IF YOU'RE WORRIED ABOUT LINA KHAN, THEN SUPPORT SPECIFIC AUTHORITY BILLS

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The adverse impact large tech firms have on children's mental health and free markets are undeniable.[1] In that vein, Congress has proffered several proposals to address those issues, such as the Kids Online Safety Act (KOSA)[2] and the Open Apps Market Act (OAMA)[3]. KOSA imposes a duty of care on social media companies to protect children from those platforms' addictive, behavioral functions. OAMA would set guardrails on app store providers, like Apple and Google, from using their dominate position to degrade third-party apps' functionality or kick them off their respective stores for anticompetitive reasons.

Although the bills have different policy objectives, they share a common enforcer—the Federal Trade Commission (FTC).[4] And while many FTC Chairmen have been restrained in their approach to using the FTC's authority,[5] current Chair Lina Khan, a noted anti-tech hawk, has not. Khan's FTC is in the avant garde on many legal theories regarding competition, antitrust, and consumer protection. Chair Khan has pressed ahead with regulatory gusto by challenging the orthodoxy of how the FTC pursues enforcement actions and the orthodoxy on whether it should conduct rulemakings.[6]

And therein lies the rub for some. There are those that argue bills, like OAMA or KOSA, endow the FTC with authority it doesn't currently have.[7]

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[1] *See, e.g.*, *Social Media and Youth Mental Health: The U.S. Surgeon General's Advisory*, U.S. DEP'T OF HEALTH AND HUMAN SERVICES (2023) https://www.hhs.gov/sites/default/files/sg-youth-mental-health-social-media-advisory.pdf [https://perma.cc/T5YX-VNXA].

[2] S. 1409, 118th Congress (2023).

[3] S. 2710, 117th Congress, (2021).

[4] *See* S. 1409 § 11, 118th Congress (2023); *see also*, *id.* § 5

[5] *See, e.g.*, Hon. Maureen K. Ohlhausen, *Regulatory Humility in Practice*, Remarks to the American Enterprise Institute (Apr. 1, 2015), https://www.ftc.gov/system/files/documents/public_statements/635811/150401aeihumilitypractice.pdf [https://perma.cc/853N-WA7F].

[6] *E.g.*, Kevin Frazier, *Return of the National Nanny or Restoration of the Cop on the Beat: The FTC's Impending Proposed Rule on Commercial Surveillance*, THE FEDERALIST SOCIETY (May 15, 2024) https://fedsoc.org/commentary/fedsoc-blog/return-of-the-national-nanny-or-restoration-of-the-cop-on-the-beat-the-ftc-s-impending-proposed-rule-on-commercial-surveillance [https://perma.cc/79EB-PJ7J]; *see also* Daniel A. Crane, *Antitrust As an Instrument of Democracy*, 72 DUKE L.J. ONLINE 21, 36 (2022).

[7] Patrick Hedger (@pat_hedger), X (Jun. 22, 2024, 12:26 p.m.) https://twitter.com/pat_hedger/status/1804551456734806266 [https://perma.cc/8FZW-887T].

So, do bills like OAMA or KOSA actually expand the FTC's authority? Or, by crafting specific remedies to specific legislative problems, would they instead constrain the FTC's general authority? I explore these questions in this essay.

I. THE FTC'S GENERAL AUTHORITY IS EXTREMELY BROAD

The FTC Act allows the Commission to prohibit "unfair or deceptive acts or practices *in or affecting commerce*" and "unfair methods of competition *in or affecting commerce*."[8] From a purely textualist perspective, that's quite an expansive remit.

