷ The FTC and DOJ admonished USTR, “[W]hile we appreciate your partnership in advancing the Administration’s agenda with respect to competition policy, we believe we can and should do more to ensure our agencies execute on that vision.”¹¹⁸

The Committee sought testimony from Director Coppola regarding the FTC’s role in the IPEF, specifically its interest in the “digital trade chapter”—a framework for cross-border data flows, data localization standards, and protections for intellectual property such as source code.¹¹⁹ During the transcribed interview with Director Coppola, the Committee presented her with a copy of the FTC’s letter to USTR and asked her about her role in its preparation. Director Coppola claimed she did not have any role in authoring, reviewing, or providing input on the letter sent to USTR in March 2023 even though OIA—which Director Coppola leads—is the FTC’s principal office for trade negotiations.¹²⁰ She testified:

Q. Are you familiar with that document?

A. I am.

Q. Did you have any role in the authoring of the document?

A. No, I did not.

Q. Did you have any input?

A. No, I did not.

Q. You weren’t asked to review it?

¹¹⁴ Letter from Hon. James Comer, Chairman, H. Comm. on Oversight & Accountability, to Hon. Lisa Khan, Federal Trade Commission (Aug. 22, 2023).

¹¹⁵ Letter on file with Committee staff.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Supra*, note 111.

¹²⁰ *See* Coppola Interview at 66-67.

A. No.¹²¹

Director Coppola’s absence in the drafting suggests the impetus for and work expended in the effort to impede adoption of the IPEF digital trade chapters could have come from the FTC official above her, which is Chair Khan and/or her office. OIA’s webpage states, “The FTC also participates in negotiating bilateral antitrust cooperation arrangements and agreements and competition chapters of U.S. Free Trade Agreements.”¹²² While the FTC has legitimate interests in international agreements like the IPEF, the FTC’s involvement traditionally is and should be limited; as Director Coppola explained of the OIA, “Our role is to provide technical expertise and also just to make sure that our equities aren’t being impacted inadvertently.”¹²³ However, the FTC does not sit on USTR’s Trade Policy Staff Committee (TPSC),¹²⁴ the senior U.S. government interagency trade advisory group that consists of 19 federal agencies and offices.¹²⁵

It appears that the FTC and DOJ pressured Ambassador Tai to abandon the digital trade provisions because they believe other countries should be allowed to single out U.S. tech companies. Agreements like the IPEF are antithetical to regulatory regimes like the DMA, which is designed to single out companies for regulation. After USTR rescinded support for the IPEF’s digital trade chapters, several Democrats in Congress wrote in support of President Biden’s “whole-of-government competition policy agenda” for digital trade.¹²⁶ These Democrats had argued that the IPEF would “restrict governments from obtaining information on algorithms to systematically enforce against self-preferencing and other competition policy threats[.]”¹²⁷ The inevitable externality of USTR’s decision will be that China stands to benefit: Senate Finance Chairman Ron Wyden (D-Ore.) summarized the decision as “a win for the Chinese government’s efforts to have unlimited access to U.S. data, a win for Chinese tech giants who want to bully smaller countries into following the Chinese model of internet censorship, and a win for China’s Great Firewall, which locks out American companies...”¹²⁸

Chair Khan appears to be using the IPEF negotiations to advance the FTC’s anti-business policies instead of advancing U.S. economic interests. The digital trade provisions upheld U.S. leadership in an industry critical to innovation, the U.S. economy, and the security of the nation and its allies.¹²⁹ Troublingly, the FTC’s actions to undermine IPEF complement the FTC’s efforts to help implement the DMA. As the letter sent from congressional Democrats to the

¹²¹ *Id.*

¹²² *Supra*, note 92.

¹²³ Coppola Interview at 65.

¹²⁴ *Executive Branch Agencies on the Trade Policy Staff Committee and the Trade Policy Review Group*, United States Trade Representative (accessed Jun. 7, 2024), available at <https://ustr.gov/about-us/executive-branch-agencies-trade-policy-staff-committee-and-trade-policy-review-group>.

¹²⁵ *Id.*

¹²⁶ Letter from Hon. Elizabeth Warren, Senator, et al., to Hon. Joseph Biden, President, United States of America (Nov. 6, 2023).

¹²⁷ *Id.*

¹²⁸ Press Release, U.S. Senate Committee on Finance, *Wyden Statement on Ambassador Tai’s Decision to Abandon Digital Trade Leadership to China at WTO* (Oct. 25, 2023).

¹²⁹ *Id.*

White House on November 6, 2023, warned, the IPEF could conflict with EU regulations, specifically the DMA.¹³⁰ Rather than find consensus working through the legitimate means of Congress or the traditional USTR-led interagency structure of U.S. international trade negotiations, the FTC and Chair Khan's allies seems to be coordinating antitrust and competition policies with foreign regulators for ideologically charged, partisan political ends. Together, these actions signal to other countries that the U.S. government will not stand up for American companies.

3. The Illumina-GRAIL and Amazon-iRobot Cases

The FTC has also leaned on its European counterparts to accomplish its enforcement goals. This reliance on foreign regulatory regimes is demonstrated in at least two prominent cases: (1) the Illumina-GRAIL proposed merger; and (2) the Amazon-iRobot proposed merger. All four companies are American. Through coordination with its European counterparts, the FTC managed to quash both mergers. While the Committee does not take a position on the merits of either merger, it is concerned with the FTC's use of time and taxpayer resources to kill mergers between American companies through European competition authorities.

a. Illumina-GRAIL

A set of emails released in 2023 as the result of a Freedom of Information Act (FOIA) request raised concerns about whether the FTC improperly consulted with British and European officials to block the proposed Illumina-GRAIL merger.¹³¹ Illumina, Inc. (Illumina), is a gene sequencing company, and GRAIL, Inc. (GRAIL), develops blood detection tests for cancer. Both are U.S. companies, and GRAIL did not have any business operations in Europe at the time the merger was proposed.¹³² These emails indicated that the FTC began reaching out to European regulators before there was any legitimate reason to do so.¹³³ On February 19, 2021, the EC solicited EU members to make referrals to bring an enforcement action against the proposed merger under Article 22 of the EU Merger Regulation.¹³⁴ Article 22 allows members of the EU to review transactions that do not meet EU or national thresholds for challenging mergers. On March 9, 2021, the French competition regulator, the Competition Authority (Autorité de la concurrence), referred Article 22 charges to EU authorities.¹³⁵ The FTC filed an administrative complaint in the U.S. on March 30, 2021, to prevent the Illumina-GRAIL

¹³⁰ *Supra*, note 126.

¹³¹ U.S. Chamber Staff, *FTC Records Related to the FTC's Attempt to Block the Illumina-Grail Transaction*, U.S. Chamber of Commerce (Feb. 23, 2023).

¹³² Conor Hale, *FTC reverses course, orders Illumina to unravel Grail deal*, Fierce Biotech (Apr. 3, 2023).

¹³³ *Supra*, note 131. A timeline describing actions taken by the FTC and its European counterparts related to the Illumina-Grail matter is provided in Appendix A.

¹³⁴ *European Commission Implements New Policy to Investigate Transactions That Would Otherwise Escape Merger Reviews*, Cleary Gottlieb (Apr. 23, 2021).

¹³⁵ *Id.*

merger.¹³⁶ In April 2021, the European Commission formally declared jurisdiction over the merger.¹³⁷

On October 22, 2023, the Committee sent a request to the FTC for records of communications with multiple European regulatory agencies related to the Illumina-GRAIL case.¹³⁸ The FTC initially refused to provide the documents to the Committee, arguing they were related to an ongoing law enforcement matter. After seven months, the FTC allowed the Committee to review the documents *in camera*. However, the FTC initially placed extremely burdensome restrictions on the process by barring Committee staff from taking notes even though the documents amounted to more than 100 pages. The FTC did not allow the Committee to return to the FTC without the burdensome restrictions until early July 2024—more than eight months after the initial request; the Commission never allowed the Committee to receive the records of communications related to the Illumina-Grail case.

The unredacted emails demonstrate that the FTC was eager for European regulators to act against the Illumina-GRAIL merger. Not long after the merger parties filed under the Hart-Scott-Rodino (HSR Act), the FTC began reaching out to regulators in the United Kingdom (UK) and EU. The FTC emailed the UK’s Competition Markets Authority (CMA) on October 29, 2020, gauging the UK regulator’s interest in the merger.¹³⁹ The email from the FTC offered a link to the CMA (and, therefore, the UK’s jurisdiction), stating it “seems [the merged parties] will sell tests in US and UK.” The UK responded on November 2, 2020, indicating they would review the merger. The FTC pressed the UK on November 16 for an update: “just wanted to touch base on Illumina/Grail. Any further thoughts?” Ms. Coppola followed up with another request and the FTC and CMA scheduled a call to discuss Illumina-GRAIL on December 10. Emails exchanged between the FTC and CMA demonstrate that commissioners were engaged in the merger review and at least one Commissioner, Commissioner Slaughter, discussed the matter with CMA officials.

The CMA did not put the matter to rest until it informed the FTC on January 28, 2021, that the UK did not have jurisdiction over the proposed merger. A UK official emailed Commissioner Slaughter:

Thanks again for raising the potential acquisition of Grail by Illumina when we spoke. We’re also grateful for recent cooperation of your colleagues at the FTC who have had a number of helpful discussions with our team ***to inform our initial assessment of the case.*** We have now reached the view

¹³⁶ Administrative Complaint at 2, In the Matter of Illumina, Inc., and GRAIL, Inc., U.S. Federal Trade Commission, Docket No. 9041 (Mar. 30, 2021).

¹³⁷ Press Release, Illumina, *Illumina Files Action for Annulment of European Commission’s Decision Asserting Jurisdiction to Review GRAIL Acquisition* (Apr. 29, 2021); Nick Paul Taylor, *Illumina sues European Commission to block competition probe into Grail buyout*, MedTech Dive (Apr. 30, 2021).

¹³⁸ Letter from Hon. James Comer, Chairman, H. Comm. on Oversight & Accountability, to Hon. Lisa Khan, Fed. Trade Comm’n (Oct. 22, 2023).

