

**UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION**

**COMMISSIONERS:**      **Lina M. Khan, Chair**  
                                 **Rebecca Kelly Slaughter**  
                                 **Christine S. Wilson**  
                                 **Alvaro M. Bedoya**

**In the Matter of**

**Meta Platforms, Inc.,  
a corporation,**

**Mark Zuckerberg,  
a natural person,**

**and**

**Within Unlimited, Inc.,  
a corporation.**

**DOCKET NO. 9411**

**DISSENTING STATEMENT OF COMMISSIONER CHRISTINE S. WILSON**

Today, the Commission rules on whether Federal Trade Commission (“FTC”) Chair Lina M. Khan must recuse herself from playing an adjudicatory role in the FTC’s challenge, in Part 3 administrative litigation, to the acquisition of Within Unlimited, Inc. (“Within”) by Meta Platforms, Inc. (“Meta”)<sup>1</sup> (the “Meta/Within Transaction”). This ruling is prompted by Meta’s July 25, 2022 petition requesting the recusal of Chair Khan from participating “in any decisions concerning the FTC’s review of” the Meta/Within Transaction (the “Petition for Recusal”).<sup>2</sup> On July 27, 2022, the FTC filed a complaint in the Northern District of California seeking a temporary restraining order and a preliminary injunction of the Meta/Within Transaction.<sup>3</sup> On August 11, 2022, the FTC filed an administrative Part 3 complaint seeking a permanent injunction of the Meta/Within Transaction.<sup>4</sup> On August 24, 2022, Meta was informed that its

---

<sup>1</sup> Meta, as used as in this opinion, is equivalent to references that appear in cited material to Facebook, Inc. Meta is the successor company of Facebook, Inc. This analysis considers Respondent Meta and Respondent Mark Zuckerberg equivalent because Mark Zuckerberg is the Ultimate Parent Entity of Meta. *See* 16 C.F.R. § 801.1.

<sup>2</sup> Petition for Recusal of Chair Lina M. Khan from Involvement in the Proposed Merger between Meta Platforms, Inc. and Within Unlimited, Inc., FTC No. 221-0040 (July 25, 2022) [*hereinafter* Petition for Recusal].

<sup>3</sup> Complaint at 2, FTC v. Meta Platforms, 3:22-cv-04325 (N.D. Cal. July 27, 2022).

<sup>4</sup> Complaint, Meta Platforms, Inc., FTC No. 221-0040 (Aug. 11, 2022).

recusal petition would be considered as a disqualification motion under Rule 4.17.<sup>5</sup> On October 13, 2022, the FTC filed an amended complaint (“Amended Part 3 Complaint”), again seeking a permanent injunction of the Meta/Within Transaction.<sup>6</sup>

This petition is not the first of its type that Meta has filed. Roughly one year before the FTC filed its complaint seeking to enjoin the Meta/Within Transaction, Meta filed a petition to disqualify Chair Khan from an FTC suit in federal court alleging that Meta monopolized the market for personal social networking services.<sup>7</sup> The FTC first filed this complaint on December 9, 2020.<sup>8</sup> Judge Boasberg, the presiding judge, dismissed the complaint on June 28, 2021.<sup>9</sup> On August 19, 2021, the FTC amended its federal court complaint against Meta; Chair Khan joined two other Commissioners in voting to authorize the amended complaint.<sup>10</sup> On October 4, 2021, Meta moved to dismiss the amended complaint, arguing that Chair Khan’s participation in the decision to file the amended complaint violated due process and federal ethics rules.<sup>11</sup> On January 11, 2022, Judge Boasberg denied Meta’s motion to dismiss the FTC’s amended complaint.<sup>12</sup> Judge Boasberg applied the prosecutorial standard for voting out a federal court complaint, and ruled that due process and federal ethics obligations did not require Chair Khan’s disqualification.<sup>13</sup>

The issue before the Commission today is distinct in material and important ways from the issue that Judge Boasberg previously decided. Three factually analogous cases (one with facts nearly identical to those in the current situation) represent the most relevant precedent for considering recusal of an FTC Commissioner.<sup>14</sup> Those cases make the conclusion here inevitable. As explained below, Chair Khan’s participation as an adjudicator in the Meta/Within Transaction would violate both due process principles and federal ethics standards. Chair Khan’s participation would deprive the merging parties of due process because her prior statements and

---

<sup>5</sup> Letter from April J. Tabor, Meta Platforms, Inc., FTC No. 221-0040 (Aug. 24, 2022). The Petition for Recusal is broader than the question of Chair Khan’s recusal as an adjudicator. The current question before the Commission is limited to Chair Khan’s role as an adjudicator.

<sup>6</sup> Amended Complaint, Meta Platforms, Inc., FTC No. 221-0040 (Oct. 13, 2022) [*hereinafter* Amended Part 3 Complaint].

<sup>7</sup> In re Petition for Recusal of Chair Lina M. Khan from Involvement in the Pending Antitrust Case Against Facebook, Inc. (July 14, 2021). That petition, and its supporting documents, are Exhibit A of the Meta/Within Transaction Petition for Recusal.

<sup>8</sup> Complaint, FTC v. Facebook, Inc., No. 1:20-cv-03590-JEB (D.D.C. Dec. 9, 2020).

<sup>9</sup> FTC v. Facebook, Inc., 560 F. Supp. 3d 1, 3-4 (D.D.C. June 28, 2021).

<sup>10</sup> Press Release, Fed. Trade Comm’n, FTC Alleges Facebook Resorted to Illegal Buy-or-Bury Scheme to Crush Competition After String of Failed Attempts to Innovate (Aug. 19, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/08/ftc-alleges-facebook-resorted-illegal-buy-or-bury-scheme-crush-competition-after-string-failed>.

<sup>11</sup> Memorandum in Support of Facebook, Inc.’s Motion to Dismiss the FTC’s Amended Complaint at 38-45, FTC v. Facebook, Inc., No. 20-cv-03590-JEB (D.D.C. Oct. 4, 2021).

<sup>12</sup> FTC v. Facebook, Inc., 581 F. Supp. 3d 34 (D.D.C. Jan. 11, 2022).

<sup>13</sup> *Id.* at 61-65.

<sup>14</sup> *See infra* notes 86-88.

work declare Meta’s acquisition strategy in the virtual reality space illegal, and she publicly demanded that the FTC block all Meta transactions.<sup>15</sup> Federal ethics requirements, separate from and in addition to the due process concerns, also necessitate Chair Khan’s disqualification as an adjudicator in this matter.<sup>16</sup> Chair Khan stated under oath during her confirmation hearing that she would “seek the guidance of the relevant ethics officials at the agency and proceed accordingly” if she were asked to recuse herself from a matter.<sup>17</sup> Despite making this commitment, Chair Khan either (1) did not “seek the guidance of the relevant ethics officials at the agency and proceed accordingly”; or (2) asked for guidance and then ignored the recommendation. [REDACTED]

[REDACTED].<sup>18</sup>  
Avoiding or ignoring unwanted guidance from the FTC ethics staff does not obviate the need for Chair Khan’s recusal as an adjudicator for the Meta/Within Transaction.

### **Procedure for Disqualification and Procedural History**

Commission procedures set forth the process for determining “all motions seeking the disqualification of a Commissioner from any *adjudicative or rulemaking* proceeding.”<sup>19</sup> Under Commission Rule 4.17, the “motion shall be addressed in the first instance by the Commissioner whose disqualification is sought.”<sup>20</sup> If the “Commissioner declines to recuse [herself,] the Commission shall determine the motion without the participation of such Commissioner.”<sup>21</sup> Commission procedure does not provide for full Commission involvement to resolve petitions for Commissioner recusal in a prosecutorial or investigative role.<sup>22</sup> The analysis in this opinion is therefore limited to the question of recusal concerning Chair Khan’s adjudicatory role.<sup>23</sup> In other

<sup>15</sup> See *infra* notes 86-212 and accompanying text.

<sup>16</sup> See *infra* notes 213-263 and accompanying text.

<sup>17</sup> Senator Mike Lee, *Senator Lee Questions FTC Nominee Lina Khan on Rulemaking, Antitrust Views*, YOUTUBE (April 21, 2021), [https://www.youtube.com/watch?v=PQSeqIW\\_3r8](https://www.youtube.com/watch?v=PQSeqIW_3r8).

[REDACTED]

<sup>19</sup> 16 C.F.R. § 4.17(a) (emphasis added).

<sup>20</sup> 16 C.F.R. § 4.17(b)(3)(i).

<sup>21</sup> 16 C.F.R. § 4.17(b)(3)(ii).

<sup>22</sup> See 16 C.F.R. § 4.17(a) (“...any adjudicative or rulemaking proceeding.”).

<sup>23</sup> In the separate matter involving the FTC and Meta concerning alleged monopolization of personal social networking services discussed above, Judge Boasberg ruled that due process and federal ethics did not require Chair Khan’s recusal despite a motion from Meta requesting Chair Khan’s disqualification. Judge Boasberg applied the

words, the question before the Commissioners today is whether Chair Khan can serve as a judge with respect to issues arising from the FTC’s administrative proceedings concerning the Meta/Within Transaction.

On September 26, Chair Khan’s office sent to other Commissioners’ offices a “Circulation for Information” with a five-page statement (the “September 26 Statement”) attached. The statement’s first paragraph states, “I reject Meta’s petition and decline to recuse myself from this matter.”<sup>24</sup> The memo then describes Chair Khan’s reasoning for declining to recuse herself.<sup>25</sup> Based on that statement, the three remaining Commissioners tasked with deciding recusal believed that Chair Khan had addressed the “petition in the first instance” and the next step of the Rule 4.17 process began.<sup>26</sup> Believing that the recusal petition then fell to the remaining Commissioners to “determine the motion without the participation of” Chair Khan,<sup>27</sup> a Commission meeting was held on October 4, 2022, to discuss the issue.

On October 5, 2022, the Commissioners were notified that Chair Khan’s September 26 Statement inadvertently was distributed to FTC staff litigating to block the Meta/Within Transaction. FTC staff requested that the September 26 Statement be provided to counsel for Meta and Within to cure any potential information asymmetry in the Part 3 proceeding. The Commission believed that the September 26 Statement was part of the Commission’s deliberative process in deciding recusal. Discussion ensued regarding waiving the deliberative process privilege so that the FTC’s Office of the Secretary could provide the September 26 Statement to counsel for Meta and Within. Before the Commission could act, the Commission was informed that the Chair considered the September 26 Statement to be a draft, and that the Chair potentially controlled work product privilege over the document such that a question was raised whether the Commission unilaterally could release it.

To attempt to rectify the situation, the FTC’s Office of the Secretary sent a letter on October 6, 2022, stating:

the motion to stay the administrative proceeding in this matter is fully briefed and is before the Commission. Please be advised that this motion will be resolved after the

---

prosecutorial standard for voting out a complaint to be filed in federal court. Judge Boasberg’s analysis shines no light on the question of whether Chair Khan can sit as an adjudicator in a Part 3 proceeding. Judge Boasberg held that a line of cases involving former FTC Chair Dixon is “not relevant because” in those cases, the Commissioners were “acting there as an adjudicatory body” while in the case in front of Judge Boasberg, the Commissioners were “simply filing a case in federal court.” *Facebook*, 581 F. Supp. 3d at 61-65.

<sup>24</sup> Internal Statement of Chair Lina M. Khan Regarding the Petition for Recusal from Involvement in the Proposed Merger Between Meta Platforms, Inc. and Within Unlimited, Inc., FTC No. 221-0040 (Sept. 26, 2022) [hereinafter September 26 Statement]. On November 18, 2022, the Chair provided an additional statement that revises the September 26 Statement in ways that are immaterial to the analysis in this dissent.