Let's start with the competition part. The FTC, in a recent policy statement, found that Section 5 of the FTC Act "*reaches beyond the Sherman and Clayton Acts* to encompass various types of unfair conduct that tend to negatively affect competitive conditions."[9] The Sherman Act and the Clayton Act are, of course, the two statutes that underpin federal antitrust law.[10]

Candidly, Chair Khan's view is a fair reading of Supreme Court precedent. In *FTC v. Ind. Fed'n of Dentists*, the Supreme Court held that "[t]he standard of 'unfairness' under the FTC Act is, by necessity, an elusive one, encompassing not only practices that violate the Sherman Act and the other antitrust laws."[11] In *FTC v. Sperry & Hutchinson Co*, the Court doubled down when holding that "the Commission has broad powers to declare trade practices unfair."[12] In *FTC v. Brown Shoe*, the Supreme Court outright said that the FTC "has broad powers to declare trade practices unfair[,] particularly . . . with regard to trade practices which conflict with the basic policies of the Sherman and Clayton Acts."[13]

In other words, Section 5 authority empowers the Commission to make its own determinations of what an "unfair" practice is. Or as Chair Khan put it, "Section 5 grants the Commission extensive authority to shape doctrine and reach conduct not otherwise prohibited by the Sherman Act…."[14]

II. THE FTC'S GENERAL RULEMAKING AUTHORITY IS FAR BROADER THAN SOME MAY ASSUME

Unless specified in a supplemental statute (*e.g.*, Children's Online Privacy Protection Act (COPPA)), the Commission has decided to use Section 6(g) of the FTC Act for rules pertaining to

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[8] 15 U.S.C. § 45 (emphasis added).

[9] Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act Commission, File No. P221202, FEDERAL TRADE COMMISSION (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf [https://perma.cc/26SB-GZVA] (emphasis added).

[10] 15 U.S.C. § 1; 15 U.S.C. § 18; *see also* 51 CONG. REC. 12146 (1914) (statement of Sen. Hollis) ("The Sherman Act is adequate for the abolition of monopoly; it is, however, but imperfectly adequate for the regulation of competition. The present Congress is charged with the duty of supplying the defect in the law").

[11] 476 U.S. 447, 455 (1986).

[12] 405 U.S. 233, 243 (1972).

[13] 384 U.S. 316, 230–21 (1966).

[14] STATEMENT OF THE COMMISSION, On the Withdrawal of the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act, FEDERAL TRADE COMMISSION (Jul. 9, 2021), www.ftc.gov/system/files/documents/public_statements/1591706/p210100commnstmtwithdrawalsec5enforcement.pdf [https://perma.cc/3ATM-P5GZ].

unfair methods of competition (UMC).[15] Section 6(g) empowers the agency to issue rules "for the purpose of carrying out" the statute.[16] However, some argue that Section 6(g) rulemakings only relate to the Commission's authority to "develop internal procedural rules related to its powers to investigate suspected violations of the law and to publish reports."[17] Unfortunately, the D.C. Circuit contradicts that notion. In *National Petroleum Refiners Association (NPRA) v. FTC*, the D.C. Circuit has upheld the Commission using its 6(g) authority to promulgate UMC rules.[18]

In *NPRA*, the FTC decided to promulgate "Trade Regulations Rules" (TRR) under Section 6(g). A trade association representing petroleum refiners argued that the Commission had no such authority along the same lines as the ones expressed above.[19] However, the D.C. Circuit categorically disagreed and held that "Section 6(g) clearly states that the Commission 'may' make rules and regulations for the purpose of carrying out the provisions of Section 5 and it has been so applied."[20] Its ruling was also consistent with the Supreme Court's decision in *U.S. v. Morton Salt Co.* where it held that that the powers within Section 6 do not stand independent of its authority in Section 5.[21] Indeed, the Court explained that "nothing" prevents the Commission from using Section 6 "for any purpose within the duties of the Commission, including [those within] Section 5 . . . ."[22]

Congress has had every opportunity to clarify the FTC's rulemaking authority after *NPRA* and hasn't. Instead, Congress enacted the Magnuson Moss Warranty Federal Trade Commission Improvement Act (Mag-Moss) that neither vacated the FTC's rulemaking authority nor did it even limit the FTC's rulemaking authority.[23] Rather, Mag-Moss gave the FTC the authority to issue TRRs related to unfair or deceptive acts or practices under a strict formal rulemaking procedure.[24] The Commission, at this point, can still use its authority under Section 6(g) to promulgate rules concerning unfair methods of competition.[25]

The good news is that we may get some clarity from a group of cases in the Eastern District of Texas where plaintiffs are seeking to challenge the FTC's rules which mostly ban non-competes.[26] On July 3, 2024, the E.D. Texas expressed significant doubt that the FTC had any substantive rulemaking authority under Section 6(g) when deciding on the parties' motion for

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[15] *Id.*

[16] 15 U.S.C. § 46(g).