¹³⁹ Email from Maria Coppola, FTC, to [Redacted], CMA (Oct. 29, 2021) [*in camera* notes on file with Committee].

that the CMA will not open a merger investigation in relation to this transaction because it does not appear to meet our jurisdictional thresholds While we do not expect to open an investigation into this transaction, we look forward to continuing our close and productive working relationship on future cases. Should there be any further development in relation to this case in the UK, we will, of course, let you know.¹⁴⁰

The CMA emailed Commissioner Slaughter on March 31 to confirm its decision and cc'd then-FTC Chair Rohit Chopra.¹⁴¹

The FTC then turned to Austrian authorities in February 2021. On February 16, 2021, the FTC reached out to Austria's competition regulator, the Austrian Federal Competition Authority (BWB), "...we learned BWB is considering investigating..." and requested a phone call.¹⁴² The BWB responded on February 17, 2021, highlighting the "important increase in international cooperation between Austria and the US in the last month" but explained that the BWB had not determined if Austria could pursue the Illumina-GRAIL merger. The BWB official did not think a call on the matter was necessary, writing "I don't know if a call would already be helpful as at the moment we can't say much more than that we contacted the parties."¹⁴³ Nevertheless, they offered to speak over the phone on February 25, 2021.¹⁴⁴ FTC staff affirmed the next day, "...I understand. However, a quick call might be helpful anyways."¹⁴⁵ The BWB followed up on March 3, 2021, to confirm it lacked jurisdiction over the parties as BWB found they had "[n]o substantial operations in Austria."¹⁴⁶

The FTC then turned to the EU, initiating conversations with EC regulators in March 2021. Ms. Coppola led the engagement; on March 10, 2021, Ms. Coppola wrote, "Any chance you are looking at this transaction? (I think it would be an Art 22 referral if so. We have deep concerns..."¹⁴⁷ The EC responded by requesting a phone call.¹⁴⁸ Follow-up emails between the officials that were reviewed by the Committee imply Director Coppola spoke with the EC official on March 10, 2021.¹⁴⁹ Director Coppola requested yet another phone call with the EC on March 15, 2021, to discuss the Illumina-GRAIL merger.¹⁵⁰ The same day, Director Coppola emailed FTC staff that it was permissible to share information with European regulators from a

¹⁴⁰ Email from [Redacted], CMA, to Rebecca Slaughter, Commissioner, FTC (Jan. 28, 2021) [*in camera* notes on file with Committee] (emphasis added).

¹⁴¹ Email from [Redacted], CMA, to Rohit Chopra, FTC, et al., (Mar. 31, 2021) [*in camera* notes on file with Committee].

¹⁴² Email from FTC staff to [Redacted], BWB (Feb. 16, 2021) [*in camera* notes on file with Committee].

¹⁴³ Email from [Redacted], BWB, to FTC staff (Feb. 17, 2021) [*in camera* notes on file with Committee].

¹⁴⁴ *Id.*

¹⁴⁵ Email from FTC staff to [Redacted], BWB (Feb. 18, 2021) [*in camera* notes on file with Committee].

¹⁴⁶ Email from [Redacted] to FTC staff (Mar. 3, 2021) [*in camera* notes on file with Committee].

¹⁴⁷ Email from Maria Coppola, FTC, to [Redacted], EU (Mar. 10, 2021) [*in camera* notes on file with Committee].

¹⁴⁸ Email from [Redacted], EU, to Maria Coppola, FTC (Mar. 10, 2021) [*in camera* notes on file with Committee].

¹⁴⁹ Email from Maria Coppola, FTC, to [Redacted], EU, et al., (Mar. 10, 2021) [*in camera* notes on file with Committee].

¹⁵⁰ Email from Maria Coppola, FTC, to [Redacted], EU, et al., (Mar. 15, 2021) [*in camera* notes on file with Committee].

“cooperation perspective,” with the caveat that information confidential to companies would not be shared.¹⁵¹ In that email Coppola added, “If you prefer to do over the phone that’s ok too.”¹⁵²

An internal email on March 16, 2021, raises questions about whether the FTC was fishing for information to convince the EU regulators to take up the case. In an email from an attorney in the FTC’s Bureau of Competition to a counsel for international antitrust, the attorney wrote that FTC staff had found documents showing the merging parties discussed entry into the European market.¹⁵³ Communications between the French competition regulatory authority, Autorité de la concurrence, indicate that the European authorities looked to the United States as the coordinator of actions related to Illumina-GRAIL and sought information to support potential enforcement actions. In a March 30, 2021, email, an Autorité de la concurrence staffer stated:

We have a very important procedural milestone on this issue early this afternoon (Paris time)...[i]ndeed we understand that a decision will be made today as to whether to challenge the transaction before the court, and *it would be much appreciated if the team could share with us the latest information on this, including the timing of such decision.*¹⁵⁴

Also on March 30, 2021, the FTC voted to file an administrative complaint to block the proposed acquisition.¹⁵⁵ The FTC then moved to dismiss its own case in federal court. The FTC’s statement published on May 20, 2021, explained, “Now that the European Commission is investigating, Illumina-GRAIL cannot implement the transaction without obtaining clearance from the European Commission.”¹⁵⁶

The FTC continued with its administrative law process to challenge the merger.¹⁵⁷ The FTC lost its case before its chief administrative law judge and then appealed to its commissioners.¹⁵⁸ Ultimately, Illumina and GRAIL abandoned the merger after being entangled in a legal knot for 34 months.¹⁵⁹

The timeline strongly implies that the FTC and European antitrust agencies influenced one another procedurally and substantively. On the procedural front, the timeline shows that the FTC withdrew its motion for a preliminary injunction shortly after the EC asserted jurisdiction over the transaction. Once the EC announced jurisdiction, the FTC could safely withdraw its

¹⁵¹ Email from Maria Coppola, FTC, to FTC staff (Mar. 15, 2021) [*in camera* notes on file with Committee].

¹⁵² *Id.*

¹⁵³ Email from [Redacted], FTC, to [Redacted], FTC, et al., (Mar. 20201) [*in camera* notes on file with Committee].

¹⁵⁴ Email from [Redacted], Autorité de la concurrence, to Maria Coppola, FTC, et al., (Mar. 30, 2021) [*in camera* notes on file with Committee] (emphasis added).

¹⁵⁵ Press Release, *FTC Challenges Illumina’s Proposed Acquisition of Cancer Detection Test Maker Grail*, Fed. Trade Comm’n (Mar. 30, 2021).

¹⁵⁶ Press Release, *Statement of FTC Acting Bureau of Competition Director Maribeth Petrizzi on Bureau’s Motion to Dismiss Request for Preliminary Relief in Illumina/GRAIL Case*, Fed. Trade Comm’n (May 20, 2021).

¹⁵⁷ *Rocky history of Illumina’s Grail deal*, Reuters (Dec. 18, 2023).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

challenge in federal courts and continue with its internal administrative court case. The EC’s merger review process easily lapped the one-year closure deadline in the companies’ sale and purchase agreement. Substantively, the EC blocked the deal on a vertical innovation theory of harm similar to the argument made by the FTC.¹⁶⁰ The Illumina-GRAIL case represents the first time the EC has used this type of vertical innovation theory to block a merger and the first time the EC has blocked an acquisition of a U.S. company with zero revenue in the EU.¹⁶¹

Ultimately, the European Court of Justice decided on September 3, 2024, that the EC lacks jurisdiction over the Illumina-GRAIL merger.¹⁶² The EU Court of Justice concluded that the EC had undermined predictability and legal certainty, writing companies “must be able easily and quickly to identify to which authority they must turn, and within what time limit and in what form.”¹⁶³

Ms. Coppola was promoted to Director of the Office of International Relations in 2022 after Ms. Khan assumed the Chair. Reports indicated her predecessor left his position because he “had taken issue with Khan’s management style and had seen several members of his team reassigned to work on mergers and acquisitions.”¹⁶⁴

Q. What was your role when Chair Khan assumed the chair?

A. I was counsel for international antitrust, responsible for relations with Europe and the U.K.

Q. And you said you were promoted to director in 2022?

A. Correct.

Q. Who was your predecessor?

* * *

A. Do you know why he left?

Q. He retired.¹⁶⁵

¹⁶⁰ *Illumina/GRAIL: EC Blocks Transaction below EU and Referring Member State Merger Control Thresholds for First Time*, Cleary Antitrust Watch (Sept. 15, 2022).

¹⁶¹ *Id.*

¹⁶² *ECJ Finds European Commission Review of Below-Threshold Mergers Unlawful*, Debevoise (Sept. 9, 2024).

¹⁶³ *Id.*

¹⁶⁴ Theo Wayt & Josh Kosman, *FTC faces staff exodus, anger over Biden-appointed Big Tech foe’s leadership*, New York Post (June 12, 2022).

¹⁶⁵ Coppola Interview at 9.

b. Amazon-iRobot

The demise of Amazon’s proposed acquisition of iRobot provides another example of the FTC using its European counterparts as a means to block mergers of American businesses. On August 5, 2022, Amazon and iRobot, both American companies, announced they intended to merge.¹⁶⁶ After an initial review of the proposed merger, the FTC followed up on September 19, 2022, with a second request for information.¹⁶⁷ The EC announced on July 6, 2023, its own investigation into the proposed merger between Amazon and iRobot.¹⁶⁸ iRobot hoped that Amazon’s acquisition would provide the company with a badly needed injection of cash, but the company needed a loan while the regulators reviewed the merger. The Committee sent a letter to the FTC on May 1, 2024, seeking information about the FTC’s consultations with European authorities.¹⁶⁹

Reports on January 18, 2024, stated that the EC advised Amazon that it would block the merger.¹⁷⁰ Amazon and iRobot agreed to terminate the merger by January 29, 2024, after continued “opposition from EU and U.S. antitrust regulators.”¹⁷¹ The FTC championed the news: “We are pleased that Amazon and iRobot have abandoned their proposed transaction.”¹⁷² Consequently, iRobot announced it would have to cut 31 percent of its workforce, meaning 350 of its employees in the United States.¹⁷³

EC Executive Vice President Margarethe Vestager admitted that the EC was “in close contact” with the FTC throughout the investigation. Speaking at the “Next World Order” conference in Brussels, Belgium on January 31, 2024, Commissioner Slaughter stated that the FTC had been prepared to block the transaction.¹⁷⁴ In response, the Consumer Technology Association stated, “At the FTC, regulators are working in partnership with foreign governments to launch antitrust suits against American companies.”¹⁷⁵

¹⁶⁶ Press Center, Amazon and iRobot Sign an Agreement for Amazon to Acquire iRobot, Amazon (Aug. 5, 2022).

¹⁶⁷ *FTC Seeks More Data on Amazon’s \$1.7-billion Deal for Vacuum Maker iRobot*, Reuters (Sept. 20, 2022). A timeline describing actions taken by the FTC and its European counterparts related to the Amazon-iRobot matter is provided in Appendix B.

¹⁶⁸ Press Release, European Commission, *Mergers: Commission Opens In-depth Investigation into the Proposed Acquisition of iRobot by Amazon* (Jul. 6, 2023).

¹⁶⁹ Letter from Hon. James Comer, Chairman, H. Comm. Oversight & Accountability, to Lina Khan, Chair, Fed. Trade Comm’n (May 1, 2024).

¹⁷⁰ Kim Mackrael & Dana Mattioli, *EU Commission Intends to Block Amazon’s iRobot Acquisition*, The Wall Street Journal (Jan. 18, 2024).

¹⁷¹ News Release, iRobot, *Amazon and iRobot Agree to Terminate Pending Acquisition* (Jan. 29, 2024); Press Release, Amazon, *Amazon and iRobot Agree to Terminate Pending Acquisition* (Jan. 29, 2024).

¹⁷² Press Release, Federal Trade Commission, *Statement Regarding the Termination of Amazon’s Proposed Acquisition of iRobot* (Jan. 31, 2024).

¹⁷³ News Release, *iRobot Announces Operational Restructuring Plan to Position Company for the Future*, iRobot (Jan. 29, 2024).

¹⁷⁴ *US FTC Was Poised to Reject Amazon Acquisition of iRobot – Source*, Reuters (Jan. 29, 2024); Leah Nylen, *After Amazon-iRobot the FTC Is More ‘Focused’ on Blocking Bad Deals*, Bloomberg (Jan. 31, 2024).