<sup>25</sup> *Id.*

<sup>26</sup> 16 C.F.R. § 4.17(b)(3). On September 26, 2022, the same day the Chair’s statement was circulated, the offices of all three Commissioners tasked with deciding recusal communicated agreement to schedule a meeting to discuss the recusal issue. The next day, on September 27, 2022, a Sunshine Motion was circulated, and a Commission meeting was scheduled for October 4, 2022.

<sup>27</sup> 16 C.F.R. § 4.17(b)(3)(ii).

Commission determines the motion for disqualification that is currently pending before it. Commission Rule 4.17 provides that in the event that the Commissioner who is the subject of a recusal motion ‘declines to recuse himself or herself from further participation in the proceeding, the Commission shall determine the motion without the participation of such Commissioner.’<sup>28</sup>

This letter was meant to cure any information asymmetry that existed.<sup>29</sup>

Chair Khan sent the following email to Commissioners’ office on October 7, 2022:

It has come to my attention that there may be ambiguity concerning the statement circulated for information on September 26, 2022. Pursuant to Rule 4.17(b)(3), I have declined to recuse myself from further participation in the proceeding. This decision was effective on September 26, 2022. The September 26 statement outlining my rationale for this decision is a draft and some of the language may change. I will circulate a more final statement at a later date.

Because the Commissioners remained concerned about an ongoing information asymmetry in the Part 3 litigation, an emergency Commission meeting was held on October 10, 2022. At that meeting, the Commission determined that Chair Khan in fact did not hold work product privilege over the document and that the Commission consequently could vote to waive its deliberative process privilege. Participating Commissioners agreed that counsel for Meta and Within should receive the September 26 Statement and an explanatory letter. These materials were sent to counsel for Meta and Within on October 12, 2022.

Two of the three participating Commissioners have determined that Chair Khan’s recusal from the Part 3 proceedings is not warranted. For the reasons explained below, I respectfully dissent.

### **Chair Khan’s Work and Statements**

The Petition for Recusal claims that “Chair Khan has prejudged the propriety of the pending merger between Meta and Within” and that her participation “would violate both due process and her obligations of impartiality under the federal ethics rules.”<sup>30</sup> The Petition for Recusal focuses on work in which “Chair Khan has consistently and publicly maintained that Meta has violated the antitrust laws” and “Chair Khan’s public statements and writings reflect her belief that the government should block future acquisitions by Meta, regardless of the merits

---

<sup>28</sup> Letter from April J. Tabor, Meta Platforms, Inc., FTC No. 221-0040 (Oct. 6, 2022), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/D9411LetterCounselFB.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/D9411LetterCounselFB.pdf).

<sup>29</sup> Joint Statement of Recent Decision, *FTC v. Meta Platforms*, Case 3:22-cv-04325 (N.D. Cal. Oct. 17, 2022) (“According to the FTC, these developments are reflected in an October 6, 2022 letter from the Secretary to counsel, which appears on the FTC’s public docket and is attached hereto as Exhibit A[.]”).

<sup>30</sup> Petition for Recusal, *supra* note 2, at 2.

of the transaction.”<sup>31</sup> Certain statements and written work, attributable to Chair Khan and explained below, are relevant to this analysis.

### Chair Khan’s Work at Open Markets Institute

In 2017 and 2018, Chair Khan was Legal Director at Open Markets Institute (“OMI”). On November 1, 2017, Chair Khan and other senior leaders at OMI signed a letter to then-Acting FTC Chair Ohlhausen stating that “[t]he most obvious immediate step to address Facebook’s current power is to prohibit mergers between Facebook [and] other potentially competitive social networks *or other new and promising products and services*.”<sup>32</sup> The letter explained now-Chair Khan’s reasoning behind her request for the FTC to block all transactions involving Meta. The letter stated that “[r]ecent events reveal that Facebook has become too big and complex for any executive team to manage responsibly, and has provided a back-door through which America’s enemies can attack our vital social and democratic institutions.”<sup>33</sup> The letter stated that all transactions involving Meta should be blocked “until the American people, working through our government, determine how to ensure that Facebook’s power does not harm our nation’s security, democratic institutions, or the political rights and commercial freedoms of individual citizens, Facebook should not be able to amass any greater power through acquisition.”<sup>34</sup>

In a press release issued on March 22, 2018, “Open Markets [Institute] call[ed] on the FTC to ... prohibit all future acquisitions by Facebook for at least five years.”<sup>35</sup> The press release referenced an op-ed authored by the Executive Director of OMI and a fellow at OMI that mirrored the calls in the press release.<sup>36</sup> Not only was Chair Khan Legal Director of OMI at this time, but as explained below, Chair Khan subsequently embraced this proposal in her academic writing by citing to this op-ed and adopting its positions.<sup>37</sup>

On May 15, 2018, speaking as OMI’s Director of Legal Policy in a video interview, Chair Khan said, “I think one of the first steps is to make sure Facebook is not acquiring further

---

<sup>31</sup> *Id.* at 1-2.

<sup>32</sup> Press Release, Open Markets Inst., Open Markets Institute Calls on the FTC to Block All Facebook Acquisitions (Nov. 1, 2017), <https://www.openmarketsinstitute.org/publications/open-markets-institute-calls-on-the-ftc-to-block-all-facebook-acquisitions>.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> 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), <https://www.openmarketsinstitute.org/publications/fines-for-facebook-arent-enough-the-open-markets-institute-calls-on-ftc-to-restructure-facebook-to-protect-our-democracy>.

<sup>36</sup> *Id.*

<sup>37</sup> See Lina M. Khan, *Sources of Tech Platform Power*, 2 GEO. L. TECH. REV. 325, 333 (2018) [hereinafter Khan, *Sources of Tech Platform Power*] (citing Barry Lynn & Matt Stoller, *Facebook Must Be Restructured. The FTC Should Take These Nine Steps Now*, GUARDIAN (Mar. 22, 2018)) (“These reforms would include, for example, structuring competition in platform markets (by creating a presumption against future acquisitions and undoing past acquisitions where necessary) and ending surveillance-based business models (by requiring platforms to spin off their ad networks).”). See also *supra* notes 53 & 181 and accompanying text.

power. So, 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."<sup>38</sup>

### Chair Khan's Work on the House Majority Staff's Investigation and Report

In June 2019, the House Judiciary Committee's Subcommittee on Antitrust, Commercial, and Administrative Law (the "House Subcommittee") began an investigation into "the dominance of Amazon, Apple, Facebook, and Google, and their business practices to determine how their power affects our economy and our democracy."<sup>39</sup> Chair Khan served as Counsel to the Majority Staff of the House Subcommittee, during which time she "led the congressional investigation into digital markets and the publication of its final report."<sup>40</sup> According to press reports, Chair Khan and a small group of staffers "often worked 70-hour weeks to keep the probe on track, all the way from the highly orchestrated questioning of the big tech CEOs down to whether Basecamp's David Heinemeier Hansson wore a jacket during his testimony. ... The future of antitrust in the U.S. will be indelibly tied to the work of these relatively unknown staffers, who wielded massive influence over issues that matter to tech executives and their businesses — for better or for worse."<sup>41</sup> Chair Khan reportedly "poured her 'sweat and blood' into the investigation" and "left her fingerprints all over the investigation."<sup>42</sup> Zephyr Teachout, a law professor and antitrust enforcer for whom Chair Khan served as policy director during Teachout's run for Governor of New York, reported that she "'could see Lina's work everywhere in the [CEO] hearing,' ... pointing out that many of the questions harkened directly back to [Chair Khan's] academic work."<sup>43</sup>

The investigation entailed collecting nearly 1.3 million documents from the companies under investigation and third parties, and interviewing more than 240 market participants.<sup>44</sup> Additionally, the Subcommittee held seven hearings, including testimony from the Chief Executive Officers of the investigated companies — which included Meta's Mark Zuckerberg.<sup>45</sup> The result of the investigation was a 450-page report authored by the Subcommittee's Majority

---

<sup>38</sup> The Bernie Sanders Show, *The Greatest Threat to Our Democracy?* (May 15, 2018) (starting at 20:29), <https://www.youtube.com/watch?v=wuCAy10hIHI>.

<sup>39</sup> MAJORITY STAFF REPORT AND RECOMMENDATIONS OF H. SUBCOMMITTEE ON ANTITRUST, COMMERCIAL, AND ADMINISTRATIVE LAW OF THE COMMITTEE ON THE JUDICIARY, 116<sup>TH</sup> CONG., INVESTIGATION OF COMPETITION IN DIGITAL MARKETS at 6 (2020), [*hereinafter* Majority Staff Report] [https://judiciary.house.gov/uploadedfiles/competition\\_in\\_digital\\_markets.pdf?utm\\_campaign=4493-519](https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaign=4493-519).

<sup>40</sup> Petition for Recusal, *supra* note 2, at ex. C.

<sup>41</sup> Emily Birnbaum, *A tiny team of House staffers could change the future of Big Tech. This is their story.*, PROTOCOL (Oct. 6, 2020), <https://www.protocol.com/house-antitrust-report-staffers-big-tech#toggle-gdpr>.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> Majority Staff Report, *supra* note 39, at 6 & 8.

<sup>45</sup> *Id.* at 6.

staff (“Majority Staff Report”), which included Chair Khan as a co-author.<sup>46</sup> The Majority Staff Report described Meta’s “Oculus, a virtual reality gaming system[,]” as one of Meta’s “five primary product offerings[.]”<sup>47</sup> The investigation found that Meta “acquired several virtual reality and hardware companies, such as Oculus” and “[m]ore recently ... Oculus game developers[.]”<sup>48</sup> The report’s analysis into the acquisition of Oculus game developers included Meta’s acquisition of Beat Games (maker of Beat Saber), Sanzaru Games, and Ready at Dawn.<sup>49</sup> The report found that “Facebook’s serial acquisitions reflect the company’s interest in purchasing firms that had the potential to develop into rivals before they could fully mature into strong competitive threats.”<sup>50</sup>

The report concludes that:

all four of the firms investigated by the Subcommittee have recently focused on *acquiring startups in the artificial intelligence and virtual reality space.*

Ongoing acquisitions by the dominant platforms raise several concerns. Insofar as any transaction entrenches their existing position, or eliminates a nascent competitor, it strengthens their market power and can close off market entry. Furthermore, by pursuing additional deals in artificial intelligence *and in other emerging markets, the dominant firms of today could position themselves to control the technology of tomorrow.*

It is unclear whether the antitrust agencies are presently equipped to block anticompetitive mergers in digital markets. The record of the Federal Trade Commission and the Justice Department in this area shows significant missteps and repeat enforcement failures.<sup>51</sup>

#### Chair Khan’s Public Statements and Academic Work

Chair Khan has made additional public statements, including through her academic writings and interviews, that are relevant to the recusal petition. As noted above, Chair Khan’s academic work directly influenced her work on the House Subcommittee and the Majority Staff Report. In reference to the congressional investigation into digital markets, Zephyr Teachout, a co-author of Chair Khan’s and for whom Khan served as policy director during Teachout’s campaign to become the Governor of New York, commented that she “‘could see Lina’s work everywhere in the [CEO] hearing,’ ... pointing out that many of the questions harkened directly

---

<sup>46</sup> The Majority Staff Report was later adopted by the U.S. House Committee On The Judiciary. Press Release, U.S. House Committee On The Judiciary, Judiciary Committee Publishes Final Report on Competition in the Digital Marketplace (July 19, 2022), <https://judiciary.house.gov/news/documentsingle.aspx?DocumentID=5025>.