[17] U.S. Chamber of Commerce Comments to the FTC, Notice of Proposed Rulemaking, Federal Trade Commission; Non-Compete Clause Rule (88 Fed. Reg. 3,482-3,546, January 19, 2023), (Apr. 17, 2023), https://www.uschamber.com/assets/documents/FTC-Noncompete-Comment-Letter_FINAL_04.17.23.pdf [https://perma.cc/WG5Q-U6VE].

[18] 482 F.2d 672 (D.C. Cir. 1972).

[19] *Id.* at 677.

[20] *Id.* at 678.

[21] 388 U.S. 632 (1950).

[22] *Id.* at 650.

[23] Pub. L. 93-637, § 202 (codified at 15 U.S.C. § 57a).

[24] 15 U.S.C. § 57a(1)(A)–(B).

[25] *Id.* at (2) ("The preceding sentence shall not affect any authority of the Commission to prescribe rules (including interpretive rules), and general statements of policy, with respect to unfair methods of competition in or affecting commerce.").

[26] Daniel Wiessner, *U.S. Judge Pauses Chamber's Legal Challenge to FTC Noncompete Ban*, REUTERS (May 3, 2024), https://www.reuters.com/legal/government/us-judge-pauses-chambers-legal-challenge-ftc-noncompete-ban-2024-05-03/ [https://perma.cc/N47Q-9VP4].

preliminary injunction.[27] Confusingly, the court did "conclude[] the FTC has some authority to promulgate rules to preclude unfair methods of competition."[28] However, it does not illustrate where such authority comes from if not Section 6(g).

The court further acknowledged (to only disregard) the clear textual evidence in Section 6(g) to promulgate UMC rules because "the location [of Section 6(g) within the FTC Act] of the alleged substantive rulemaking authority is suspect." This is an odd statement because the Supreme Court in *AT&T Corp. v. Iowa Utilities Bd.* deemed the location of the authorized provision irrelevant to interpreting general-rulemaking authority statutes.[29] Faced with a similar issue of statutory construction concerning the Communications Act, the Court found that the Federal Communications Commission's general grant of rulemaking authority in Section 201(b) allowed it to create rules under other statutes within that same Act to resolve pricing and interconnection disputes for state utility commissions. Justice Scalia wrote that this provision "means what it says: The FCC has rulemaking authority to carry out the 'provisions of [the 1934] Act.'"[30] There's no reason the same principle wouldn't apply to interpreting the FTC Act given the precise language exists in Section 6(g).

Even so, we have yet to get a decision on the merits and the court allowed the rules to move forward, except as it pertains to the plaintiffs at issue. But, even if we get a decision, one wonders if the court will narrow the decision to say that these rules are outside the scope of Section 6(g) without fully deciding on the scope of the FTC's authority of 6(g) in general. What's more, either party is likely to appeal the decision, which means the Fifth Circuit will have to decide. Even if the Fifth Circuit disagrees with the FTC, we would likely have a circuit split ripe for Supreme Court review.

For those betting against the FTC, it would be wise not to count your chickens before they hatched. One concerning factor for those in that camp is that Plaintiffs' argument in the E.D. Texas parallels the same rationale the Respondents presented in *Morton Salt*.[31] In that their argument requires courts to find or create a statutory chasm between the Commission's duties in Section 6 and those in Section 5—a premise the Supreme Court categorically rejected. Given that their case relies on a court subscribing to their view, it is ironic that plaintiffs motion neither attempts to distinguish nor even mentions the existence of *Morton Salt*. At this juncture, we must assume that the FTC is more likely than not correct in its expansive view of its general authority under Section 6 given this and the D.C. Circuit's opinion in *NPRA*.

But Section 6 is not its only general rulemaking authority. The FTC also has a trade regulation rulemaking authority under Mag-Moss, or Section 18 of the FTC Act.[32] Under Section 18, the Commission may develop "rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce" within the meaning of Section 5(a)(1) of

[27] Ryan LLC v. Federal Trade Commission, No. 3:24-cv-00986-E, Doc. 153, at 13–19 (N.D. Tex. 2024).