¹⁷⁵ Stewart Wolpin, *iRobot’s Angle, CTA’s Shapiro Lash out at Regulation*, TWICE (Apr. 22, 2024).

Several facts about the companies involved in the doomed merger need to be raised. The former CEO of iRobot, Colin Angle, recently explained that the company is “facing a new breed of competitor – the Chinese fast follower – companies subsidized strategically by the Chinese government who invested in innovation, companies able to prosper in their home market, which became effectively closed to us, giving them the opportunity to scale.”¹⁷⁶ The Computer & Communications Industry Association has said the market stands to be “overtaken by dynamic Chinese manufacturers.”¹⁷⁷

iRobot’s global market share was 64 percent in 2016, but due to increased competition from cheap Chinese products, iRobot’s market share dropped to 46 percent in 2020.¹⁷⁸ The company had to lay off employees in 2022 and 2023, sublease part of its headquarters, and cut expenditures in marketing.¹⁷⁹ iRobot increased its debt—\$200 million in loans—to try to survive the merger review.¹⁸⁰ The financial challenges facing iRobot raise the question as to whether the case was about an antitrust problem or singling out a large digital platform because it was politically advantageous to do so. Democrats in Congress had called on the FTC to block the proposed merger between Amazon and iRobot.¹⁸¹

Chair’s Khan’s history of criticizing Amazon reinforces the suspicion that the FTC’s actions were politically motivated. In 2017, she wrote an academic paper that accused Amazon of predatory pricing.¹⁸² Chair Khan argued that Amazon should be broken up.¹⁸³ However, when the FTC filed its suit against Amazon in 2023, the FTC claimed that the e-commerce company forced its sellers to maintain high prices.¹⁸⁴ It is also apparent that the FTC defined in its lawsuit an “online market” that suits the FTC’s legal challenge but does not reflect the experiences of the American consumer.¹⁸⁵ The goal in doing so seems to have been to support an inflated representation of Amazon’s share of the market and present a deflated perception of the apparent amount of competition. The FTC did not even account for brick-and-mortar stores, which still account for how most Americans retail shop.¹⁸⁶

¹⁷⁶ *Id.*; *Robotic Vacuum Cleaners: Global Market Share 2014-2018*, Statista (accessed Jun. 24, 2024) available at <https://www.statista.com/statistics/934089/worldwide-robotic-vacuum-cleaner-market-share/>.

¹⁷⁷ Press Release, *CCIA Response to News Reports EU Regulators May Block iRobot Acquisition*, Computer & Communications Industry Association (Jan. 18, 2024).

¹⁷⁸ Jennifer P. Tuohy, *Amazon left Roomba a huge mess to clean up*, the Verge (Jan. 31, 2024).

¹⁷⁹ *ICYMI: Experts Criticize the Politicized Intention of European Commission’s Intent to Block the Amazon-iRobot Deal which Jeopardized iRobot’s Viability*, Computer & Communications Industry Association (Feb. 1, 2024).

¹⁸⁰ Greg Roumeliotis, *Amazon’s Abandoned Acquisition Leaves iRobot in Carylyl Debt Straightjacket*, Reuters (Jan. 31, 2024).

¹⁸¹ Letter from Elizabeth Warren, Senator, et al., to Hon. Lina Khan, Chair, Fed. Trade Comm’n (Sept. 28, 2022).

¹⁸² Lina Khan, *Amazon’s Antitrust Paradox*, Yale Law Journal (2017).

¹⁸³ *Id.*

¹⁸⁴ *Amazon (eCommerce): Revised Redacted Complaint*, Fed. Trade Comm’n (Nov. 1, 2023); Dave Michaels, Dana Mattioli, *FTC Sues Amazon, Alleging Illegal Online-Marketplace Monopoly*, The Wall Street Journal (Sept. 26, 2023).

¹⁸⁵ *Id.*

¹⁸⁶ *E-Commerce Retail Sales as a Percent of Total Sales*, Fed. Reserve Bank of St. Louis (Aug. 19, 2024), available at <https://fred.stlouisfed.org/series/ECOMPCTSA>.

The FTC’s 2023 suit against Amazon under Chair Khan’s leadership was viewed by and large as an inevitable legal challenge.¹⁸⁷ The notion that Chair Khan assumed her position with a pre-determined agenda, coupled with the facts of iRobot’s finances—which cried out for a merger to save this American company and foster American competition against China—leave the Committee to wonder whether the FTC’s case against the Amazon-iRobot merger was driven by objective or by ideological motivations.

The Amazon-iRobot case also fits a larger pattern. The Biden-Harris Administration and the FTC under Chair Khan have been transparently biased against U.S. tech companies. The FTC and DOJ have worked in tandem to investigate Amazon, Apple, Google, and Meta.¹⁸⁸ All four companies have been sued. The FTC is also trying to prevent the merger between Microsoft and Activision.¹⁸⁹ The most extreme example may be the FTC’s challenge to the proposed merger of Meta and the virtual reality app enterprise, Within. In 2022, the FTC challenged Meta’s acquisition of Within. Meta requested Chair Khan’s recusal because she has a lengthy history of advocating against Meta’s rights to pursue mergers.¹⁹⁰ As discussed above, the FTC’s DAEO recommended Chair Khan recuse herself from the FTC’s challenge due to concerns over the appearance of bias, but the Chair refused to heed that advice.¹⁹¹ It appears that, for Chair Khan, it was more important for the FTC to put its thumb on the scale than for the Commission to provide a credible process.

The Committee wrote to the FTC on May 1, 2024, seeking internal emails and communications with European authorities related to the Commission’s actions to block the merger between Amazon and iRobot.¹⁹² The FTC has not produced a single email or record of communication between the FTC and EC. Nor has the Commission produced a single internal document that justifies contacting European authorities. Director Coppola and the Director of the Bureau of Competition, Henry Liu, could not provide the Committee with information related to the matter during their transcribed interviews, either; Director Liu had to recuse himself from the case, and Director Coppola “wasn’t involved in the review.”¹⁹³ The FTC’s noncompliance with the Committee’s request has made the case a black box.

¹⁸⁷ Andrew Ross Sorkin, et al., *What to Watch as Lina Khan Finally Takes on Amazon*, The New York Times (Sept. 27, 2023); Anat Alon-Beck, *Lina Khan and Her White Whale: the FTC Takes on Amazon*, Forbes (Sept. 29, 2023); Johsh Sisco, *FTC readies lawsuit that could break up Amazon*, Politico (Jul. 25, 2023).

¹⁸⁸ Cecilia Kang and David McCabe, *U.S. Antitrust Case Against Google Is Just the Start*, The New York Times (May 3, 2024).

¹⁸⁹ *FTC chair met UK antitrust officials last week but did not talk deals*, Reuters (Apr. 27, 2023).

¹⁹⁰ Press Release, *Open Markets Institute Calls on the FTC to Block All Facebook Acquisitions*, Open Markets Inst. (Nov. 1, 2017); Press Release, Open Markets Inst., *Fines for Facebook Aren’t Enough: The Open Markets Institute Calls on FTC to Restructure Facebook to Protect Our Democracy* (Mar. 22, 2018); The Bernie Sanders Show, *The Greatest Threat to Our Democracy?* (May 15, 2018) (starting at 20:29), available at <https://www.youtube.com/watch?v=wuCAy10hIHI>; *Majority Staff Report and Recommendations of H. Subcommittee on Antitrust, Commercial, and Administrative Law of the Committee on the Judiciary*, H. Comm. on the Judiciary, 116th Cong., *Investigation of Competition in Digital Markets* (2020).

¹⁹¹ Chelsey Cox, *FTC Chair Lina Khan refused to sit out agency’s case against Meta despite ethics concerns, report says*, CNBC (Jun. 16, 2023); *Why I’m Resigning*.

¹⁹² *Supra*, note 169.

¹⁹³ *See* Liu Interview at 108; Coppola Interview at 68.

4. A Threat to an Independent, Nonpartisan Commission

The FTC's actions related to the DMA and IPEF and Illumina-Grail and Amazon iRobot show the Khan FTC has broken from its mandate of nonpartisanship, impartiality, and independence. The FTC is the United States' "oldest independent agency, with the exception of the Civil Service Commission and the Interstate Commerce Commission."¹⁹⁴ It is supposed to be non-partisan and is "charged with the enforcement of no policy except the policy of the law."¹⁹⁵ As the Supreme Court held:

The commission is to be non-partisan; and it must, from the very nature of its duties, act with entire impartiality. It is charged with the enforcement of no policy except the policy of the law. Its duties are neither political nor executive, but predominantly quasi-judicial and quasi-legislative.¹⁹⁶

While the FTC may, according to former Commissioner Robert E. Freer, "make *investigations* at the direction of the President, the Congress, upon the request of the Attorney General, or upon its own initiative,"¹⁹⁷ the FTC should not be seeking, aiding, or effectuating the enforcement of policies or actions, whether drawn from foreign authorities or inspired by domestic allies, that have no basis in law or have a predetermined outcome.

Under Chair Khan's leadership, the FTC has looked to Europe and Congressional allies, not its lawful mandate, for inspiration regarding how to regulate digital market and economic competition. Speaking in Brussels in 2022, Chair Khan applauded her European counterparts, "[J]ust last week, of course, we saw the EU finalize the Digital Markets Act, a significant proposal to promote fair access to market control by digital gatekeepers."¹⁹⁸ Speaking on January 31, 2024, at a conference on "Antitrust, Regulation, and the Next World Order" in Brussels, Commissioner Slaughter stated that there "is no apolitical, neutral application of the [antitrust] law, as aspirational as that goal may seem," and that "economics doesn't necessarily provide us with some neutral, independent analysis."¹⁹⁹ Chair Khan has also praised the regulatory regimes of the EU and the United Kingdom more broadly, "And frankly, I think it's no doubt the US has been behind the curve, especially with regards to the European

¹⁹⁴ Public Statement of Commissioner Robert E. Freer, The Work of the Federal Trade Commission, Fed. Trade Comm'n (Mar. 23, 1936), *available at* https://www.ftc.gov/system/files/documents/public_statements/674231/19360323_freer_the_work_of_the_ftc.pdf [hereinafter "Freer Statement"].

¹⁹⁵ *Id.*

¹⁹⁶ *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

¹⁹⁷ Freer Statement.

¹⁹⁸ Speeches, Remarks of Chair Lina M. Khan at the Charles River Associates Conference, Competition & Regulation in Disrupted Times in Brussels, Belgium, Fed. Trade Comm'n (Mar. 31, 2022).

¹⁹⁹ Antitrust, Regulation and the Next World Order, "From Price to Power"? Reorienting Antitrust for the New Political Economy, YouTube (Feb. 2, 2024), *available at* <https://www.youtube.com/watch?v=rWNIhGA8Rx8>.