<sup>47</sup> Majority Staff Report, *supra* note 39, at 132.

<sup>48</sup> *Id.* at 149.

<sup>49</sup> *Id.* at 424 (listing acquisitions by Meta); *id.* at fn. 859 (citing articles referencing Meta’s acquisitions of Oculus game developers Beat Games, Sanzaru Games, and Ready at Dawn).

<sup>50</sup> *Id.* at 150.

<sup>51</sup> *Id.* at 387 (emphasis added).

back to [Chair Khan’s] academic work.”<sup>52</sup> Chair Khan’s academic work also adopted the positions she and her previous employers advanced. For example, Chair Khan, in an academic article, adopted the decision to create “a presumption against future acquisitions” by citing the OMI op-ed that argued for prohibiting “all future acquisitions by Facebook for at least five years.”<sup>53</sup>

Chair Khan’s academic writings have explained Meta’s acquisition strategy regarding nascent markets and potential competitors. For example, Chair Khan asserted that Meta “systematically copied” apps that “it deemed competitive threats” and “established a systemic informational advantage (gleaned from competitors) that it can reap to thwart rivals and strengthen its own position, either through introducing replica products or buying out nascent competitors.”<sup>54</sup> Chair Khan has argued that Meta can “detect which rival apps are succeeding” and “would often give companies a choice: Be acquired by [Meta], or watch it roll out a direct replica.”<sup>55</sup> Chair Khan has described this strategy as Meta’s “systematic ability to exploit information.”<sup>56</sup>

In a later interview, Chair Khan expanded on her views, stating that Meta’s “acquisition strategy was basically a land grab to buy up as many assets and kind of lock up the market, and that certain acquisitions such as [Meta’s] purchase of Instagram was an effort to really neutralize these competitive threats[.]”<sup>57</sup> The problem, according to Chair Khan, is that Meta “can either make an aggressive acquisition bid, taming the nascent threat by bringing it in-house, or can introduce an identical app, eating into its business.”<sup>58</sup> Chair Khan argued in one academic article that Meta’s “threat of entry . . . into platform-adjacent markets is dampening investment in complementary segments[.]”<sup>59</sup> Specifically, Chair Khan wrote that Meta’s “willingness to

---

<sup>52</sup> Birnbaum, *supra* note 41.

<sup>53</sup> Khan, Sources of Tech Platform Power, *supra* note 37, at 333.

<sup>54</sup> Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973, 1002-3 (2019) [*hereinafter* Khan, *The Separation of Platforms and Commerce*].

<sup>55</sup> *Id.* 977-78.

<sup>56</sup> Khan, Sources of Tech Platform Power, *supra* note 37, at 330.

<sup>57</sup> Sway, Opinion, *She’s Bursting Big Tech’s Bubble*, N.Y. TIMES (Oct. 29, 2020), <https://www.nytimes.com/2020/10/29/opinion/sway-kara-swisher-lina-khan.html?showTranscript=1> (transcript).

<sup>58</sup> Khan, Sources of Tech Platform Power, *supra* note 37, at 330-31.

<sup>59</sup> Khan, *The Separation of Platforms and Commerce*, *supra* 54 at 1009 (“Anecdotal evidence suggests that both actual entry and the threat of entry by digital platforms into platform-adjacent markets is dampening investment in complementary segments, now known as a ‘kill-zone.’ For example, a survey of more than two dozen Silicon Valley investors revealed that Facebook’s willingness to appropriate information from and mimic the functionality of apps has created ‘a strong disincentive for investors’ to fund services that Facebook might copy. . . . This concern raised by venture capitalists makes sense: A potential innovator (or a potential funder of a potential innovator) decides whether to invest based on the anticipated risk and reward of realizing the innovation. Anticipating platform discrimination or appropriation will lower expected rewards, depressing the incentive to invest. Even the uncertainty of discrimination can dissuade entry by heightening risk.”) (internal citations omitted).

appropriate information from and mimic the functionality of apps has created ‘a strong disincentive for investors’ to fund services that [Meta] might copy.’<sup>60</sup>

Chair Khan’s statements also connect her views of Meta’s conduct to the virtual reality space. Chair Khan, in commenting on Meta’s Instagram and WhatsApp acquisitions, explained that “[i]n hindsight, I think, looking back, looking at the documents, looking at the evidence that was available, now the agency was able to determine, that was an illegal transaction.”<sup>61</sup> In commenting on the “complaints from FTC & 48 AGs suing” Meta to unwind the Instagram and WhatsApp acquisitions, Chair Khan connected Meta’s earlier acquisition strategy to virtual reality by stating that Meta “is now following this playbook in the virtual reality space. Quoting [Representative Pramila Jayapal] & [the Majority Staff Report], Bloomberg notes [Meta] is using same ‘copy-acquire-kill’ strategy it used to monopolize social networking. Key task for enforcers is to prevent a repeat[.]”<sup>62</sup>

Chair Khan’s academic writings add further context regarding her agenda for Meta. Chair Khan analyzed and commented on Meta’s conduct while “in competition with developers” including allegedly having “foreclosed competitors from its platform and appropriated [developers’] business information and functionality.”<sup>63</sup> Chair Khan argued that users and advertisers rely on Meta as a dominant intermediary.<sup>64</sup> According to Chair Khan, users are beholden to Meta because of its dominant position and a lack of alternatives, which allows Meta to pursue deliberate strategies to downgrade the privacy and control of their users.<sup>65</sup> Chair Khan also concluded in her academic work that Meta “is a dominant social network.”<sup>66</sup> Chair Khan stated that app developers and online publishers rely on Meta and that in this context, Meta “has

---

<sup>60</sup> *Id.*

<sup>61</sup> Sway, Opinion, *Exclusive: Lina Khan Is (Still) Bursting Big Tech’s Bubble*, N.Y. TIMES (Jan. 19, 2022), <https://www.nytimes.com/2022/01/19/opinion/sway-kara-swisher-lina-khan.html?showTranscript=1>.

<sup>62</sup> Petition for Recusal, *supra* note 2, at ex. D.

<sup>63</sup> Khan, *The Separation of Platforms and Commerce*, *supra* 54 at 1001 (“Facebook also delivers certain apps and features directly, placing it in competition with developers. It has both foreclosed competitors from its platform and appropriated their business information and functionality.”).

<sup>64</sup> Dave E. Pozen & Lina M. Khan, *A Skeptical View of Information Fiduciaries*, 133 HARV. L. REV. 497, 516 (2019) (“Many advertisers and content producers are just as captive to Facebook as its end users are, or even more so. Insofar as the purpose of the information-fiduciary proposal is to rebalance the relationship between dominant online intermediaries and those who depend on them, it is unclear why its protections should cover only one set of dependents.”).

<sup>65</sup> *Id.* at 517-18 (“The loss of privacy and control experienced by Facebook users therefore does not stem, organically, ‘from the structure and nature of the fiduciary relation.’ It stems from Facebook’s deliberate efforts to create such vulnerabilities. Facebook’s dominant market position supports this strategy. To the extent that users feel beholden to Facebook, it is not because the company offers them especially skillful services or judgments so much as because of a lack of viable alternatives. By virtue of owning four of the top five social media applications, Facebook makes it difficult to escape the company’s ecosystem.”) (internal citations omitted).

<sup>66</sup> Khan, *The Separation of Platforms and Commerce*, *supra* 54 at 1001.

used its dominant position to appropriate from rivals.”<sup>67</sup> Additionally, Chair Khan found that Meta “leveraged its dominant position as a communications network to extract sensitive business information from publishers.”<sup>68</sup> Chair Khan’s scholarship states that the “backdrop of platform dominance and democratic decay” requires “attending to issues of market structure or political economic influence[.]”<sup>69</sup> In her academic writing, Chair Khan has likened Meta CEO Mark Zuckerberg to a doctor called “Marta Zuckerberg” who “floods you (and her two billion other patients) with ads for all manner of pills and procedures[.]”<sup>70</sup>

### **Allegations in the Meta/Within Transaction Complaint**

On October 13, 2022, the FTC filed the Amended Part 3 Complaint alleging that Meta’s acquisition of Within is an illegal acquisition.<sup>71</sup> The complaint explains that Meta is “one of the largest technology companies in the world and the leading provider of virtual reality (‘VR’) devices and applications (‘apps’) in the United States” and that Within is “a software company that develops apps for VR devices[.]”<sup>72</sup> The complaint claims that Meta is a “global technology

---

<sup>67</sup> *Id.* (“There are at least two sets of market participants that both rely on Facebook’s network and find themselves in competition with Facebook: app developers and online publishers. In both markets, Facebook has used its dominant position to appropriate from rivals.”).

<sup>68</sup> *Id.* at 1003.

<sup>69</sup> Pozen & Khan, *supra* note 64, at 528 (“Against this backdrop of platform dominance and democratic decay, the user-centric nature of the information-fiduciary proposal should give pause. The relevant inquiry for legal reformers, we submit, should be not just how a firm such as Google or Facebook exercises its power over end users, but whether it ought to enjoy that kind of power in the first place. Limiting the dominance of some of these firms may well have salutary effects for consumer privacy, both by facilitating competition on privacy protection and by reducing the likelihood that any single data-security failure will cascade into a much wider harm. More than that, the very effort to think through the ramifications of platform power would force policymakers to grapple with a wide range of systemic concerns that fall outside the fiduciary frame. To be clear, we do not believe that addressing the market clout of companies like Facebook will remedy the full panoply of harms associated with them. Nor do we view antitrust enforcement as the sole tool for addressing this dominance. Our point here (which we will develop further in section IV.B) is that any broad regulatory framework or ‘grand bargain’ for social media that focuses on abusive data practices, without attending to issues of market structure or political economic influence, is bound to be at best highly incomplete and at worst an impediment to necessary reforms.”).

<sup>70</sup> *Id.* at 514 (“...imagine visiting a doctor — let’s call her Marta Zuckerberg — whose main source of income is enabling third parties to market you goods and services. Instead of requesting monetary payment for services rendered, Dr. Zuckerberg floods you (and her two billion other patients) with ads for all manner of pills and procedures from the second you set foot in her office, and she gets paid every time you try to learn more about one of these ads or even look in their direction. In fact, this is just about the only way she gets paid — as her financial backers are apt to remind her. The ads themselves, moreover, are tightly tailored to your economic, demographic, and psychological profile and to any consumer frailties you exhibit. They are also continually updated in light of information Dr. Zuckerberg collects on you; to be sure she does not miss anything, she has planted surveillance devices all around your neighborhood as well as her office. Can this institutional sociology and incentive structure plausibly be reconciled with a commitment to prioritizing your health?”).

<sup>71</sup> Amended Part 3 Complaint, *supra* note 6, at Count 1.

