



**Written Testimony of Jessica Melugin, Director of the Center for Technology & Innovation,
Competitive Enterprise Institute**

**Regarding the Senate Committee on Commerce, Science, and Transportation hearing on February
16, 2023 titled “Bringing Transparency and Accountability to Pharmacy Benefit Managers.”**

Submitted February 14, 2023

The Honorable Maria Cantwell
Chair
Committee on Commerce, Science, and Transportation
U.S. Senate
Washington, D.C. 20510

The Honorable Ted Cruz
Ranking Member
Committee on Commerce, Science, and Transportation
U.S. Senate
Washington, D.C. 20510

Dear Chair Cantwell and Ranking Member Cruz,

Thank you for the opportunity to submit written testimony. I am Jessica Melugin, Director of the Center for Technology and Innovation and the Competitive Enterprise Institute (CEI). CEI is a non-profit public policy research organization dedicated to advancing individual liberty and free enterprise with an emphasis on regulatory policy. We recently launched a project to monitor the regulatory overreach of the Federal Trade Commission. Since its founding, our organization has advocated for a more market-based approach to competition as an alternative to aggressive regulation and antitrust enforcement.

Over nearly a century of independence, the FTC operated with broad, sometimes open-ended legal standards to police competition. During the past forty years, the agency sought to optimize consumer welfare in its analysis. No longer is this the case. FTC Chair Lina Khan has taken issue with numerous industries, trade practices, and regulatory norms. Her expansive view of the agency and the public interest clashes with established practices, the law, and what is best for consumers.

We therefore appreciate the opportunity to comment on this important context as it relates to the Pharmacy Benefit Manager Transparency Act of 2023.

Pharmacy Benefit Managers (PBM) play a vital role in lowering drug prices on behalf of insurance companies and state Medicaid programs. Creating unnecessary regulatory hurdles on PBMs will ultimately result in higher drug prices for consumers.¹ The PBM Transparency Act seeks to further expand the powers of the FTC and place the agency in the middle of private business dealings. And the

¹ Ike Brannon and Tony LoSasso, “Constraining Pharmacy Benefit Managers Will Not Reduce Drug Prices,” Bloomberg Law, January 6, 2020, <https://news.bloomberglaw.com/pharma-and-life-sciences/insight-constraining-pharmacy-benefit-managers-will-not-reduce-drug-prices>.

FTC is more than happy to accept this power. Former senior economist for the U.S. Treasury and Congress, Ike Brannon, wrote in a recent article for *Forbes* that the FTC's objections to PBMs relies on the "Leninist notion that middlemen don't add anything of value."² Middlemen, on the contrary, play an important role in lowering transaction costs, resulting in more economic transactions than would otherwise happen.

The PBM Transparency Act would create strenuous reporting requirements to the FTC, on top of an existing regulatory jungle gym that PBMs are tasked with navigating.³ These compliance costs will be reflected in higher prices for consumers. Further, the proposed legislation would require PBMs to disclose valuable proprietary information on prices to those they do business with. This will severely limit PBMs' ability to negotiate the lowest possible price for clients and consumers. The result will be more people ending up without the pharmaceutical products they need, leading to poorer health outcomes. This burden will be borne most by those on the economic margin – the poor and the marginalized.

More broadly, the FTC is currently in the midst of an unprecedented attempt to expand its regulatory reach into many corners of the U.S. economy. It's throwing out well-established consumer welfare precedent, ignoring gains in economic analysis, and attacking companies in the interest of their competitors, not for the benefit of consumers. If successful, all of this will result in more government red tape, higher compliance costs, and increased uncertainty for American industries and the citizens who depend on them for jobs, products and services. Ultimately, all of those costs will be borne by the consumer in the form of higher prices and less innovation. Chairperson Lina Khan may be invoking the term "competition," but the FTC's current radical agenda is at odds with the fundamental principles of the free enterprise system.

Current FTC Commissioner Christine S. Wilson wrote in a January 5, 2023 dissenting statement regarding the Notice of Proposed Rulemaking for the Non-Compete Clause Rule:

"Setting aside the substance of the rule, the Commission's competition rulemaking authority itself certainly will be challenged. The NPRM is vulnerable to meritorious challenges that (1) the Commission lacks authority to engage in "unfair methods of competition" rulemaking, (2) the major questions doctrine addressed in *West Virginia v. EPA* applies, and the Commission lacks clear Congressional authorization to undertake this initiative; and (3) assuming the agency does possess the authority to engage in this rulemaking, it is an impermissible delegation of legislative authority under the non-delegation doctrine, particularly because the Commission has replaced the consumer welfare standard with one of multiple goals. In short, today's proposed rule will lead to protracted litigation in which the Commission is unlikely to prevail."⁴

Her comments illustrate that the FTC isn't just pursuing extremist policies that some may oppose, but is employing methods that are beyond the agency's Congressional mandate and, perhaps, the constraints of the U.S. Constitution.

² Ike Brannon, "The FTC's Fight Against Non-Monopolies Won't Help Consumers," *Forbes*, February 8, 2023, <https://www.forbes.com/sites/ikebrannon/2023/02/08/the-ftcs-fight-against-non-monopolies-wont-help-consumers/?sh=5294e6d32ad7>.