Commission, with CMA; we learned an enormous amount from the work that other jurisdictions have done.”²⁰⁰

Democrats in Congress as well as those in the Administration support the DMA and passing legislation in Congress with similar authorities. A letter from several Democrat members of Congress to the White House explains the means to their ends:

We urge you to continue to reject claims that the European Union’s Digital Markets Act (DMA) constitutes an illegal barrier to trade. The DMA will protect consumers and spur competition in the tech industry. The United States’ trade policy must support the European Union’s efforts to rein in Big Tech and facilitate similar American policies, rather than impair them.²⁰¹

Additionally, the members of Congress wrote:

The DMA shares many similarities with the bipartisan American Innovation and Choice Online Act that your administration supports. Last year, DOJ sent a views letter on behalf of the Biden Administration...[t]he letter concluded that “the Department strongly supports the principles and goals animating the legislation...”²⁰²

The FTC’s support for and assistance in the implementation of the DMA constitutes a departure from its legislative purpose and mission—a threat to its nonpartisanship, impartiality, and independence. The FTC’s support for the passage of the DMA in Europe and its eagerness to help implement a foreign authority’s law that adversely affects U.S. businesses is deeply concerning. The Administration’s interest in the DMA seems part of its larger goals to expand the power and size of government. Adopting EU regulations would give the Biden-Harris Administration the more intrusive type of government to which leaders at the FTC (and DOJ) clearly aspire.

This is further demonstrated in the FTC’s role in IPEF negotiations. A letter sent by Democratic members of Congress on April 21, 2023, to USTR Ambassador Tai and Commerce Secretary Raimondo regarding the IPEF echoed the FTC’s positions:²⁰³ “Given the impact that skewed trade rules would have, we ask that you ensure new digital trade rules complement—rather than conflict with—our efforts to promote competition in the digital economy, regulate artificial intelligence, and protect online privacy.”

²⁰⁰ Micaela Arias Domecq, *Lina Khan, US Federal Trade Commission: US antitrust takes big steps – How to read that in Europe*, Concurrences (May 21, 2024).

²⁰¹ Letter from Hon. Elizabeth Warren, Senator, et al., to Hon. Joseph Biden, President, United States of America (Dec. 12, 2023).

²⁰² *Id.*

²⁰³ Letter from Hon. Elizabeth Warren, Senator, et al., to Hon. Katherine Tai, Ambassador, U.S. Trade Representative, and Hon. Gina Raimondo, Secretary, Department of Commerce (Apr. 21, 2023).

IV. RULEMAKING AT THE FTC UNDER CHAIR KHAN: BULLDOZING NORMS, BURSTING STATUTORY BOUNDS, AND WORKING WITHOUT THE FACTS

Under Chair Khan, rulemaking at the FTC has followed the same pattern—bulldozing agency norms, going beyond statutory authority, and regulating based on Biden-Harris ideology, not the facts.

Almost immediately following Chair Khan’s swearing-in on June 15, 2021, the Commission changed procedures for trade-regulation rulemaking under Section 18 of the Federal Trade Commission Act.²⁰⁴ This unshackled Chair Khan from restraints long in place to prevent rulemaking abuses. As then-Commissioners Wilson and Phillips decried in their dissent:

What the[se] changes – adopted without public input – in fact do is fast-track regulation at the expense of public input, objectivity, and a full evidentiary record. We see no need for bulldozing procedural safeguards in our Section 18 rulemaking Rules of Practice and are concerned in particular that the reforms undercut the independence of those charged with conducting evidentiary hearings, limit valuable input from the public, and reverse decades of practice regarding agency transparency.²⁰⁵

Key to these changes, the Commission’s action reassigned from an independent judge to Chair Khan the selection of presiding officers at rulemaking hearings. As Commissioners Wilson and Phillips put it, this “open[ed] the door for a fact-finding process gerrymandered to fit the agenda of a majority of commissioners.”²⁰⁶ The changes also shifted to the Commission from the presiding judge authority “to set the agenda for the [rulemaking] hearing, choose which issues will be discussed, and select which parties will be permitted to testify, conduct cross-examination, and offer rebuttal evidence.”²⁰⁷ As Commissioners Wilson and Phillips aptly summarized it, “a majority of the Commission will now have a greater ability to control which facts make it into the record, laying the groundwork for skewed rulemakings designed not to benefit the consumer but instead to satisfy the Commission majority.”²⁰⁸

To narrow further the issues parties might be able to address at a hearing, Chair Khan also ensured that the Commission ushered out of the presiding officer’s hands and into the

²⁰⁴ Press Release, *FTC Votes to Update Rulemaking Procedures, Sets Stage for Stronger Deterrence of Corporate Misconduct*, Fed. Trade Comm’n (July 1, 2021).

²⁰⁵ *Dissenting Statement of Commissioners Christine S. Wilson and Noah Joshua Phillips Regarding the Commission Statement on the Adoption of Revised Section 18 Rulemaking Procedures* at 3, Fed. Trade Comm’n (July 9, 2021).

²⁰⁶ *Id.* at 4.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

Commission’s the declaration of which disputed issues were even eligible for testing at a hearing by cross-examination.²⁰⁹ As Commissioners Wilson and Phillips again incisively noted, this cleared the way for a majority of the Commission to “more easily ignore contradictory views by omitting disputed issues from the [Commission’s notice of proposed rulemaking] and the initial hearing notice.²¹⁰ Finally, “[t]he revisions abolish[ed] a staff report that analyzes the rulemaking record and makes recommendations as to the form of the final rule” and removed “comment periods on the staff report and the Presiding Officer’s recommended decision.”²¹¹

Notwithstanding the far-reaching implications of these changes, the Commission did not even seek public comment on them.²¹² To open the door further to expansive Commission rulemaking, the Commission under Chair Khan also adopted an extremely questionable reading of FTC Act sec. 6(g) to provide the Commission with authority to issue rules to prohibit unfair methods of competition under FTC Act sec. 5. This change flew in the face of the fact that “[f]or decades, consistent with the statements in the FTC Act’s legislative history, Commission leadership testified before Congress that the Commission lacked substantive competition rulemaking authority.”²¹³

By discarding this consistent and authoritative past interpretation, Chair Khan sought to open the door wide to a whole new field of FTC rulemaking. And, surely, she intended that field to be influenced by the new Section 5 guidelines on unfair methods of competition she had ushered through the Commission in November of 2022.²¹⁴ As then-Commissioner Wilson put it in her dissent from the guidelines’ adoption, these new guidelines created such uncertainty as to what the Commission might find to constitute an unfair method of competition that they amounted to “an ‘I know it when I see it’ approach,” announcing “that the Commission has the authority summarily to condemn essentially any business conduct it finds distasteful.”²¹⁵ Compounding the danger, the Guidelines also abandoned the traditional antitrust touchstones of the rule-of-reason and the consumer-welfare standard and “reject[ed] a vast body of relevant precedent[.]”²¹⁶ In these ways, as Commissioner Wilson observed, “the Policy Statement abandons bedrock principles of antitrust that long have been accepted by the Commission, the courts, the business community, and enforcers across the globe.”²¹⁷

²⁰⁹ *Id.* at 4-5.

²¹⁰ *Id.* at 5.

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Dissenting Statement of Commissioner Christine S. Wilson Regarding the Notice of Proposed Rulemaking for the Non-Compete Clause Rule*, Commission File No. P201200-1 at 10, Fed. Trade Comm’n (Jan. 5, 2023) [hereinafter “Wilson Non-Compete Dissent”].

²¹⁴ *Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act*, Fed. Trade Comm’n (Nov. 20, 2022).

²¹⁵ *Dissenting Statement of Commissioner Christine S. Wilson Regarding the “Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act”* at 2, Fed. Trade Comm’n (Nov. 10, 2022).

²¹⁶ *Id.* at 2-3

²¹⁷ *Id.* at 3.

Promptly after assuming the chair, Chair Khan launched the Commission on “an aggressive rulemaking campaign,” including rules “seeking fundamental restructuring of the economy.”²¹⁸

A. The FTC’s Non-Compete Clause Rule—Transforming the Labor Economy

Perhaps the most prominent and controversial of these rules is the rule to ban the use of non-compete clauses in employment contracts.²¹⁹ This rule seeks to displace state authority over the law of employment contracts, intrude into the labor relations of vast numbers of employers and employees across the Nation, and “represent[s] a radical departure from hundreds of years of legal precedent that employs a fact-specific inquiry into whether a non-compete clause is unreasonable in duration and scope, given the business justification for the restriction.”²²⁰ It represents a sharp tip of the spear in Chair Khan’s efforts to introduce “labor antitrust” into the FTC’s jurisdiction and thereby transform the United States’ labor economy.²²¹ It also represents a dramatic assertion of the Khan FTC’s newfound “authority” to issue substantive rules addressing unfair methods of competition under FTC Act Sections 5 and 6(g).

Not surprisingly, given the longstanding FTC interpretation that there is no such authority, the Non-Compete Clause Rule was found unlawful right out of the gate by the U.S. District Court for the Northern District of Texas.²²² Methodically analyzing the text, structure, and history of the FTC Act, the court found it clear the FTC lacked the rulemaking authority it asserted.²²³

B. The FTC’s CARS Rule

The Non-Compete Clause Rule shows perhaps the clearest example of how Chair Khan has led the FTC to disregard the rule of law through rulemaking, seeking to establish rules beyond the limits allowed by the FTC Act. Contrastingly, the rule that may best portray the Khan FTC’s willingness to disregard the facts—and carry political water for the Biden-Harris administration—is the Commission’s Combating Auto Retail Scams Trade Regulation Rule (CARS Rule).²²⁴

²¹⁸ Beales and Muris at 4.

²¹⁹ 89 Fed. Reg. 38342 (May 7, 2024) [hereinafter “Non-Compete Clause Rule”].

²²⁰ Wilson Non-Compete Dissent at 1.

²²¹ See, e.g., 89 Fed. Reg. at 38343; *Remarks of Chair Lina M. Khan at the Joint Workshop of the Federal Trade Commission and the Department of Justice Making Competition Work: Promoting Competition in Labor Markets*, Fed. Trade Comm’n (Dec. 6, 2021).

²²² *Ryan LLC v. Fed’l Trade Comm’n*, Civil Action No. 3:24-CV-00986-E, *Memorandum Opinion and Order* at 17-22 (N.D. Tex. Aug. 20, 2024).

²²³ *Id.*

²²⁴ 89 Fed. Reg. 590 (Jan. 4, 2024).