<sup>72</sup> *Id.* at ¶ 1.

behemoth” that “reaches into every corner of the world through its ‘Family of Apps’—Facebook, Instagram, Messenger, and WhatsApp—with more than three billion regular users.”<sup>73</sup>

The complaint alleges that Meta is now “[s]eeking to expand its empire even further, Meta in recent years has set its sights on building, and ultimately controlling, a VR ‘metaverse.’”<sup>74</sup> According to the complaint, “Meta’s campaign to conquer VR began in 2014 when it acquired Oculus[.]”<sup>75</sup> The complaint notes that “Meta controls the wildly popular app Beat Saber, which it acquired by purchasing Beat Games in November 2019” and that “Meta owns a number of other VR apps, some of which it developed in-house but most of which it acquired by rolling up other app studios.”<sup>76</sup> Specifically, the complaint notes that “[s]ince its acquisition of Beat Games, Meta has continued to acquire a series of studios behind many popular VR apps”<sup>77</sup> including Sanzaru Games<sup>78</sup> and Ready at Dawn Studios.<sup>79</sup> The complaint claims that “Meta has an explicit strategy of harnessing strong network effects in VR to ensure its leading status in this growing industry. Meta could have chosen to try to compete with Within on the merits; instead, Meta decided it preferred to simply buy[.]”<sup>80</sup>

According to the complaint, “network effects on a digital platform can cause the platform to become more powerful—and its rivals weaker and less able to seriously compete—as it gains more users, content, and developers”<sup>81</sup> and “Meta seeks to exploit the network-effects dynamic in VR.”<sup>82</sup> The complaint notes that Meta’s VR “strategy” and “vision,” through instructions from Meta’s CEO, date back “[a]s early as 2015.”<sup>83</sup> The complaint alleges that the “proposed acquisition of Within would be one more step along that path toward dominance.”<sup>84</sup> The complaint’s requested relief includes enjoining the Meta/Within Transaction.<sup>85</sup>

### **Due Process and Federal Ethics**

The Commission is required to recuse Chair Khan if her participation would violate either due process or federal ethics requirements.

---

<sup>73</sup> *Id.* at ¶ 2.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at ¶ 3.

<sup>76</sup> *Id.* at ¶ 4.

<sup>77</sup> *Id.* at ¶ 27.

<sup>78</sup> *Id.* at ¶ 27.a.

<sup>79</sup> *Id.* at ¶ 27.b.

<sup>80</sup> *Id.* at ¶ 5.

<sup>81</sup> *Id.* at ¶ 6.

<sup>82</sup> *Id.* at ¶ 7.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at ¶ 8.

<sup>85</sup> *Id.* at page 18.

## Due Process Requirements

In a case dealing with the potential recusal of a former FTC Chair from agency adjudication, the D.C. Circuit held that “[t]he test for disqualification has been succinctly stated as being whether ‘a disinterested observer may conclude that (the agency) has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.’”<sup>86</sup> In other words, as stated by the Sixth Circuit in another case involving the potential recusal of the same former FTC Chair, “[i]t is fundamental that both unfairness and the appearance of unfairness should be avoided. Wherever there may be reasonable suspicion of unfairness, it is best to disqualify.”<sup>87</sup>

These two cases and one other D.C. Circuit case<sup>88</sup> are most analogous to the facts at hand and best present the case law for considering recusal of an FTC Commissioner. The cases involve former FTC Chair Paul Rand Dixon. Dixon began his career as a trial attorney at the FTC in 1938.<sup>89</sup> He served almost 20 consecutive years as a staff member at the FTC, leaving only for his years of service in the Navy during WWII and returning to the FTC after the war.<sup>90</sup> Dixon left the FTC and served as Counsel and Staff Director for the U.S. Senate Antitrust and Monopoly Subcommittee beginning in 1957.<sup>91</sup> In 1961, Dixon became Chair of the FTC. He remained Chair until January 1, 1970, but he continued to serve as an FTC Commissioner (and briefly Acting Chair in 1976) until his retirement on September 25, 1981.<sup>92</sup>

### *Cinderella Career & Finishing Schools*

In *Cinderella Career & Finishing Schools, Inc. v. FTC*, the FTC filed a complaint charging a trade school with “making representations and advertising in a manner which was false, misleading and deceptive[.]”<sup>93</sup> The specific allegations included that the “operator of a Washington, D.C., trade school ... misrepresent[ed] that the school extends loans to students, that it is approved by a government agency, that its courses will qualify students to be airline stewardesses or buyers for retail stores, exaggerating the availability of jobs through the school’s placement service, and using false inducements to obtain signatures on obligations to pay

---

<sup>86</sup> *Cinderella Career & Finishing Schools, Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970) (quoting *Gilligan, Will & Co. v. SEC*, 267 F.2d 461, 469 (2d Cir. 1959), *cert. denied*, 361 U.S. 896 (1959)).

<sup>87</sup> *American Cyanamid Co. v. F.T.C.*, 363 F.2d 757, 767 (6th Cir. 1966).

<sup>88</sup> *Texaco, Inc. v. FTC*, 336 F.2d 754 (D.C. Cir. 1964), *vacated on other grounds*, 381 U.S. 739 (1965).

<sup>89</sup> Paul Rand Dixon Personal Papers, John F. Kennedy Presidential Library and Museum, <https://www.jfklibrary.org/asset-viewer/archives/PRDPP> (“Dixon joined the Federal Trade Commission (FTC) in July 1938 as a trial attorney, focusing on both antimonopoly and anti-deceptive practice cases.”).

<sup>90</sup> *Id.* (“During World War II, he served as a Lieutenant in the U.S. Navy. Following the war, he returned to his position with the FTC.”).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> 425 F.2d at 584.

money.”<sup>94</sup> An FTC hearing examiner<sup>95</sup> held hearings and then issued an initial decision dismissing the complaint.<sup>96</sup> Complaint counsel appealed the initial decision to the Commissioners.<sup>97</sup>

While the appeal was pending before the Commission, Chair Dixon gave a speech to the Government Relations Workshop of the National Newspaper Association.<sup>98</sup> In the speech, Chair Dixon posed questions about the “standards” a newspaper “maintain[s] on advertising acceptance[.]”<sup>99</sup> The speech included hypothetical questions: “What would be the attitude toward accepting good money for advertising by a merchant who conducts a ‘going out of business’ sale every five months? What about carrying ads that offer college educations in five weeks, fortunes by raising mushrooms in the basement, getting rid of pimples with a magic lotion, *or becoming an airline’s hostess by attending a charm school?*”<sup>100</sup> He closed the relevant paragraph of his speech by stating that “advertising acceptance standards could stand more tightening by many newspapers” because “the Federal Trade Commission, even where it has jurisdiction, could not protect the public as quickly.”<sup>101</sup>

On appeal from the hearing examiner’s initial decision, the Commissioners issued a final order reversing the hearing examiner on some of the charges.<sup>102</sup> On appeal from the final order, the D.C. Circuit considered whether Chair Dixon should have been recused due to prejudgment concerns stemming from his speech.<sup>103</sup> The court held that Commissioners do not have “license to prejudge cases or to make speeches which give the appearance that the case has been prejudged.”<sup>104</sup> Statements giving the appearance that a case has been prejudged “may have the effect of entrenching a Commissioner in a position which he has publicly stated, making it difficult, if not impossible, for him to reach a different conclusion in the event he deems it necessary to do so after consideration of the record.”<sup>105</sup> The D.C. Circuit vacated the

---

<sup>94</sup> *In re of Sch. Servs., Inc.*, 74 F.T.C. 920 (1968) (describing the Commission’s order deciding the appeal), *rev’d*. 425 F.2d 583 (D.C. Cir. 1970).

<sup>95</sup> For the purposes of the analysis in this opinion, a “hearing examiner” is equivalent to what the FTC now calls an administrative law judge.

<sup>96</sup> *Cinderella Career & Finishing Schools*, 425 F.2d at 584 (“... a hearing examiner held a lengthy series of hearings which consumed a total of sixteen days; these proceedings are reported in 1,810 pages of transcript. After the Commission had called twenty-nine witnesses and the petitioners twenty-three, and after the FTC had introduced 157 exhibits and petitioners 90 (Petitioners’ Brief at 7), the hearing examiner ruled in a ninety-three page initial decision that the charges in the complaint should be dismissed.”).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 589.

<sup>99</sup> *Id.* at 589.

<sup>100</sup> *Id.* at 589-90 (emphasis added).

<sup>101</sup> *Id.* at 590.

<sup>102</sup> *Id.* at 584.

<sup>103</sup> *Id.* at 584-85.

<sup>104</sup> *Id.* at 590.

<sup>105</sup> *Id.*

Commission's order and remanded with instructions to consider the case without Chair Dixon's participation.<sup>106</sup>

### *Texaco*

In *Texaco, Inc. v. FTC*, the FTC issued a complaint claiming that "Texaco coerce[d] its dealers, through economic pressure, to distribute Goodrich [tires, batteries and accessories (TBA)] and thus unfairly and unlawfully prevent[ed] Goodrich's competitors from selling TBA to Texaco's outlets."<sup>107</sup> After evidentiary hearings, an initial decision was issued by the hearing examiner.<sup>108</sup> On appeal, the Commission reversed and remanded the case back to the hearing examiner.<sup>109</sup> After remand, Paul Rand Dixon joined the Commission and replaced the previous Chair.<sup>110</sup> The hearing examiner conducted additional hearings and a new initial decision was filed.<sup>111</sup>

While the case was pending before the hearing examiner on remand, Chair Dixon delivered a speech to the National Congress of Petroleum Retailers, Inc.<sup>112</sup> In the speech, Chair Dixon stated:

Your problems are many, and many of them are the problems of the Federal Trade Commission, too; for the Commission is concerned with promoting fair competition. More particularly, many of your problems are ours because they arise from practices prohibited by two of the most important statutes administered by the Commission- discriminatory pricing, prohibited by the Robinson-Patman Act, and other unfair acts, practices, and methods of competition, prohibited by the Federal Trade Commission Act.

---

<sup>106</sup> *Id.* at 592 ("For the reasons set forth above we vacate the order of the Commission and remand with instructions that the Commissioners consider the record and evidence in reviewing the initial decision, without the participation of Commissioner Dixon.").

<sup>107</sup> 336 F.2d at 756.

<sup>108</sup> *Id.* ("Answers by the companies placed the essential allegations of the complaint in issue, after which evidentiary hearings were conducted over a period of nearly three years. They were concluded December 10, 1958. The examiner, in his initial decision issued October 23, 1959....").

<sup>109</sup> *Id.* at 757-59.

<sup>110</sup> *Id.* at 759 ("The order of remand of March 9, 1961, was entered by a Commission composed of Chairman Kintner and Commissioners Secrest, Anderson and Kern. Accompanying it was the opinion to which we have referred, written by Chairman Kintner and concurred in by the other three members of the Commission. Shortly thereafter- on March 21, 1961- Earl W. Kintner was replaced as Chairman by Paul Rand Dixon, who had not been a member of the Commission theretofore.").

<sup>111</sup> *Id.* at 758 ("More than a year after the remand of March 9, 1961, the examiner conducted hearings from July 16 to July 19, 1962, at which the only proof introduced was in the form of exhibits received over the objection of the petitioners. A new initial decision was filed by the examiner September 24, 1962.").

<sup>112</sup> *Id.* at 759 ("The basis of the motion was a speech made by Dixon before the National Congress of Petroleum Retailers, Inc., in Denver, Colorado, on July 25, 1961, while the case was pending before the examiner after remand and before any steps had been taken by him.").

We at the Commission are well aware of the practices which plague you and we have challenged their legality in many important cases.

You know the practices- price fixing, price discrimination, and overriding commissions on TBA.

You know the companies- Atlantic, Texas, Pure, Shell, Sun, Standard of Indiana, American, Goodyear, Goodrich, and Firestone.