[28] *Id.* at 15.

[29] 525 U.S. 366 (1999).

[30] *Id.* at 379.

[31] Plaintiff's Mot. for Stay of Effective Date and Preliminary Injunction, 17, Chamber of Commerce v. Federal Trade Commission, No. 6:24-cv-00148-JCB (E.D. Tex. 2024).

[32] 15 U.S.C. § 57a.

the Act.[33] The FTC used this authority to initiate rulemakings on online privacy even though Congress has yet to pass one general privacy law. But its rulemaking authority is certainly not limited to data privacy rules.[34] As FTC Commissioner Rebecca Slaughter wrote:

> These changes show the FTC is turning the page on decades of *self-imposed red-tape* and returning to the participatory and dynamic process for issuing Section 18 rules that Congress envisioned . . . . Section 18 rulemaking means that the Commission will have the ability to issue timely rules on issues ranging from data abuses to dark patterns to other unfair and deceptive practices widespread in our economy.[35]

Note the phrase "self-imposed" restrictions. Hence, these statutes in concert give the FTC an incredible amount of rulemaking avenues from which to choose. And Chair Khan is correct. No court has said the FTC doesn't have substantive rulemaking authority. It's all been self-imposed since the passage of Mag-Moss (and the FTC actually did a good number of rulemakings before then).

III. A SALIENT REMEDY AGAINST GENERAL AUTHORITY IS SPECIFIC AUTHORITY

One legislative tool that can cut against an agency using its general authority is to create a specific statute. As the Supreme Court succinctly put it in *Morales v. Trans World Airlines, Inc.*: "[I]t is a commonplace of statutory construction that the specific governs the general."[36] In *HCSC-Laundry v. U.S.*, the Court further explained that courts ought to read the specific statute governing the general "particularly when the two are interrelated and closely positioned, both in fact being parts of [the same statutory scheme]."[37] Better yet, the Ninth Circuit in *Roseman v. United States* determined that the specific statute controls over the general statute if the application of the general statute "conflicts" with the specific statute and the general statute temporally precedes it.[38]

To illustrate how specific statutes interplay with general statutes, look no further than the Supreme Court's opinion in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP* written by the late-Justice Scalia.[39] In that case, the Court considered whether a complaint alleging breach of the Verizon's duty under the 1996 Telecom Act to share its network with competitors states a claim under Section 2 of the Sherman Act.[40] Justice Scalia wrote that "a detailed regulatory scheme such as that created by the 1996 Act ordinarily raises the question whether the regulated

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[33] *Id.*

[34] Proposed Rule, 87 FR 51273 (2022), FEDERAL TRADE COMMISSION https://www.federalregister.gov/documents/2022/08/22/2022-17752/trade-regulation-rule-on-commercial-surveillance-and-data-security [https://perma.cc/U9PW-CKGJ].

[35] STATEMENT OF COMMISSIONER REBECCA KELLY SLAUGHTER, *Regarding the Adoption of Revised Section 18 Rulemaking Procedures*, FEDERAL TRADE COMMISSION (Jul. 1, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591522/joint_rules_of_practice_statement_final_7121_1131am.pdf [https://perma.cc/MXT2-UF4R].

[36] 504 U.S. 374, 385 (1992).

[37] 450 U.S. 1, 7 (1981).

[38] 364 F.2d 18 (9th Cir. 1966).

[39] 540 U.S. 398 (2003).

[40] *Id.*

entities are not shielded from antitrust scrutiny altogether by the doctrine of implied immunity."[41] In other words, a specific antitrust statute may have the effect of trumping the general antitrust statute's enforcement. What's more, Justice Scalia goes on to say that when there exists a "detailed regulatory scheme, it would behoove even courts to observe it over the general authority. Doings so may "avoid the real possibility of judgments conflicting with the agency's regulatory scheme . . . ."[42]