The FTC proposed the CARS Rule on July 13, 2022, in the run-up to the 2022 mid-term election.²²⁵ The rule was proposed to prohibit or burden automobile dealer practices in the sale, leasing and financing of new vehicles and add-on products.²²⁶ Promulgated under the guise of protecting consumers, the proposed rule threatened “harm to consumers and small businesses by making car purchases more difficult and inhibiting innovation in the industry,” as this Committee pointed out to the Commission in an oversight letter dated November 16, 2023.²²⁷ As the Committee emphasized, “[t]he proposed rule appear[ed] to rest on thin analysis and unreliable data and suffer[ed] from several procedural flaws, including violations of FTC regulations requiring advanced notice of proposed rulemaking.”²²⁸ The weak data on which the Commission rested the proposal included “stale evidence from 2011, a severely limited study of thirty-eight consumers in just one market, Washington, D.C, and a cost-benefit analysis that lacked any supporting data” and understated the costs of the proposed rule while overstating its asserted benefits.²²⁹ As the Committee highlighted, “a study published by the Center for Automotive Research in May 2023...suggested the proposed rule could cost consumers \$38.1 billion or more over ten years, as opposed to benefitting consumers by \$29.7 billion as the FTC estimated.”²³⁰ The Committee further stressed that:

The FTC may also have violated its own procedures by failing to issue an advanced notice of proposed rulemaking. Further, the FTC failed to list its proposed rule in the Biden Administration’s Unified Agenda of Regulatory and Deregulatory Actions, in violation of the Regulatory Flexibility Act and Executive Order 12866. As a result, stakeholders and consumers were blind-sided when the proposed rule was published and harmfully constrained when the FTC allowed only sixty days for comment on the NPRM’s forty-nine separate, detailed questions.²³¹

Significantly, the Small Business Administration’s Office of Advocacy—the chief federal watchdog against threats to small businesses—urged the Commission to abandon its proposal and instead pursue targeted actions against the small percentage of bad actors present in the industry.²³² Like the Committee, the Office of Advocacy stressed that the FTC lacked evidence suggesting the proposed rule responded to a pervasive problem in the industry and may have violated procedural requirements.²³³ The Office of Advocacy also stressed that the proposed rule

²²⁵ 87 Fed. Reg. 42012 (July 13, 2022).

²²⁶ *Id.*

²²⁷ Letter from the Hon. James Comer, Chairman, H. Comm. on Oversight & Accountability, to Hon. Lina M. Khan, Chair, Fed. Trade Comm’n (Nov. 16, 2023).

²²⁸ *Id.* at 1.

²²⁹ *Id.* at 2.

²³⁰ *Id.*

²³¹ *Id.*

²³² U.S. Small Business Administration: Office of Advocacy, *Comment on the Notice of Proposed Rulemaking on the Motor Vehicle Dealers Trade Regulation Rule—Rulemaking, No. P204800*, at 7 (Sept. 8, 2022) (SBA Advocacy Comments).

²³³ *Id.* at 2-4, 6.

would make car purchases more cumbersome, stifle industry innovation, and sweep in non-automobile dealers.²³⁴

In short, the proposed rule displayed disregard for the Commission’s duties to assemble and respect the facts needed to determine whether such a rule was needed, honor procedural requirements, and respect the public’s rights to have adequate time to digest and provide meaningful public comment on the rule. Perhaps this was because the rule was hustled out of the Commission’s door in time to affect public opinion before the 2022 mid-term election. Perhaps there are other reasons. Either way, the Commission’s proposal was deeply concerning.

The Commission finalized the CARS rule on January 4, 2024.²³⁵ Legal challenges to the rule were filed immediately. The Commission promptly issued an order staying the rule’s effective date until the legal challenges to it were resolved.²³⁶

C. Other Commission Rulemakings under Chair Khan

The Commission has embarked on other troubling rulemakings as well. As long as Chair Khan remains the head of the Commission, there remains a constant threat that many more may come. One prominent rule of concern is that to revise the Commission form that parties to proposed mergers must file at the beginning of the Hart-Scott-Rodino Act merger-review process. As discussed above,²³⁷ this rule would vastly increase paperwork and disclosure burdens on parties proposing to merge, including parties to the vast numbers of mergers of the sort that in the past have been of no significant concern to the Commission. This raises the question whether the rule is intended simply to chill the consummation of mergers of any sort, consistent with the Biden-Harris Administration’s “Big is Bad” ideology. The Commission’s possible new rule to restrict franchising²³⁸—apparently one of the Commission’s “labor antitrust” priorities—is another rule of concern.

At the most fundamental level, as J. Howard Beales III and Tim Muris warn, numerous rules proposed or finalized under Chair Khan “show signs of the Commission seeking to reprise its role as the second most powerful legislature in Washington,” a role the Commission had last attempted many decades previously.²³⁹ As these former FTC leaders explain:

The Combating Auto Retail Scams Rule (CARS Rule), for example, seeks to restructure the car buying process, requiring extensive disclosures

²³⁴ *Id.* at 5-6.

²³⁵ *Supra*, note 224.

²³⁶ Press Release, *FTC Pauses CARS Rule Effective Date*, Fed. Trade Comm’n (Jan. 18, 2024).

²³⁷ *Supra* at 27.

²³⁸ Press Release, *FTC Seeks Public Comment on Franchisors Exerting Control over Franchisees and Workers*, Fed. Trade Comm’n (Mar. 10, 2023); *Solicitation for Public Comments on Provisions of Franchise Agreements and Franchisor Business Practices*, Fed. Trade Comm’n, available at https://www.ftc.gov/system/files/ftc_gov/pdf/Franchise-RFI.pdf.

²³⁹ Beales and Muris at 63.

regarding financing and optional add-on products and forcing buyers to decline, in writing, to purchase the car at the “offering price” without any add-ons before they can discuss any aspect of financing or optional purchases. The Negative Option Rule requires a cancellation method for goods and services sold with a negative option feature that is as easy as the signup process, and require[s] the consumer’s express consent before offering any alternative to cancellation. The economy-wide Unfair or Deceptive Fees Rule regulates the details of pricing structures, replacing market determination of pricing strategies, changing fundamentally how companies advertise and compete on price and product features. With each of these proposals, there have certainly been instances warranting case by case enforcement, but there are also entirely legitimate, long-standing uses of similar practices that do not appear to harm, and may benefit consumers. Under both the law and sound policy, the Commission should do more than attempt to generalize its enforcement experience with actual frauds to impose uniform solutions on all affected businesses and consumers, many in vastly different circumstances. Nevertheless, the agency appears to be giving short shrift to such basic questions as it attempts to avoid rigorous application of Section 18 rulemaking procedures.²⁴⁰

The course of rulemaking and rulemaking policy at the Commission under Chair Khan is deeply troubling.

V. THE BIDEN-HARRIS “STRIKE FORCE ON UNFAIR AND ILLEGAL PRICING”: THE FTC SHILLING AS A CAMPAIGN-YEAR POLITICAL TOOL FOR THE BIDEN-HARRIS WHITE HOUSE

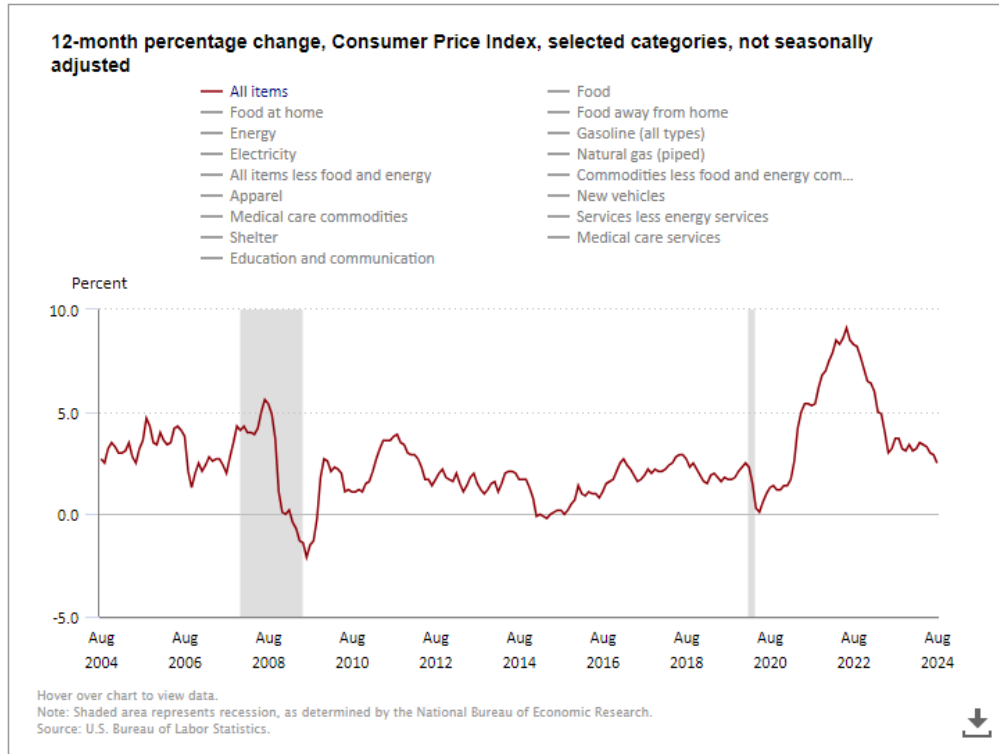
The Biden-Harris White House’s deployment of the FTC to lead its recently created “Strike Force on Unfair and Illegal Pricing” (Strike Force) constitutes another disturbing development at the FTC during Chair Khan’s tenure. The Commission’s leadership of the Strike Force reveals either Chair Khan’s failure to use FTC resources efficiently or an abuse of the FTC for political ends.²⁴¹ The Committee’s investigation has revealed the Strike Force to be, in essence, a sham effort that abuses the imprimatur of the FTC to shore up the Biden-Harris White House’s reputation and record in the run-up to the 2024 presidential election.

²⁴⁰ *Id.*

²⁴¹ Statements and Releases, *FACT SHEET: President Biden Announces New Actions to Lower Costs for Americans by Fighting Corporate Rip-Offs*, The White House (Mar. 5, 2024) [hereinafter “Strike Force Announcement”].

A. Biden-Harris Administration’s Policies Spurred Rampant Inflation

Under the Biden-Harris Administration, the United States has suffered “the largest 12-month increase” in inflation in 40 years.²⁴² From June 2021 to June 2022, food prices increased 10.4 percent.²⁴³ In total, under the Biden-Harris Administration, grocery prices are up 20 percent.²⁴⁴



Source: Charts for Economic News Releases, 12-month percentage change, Consumer Price Index, selected categories, U.S. Bureau of Labor Statistics (accessed Oct. 3, 2024).

Staples like eggs and milk are up 85 percent and 14.1 percent, respectively.²⁴⁵ Food costs account for the highest percentage of Americans’ income in thirty years.²⁴⁶ While inflation has decreased from its high of 9.1 percent in the summer of 2022, the rate of inflation has only

²⁴² TED: The Economics Daily, *Consumer prices up 9.1 percent over the year ended June 2022, largest increase in 40 years*, U.D. Bureau of Labor Statistics (July 18, 2022), available at <https://www.bls.gov/opub/ted/2022/consumer-prices-up-9-1-percent-over-the-year-ended-june-2022-largest-increase-in-40-years.htm>.

²⁴³ *Id.*

²⁴⁴ See Madeline Ngo, *How Food Prices Have Changed Over the Past Four Years*, New York Times (Aug. 13, 2024).

²⁴⁵ See Chris Pandolfo, *How it started ... How it’s going: Inflation down in June, but food, housing prices still up under Biden*, Fox Business (July 11, 2024).