Some of these cases are still pending before the Commission; some have been decided by the Commission and are in the courts on appeal. You may be sure that the Commission will continue and, to the extent that increased funds and efficiency permit, will increase its efforts to promote fair competition in your industry.<sup>113</sup>

The speech led Texaco to file a motion that Chair Dixon be disqualified from participating in the proceeding.<sup>114</sup> Chair Dixon declined to recuse himself and the Commissioners denied the motion.<sup>115</sup> The Commission, with Chair Dixon's participation, entered an order adopting the hearing examiner's second initial decision.<sup>116</sup>

The speech referenced "three business practices, seven oil companies, and three tire manufacturers" and "was qualified by the statement that '[s]ome of these cases are still pending before the Commission; some have been decided by the Commission and are in the courts on appeal.'"<sup>117</sup> Chair Dixon explained that he believed "it would be taken for granted that, insofar as [his] other remarks suggested the actual existence and illegality of the named practices, the references were to the already-decided cases, not to those still pending before the agency."<sup>118</sup> Chair Dixon believed that "the reference to the, other proceedings—those still pending before the agency—was intended merely as a statement of the allegations in the complaints, not as prejudgment of their merits."<sup>119</sup> The D.C. Circuit explained that "[o]nce an adjudicator has taken a position apparently inconsistent with an ability to judge the facts fairly, subsequent protestations of open-mindedness on his part cannot restore a presumption of impartiality."<sup>120</sup>

---

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* ("On February 18, 1963, before the Commission had acted on the examiner's new initial decision of September 24, 1962, Texaco filed a motion that Chairman Dixon withdraw from participation in the proceeding or that the Commission determine him to be disqualified.").

<sup>115</sup> *Id.* ("The Commission denied the motion that it determine Chairman Dixon to be disqualified, and he declined to withdraw from participation.").

<sup>116</sup> *Id.* ("Instead, he took part in the entry of the order of April 15, 1963, more than two years after the remand, which adopted the examiner's initial decision and order of September 25, 1962[.]").

<sup>117</sup> *In re Pure Oil Company*, 66 FTC 1552, 1559 (1964).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Texaco*, 336 F.2d at 764 (Washington, J., concurring in part and dissenting in part).

The court in *Texaco* found that the “administrative hearing in the present case was certainly as important as that” in other cases that required recusal.<sup>121</sup> Consequently, the administrative hearing “must be attended, not only with every element of fairness but with the very appearance of complete fairness. Only thus can the tribunal conducting a quasi-adjudicatory proceeding meet the basic requirement of due process.”<sup>122</sup>

The D.C. Circuit held that “a disinterested reader of Chairman Dixon's speech could hardly fail to conclude that he had in some measure decided in advance that Texaco had violated the Act.”<sup>123</sup> Chair Dixon’s speech, “made before the matter was submitted to the Commission but while it was before the examiner, plainly reveals that he had already concluded that Texaco and Goodrich were violating the Act, and that he would protect the petroleum retailers from such abuses.”<sup>124</sup> Chair Dixon’s “speech suggest[ed] not only a substantial conviction” that the petitioners violated the law, “but an implied promise to support the petroleum retailers in their struggle against alleged abuses by their suppliers.”<sup>125</sup>

### *American Cyanamid*

In *American Cyanamid Company v. FTC*, the FTC issued a complaint alleging that five companies violated Section 5 of the FTC Act in connection with the production and sale of tetracycline, a broad-spectrum antibiotic.<sup>126</sup> The hearing examiner issued his initial decision in favor of the drug companies and dismissed the complaint.<sup>127</sup> After notice of appeal, all five drug companies filed motions to disqualify Chair Dixon from participating in the proceeding.<sup>128</sup> The motions to disqualify:

were based upon the contention that Chairman Dixon, in his former capacity as Chief Counsel and Staff Director of the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary of the United States Senate, played an ‘active role’ in an investigation by that Subcommittee of many of the same facts and issues and of the same parties as are involved in this proceeding, and participated

---

<sup>121</sup> *Id.* at 760 (“We said in [*Amos Treat*]: ‘... An administrative hearing of such importance and vast potential consequences must be attended, not only with every element of fairness but with the very appearance of complete fairness. Only thus can the tribunal conducting a quasi-adjudicatory proceeding meet the basic requirement of due process.’ The administrative hearing in the present case was certainly as important as that in the *Amos Treat* case, and has perhaps even greater potential consequences.”).

<sup>122</sup> *Id.* (citing *Amos Treat & Co. v. SEC*, 306 F.2d 260, 267 (D.C. Cir. 1962)).

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* (Washington, J., concurring in part and dissenting in part).

<sup>126</sup> *American Cyanamid*, 363 F.2d at 760-62.

<sup>127</sup> *Id.* at 762 (“The hearing examiner issued his initial decision, finding in favor of the petitioner drug companies on all issues, and dismissed the complaint”).

<sup>128</sup> *Id.* at 763 (“After notice of appeal to the Commission from this decision, all five petitioners filed motions on December 13, 1961, to disqualify Chairman Paul Rand Dixon from participating in the proceeding.”).

in the preparation of the report of the Subcommittee on the same facts, issues and parties.<sup>129</sup>

The motions to disqualify were denied.<sup>130</sup> On appeal, the Commissioners reversed the hearing examiner.<sup>131</sup>

Paul Rand Dixon served as the Chief Counsel and Staff Director of the subcommittee investigating “the drug industry, including the manufacture and sale of tetracycline.”<sup>132</sup> At the subcommittee, soon-to-be-Chair Dixon “played an active part in the investigation. These hearings were concerned specifically, among other things, with issues which were decided against petitioners by the Commission in [the *American Cyanamid* case].”<sup>133</sup> Dixon questioned witnesses about tetracycline during the subcommittee’s investigation.<sup>134</sup> The subcommittee received evidence relating to petitioner’s prices for broad spectrum antibiotics, including tetracycline,<sup>135</sup> and the report included discussions of tetracycline and the conduct of the five petitioner drug companies.<sup>136</sup> “The letter of Senator Kefauver transmitting the report to the Chairman of the Senate Committee on Judiciary expressed appreciation for the ‘efforts of Paul Rand Dixon[.]’”<sup>137</sup>

---

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* (“These motions to disqualify Chairman Dixon were made or renewed on three separate occasions prior to the Commission’s final decision. The motions were denied.”).

<sup>131</sup> *Id.* at 762 (“On appeal, the Commission reversed, finding that the hearing examiner had misconstrued the actions of the patent examiner and the information which he deemed relevant to the application. The Commission found that Pfizer made deliberately false and misleading statements to, and withheld material information from, the Patent Office in securing its tetracycline patent; that this conduct amounted to ‘unclean hands,’ ‘inequity’ and ‘bad faith’ vis-a-vis the Patent Office; that Pfizer asserted monopoly rights under its patent in order to prevent competition in the tetracycline market; and that the effects of Pfizer’s acts and conduct before the Patent Office have been to restrain competition, to foreclose access to substantial markets to competitors and potential competitors, and to create a monopoly in the manufacture and sale of tetracycline in violation of Section 5 of the Federal Trade Commission Act. The Commission further found that Cyanamid made erroneous representations to the Patent Office concerning matters bearing upon the patentability of tetracycline; and that although Cyanamid soon discovered that these representations were inaccurate, it did not disclose this fact to the Patent Office until after the tetracycline patent had been granted to Pfizer, thereby aiding the latter in its efforts to obtain a patent. The Commission ruled that this suppression of material information, combined with the cross-licensing agreement between Pfizer and Cyanamid and the acceptance by the latter of a license from the former to produce and sell tetracycline, constituted an illegal attempt to share a monopoly with Pfizer and amounted to a combination in restraint of trade. Similar charges against Bristol, Squibb and Upjohn were dismissed by the Commission, although these latter three companies were found guilty of price-fixing. On the issue of price-fixing, the Commission decided that the record as a whole sustains the conclusion that the five petitioners fixed and maintained the price of tetracycline in substantial markets through conspiracy and combination.”).

<sup>132</sup> *Id.* at 765.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 766.

<sup>137</sup> *Id.* at 767.

The Sixth Circuit concluded that “the questions and comments of Mr. Dixon” during the investigation demonstrated that he formed opinions that were conclusions of facts.<sup>138</sup> According to the court, these opinions were “not merely an underlying philosophy or a crystallized point of view on questions of law or policy.”<sup>139</sup> The Sixth Circuit held that “the participation of Chairman Dixon in the hearing ‘amounted ... to a denial of due process which invalidated the order under review” because Chair “Dixon sat with the other members as triers of the facts and joined in making the factual determination upon which the order of the Commission is based. As counsel for the Senate Subcommittee, he had investigated and developed many of these same facts.”<sup>140</sup> The court ruled “that disqualification is required when, as in the present case, the legislative committee investigation involved the same facts and issues concerning the same parties named as respondents before the administrative agency[.]”<sup>141</sup>

### Due Process Requires Chair Khan’s Recusal

Due process requires that the FTC’s adjudicatory proceedings maintain the “very appearance of complete fairness.”<sup>142</sup> For the reasons explained below, “a disinterested observer may conclude that [Chair Khan] has in some measure adjudged the facts as well as the law”<sup>143</sup> regarding the Meta/Within Transaction, and the Chair must therefore be recused from adjudicating the Meta/Within Transaction.

### *Chair Khan Appears to Have Prejudged the Law and Facts*

Prior to joining the FTC, Chair Khan wrote to then-FTC Chair Ohlhausen asking the FTC “to prohibit mergers between Facebook ... [and] other new and promising products and services.”<sup>144</sup> The letter stated that Meta “has become too big and complex for any executive team to manage responsibly” and that all transactions involving Meta should be blocked until the government “determine[s] how to ensure that Facebook’s power does not” lead to a long list of potential harms.<sup>145</sup>

---

<sup>138</sup> *Id.* at 765 (“Some of the questions and comments of Mr. Dixon as quoted in Appendix E demonstrate to us that he then had formed the opinion that tetracycline prices quoted by petitioners were artificially high and collusive and that the patent interference settlement between Pfizer and Cyanamid involved improper aid by Cyanamid to Pfizer in obtaining the tetracycline patent. Any opinions so formed were conclusions as to facts, and not merely an ‘underlying philosophy’ or a ‘crystallized point of view on questions of law or policy.’ The facts to which questions were directed as set forth in Appendix E are inseparably a part of the ultimate findings of fact of the Commission in disagreeing with the decision of the trial examiner in the present proceeding.”).

<sup>139</sup> *Id.* (internal quotations omitted).

<sup>140</sup> *Id.* at 767.

<sup>141</sup> *Id.* at 768.

<sup>142</sup> *Texaco*, 336 F.2d at 760.

<sup>143</sup> *Cinderella Career & Finishing Schools*, 425 F.2d at 591.

<sup>144</sup> Press Release, Open Markets Inst., Open Markets Institute Calls on the FTC to Block All Facebook Acquisitions (Nov. 1, 2017), <https://www.openmarketsinstitute.org/publications/open-markets-institute-calls-on-the-ftc-to-block-all-facebook-acquisitions>.