³ Alex Hendrie, "Senators Should Oppose the Pharmacy Benefit Manager Transparency Act," Americans for Tax Reform, June 21, 2022, <https://www.atr.org/senators-should-oppose-the-pharmacy-benefit-manager-transparency-act/>.

⁴ Dissenting Statement of Commissioner Christine S. Wilson Regarding the Notice of Proposed Rulemaking for the Non-Compete Clause Rule, Matter No. P201200-1, January 5, 2023, https://www.ftc.gov/system/files/ftc_gov/pdf/p201000noncompetewilsondissent.pdf.

Perhaps FTC Commissioners, both past and present, are the most informed about the agency's norms and the current destructive departure from them.

In the early days of Khan's chairmanship, former FTC Commissioner Joshua M. Wright expressed his concern for her action in the pages of the *Wall Street Journal*, including her disposal of the Obama era's policy statement that put guardrails on how the FTC could police "unfair methods of competition." Wright warned that, "the FTC's competition authority is about to become a free-for-all for the Biden administration to reshape the economy." He compared the agency to "Icarus flying without the constraints of history, economics or law."⁵

Former FTC Chairman Timothy L. Muris writes in a recent report, *Neo-Brandeisian Antitrust: Repeating History's Mistakes*, that "their proposals for radical antitrust intervention untethered to economic analysis of the impact on consumers" are evidenced by the FTC's resurrecting of the long ago abandoned and widely discredited Robinson Patman Act and the early enforcement under the amended Section 7 of the Clayton Act. He refers to the two as, "the great populist mistakes of antitrust history."⁶

Just this week the Wall Street Journal was alarmed enough about the state of the FTC to run an editorial warning that, "Ms. Khan's bias and lack of transparency undermine due process for defendants and bolster arguments made by some companies in legal challenges to the FTC's constitutional structure, statutory powers and administrative proceedings,"⁷ alongside Commissioner Christine Wilson's commentary piece explaining her upcoming resignation. Ms. Wilson points to Ms. Khan's, "disregard for the rule of law and due process" and her, "abuses of government power."⁸ There could be no clearer raising of red flags.

There is empirical evidence that all is not well at the FTC too. A series of failed cases, one being a challenge to the formation of what the agency itself calls, "life-saving multi-cancer early detection tests," illustrate the hubris of the current FTC agenda.⁹ Had the Commission been successful in thwarting that merger, the costs might have been measured in lives lost.

Further evidence are the survey results from FTC staff. In 2020, under Chair Joseph Simons, 87% of those asked said that senior staff at the agency were honest and had high standards of integrity. The 2022 survey, under Chair Khan, reports a plunge to less than half the staff answering that same way. The findings also revealed that only 44% of those surveyed said they either agreed or strongly agreed that they

⁵ Joshua D. Wright, "Lina Khan Is Icarus at the FTC," *Wall Street Journal*, July 13, 2021, <https://www.wsj.com/articles/lina-khan-ftc-monopoly-big-tech-11626108008>.

⁶ Timothy J. Muris, "Neo-Brandeisian Antitrust: Repeating History's Mistakes," AEI Economics Working Paper 2023-02, January 2023, <https://www.aei.org/wp-content/uploads/2023/01/Muris-Neo-Brandeisian-Antitrust-WP.pdf?x91208&x91208>.

⁷ Wall Street Journal Editorial Board, "The Many Abuses of Lina Khan's FTC," *Wall Street Journal*, February 14, 2023. <https://www.wsj.com/articles/christine-wilson-resigns-federal-trade-commission-lina-khan-ftc-87328998>

⁸ Christine Wilson, "Why I'm Resigning as an FTC Commissioner," *Wall Street Journal*, February 14, 2023, <https://www.wsj.com/articles/why-im-resigning-from-the-ftc-commissioner-ftc-lina-khan-regulation-rule-violation-antitrust-339f115d>.

⁹ Federal Trade Commission, "Administrative Law Judge Dismisses FTC's Challenge of Illumina's Proposed Acquisition of Cancer Detection Test Maker Grail," press release, September 12, 2022, <https://www.ftc.gov/news-events/news/press-releases/2022/09/administrative-law-judge-dismisses-ftcs-challenge-illumina-proposed-acquisition-cancer-detection>.

have “a high level of respect” for the FTC’s senior leaders¹⁰. Those are not the results of an agency that should be empowered with more responsibility or scope.

For the reasons mentioned above, the PBM Transparency Act is an example of the same flawed economic thinking that has overtaken the direction and resources of the FTC. But even putting the merits or flaws of this particular piece of legislation aside, no friend of free markets, accountability to taxpayers, and skeptic of growing the regulatory state should act to give the FTC the increase in scope and authority that this legislation provides. This is especially true of today’s FTC and its leadership’s unprecedented, unjustified, and unwise attempts at expanding the reach of the agency.

Thank you,

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¹⁰ U.S. Office of Personnel Management, 2022 *Office of Personnel Management Federal Employee Viewpoint Survey: Report by Agency* (Washington, DC: U.S. Office of Personnel Management, 2022), <https://www.opm.gov/fevs/reports/data-reports/data-reports/report-by-agency/2022/2022-agency-report.pdf>.