²⁴⁶ See Jesse Newman & Heather Haddon, *It’s Been 30 Years Since Food Ate up this Much of Your Income*, The Wall ST. J. (Feb. 21, 2024).

recently returned to pre-pandemic levels.²⁴⁷ As Vice President Harris has recently admitted, “Prices are still too high.”²⁴⁸

Rampant inflation during the Biden-Harris Administration is attributable to the Administration’s runaway federal spending since it assumed office.²⁴⁹ In her recently unveiled economic agenda, however, Vice President Harris refused to accept accountability for this fact, despite the elementary economics that have predicted and now explain it.²⁵⁰ Instead, Vice President Harris sought to shift the blame to grocers for “rising food prices” and accused businesses of charging “excessive prices unrelated to the costs of doing business.”²⁵¹

Contrary evidence shows that the rise in prices is not due to “illegal pricing” or “corporate rip-offs.”²⁵² The Federal Reserve Bank of San Francisco, for example, has found “that markup fluctuations have not been a main driver of the ups and downs of inflation during the post-pandemic recovery;” “rising markups have not been a main driver of the recent surge and subsequent decline in inflation.”²⁵³ The San Francisco Fed further found that the “Data . . . show that the increase in corporate profits is not particularly pronounced compared with previous recoveries.”²⁵⁴ Instead of “markups” made possible by increased “pricing power,” “much of the recent rise in corporate profits can be attributed to lower business taxes and higher subsidies from pandemic-related government support.”²⁵⁵ Inflation, not markups or price gouging, is to blame for the high prices affecting every American; the Biden-Harris Administration’s reckless spending—only made possible by Vice President Harris’s tiebreaking votes in the Senate—is itself the root of the American economic system’s anemia under this Administration.²⁵⁶

Instead of reducing government spending to actually bring down prices, however, President Biden and Vice President Harris have continued to resuscitate sophomoric explanations of business owners and companies being behind price increases. Vice President Harris has vowed “to go after bad actors to bring down Americans’ grocery costs and keep inflation in check,” including the creation of new “rules of the road to make clear that big corporations can’t unfairly exploit consumers to run up excessive profits on food and groceries”

²⁴⁷ Charts for Economic News Releases, 12-month percentage change, Consumer Price Index, selected categories, U.S. Bureau of Labor Statistics (accessed Oct. 3, 2024), *available at* <https://www.bls.gov/charts/consumer-price-index/consumer-price-index-by-category-line-chart.htm>.

²⁴⁸ Adam Cancryn, *Harris goes after Trump on economy and inflation in new ad*, Politico (Aug. 26, 2024).

²⁴⁹ See, e.g., Betsy Vereckey, *Federal Spending Was Responsible for the 2022 Spike in Inflation, Research Shows*, MIT Management Sloan School (July 17, 2024).

²⁵⁰ See *Vice President Harris Lays Out Agenda to Lower Costs for American Families*, Harris Walz (Aug. 16, 2024), *available at* <https://mailchi.mp/press.kamalaharris.com/vice-president-harris-lays-out-agenda-to-lower-costs-for-american-families> [hereinafter “Vice President Harris’s Agenda”].

²⁵¹ *Id.*

²⁵² Strike Force Announcement.

²⁵³ Sylvain Leduc, et al., *Are Markups Driving the Ups and Downs of Inflation?*, Federal Reserve Bank of San Francisco (May 13, 2024).

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ See Fred Lucas, *VP Harris’ tiebreaker votes in Senate were key to inflation-boosting Biden policies: expert*, Fox News (Aug. 25, 2024).

and providing “new authority for the FTC and state attorneys general to investigate and impose strict new penalties on companies that break the rules.”²⁵⁷ Contrary to the evidence, Vice President Harris blames “[e]xtreme consolidation in the food industry” for “higher prices that account for a large part of higher grocery bills.”²⁵⁸ The Biden-Harris Administration has also accused U.S. businesses of “greedflation”—that is, blaming corporate greed for steady inflation.²⁵⁹ The causes of high prices are not profiteering or price gouging but the Biden-Harris Administration’s inflationary policies.²⁶⁰

B. The Biden-Harris Administration Politicized the FTC through its “Strike Force”

The Biden-Harris Administration’s Strike Force appeared to be created in the run-up to a high-stakes 2024 State of the Union speech amidst growing frustration among Americans about prices and the economy.²⁶¹ The Strike Force, however, does not appear to deviate from the Administration’s previous theories regarding inflation. Indeed, rather than examine its own role in contributing to inflation, the White House often has used a willing FTC to shift blame for historic inflation to the Administration’s favorite scapegoats: American companies.

In August of 2021, amid rising gas prices,²⁶² the Biden-Harris Administration demanded the FTC investigate “illegal conduct” in the oil and gas market “that might be contributing to price increases for consumers at the pump.”²⁶³ Then, in October 2021, the FTC required parties to several proposed oil and gas mergers to respond to second requests for information by the Commission under the Hart-Scott-Rodino Act.²⁶⁴ Former acting FTC chair Maureen Ohlhausen has called the FTC’s actions unprecedented:

Even though previous Democratic FTC commissioners wanted active enforcement, the industry was told what the standards were, deals got

²⁵⁷ Vice President Harris’s Agenda.

²⁵⁸ *Id.*

²⁵⁹ See David Goldman & Elizabeth Buchwald, *The truth behind Harris’ inflation and corporate greed claims*, CNN (Aug. 20, 2024).

²⁶⁰ See EJ Antoni & Andrew Puzder, Kamala Harris, *You Can’t Run from America’s Cost-of-Living Crisis. And Your Price-Gouging Claims Equal No Sale*, The Heritage Foundation (Aug. 23, 2024).

²⁶¹ See Speeches and Remarks, *Remarks of President Joe Biden – State of the Union Address As Prepared for Delivery*, The White House (Mar. 7, 2024) (“Too many corporations raise their prices to pad their profits charging you more and more for less and less. That’s why we’re cracking down on corporations that engage in price gouging or deceptive pricing from food to health care to housing.”); see also Peter Coy, *Please, President Biden: Don’t Blame Corporate Greed for Inflation*, The New York Times (Mar. 6, 2024).

²⁶² See Petroleum & Other Liquids, U.S. All Grades All Formulations Retail Gasoline Prices, U.S. Energy Information Administration (accessed Sept. 10, 2024), available at https://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?f=m&n=p&s=emm_epm0_pte_nus_dpg.

²⁶³ Letter from Brian Deese, Director, National Economic Council, to Hon. Lina Khan, Chair, Fed. Trade Comm’n (Aug. 11, 2021).

²⁶⁴ See David French & Diane Bartz, *EXCLUSIVE U.S. Slows Down Oil and Gas Mergers-Sources*, Reuters (Oct. 21, 2021).

reviewed and things moved along. This is really different...I believe the FTC chair, effectively, would like to deter mergers.”²⁶⁵

On January 27, 2024, President Biden used a political event to pressure grocery stores to lower prices, stating “...there are still too many corporations in America ripping people off: price gouging, junk fees, greedflation, shrinkflation.”²⁶⁶ The *New York Times* reported on February 1, 2024, that White House aides discussed how the President could politicize food prices using grocery chains as scapegoats.²⁶⁷ On February 26, 2024, the FTC announced it would attempt to block a merger between two major grocers, Kroger and Albertsons.²⁶⁸

The Biden-Harris Administration’s efforts to blame private business for the rise in the cost-of-living for Americans is further manifested by the Strike Force.²⁶⁹ On May 5, 2024, President Biden announced “New Actions to Lower Costs for Americans by Fighting Corporate Rip-Offs,” including “a new Strike Force to crack down on unfair and illegal pricing.”²⁷⁰ The FTC and DOJ co-chair this formally titled “Strike Force on Unfair and Illegal Pricing.”

The Strike Force appears to be little more than a messaging tool for the Biden-Harris Administration to take credit for the work the FTC—an independent agency—had already been doing. During a transcribed interview with the Committee, Samuel Levine, Director of the Bureau of Consumer Protection, claimed the Strike Force had no influence on his bureau’s work: “But in terms of the selection of cases, the prosecution of cases, how we staff them, how we choose them, how we litigate them, nothing has changed.”²⁷¹

While the Biden-Harris Administration’s Strike Force purports to “strengthen interagency efforts to root out and stop illegal corporate behavior that hikes prices on American families,”²⁷² Henry Liu, Director of the Bureau of Competition, and Director Levine—the heads of the two enforcement arms of the FTC—recalled having little to no communications regarding the Strike Force. Despite the Strike Force being co-chaired by the FTC and DOJ, Director Liu could not recall any communications with DOJ regarding the Strike Force. Director Liu testified:

Q. The strike force is co-chaired by the FTC and DOJ?

A. That is my understanding, correct.

²⁶⁵ *Id.*

²⁶⁶ Speeches and Remarks, *Remarks by President Biden at a Political Event at South Carolina’s First in the Nation Dinner | Columbia, SC*, The White House (Jan. 28, 2024).

²⁶⁷ See Jim Tankersley, *Biden Takes Aim at Grocery Chains over Food Prices*, The New York Times (Feb. 1, 2024).

²⁶⁸ See Press Release, *FTC Challenges Kroger’s Acquisition of Albertson’s*, Fed. Trade Comm’n (Feb 26, 2024).

²⁶⁹ Strike Force Announcement.

²⁷⁰ *Id.*

²⁷¹ Levine Interview at 38.

²⁷² Strike Force Announcement.

Q. And you mentioned you have not had any communications with any agency regarding the strike force since it was announced?

A. Personally, I have not.

Q. You haven't communicated with DOJ at all about the strike force?

A. I have not personally had any communications with DOJ about the strike force.²⁷³

Director Liu also could not recall having any internal communications at the Commission, including any with Chair Khan, regarding the Strike Force. He stated:

Q. Have you had any internal conversations regarding the Strike Force?

A. Sitting here today, I do not recall any internal communications about functions and executions of the Strike Force since the announcement.

Q. So not with your staff? You haven't had any conversations . . . with your staff within the Bureau of Competition?

A. I don't recall any. I don't recall any.

Q. What about with staff in other offices at [the] FTC?

A. I'm not recalling any.

Q. With anyone in the commissioners' office, any of the commissioners' offices or the commissioners themselves?

A. I'm not recalling any such communications about the Strike Force since the announcement.

* * *

Q. Not with Chair Khan either?

A. I'm not recalling any communications with Chair Khan about the Strike Force.²⁷⁴

²⁷³ Liu Interview at 21.

²⁷⁴ *Id.* at 39.

Similarly, Director Levine could not recall any communications related to the Strike Force with Chair Khan. He testified:

Q. So you said you meet with the Chair weekly. Has the strike force ever come up in conversations with the Chair?

A. I don't think it has ever come up in conversations with the Chair.²⁷⁵

The Committee sought to understand what exactly the Strike Force is doing. Directors Liu and Levine claimed to have little to no knowledge or involvement in the Strike Force, and neither could identify an instance in which the Strike Force affected the work of their bureaus. Director Liu gave his "best impression" of what the Strike Force is doing, claiming he was "not directly involved" in the new project.²⁷⁶ He stated:

Q. So the White House makes this announcement and says the FTC and DOJ are going to work together to do this. Like, what is this? What is it that they are doing?

A. Let me give you my best impression. You know, I was not directly involved and have had no communications with other agencies about the particular contours of the contemplated strike force²⁷⁷

Director Liu assumed someone at the FTC was working on the Strike Force, but he could not identify whom. He testified:

Q. So you previously said . . . that you are aware of others within the FTC who are involved with this Strike Force. Who are they?