<sup>145</sup> *Id.*

Calling for the FTC, which Chair Khan now leads, to ban all future Meta transactions is an express statement that Meta transactions are illegal. Because *Cinderella* articulated that Commissioners cannot make statements that “give the appearance that the case has been prejudged,”<sup>146</sup> Chair Khan’s letter requires her to be recused from the Meta/Within transaction. In *Cinderella*, Chair Dixon gave a speech that mentioned one fact similar to a pending case and stated, “the Federal Trade Commission, even where it has jurisdiction, could not protect the public as quickly.”<sup>147</sup> Chair Dixon was recused in *Cinderella* despite not naming the parties, referencing only one fact among many hypothetical examples included in the speech,<sup>148</sup> and concluding only that if the FTC has jurisdiction it would still protect the public more quickly for newspapers to have higher advertising standards.<sup>149</sup> Chair Khan’s letter goes far beyond Chair Dixon’s speech. Chair Khan names Meta and demands that all of its acquisitions be blocked by the FTC.<sup>150</sup> The Meta/Within transaction is now before the FTC, and Chair Khan’s letter “give[s] the appearance that the case has been prejudged.”<sup>151</sup>

Chair Khan made another statement about blocking all Meta acquisitions on May 15, 2018 when she stated that if Meta is “acquiring another company, I would hope the FTC would look at that very closely and block it.”<sup>152</sup> In *Texaco*, Chair Dixon’s speech listed many companies,<sup>153</sup> he made clear that he was speaking about potential cases and only suggested FTC action “if funds and efficiency permitted future efforts[.]”<sup>154</sup> The *Texaco* court did not recuse Chair Dixon because his speech referenced the exact matter at issue, but instead because “a disinterested reader of Chairman Dixon’s speech could hardly fail to conclude that he had in some measure decided in advance that Texaco had violated the Act.”<sup>155</sup> Similarly, a disinterested observer “could hardly fail to conclude” that Chair Khan has “in some measure decided in advance” that the Meta/Within Transaction should be blocked by the FTC given her repeated calls for the FTC to block all Meta transactions.

---

<sup>146</sup> *Cinderella Career & Finishing Schools*, 425 F.2d at 590.

<sup>147</sup> *Id.* at 589-90.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> See Press Release, Open Markets Inst., Open Markets Institute Calls on the FTC to Block All Facebook Acquisitions (Nov. 1, 2017), <https://www.openmarketsinstitute.org/publications/open-markets-institute-calls-on-the-ftc-to-block-all-facebook-acquisitions>.

<sup>151</sup> See *Cinderella Career & Finishing Schools.*, 425 F.2d at 590.

<sup>152</sup> The Bernie Sanders Show, *The Greatest Threat to Our Democracy?* (May 15, 2018) (starting at 20:29), <https://www.youtube.com/watch?v=wuCAy10hIHI>.

<sup>153</sup> *Texaco*, 336 F.2d at 759 (“You know the companies- Atlantic, Texas, Pure, Shell, Sun, Standard of Indiana, American, Goodyear, Goodrich, and Firestone.”).

<sup>154</sup> *Id.* (“Some of these cases are still pending before the Commission; some have been decided by the Commission and are in the courts on appeal. You may be sure that the Commission will continue and, to the extent that increased funds and efficiency permit, will increase its efforts to promote fair competition in your industry.”).

<sup>155</sup> *Id.* at 760.

Chair Khan connected Meta’s earlier acquisition strategy, which she deemed illegal based on her comments and writings, to virtual reality by stating that Meta “is now following this playbook in the virtual reality space” by “using [the] same ‘copy-acquire-kill’ strategy it used to monopolize social networking. Key task for enforcers is to prevent a repeat[.]”<sup>156</sup> Chair Khan’s comments that Meta’s past acquisition strategy resulted in unlawful transactions, and her public statement connecting the past strategy to virtual reality, demonstrates that she has prejudged Meta’s virtual reality acquisition strategy – and consequently the Meta/Within Transaction – as illegal.

### *Chair Khan’s Congressional Work Requires Recusal*

Chair Khan’s work on the House Subcommittee’s investigation into Meta, Amazon, Apple, and Google requires that Chair Khan be disqualified from adjudicating the Meta/Within Transaction for the same reasons that Chair Dixon’s work on the Senate Subcommittee’s investigation into the drug industry required his disqualification. Soon-to-be-Chair Dixon “played an active part in the investigation” into the drug industry;<sup>157</sup> soon-to-be-Chair Khan “led the congressional investigation into digital markets and the publication of its final report”<sup>158</sup> and “highly orchestrated” the hearings with a small group of staffers.<sup>159</sup> Chair Dixon’s Senate investigation was “concerned specifically, among other things, with” products, companies, and practices at issue in *American Cyanamid*;<sup>160</sup> Chair Khan’s House investigation examined Meta’s acquisitions of virtual reality game developers (including Beat Saber, one of the studios primarily at issue in the Meta/Within transaction)<sup>161</sup> and Meta’s alleged strategy of “serial acquisitions [that] reflect the company’s interest in purchasing firms that had the potential to develop into rivals before they could fully mature into strong competitive threats.”<sup>162</sup> Notably, Chair Khan’s work was published in a staff report that she co-authored,<sup>163</sup> whereas Chair Dixon’s investigation resulted in a Committee Report (Chair Dixon was only thanked in the cover letter for his work).<sup>164</sup> Consequently, the findings in Chair Khan’s report are even more attributable to Chair Khan than the findings in the *American Cyanamid* report are attributable to Chair Dixon.

The Majority Opinion argues that Chair Khan’s House Subcommittee work “did not involve the ‘same facts and issues’ as this case nor fully the ‘same parties,’ which distinguishes it

---

<sup>156</sup> Petition for Recusal, *supra* note 2, at Ex. D.

<sup>157</sup> *American Cyanamid*, 363 F.2d at 765.

<sup>158</sup> Petition for Recusal, *supra* note 2, at Ex. C.

<sup>159</sup> Birnbaum, *supra* note 41.

<sup>160</sup> *American Cyanamid*, 363 F.2d at 765.

<sup>161</sup> Majority Staff Report, *supra* note 39, at fn. 859 (citing articles referencing Meta’s acquisitions of Oculus game developers Beat Games, Sanzaru Games, and Ready at Dawn); *id.* at 424 (listing acquisition by Meta).

<sup>162</sup> *Id.* at 150.

<sup>163</sup> Petition for Recusal, *supra* note 2, at Ex. C.

<sup>164</sup> *American Cyanamid*, 363 F.2d at 767.

from American Cyanamid.”<sup>165</sup> But like Chair Dixon in *American Cyanamid*, due process requires Chair Khan’s disqualification because she “investigated and developed many of these same facts” at issue in the present case.<sup>166</sup> As summarized in the chart below, which compares language in the Majority Staff Report to language in the Meta/Within Transaction complaint by topic, the facts and issues in the Meta/Within Transaction are the same as the facts and issues in the Majority Staff Report:

<b>THE SAME FACTS, ISSUES, AND PARTIES APPEAR IN THE MAJORITY STAFF REPORT AND THE COMPLAINT</b>		
<b>Topic</b>	<b>Majority Staff Report</b>	<b>Meta/Within Transaction Complaint</b>
Virtual Reality Product Offering	“[Meta] is the largest social networking platform in the world. Its business operates around five primary product offerings, including: ... (5) Oculus, a virtual reality gaming system.” <sup>a</sup>	“Meta, one of the largest technology companies in the world and the leading provider of virtual reality (‘VR’) devices and applications (‘apps’) in the United States ...” <sup>b</sup>
Family of Apps	“[Meta] reported that its family of products—including Facebook, Instagram, Messenger, and WhatsApp—includes 2.47 billion daily active people (DAP), 3.14 billion monthly active people (MAP), ...” <sup>c</sup>	“A global technology behemoth, Meta reaches into every corner of the world through its ‘Family of Apps’—Facebook, Instagram, Messenger, and WhatsApp—with more than three billion regular users.” <sup>d</sup>
Oculus Acquisition	“[Meta] has also acquired several virtual reality and hardware companies, such as Oculus.” <sup>e</sup>	“Meta’s campaign to conquer VR began in 2014 when it acquired Oculus VR, Inc., a VR headset manufacturer.” <sup>f</sup>
Beat Games	The mergers and acquisitions appendix cites to the Beat Games acquisition. <sup>g</sup>	“Meta controls the wildly popular app Beat Saber, which it acquired by purchasing Beat Games in November 2019.” <sup>h</sup>
Continued VR Game Developer Acquisitions	“... [Meta] has acquired ... Oculus game developers ...” (citing articles that note the acquisitions of Ready at Dawn, Sanzaru, and Beat Saber). <sup>i</sup>  The mergers and acquisitions appendix cites Ready at Dawn and Sanzaru Games. <sup>j</sup>	“Since its acquisition of Beat Games, Meta has continued to acquire a series of studios behind many popular VR apps ... : a. In January 2020, Meta acquired Sanzaru games, ... . b. In May 2020, Meta acquired Ready at Dawn Studios ... .” <sup>k</sup>
Ongoing Acquisition Strategy	“As discussed earlier in this Report, Facebook’s senior executives described the company’s mergers and acquisitions strategy in 2014 as a ‘land grab’ to ‘shore up our position.’ ... Facebook’s serial acquisitions reflect the company’s interest in purchasing firms that had the potential to develop into rivals before they could fully mature into strong competitive threats.” <sup>l</sup>	“As early as 2015, Mr. Zuckerberg instructed key Facebook executives that his vision for ‘the next wave of computing’ was control of apps and the platform on which those apps were distributed...” <sup>m</sup>

<sup>165</sup> Order Denying Petition for Recusal, FTC No. 221-0040 (Jan. 31, 2023) [*hereinafter* Majority Opinion].

<sup>166</sup> *American Cyanamid*, 363 F.2d at 767.

Roll-up Acquisitions	“Over the course of the investigation, the Subcommittee uncovered evidence that the antitrust agencies failed, at key occasions, to stop monopolists from rolling up their competitors and failed to protect the American people from abuses of monopoly power. Forceful agency action is critical.” <sup>n</sup>	“In addition to Beat Games, Meta owns a number of other VR apps, some of which it developed in-house but most of which it acquired by rolling up other app studios.” <sup>o</sup>
Use of Data to Make Strategic Decisions	“[Meta] used its data advantage to create superior market intelligence to identify nascent competitive threats and then acquire, copy, or kill these firms.” <sup>p</sup>	“Meta’s control over the Quest platform also gives it unique access to VR user data, which it uses to inform strategic decisions.” <sup>q</sup>
Network Effects	“Facebook’s executives—including Mr. Zuckerberg—have extensively discussed the role of network effects and tipping points as part of the company’s acquisition strategy and overall competitive outlook” <sup>r</sup>	“As Meta fully recognizes, network effects on a digital platform can cause the platform to become more powerful—and its rivals weaker and less able to seriously compete—as it gains more users, content, and developers. The acquisition of new users, content, and developers each feed into one another, creating a self-reinforcing cycle that entrenches the company’s early lead.” <sup>s</sup>  “Meta has an explicit strategy of harnessing strong network effects in VR to ensure its leading status in this growing industry.” <sup>t</sup>
Big Tech Expansion into VR	“Meanwhile, all four of the firms investigated by the Subcommittee have recently focused on acquiring startups in the artificial intelligence and virtual reality space. Ongoing acquisitions by the dominant platforms raise several concerns. Insofar as any transaction entrenches their existing position, or eliminates a nascent competitor, it strengthens their market power and can close off market entry.” <sup>u</sup>	“Meta’s internal codename for the proposed acquisition of Within was ‘Project Eden,’ a reference to its belief that Apple was also interested in acquiring Within.” <sup>v</sup> “Seeking to expand its empire even further, Meta in recent years has set its sights on building, and ultimately controlling, a VR ‘metaverse.’” <sup>w</sup>
<p><i>Sources:</i> (a) Majority Staff Report, <i>supra</i> note 39, at 132; (b) Amended Part 3 Complaint, <i>supra</i> note 6, at ¶1; (c) Majority Staff Report, <i>supra</i> note 39, at 132; (d) Amended Part 3 Complaint, <i>supra</i> note 6, at ¶2; (e) Majority Staff Report, <i>supra</i> note 39, at 149; (f) Amended Part 3 Complaint, <i>supra</i> note 6, at ¶3; (g) Majority Staff Report, <i>supra</i> note 39, at 424; (h) Amended Part 3 Complaint, <i>supra</i> note 6, at ¶4; (i) Majority Staff Report, <i>supra</i> note 39, at 149; (j) Majority Staff Report, <i>supra</i> note 39, at 424; (k) Amended Part 3 Complaint, <i>supra</i> note 6, at ¶27; (l) Majority Staff Report, <i>supra</i> note 39, at 149-50; (m) Amended Part 3 Complaint, <i>supra</i> note 6, at ¶7; (n) Majority Staff Report, <i>supra</i> note 39, at 7; (o) Amended Part 3 Complaint, <i>supra</i> note 6, at ¶4; (p) Majority Staff Report, <i>supra</i> note 39, at 14; (q) Amended Part 3 Complaint, <i>supra</i> note 6, at ¶62; (r) Majority Staff Report, <i>supra</i> note 39, at 143; (s) Amended Part 3 Complaint, <i>supra</i> note 6, at ¶6; (t) Amended Part 3 Complaint, <i>supra</i> note 6, at ¶5; (u) Majority Staff Report, <i>supra</i> note 39, at 387; (v) Amended Part 3 Complaint, <i>supra</i> note 6, at ¶ 79; (w) Amended Part 3 Complaint, <i>supra</i> note 6, at ¶2.</p>		