Even the FTC opts for specific authority over general authority when given the choice. For instance, the FTC uses its specific authority under COPPA, as opposed to its general Section 18 authority, to promulgate rules to protect kids from harmful online advertising. The FTC also used its specific authority under the Fairness to Contact Lens Consumers Act, as opposed to its general UMC Section 6(b) authority, to create its Content Lens Rule.[43] The rule ensures that prescribers provide a copy of their contact lens prescriptions at the end of a contact lens fitting so that the patient can compare prices for lenses from other prescribers.[44]

Given this, legislation, like KOSA or OAMA, would have the practical effect of narrowing the FTC's general authority. Indeed, the recent Supreme Court decisions concerning the major questions doctrine in *West Virginia v. E.P.A.*[45] and the revocation of the Chevron Doctrine in *Loper Bright v. Raimondo*[46] may even give specific statutes more weight than general grants of authority. In other words, if Congress provides the Commission with a specific grant and the FTC opts for its general authority, courts will now require the FTC to make an even stronger textual showing that its actions do not conflict or exceed its specific grant.[47] Indeed, Justice Gorsuch signaled this when saying that the major questions doctrine requires Congress to "'speak clearly' if it wishes to assign decisions 'of vast economic and political significance'" to any agency.[48] With these precedents, both KOSA and OAMA would provide the FTC with specific statutes oriented towards particularized harms and nullify the threat of the Commission using its general grant of authority.

Let's start with KOSA. KOSA would specify the types of harms the FTC can regulate and investigate with respect to protecting kids online and, thus, take its Section 5's deceptive practices prong. Similar to what the Telecom Act did for the Sherman Act in *Verizon*, KOSA would narrow the FTC's Section 5 remit with respect to protecting kids from social media platforms and define

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[41] *Id.* at 407.

[42] *Id.*

[43] *The Contact Lens Rule: A Guide for Prescribers and Sellers*, FEDERAL TRADE COMMISSION (last visited Jul. 3, 2024), https://www.ftc.gov/business-guidance/resources/contact-lens-rule-guide-prescribers-sellers [https://perma.cc/7CBX-UMNR].

[44] *Id.*

[45] 182 S. Ct. 2587 (2022).

[46] 144 S. Ct. 2244 (2024).

[47] It is important to note that the effect of *Loper* and *West Virginia* are far from unclear as it relates to the FTC's enforcement action. However, courts have suggested that *Chevron* may apply when evaluating the FTC's interpretation of its Section 5 authority. LabMD, Inc. v. FTC, 678 F. App'x 816, 820 (11th Cir. 2016) ("We recognize that the FTC's interpretation of § [5](n) is entitled to *Chevron* deference, if it is reasonable."); *see also* FTC v. IFC Credit Corp., 543 F. Supp. 2d 925 (N.D. Ill. 2008) (citing Chevron and deferring to the FTC's interpretation under Section 5(n) that the term "consumer" includes businesses that purchase a good).

[48] Nat'l Fed'n of Indep. Bus v. Lab., Occupational Safety & Health Admin., 142 S. Ct. 661, 667 (2022) (Gorsuch, J., concurring) (quoting Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021) (per curiam).

what harms the FTC could investigate via KOSA's "duty of care" section that focused only on specific addictive functions. Without KOSA's duty of care, the FTC has free rein to decide what harms to minors look like in the broadest sense (think back to the text of Section 5).

The same is true with OAMA, because it would limit its Section 5's unfair competition authority by specifying what competitive harms the FTC can enforce against with respect to the app store market. Section 3 of OAMA articulates what competitive harms look like in the app-store market and would focus the FTC's remit to looking for specific anticompetitive behaviors. OAMA would prevent Apple and Google from forcing developers into particular exclusive dealings with them, interfering with developers' communications with their customers, using developers' non-public data to get an unfair competitive over them, and using their search functions to bury apps. Any use of Section 5 to address competition in app stores in any other way would almost certainly conflict with the provisions of OAMA. Given the current caselaw outlined above, OAMA would preempt any attempt from the FTC to use its expansive Section 5 authority to circumvent it, which has the effect of narrowing it.

As of right now, the FTC seems to have plenty of authority to define competitive harms and deceptive practices any way it sees fit. Hence, to limit the FTC's authority, Congress may want to look into measures, like KOSA and OAMA, to give the agency more direction in that regard.