A. I believe what I said, and I apologize, is to the best of my knowledge there are others in the agency who were involved in the various tasks or projects called for by the Strike Force. But I cannot say who those individuals are. I'm not aware of who those individuals are.

Q. What is your basis for that knowledge?

A. Often policy projects handled by the agency, particularly ones that are not solely focused on competition but have both the consumer protection and competition angle, are handled by other offices.

²⁷⁵ Levine Interview at 31.

²⁷⁶ Liu Interview at 19.

²⁷⁷ *Id.* at 19.

Our Office of Policy Planning, for example, will often handle cross-policy projects. Our Office of General Counsel tends to get involved in these types of initiatives.

Again, sitting here today, I'm not aware of any specific individuals in those offices. But based on my time at the agency, that does seem like the divisions that would be responsible for these types of initiatives.

Q. Is it an assumption then, is the basis of your knowledge that there are others working on it, or do you have some – was there a memoranda or something . . . that provides that basis of knowledge to say that somebody else is working on it?

A. An assumption. An assumption.²⁷⁸

Director Levine provided more context, explaining that his “understanding is that the strike force might end up highlighting some of” the FTC’s work.²⁷⁹ In essence, the Strike Force would serve as a messaging tool for the Biden-Harris Administration to take credit for work the FTC would have done regardless of the existence of the Strike Force. Both Director Levine and Director Liu were emphatic that the Strike Force did not influence or affect the functions of their bureaus. Director Levine testified:

Q. Okay. Does the Bureau of Consumer Protection have any role in the strike force, in its functions or execution?

A. Not so far, except insofar as – we bring a lot of cases that I think get at the heart of some of the strike force’s concern, right. So, you know, we sued Adobe. With the Department of Justice, we sued Adobe over the summer for, what we alleged, some hidden fees, things of that nature.

So as part of our ordinary work, we do things that I think are good for Americans’ pocketbooks. Certainly all of our antifraud work is about protecting Americans’ pocketbooks. My understanding is that the strike force might end up highlighting some of that work. ***But in terms of – the strike force had no impact on the decision of what cases to bring or what policy initiatives to pursue. Absolutely nothing changed within the Bureau.***²⁸⁰

²⁷⁸ *Id.* at 40-41.

²⁷⁹ Levine Interview at 26.

²⁸⁰ *Id.* at 26 (emphasis added).

Director Levine could not point to a single action the strike force has taken. He stated:

Q. Can you speak to any specific actions that the strike force has taken?

A. I don't know.²⁸¹

Neither Director Liu nor Director Levine viewed the Strike Force as a departure from the FTC's traditional roles or a marked change in the functions of their bureaus. Director Levine explained quite clearly, "nothing has changed."²⁸² He testified:

Q. So you don't [view] a strike force as a departure from the FTC's traditional roles?

A. I don't.

Q. Then how are the functions different with the strike force?

A. How are the functions of the FTC different from the strike force?

Q. Or change with the strike force?

A. You know, I don't know what change – if the Chair's office had conversations with them about messaging, I don't know. If there were conversations about maybe listening sessions – like I understand this upcoming event is a listening session, that might be a change. I don't think we've done a listening session on this issue in particular. ***But in terms of the selection of cases, the prosecution of cases, how we staff them, how we choose them, how we litigate them, nothing has changed.***²⁸³

Director Liu did not consider the Strike Force as changing the functions of the FTC either. He stated:

Q. Do you view the Strike Force as a departure from the agency, the FTC's traditional goals?

A. I do not.²⁸⁴

²⁸¹ *Id.* at 32.

²⁸² *Id.* at 38.

²⁸³ *Id.* at 38 (emphasis added).

²⁸⁴ Liu Interview at 41.

If anything, Director Levine viewed the Strike Force as a potential distraction to the professionals within his bureau:

What I really meant is, you know, you might have seen, sounds like you did a press release that went out yesterday or the day before. Believe it or not, like, that takes a lot of coordination. You've got to run it by our press folks. You've got to run it by – I don't know this specifically, but generally you have to run it by the DOJ press folks. I did not want our folks involved in sort of the logistics of setting this thing up and finding a venue and figuring out speakers. That was really my focus.²⁸⁵

Director Levine also expressed that he did not want attorneys in his Bureau “dragged” into the Strike Force. He stated:

I really want, and I have maintained a clear firewall between, you know, the White House wanting to announce the strike force, which is fine, and our attorneys wanting to bring cases when the law is being broken. And to maintain that firewall, I did not want staff attorneys being, you know, dragged into this process. Again, I think if they had been that those norms would have been respected, but it was really just about making sure people could have time to focus on the cases they were bringing.²⁸⁶

The Strike Force held its first public meeting on August 1, 2024.²⁸⁷ It proved to be exactly what Director Levine anticipated—a means for the Biden-Harris Administration to highlight the work the FTC would have done regardless of the existence of the Strike Force.²⁸⁸ As Chair Khan herself stated:

- “This Strike Force was launched by President Biden back in March to make sure that no American pays inflated prices due to corporate lawbreaking or exploitative tactics.”²⁸⁹
- “The FTC is happy to co-chair the Strike Force alongside the Department of Justice, and I'm so glad that we have the chance to gather with our partners across the government today to discuss our efforts to bring down the prices that Americans are paying for everyday goods and services.”²⁹⁰

²⁸⁵ Levine Interview at 32.

²⁸⁶ *Id.* at 31.

²⁸⁷ See Events, *Strike Force on Unfair and Illegal Pricing*, Fed. Trade Comm'n (Aug. 1, 2024).

²⁸⁸ See Levine Interview at 26, 38.

²⁸⁹ Transcript of Strike Force Virtual Meeting, Fed. Trade Comm'n (Aug. 1, 2024), available at https://www.ftc.gov/system/files/ftc_gov/pdf/strike-force-virtualmeeting_-transcript.pdf.

²⁹⁰ *Id.*

- “The Biden-Harris administration has already made so much progress, slashing credit card fees, capping the cost of insulin, making it easier and cheaper to get hearing aids and so much more.”²⁹¹
- “Often we get taught that the prices people pay are just a reflection of supply and demand, but sometimes businesses can use their power to unfairly inflate prices just because they can.”²⁹²

In short, Chair Khan spent the taxpayers’ time and money and allowed the abuse of her independent agency to provide political cover for the Biden-Harris Administration, parrot Biden-Harris talking points, and give credit to the Biden-Harris Administration for the FTC’s independent work.

VI. COMMISSION MISMANAGEMENT AND STAFF IMPLOSION AT THE FTC UNDER CHAIR KHAN

Over the years, FTC staff have been regarded widely as dedicated and respected civil servants. They, in turn, have shown high morale and high regard for Commission leadership. That has changed under Chair Khan. Appalled at the state of affairs under Chair Khan, career staff have headed for the exits. Career staff’s confidence in the honesty and integrity of Commission leadership, meanwhile, has collapsed.

When Chair Khan took up her chairmanship, the FTC began to experience a “staff exodus.”²⁹³ Staff complained that Chair Khan met “with rank-and-file employees far less frequently than previous FTC chairs.”²⁹⁴ A former executive director of the FTC with 27 years of experience at the agency commented: “People were devastated that all they were getting from the chair’s office was criticism, refusal to engage,” and, because of this, “[t]hey started quitting.”²⁹⁵

The collapse of staff morale was emphatically reflected in the 2022 Federal Employee Viewpoint Survey Results (FEVS). Formerly second on the list of “Best Places to Work in the Federal Government,” the FTC fell to twenty-second during Chair Khan’s first year leading the agency.²⁹⁶

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ *Supra*, n. 164.

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ Cat Zakrewski, *Sinking FTC workplace rankings threaten Chair Lina Khan’s agenda*, The Washington Post (July 13, 2022).

Equally striking was the change in staff's specific perceptions of leadership reported in the 2022 FEVS. Prior to Chair Khan's arrival, the FTC consistently ranked near the top of federal agencies in employees' perception of their leadership.²⁹⁷ But under Chair Khan, the Commission's ranking plummeted in three categories gauging the quality of senior leadership: (1) honesty and integrity of senior leaders; (2) respect for senior leaders; and, (3) the ability of senior leaders to generate high levels of motivation and commitment in the workforce. In 2020, under the Trump administration, the FTC achieved positive feedback from 80 percent or more of the employees surveyed in all three categories.²⁹⁸ By 2022, under Chair Khan, only 49.2 percent of staff surveyed believed senior leadership maintained high standards of honesty and integrity, just 44 percent respected senior leaders, and only 35.8 percent felt senior leaders generated high levels of motivation and commitment in the workforce.²⁹⁹ These numbers recovered slightly in the 2023 FEVS, but the results remained well below 2020 FEVS results.³⁰⁰

Executive Director Robbins confirmed for the Committee that the Chair's office was made aware of these disturbing results. He stated:

Q. I just asked if there were morale problems in 2021 and 2022.

A. So I am aware of the FEVS results. I think the concerns that I heard from staff at the time relating to morale from the FEVS were things that we noted and I know that we took efforts to address.³⁰¹

Committee staff asked Executive Director Robbins to provide examples of the FTC staff's complaints. Mr. Robbins believed that one of the causes of the drop in results was due to Chair Khan's banning of FTC staff from participation in public events. He testified:

Q. Could you provide some examples?

A. Of?

Q. Of those complaints.

A. So I think I'm talking about the FEVS results, and I know there was at least one policy that the Chair had noted in her listening sessions

²⁹⁷ See Mike Swift, *Under Khan's leadership, staffers air frustrations in wake of survey*, MLex Market Insight (June 6, 2022), available at <https://mlexmarketinsight.com/news-hub/editors-picks/area-of-expertise/antitrust/under-khans-leadership-staffers-air-frustrations-in-wake-of-survey>.

²⁹⁸ See 2020 Office of Personnel Management Federal Employee Viewpoint Survey: Report by Agency available at <https://www.opm.gov/fevs/reports/data-reports/data-reports/report-by-agency/2020/2020-agency-report.pdf>.

²⁹⁹ See 2022 Office of Personnel Management Federal Employee Viewpoint Survey: Report by Agency available at <https://www.opm.gov/fevs/reports/data-reports/data-reports/report-by-agency/2022/2022-agency-report.pdf>.

³⁰⁰ See Results At-A-Glance: 2023 Federal Employee Viewpoint Survey Results available at https://www.ftc.gov/system/files/ftc_gov/pdf/2023_FEVS_Results_At_Glance.pdf.

³⁰¹ Robbins Interview at 28.

– the Chair or her chief of staff – that they decided to change, which was intended to try to get at some of the root cause.