Chair Khan attempts to differentiate her situation from *American Cyanamid* by stating that “none of the examples of [her] prior statements that Meta cites in support of its petition even involve any of the relevant markets or products being reviewed here, let alone the ‘same facts and issues.’”<sup>167</sup> The Majority Opinion similarly states that Chair Khan’s House Subcommittee work “did not involve the ‘same facts and issues’ as this case nor fully the ‘same parties,’ which

<sup>167</sup> September 26 Statement, *supra* note 24, at 4.

distinguishes it from *American Cyanamid*.”<sup>168</sup> In doing so, Chair Khan and the Majority Opinion raise the test for recusal to a requirement that Chair Khan had conducted the identical investigation in her past work. But *American Cyanamid* requires recusal if the investigation that Chair Khan led involved the same parties, facts, and issues. In attempting to justify Chair Khan’s role as an adjudicator in the Part 3 process, Chair Khan and the Majority Opinion have adopted a heightened standard for disqualification that exceeds the standard articulated by the relevant case law.

#### *Chair Khan Took an Active Part in the House Subcommittee Investigation*

*American Cyanamid* is distinguished in *Safeway Stores, Inc. v. FTC*, which again involved Chair Dixon’s prior work as Chief Counsel and Staff Director of the Antitrust and Monopoly Subcommittee of the United States Senate.<sup>169</sup> Chair Dixon was recused in *American Cyanamid* and not recused in *Safeway Stores*, even though both situations involved Chair Dixon’s role in a Congressional investigation. In *Safeway Stores*, the FTC found that baking companies engaged in a conspiracy to fix the price of bread.<sup>170</sup> On appeal, the Ninth Circuit considered disqualifying Chair Dixon from sitting as an adjudicator because “he participated in a Subcommittee hearing on administered pricing in the bread industry” before joining the Commission.<sup>171</sup> Specifically, soon-to-be-Chair Dixon “interrogated [the petitioner’s] president, and [the petitioner urged the Ninth Circuit to find] that his questions suggest such a fixed view on one aspect of the present controversy that [the Court] should overrule the Commission’s determination that [Chair Dixon] was not disqualified.”<sup>172</sup> The Ninth Circuit did “not agree that an attorney’s personal opinion on a factual controversy may be inferred from questions he puts in the performance of his professional duty.”<sup>173</sup> The Ninth Circuit found that Chair Dixon “took a much more active part in the investigation” at issue in *American Cyanamid* than the one at issue in *Safeway Stores*.<sup>174</sup>

Chair Khan was praised for leading the investigation<sup>175</sup> and co-authored the Majority Staff Report that resulted from the investigation.<sup>176</sup> Further, as explained by Chair Khan’s academic co-author Zephyr Teachout, Chair Khan “poured her ‘sweat and blood’ into the investigation” and “left her fingerprints all over the investigation.”<sup>177</sup> According to Teachout, she

---

<sup>168</sup> Majority Opinion, *supra* note 165, at 10.

<sup>169</sup> *Safeway Stores, Inc. v. F.T.C.*, 366 F.2d 795 (9th Cir. 1966).

<sup>170</sup> *Id.* at 796.

<sup>171</sup> *Id.* at 801.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 802.

<sup>175</sup> Birnbaum, *supra* note 41.

<sup>176</sup> Majority Staff Report, *supra* note 39.

<sup>177</sup> Birnbaum, *supra* note 41.

“could see [Chair Khan’s] work everywhere in the [CEO] hearing.”<sup>178</sup> Chair Khan’s involvement goes beyond Chair Dixon’s involvement in *American Cyanamid*. The only notable difference is that Chair Dixon questioned witnesses in *American Cyanamid*. But Chair Dixon also questioned witnesses in *Safeway Stores*, where he was not recused, so questioning witnesses cannot be the operative fact in deciding whether disqualification is warranted.

*Chair Khan’s Academic Work Adopted Her Professional Positions*

The Majority Opinion argues that “the positions taken by Chair Khan as an advocate on behalf of OMI should not necessarily be ascribed to her personally[.]”<sup>179</sup> Even if one were to stipulate that there should be an exception for advocates, a position with which I disagree, there are reasons that Chair Khan’s work as an advocate should be considered in deciding the motion for disqualification.

First, Chair Khan’s academic work adopted positions advanced in her professional role. For example, Chair Khan, in an academic article, adopted the recommendation to create “a presumption against future acquisitions” by citing the OMI op-ed that argued for prohibiting “all future acquisitions by Facebook for at least five years.”<sup>180</sup> An OMI press release – issued while Chair Khan was legal director – called for the FTC to “prohibit all future acquisitions by Facebook for at least five years.”<sup>181</sup> This demand was made by OMI on March 22, 2018.<sup>182</sup> Five years will not run until March 22, 2023. A demand made by Chair Khan’s former organization while she was its Legal Director “may have the effect of entrenching” the Chair “in a position which [she] has publicly stated, making it difficult, if not impossible, for [her] to reach a different conclusion in the event [she] deems it necessary to do so after consideration of the record.”<sup>183</sup> But even if it is argued that Chair Khan was an advocate and the press release should not be attributed to her personal opinion, her academic work adopting this position and citing the exact source strongly implies that these views are held personally by Chair Khan.

Second, evidence also suggests that the Majority Staff Report co-authored by Chair Khan can be attributed to Chair Khan’s academic work. For example, Zephyr Teachout “point[ed] out that many of the questions [in the CEO hearing] harkened directly back to [Chair Khan’s] academic work.”<sup>184</sup>

---

<sup>178</sup> *Id.*

<sup>179</sup> Majority Opinion, *supra* note 165, at 9.

<sup>180</sup> Khan, Sources of Tech Platform Power, *supra* note 37, at 333.

<sup>181</sup> 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), <https://www.openmarketsinstitute.org/publications/fines-for-facebook-arent-enough-the-open-markets-institute-calls-on-ftc-to-restructure-facebook-to-protect-our-democracy>.

<sup>182</sup> *Id.*

<sup>183</sup> See *Cinderella Career & Finishing Schools*, 425 F.2d at 590.

<sup>184</sup> Birnbaum, *supra* note 41.

Finally, as noted above, many of Chair Khan’s relevant statements are drawn directly from her academic work.<sup>185</sup> These statements cannot be attributed to OMI or the House Subcommittee. Chair Khan bears ownership of her academic work.

*The Timing of Chair Khan’s Statements and Work Do Not Prevent Recusal*

Chair Khan and the Majority Opinion both attempt to distinguish the facts of *Cinderella*. Chair Khan claims that in *Cinderella*, Chair Dixon “gave a speech . . . in which he used specific behavior by Cinderella as an example of misconduct” and that “the court stated that it was ‘the timing of the speech in relation to the proceedings’ that gave a ‘disinterested observer’ a ‘reasonable inference’ to view his remarks as connected to the case.”<sup>186</sup> Chair Khan distinguishes the present situation with *Cinderella* by stating that “none of the statements that Meta cites in support of its petition were made during the pendency of this matter, let alone during [Chair Khan’s] time serving on the Commission.”<sup>187</sup> Similarly, the Majority Opinion states that the “court made clear that its concern was with Chair Dixon’s speaking on ‘a case awaiting his official action.’”<sup>188</sup>

Chair Khan and the Majority Opinion mischaracterize the D.C. Circuit’s analysis regarding the importance of the timing of the speech. Chair Dixon’s speech mentioned one fact similar to a pending case.<sup>189</sup> Chair Dixon did not name the parties, referenced many hypothetical examples, and concluded only that if the FTC had jurisdiction it would still protect the public more quickly if businesses had advertising standards instead of waiting for the FTC’s involvement.<sup>190</sup> The D.C. Circuit used the timing of Chair Dixon’s speech (i.e., while the matter was pending at the Commission) to conclude that the fact mentioned by Chair Dixon in the

---

<sup>185</sup> See *supra* notes 52-70 and accompanying text.

<sup>186</sup> September 26 Statement, *supra* note 24.

<sup>187</sup> *Id.* at 4.

<sup>188</sup> Majority Opinion, *supra* note 165, at 9. Notably, the full quote from *Cinderella* is: “To this tenet of self-appraisal we apply Lord Macaulay’s evaluation more than 100 years ago of our American government: ‘It has one drawback— it is all sail and no anchor.’ We find it hard to believe that former Chairman Dixon is so indifferent to the dictates of the Courts of Appeals that he has chosen once again to put his personal determination of what the law requires ahead of what the courts have time and again told him the law requires. If this is a question of ‘discretion and judgment,’ Commissioner Dixon has exercised questionable discretion and very poor judgment indeed, in directing his shafts and squibs at a case awaiting his official action. We can use his own words in telling Commissioner Dixon that he has acted ‘irrespective of the law’s requirements’; we will spell out for him once again, avoiding tired cliché and weary generalization, in no uncertain terms, exactly what those requirements are, in the fervent hope that this will be the last time we have to travel this wearisome road.” *Cinderella Career & Finishing Schools*, 425 F.2d at 591. This full quote does not imply that it was “clear that [the court’s] concern was with” the timing of the speech as the Majority Opinion suggests.

<sup>189</sup> *Cinderella Career & Finishing Schools*, 425 F.2d at 589-90 (“What would be the attitude toward accepting good money for advertising by a merchant who conducts a ‘going out of business’ sale every five months? What about carrying ads that offer college educations in five weeks, fortunes by raising mushrooms in the basement, getting rid of pimples with a magic lotion, or *becoming an airline’s hostess by attending a charm school*? Or, to raise the target a bit, how many newspapers would hesitate to accept an ad promising an unqualified guarantee for a product when the guarantee is subject to many limitations?” (emphasis added)).

<sup>190</sup> *Id.* at 589-90.

speech showed prejudgment of the matter.<sup>191</sup> In other words, the D.C. Circuit used the timing of the speech to infer the relevance of the comment. In Chair Khan's situation, it is unnecessary to speculate on Chair Khan's thoughts about the Meta/Within Transaction. Chair Khan's work has explicitly demanded that all transactions by Meta be blocked by the FTC<sup>192</sup> and concluded that Meta's acquisition strategy in the virtual reality space is illegal.<sup>193</sup>

Further, the *Texaco* concurrence was concerned that Chair Dixon's statement could be seen as "an implied promise to support the petroleum retailers in their struggle against alleged abuses by their suppliers."<sup>194</sup> Similarly, Chair Khan's repeated calls for the FTC to block all Meta transaction could be seen as an "an implied promise to" take such action in the future if given the power.