Q. What was the policy change?

A. I think it was related to a policy on the kinds of, I want to say, events or things that staff could participate in.³⁰²

The policy to which Executive Director Robbins referred was the infamous “gag order” Chair Khan “imposed on staff that prevented them from engaging in consumer and business education.”³⁰³ But that was not the only cause for employee dissatisfaction under Chair Khan. The House Committee on the Judiciary found FTC employees had expressed concerns that “outside influences . . . have an undue impact on [FTC] priorities, investigation management, and enforcement decisions” under Chair Khan, and that Chair Khan acted “with little regard for the consequences of losing in a way that negatively affects the enforcement agenda.”³⁰⁴ One FTC employee put it simply, “[s]taff feels disrespected.”³⁰⁵

Executive Director Robbins acknowledged to the Committee that “attracting and retaining talented staff is critical to every organization’s success[.]”³⁰⁶ But under Chair Khan, “seven of the agency’s 28 employees in leadership positions departed” and “71 attorneys, among the agency’s most experienced line staff, also left, the highest number of departures in a two year period since 2000.”³⁰⁷

Rather than resolve employees’ concerns, Chair Khan found staffing solutions in unpaid consultants from highly partisan non-profit organizations. The FTC’s Office of Inspector General (OIG) published a report on August 1, 2022, finding that the FTC’s use of unpaid consultants lacked accountability.³⁰⁸ Unpaid consultants are barred from performing “inherently governmental functions,” such as policy and legal work.³⁰⁹ Yet rather than exhibiting controls to respect those limits, OIG found: “(1) the FTC’s unpaid consultant and expert program lacks a comprehensive system of controls and (2) the FTC identifies, recruits, and selects unpaid consultants and experts without uniformity and transparency across all agency stakeholders.”³¹⁰

³⁰² *Id.* at 28-29.

³⁰³ Letter from Christine Wilson, Comm’r, Fed. Trade Comm’n, to Joseph R. Biden, President, United States of America (Mar. 2, 2023).

³⁰⁴ Interim Staff Report, *Abuse of Power, Waste of Resources, And Fear: What Internal Documents and Testimony from Career Employees Show About The FTC Under Chair Lina Khan*, H. Comm. on the Judiciary (Feb. 22, 2024), available at https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/2024-02-22%20Abuse%20of%20Power%20Waste%20of%20Resources%20and%20Fear_0.pdf.

³⁰⁵ *Id.*

³⁰⁶ Robbins Interview at 44.

³⁰⁷ Beales and Muris at 24.

³⁰⁸ See Office of Inspector General, Federal Trade Commission, *Audit of the Federal Trade Commission’s Unpaid Consultant and Expert Program*, OIG Report No. A-22-06 (Aug. 1, 2022).

³⁰⁹ *Id.*

³¹⁰ *Id.*

The Office of the Executive Director oversees the office that executes the hiring of unpaid consultants.³¹¹ Executive Director Robbins confirmed his office oversees the hiring of unpaid consultants and experts in his transcribed interview with the Committee. He testified:

- Q. . . . Do you manage the onboarding process for unpaid consultants and experts?
- A. Through our Human Capital Management organization, that is one of the functions.³¹²

Executive Director Robbins fielded questions about OIG's report during his transcribed interview with the Committee. Executive Director Robbins stated that unpaid consultants are recruited based on an assessment of needs within bureaus or offices:

- Q. Okay. What role do you have in onboarding and approving or authorizing the unpaid consultants or experts?
- A. So there is a documented process that hiring managers work with the Human Capital Management organization when they identify an unpaid consultant that they'd like to bring on board, that they work with the Human Capital Management organization and our Office of General Counsel to make sure that we're documenting that need and appropriately executing to it.
- Q. So then who determines whether or not they're qualified to be an unpaid consultant at FTC?
- A. So I'm not sure what you mean by qualification. I will say that the hiring managers of the organizations that need these services work with the Human Capital Management organization to identify their need, to document their need, and to appropriately execute the policies and procedures and the documentation that's required to make that happen.³¹³

Reports indicate that many of the unpaid consultants were farmed from left-wing activist organizations.³¹⁴ During his transcribed interview with the Committee, however, Executive Director Robbins could not recall where the Khan Commission's unpaid consultants worked outside of their roles at the FTC.

³¹¹ See Robbins Interview at 33-34, 36.

³¹² *Id.* at 33-34.

³¹³ *Id.* at 34.

³¹⁴ See Press Release, *Lee Leads Letter Addressing Conflicts of Interest at the FTC*, Senator Mike Lee (Sept. 14, 2022).

Q. I'm asking who the unpaid consultants are employed by outside of the FTC.

A. Oh, I don't remember.³¹⁵

Documents furnished by the FTC to Senator Lee, meanwhile, revealed that three unpaid consultants worked concurrently for companies that compete under FTC jurisdiction and five unpaid consultants were employed by an activist non-profit organization.³¹⁶ Chair Khan herself, in testimony before the House Committee on Energy and Commerce, stated the consultants were brought on for their “expertise in AI, in particular its forms of digital markets.”³¹⁷ These conflicts of interest and far-left activist influence in FTC policymaking—especially on a matter like the exponentially expanding role of artificial intelligence in American markets—clearly pose a threat to the impartiality of the FTC.

VII. CONCLUSION

As this report demonstrates, Lina Khan's chairmanship of the Federal Trade Commission has left a landscape strewn with the wreckage of due process, the rule of law, ethics, respect for U.S. international interests, and the career ranks at the Commission. Lina Khan's term as chair expired on of September 25, 2014.³¹⁸ There are abundant reasons for concern should she be renominated by the current or next president to continue in her service.

³¹⁵ Robbins Interview at 51.

³¹⁶ *Supra*, n. 314.

³¹⁷ Transcript, Hearing on Fiscal Year 2024 Federal Trade Commission Budget, H. Comm. on Energy & Commerce, Subcomm. on Innovation, Data, and Commerce (Apr. 18, 2023) *available at* <https://docs.house.gov/meetings/IF/IF17/20230418/115716/HHRG-118-IF17-Transcript-20230418.pdf>.

³¹⁸ *Supra*, n. 10.

APPENDIX A (ILLUMINA-GRAIL TIMELINE)

United States (FTC)	Date	European Commission
Illumina-Grail announce merger. ³¹⁹	21 Sept. 2020	
FTC (Maria Coppola) reaches out to UK CMA regarding Illumina-Grail. ³²⁰	29 Oct. 2020	
Maria Coppola asks EC for a phone call to speak about Illumina-Grail. ³²¹	15 Mar. 2021	
FTC sues to block merger and seeks preliminary injunction. ³²²	30 March 2021	
FTC reaches out to Austrian antitrust and competition agency. ³²³	16 Feb. 2021	
	19 Feb. 2021	EC invites Member States to make Article 22 referral. ³²⁴
	9 March 2021	France makes Article 22 referral. ³²⁵
Maria Coppola thanks EC individuals for speaking with her regarding Illumina Grail. ³²⁶	10 March 2021	
FTC approves a motion to file an administrative complaint to block the proposed merger. ³²⁷	30 March 2021	French regulators reach out to the FTC. ³²⁸ Other emails indicate that FTC Commissioners met with UK CMA officials and discussed the Illumina-GRAIL merger. ³²⁹

³¹⁹ *Supra*, note 162.

³²⁰ *Supra*, note 139.

³²¹ Email from Maria Coppola, FTC to [Redacted], EC (Mar. 15, 2021) [*in camera* notes on file with Committee].

³²² *Supra*, note 136.

³²³ *Supra*, note 142.

³²⁴ *Supra*, note 134.

³²⁵ *Id.*

³²⁶ *Supra*, note 147.

³²⁷ *Supra*, note 155.

³²⁸ *Supra*, note 154.

³²⁹ *Supra*, note 141.

United States (FTC)	Date	European Commission
	19 April 2021	EC accepts Article 22 referral request from France and asserts jurisdiction. ³³⁰
	28 April 2021	Illumina appeals the EC's decision to assert jurisdiction. ³³¹
FTC withdraws preliminary injunction after EC's assertion of jurisdiction. ³³²	20 May 2021	
	18 Aug. 2021	Illumina closes the deal. ³³³
	29 Nov. 2021	EC staff email FTC staff regarding topics of discussion, including "updates on cases such as Illumina." ³³⁴
FTC administrative law judge (ALJ) rules in Illumina's favor. ³³⁵	2 Sept. 2022	
FTC appeals ALJ ruling to the FTC's commissioners. ³³⁶	2 Sept. 2022	
	6 Sept. 2022	EC blocks the Illumina/Grail deal. ³³⁷
	23 Sept. 2022	Illumina appeals to the EU General Court judgement on Jurisdiction. ³³⁸
	28 Oct. 2022	EC renews and adjusts hold-separate interim measures. ³³⁹
	May 2023	Chair Khan promotes Maria Coppola to Director of OIA. ³⁴⁰
Illumina completes the divestiture of Grail. ³⁴¹	24 June 2024	

³³⁰ *European Commission's approach to Article 22 referrals in jeopardy after AG opinion*, Norton Rose Fulbright (Apr. 2024).

³³¹ *Supra*, note 157.

³³² *Supra*, note 156.

³³³ *Id.*

³³⁴ Email from [Redacted], EC to FTC (Nov. 29, 2021) [*in camera* notes on file with Committee].

³³⁵ *Id.*

³³⁶ *Id.*

³³⁷ *Id.*

³³⁸ *Id.*

³³⁹ *Id.*

³⁴⁰ *US FTC appoints Coppola as director of international affairs unit*, MLex (May 17, 2023).

³⁴¹ Press Release, Illumina completes the divestiture of GRAIL, Illumina (June 24, 2024).

United States (FTC)

Date

European Commission

3 Sept. 2024

EU Court of Justice rules that the EC lacks jurisdiction over the Illumina-GRAIL merger.³⁴²

³⁴² *Supra*, note 162.

APPENDIX B (AMAZON-iROBOT TIMELINE)

United States (FTC)	Date	European Commission
Amazon and iRobot propose their merger. ³⁴³	5 Aug. 2022	
FTC sends a second request for information to the merger parties ³⁴⁴	19 Sept. 2022	
	6 July 2022	The EC announces it is also scrutinizing the proposed merger. ³⁴⁵
iRobot takes on \$200m in new debt. ³⁴⁶ Merger parties rework buyout agreement to compensate for iRobot's new debt. ³⁴⁷	July 2023	
	26 Nov. 2022	The EC announces a statement of objections to the deal on basis that it could restrict competition for robot vacuum cleaners. ³⁴⁸
	18 Jan. 2024	Reports: Amazon is told by the EC that the proposed merger is likely to be rejected. ³⁵⁰
iRobot loses \$200m in value (following reports). ³⁴⁹		
Amazon and iRobot call off the merger. ³⁵¹ iRobot announces that it will have to restructure the company with layoffs to come. ³⁵²	29 Jan. 2024	

³⁴³ *Supra*, note 166.

³⁴⁴ *Supra*, note 167.

³⁴⁵ *Supra*, note 168.

³⁴⁶ *Supra*, note 180.

³⁴⁷ Collin Brantmeyer, *Here's the Latest on Amazon's Acquisition of iRobot at the End of 2023*, the Motley Fool (Dec. 3, 2022).

³⁴⁸ *Id.*

³⁴⁹ *Id.*

³⁵⁰ *Id.*

³⁵¹ *Supra*, note 171.

³⁵² *Supra*, note 173.

United States (FTC)	Date	European Commission
FTC Commissioner tells conference in Brussels, Belgium that FTC would have blocked the merger.	31 Jan. 2024	
	14 Feb. 2024	Deadline for the EC to make a final decision regarding the merger. ³⁵³

³⁵³ Collin Brantmeyer, *Here's the Latest on Amazon's Acquisition of iRobot at the End of 2023*, the Motley Fool (Dec. 3, 2022).