The Majority Opinion implies that Chair Khan should not be disqualified because the statements and work forming the basis of recusal were made before the President nominated Chair Khan, and before the Senate confirmed her.<sup>195</sup> Chair Dixon's work at issue in *American Cyanamid*, which took place prior to his becoming a Commissioner, demonstrates that the nomination and confirmation processes do not invalidate due process concerns.<sup>196</sup> Many people with conflicts are nominated. In their confirmation hearings, nominees routinely promise to abide by conflicts rules and federal ethics obligations. The President and Senate did not, and could not, grant Chair Khan a waiver to ignore due process and federal ethics requirements.

*The Relevant Role is that of an Adjudicator, Not a Prosecutor*

Chair Khan's September 26 Statement largely analyzes recusal in her role as a prosecutor and relies on Judge Boasberg's decision in the FTC's conduct case against Meta.<sup>197</sup> As noted above, the Commission's decision under Rule 4.17 is limited to Chair Khan's role as an adjudicator.<sup>198</sup> Meta was informed that the recusal petition would be considered as a disqualification motion under Rule 4.17.<sup>199</sup> Consequently, Chair Khan's involvement as a prosecutor is for federal courts to decide in light of the facts of the Meta/Within Transaction, but

---

<sup>191</sup> *Id.* at fn. 10 ("In its brief the respondent has attempted to demonstrate that Chairman Dixon's speech made reference not to the currently pending case, but rather to two cases which had been decided by the Commission in 1964. In light of the timing of the speech in relation to the proceedings herein, we think the reasonable inference a disinterested observer would give these remarks would connect them inextricably with this case.").

<sup>192</sup> See, e.g., The Bernie Sanders Show, *The Greatest Threat to Our Democracy?* (May 15, 2018) (starting at 20:29), <https://www.youtube.com/watch?v=wuCAy10hIHL>.

<sup>193</sup> Petition for Recusal, *supra* note 2, at ex. D.

<sup>194</sup> *Texaco*, 336 F.2d at 764 (Washington, J., concurring in part and dissenting in part).

<sup>195</sup> Majority Opinion, *supra* note 167, at 12-13.

<sup>196</sup> *American Cyanamid*, 363 F.2d at 765.

<sup>197</sup> September 26 Statement, *supra* note 24 at 1-2 ("Meta largely recycles the same arguments rejected by the federal district court in *Meta I*. For both the reasons stated by Judge Boasberg in *Meta I* as well as the additional reasons discussed below, I reject Meta's petition and decline to recuse myself from this matter.") (internal citation omitted).

<sup>198</sup> See *supra* notes 5 & 23.

<sup>199</sup> Tabor, *supra* note 5.

are largely irrelevant under Rule 4.17.<sup>200</sup> Judge Boasberg’s opinion did not analyze disqualification in terms of Chair Khan’s role as an adjudicator. Judge Boasberg described the role of an adjudicator to differentiate the analysis he conducted with respect to his analysis of prosecutorial bias.<sup>201</sup> Judge Boasberg draws no conclusions about the propriety of Chair Khan’s serving in an adjudicatory function and his analysis consequently cannot serve as a basis for Chair Khan and the Majority Opinion’s analysis.

*Meta’s Other VR Transactions Do Not Show an Absence of Prejudgment*

The Majority Opinion argues that Chair Khan has not prejudged Meta’s mergers in the virtual reality space because the FTC has not challenged previous Meta mergers, including the virtual reality mergers cited in the complaint that have been consummated while Chair Khan has been in charge of the FTC.<sup>202</sup> If Chair Khan had voted to close an investigation or to not file a complaint in any transaction conducted by Meta, that vote could be evidence of considering each case on its merits. But the Majority Opinion points to nothing that indicates Chair Khan has ever voted on a transaction involving Meta except for the Meta/Within Transaction or any other evidence indicating that the Chair made a considered choice not to challenge these transactions.

*The Majority Relies on Peripheral Case Law*

The Majority Opinion relies on a selection of cases that walk on the edge of relevance to the present analysis in an attempt to establish that an “irrevocably closed mind” standard applies. The Majority Opinion primarily relies on *Southern Pacific Communications Company v. American Telephone & Telephone Company*, which states that the test is whether the judge’s mind is “irrevocably closed” on the issues as they arise in the context of the specific case.<sup>203</sup> But in *Southern Pacific*, there was “no claim that the District Judge was biased in the sense of having adjudged the facts in advance of hearing the case. . . . Rather, [the Petitioner] asserts that the District Judge was biased only in the sense that he held firm views concerning law and policy and decided the case on the basis of these views, thus depriving [the Petitioner] of an impartial judgment.”<sup>204</sup> The allegations in *Southern Pacific* were based on the District Judge’s personal policy views expressed in his written judgement deciding the case.<sup>205</sup> Here, the need for Chair Khan’s recusal is not driven by allegations that she has expressed policy views. The concern

---

<sup>200</sup> It remains an outstanding question whether voting for a complaint into administrative court is an adjudicatory or prosecutorial function. Regardless of the answer to that question, Judge Boasberg’s opinion analyzed a complaint voted into federal court, which is a prosecutorial function.

<sup>201</sup> *Facebook*, 581 F. Supp. 3d at 63 (“[*Cinderella* and *American Cyanamid*] deal with an agency official adjudicating the merits of a case, not authorizing the filing of one.”).

<sup>202</sup> Majority Opinion, *supra* note 167, at 9.

<sup>203</sup> 740 F.2d 980, 991 (D.C. Cir. 1984).

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at 983 (“[I]n his Memorandum Opinion, the District Judge strongly expressed his personal policy view that an AT & T monopoly, and not competition, is in the public interest in the telecommunications industry. Moreover, in drafting his extremely lengthy Memorandum Opinion, the trial judge simply copied—word-for-word (including even typographical errors)—most of AT & T’s proposed findings of fact and conclusions of law. Virtually every assessment of the credibility of witnesses, finding of fact and conclusion of law is in favor of AT & T.”).

presently at issue is that Chair Khan prejudged the Meta/Within Transaction. The cases involving former Chair Dixon, which (as described above) are analogous to Chair Khan's situation, explain that Chair Dixon's actions are "not merely an underlying philosophy or a crystallized point of view on questions of law or policy."<sup>206</sup> In other words, like Chair Dixon, Chair Khan's work and statements are not mere views on law and policy, as explained in detail in the sections above. The Majority Opinion makes this error repeatedly, suggesting that Chair Khan's statements are mere views regarding law and policy.<sup>207</sup> To support this position, the Majority Opinion cites inapposite (and distinguishable) case law while giving short shrift to the Chair Dixon cases.<sup>208</sup>

The Majority Opinion also relies on *Association of National Advertisers, Inc. v. FTC* for the position that adjudicators "are free to decide cases involving policy questions on which they previously have expressed a view."<sup>209</sup> But *Association of National Advertisers* is specific to rulemaking because it involved an advertising association's attempt to disqualify the FTC Chair from participating in a rulemaking proceeding and the D.C. Circuit stated explicitly that it "never intended the *Cinderella* rule to apply to a rulemaking procedure such as the one under review."<sup>210</sup> Finally, in *FTC v. Cement Institute*, one of the issues on appeal was that the entire Commission should disqualify itself based on Commission reports required under Section 6 of the FTC Act and testimony in Congress.<sup>211</sup> The *Cement Institute* court expressed concern that "[h]ad the entire membership of the Commission disqualified in the proceedings against these respondents, this complaint could not have been acted upon by the Commission or by any other government agency."<sup>212</sup> This concern does not arise in Chair Khan's situation because neither a 6(b) report nor Congressional testimony drives the need for Chair Khan's recusal and disqualification of the entire Commission is not being considered.

### Federal Ethics Requirements

Chair Khan's participation in an adjudicatory role with respect to the Meta/Within Transaction raises federal ethics concerns that are separate from the due process issues explained in the Chair Paul Rand Dixon line of cases. The Standards of Ethical Conduct for Employees of the Executive Branch ("Standards of Conduct") are regulations issued by the U.S. Office of

---

<sup>206</sup> *American Cyanamid*, 363 F.2d at 765 (internal quotations omitted).

<sup>207</sup> Compare Majority Opinion, *supra* note 165, at 5-8 & 11 (discussing Chair Khan's past actions and statements as mere views regarding law and policy) with Majority Opinion, *supra* note 165, at 10-12 (attempting to distinguish the Chair Dixon cases).

<sup>208</sup> See *supra* notes 203-207 and accompanying text discussing *Southern Pacific* and *infra* notes 209-211 discussing *Association of National Advertisers* and *Cement Institute*. See also *Phillip v. ANR Freight Sys., Inc.*, 945 F.2d 1054, 1056 (8th Cir. 1991) (requesting recusal of a trial judge during a jury trial for making a comment not in the presence of the jury about Title VII cases).

<sup>209</sup> 627 F.2d 1151, 1171 n.51 (D.C. Cir. 1979).

<sup>210</sup> *Id.* at 1168.

<sup>211</sup> 333 U.S. 683, 700 (1948).

<sup>212</sup> *Id.* at 701.

Government Ethics.<sup>213</sup> The Standards of Conduct are premised on a reasonable person standard, and explain that “[w]hether particular circumstances create an appearance that the law or these standards have been violated shall be determined from the perspective of a reasonable person with knowledge of the relevant facts.”<sup>214</sup>

The Standards of Conduct establish two broad areas of inquiry. First, a government employee “should not participate in a particular matter involving specific parties which he knows is likely to affect the financial interests of a member of his household, or in which he knows a person with whom he has a covered relationship is or represents a party, if he determines that a reasonable person with knowledge of the relevant facts would question his impartiality in the matter.”<sup>215</sup> Second, a regulatory catch-all provision requires that “[a]n employee who is concerned that other circumstances would raise a question regarding his impartiality should use the process described in [the Standards of Conduct] to determine whether he should or should not participate in a particular matter.”<sup>216</sup> In other words, even if not per se prohibited by law, when an employee faces circumstances that “would raise a question regarding his impartiality[ , the employee] should use the process described in [the Standards of Conduct] to determine whether he should or should not participate in a particular matter.”<sup>217</sup>

The Standards of Conduct provide that “[i]f the [FTC ethics staff] determines that the employee’s impartiality is likely to be questioned, [the FTC ethics staff] shall then determine ... whether the employee should be authorized to participate in the matter.”<sup>218</sup> How this provision is applied depends on which broad bucket of concern is in play. First, if a financial interest or covered relationship exists, then the FTC ethics staff determines whether “the financial interest of a member of the employee's household, or the role of a person with whom he has a covered relationship, is likely to raise a question in the mind of a reasonable person about his impartiality.”<sup>219</sup> If the FTC ethics staff determines the situation will raise a question in the mind of a reasonable person about his impartiality, the employee can only participate if the employee receives authorization to participate from the FTC ethics staff. Second, if the catch-all provision is at issue, then the FTC ethics staff can recommend that the employee not participate but cannot

---

<sup>213</sup> Codified in 5 C.F.R. Part 2635, as amended at 81 FR 81641 (effective January 1, 2017). In prior cases, the Commission used “the federal judicial recusal standard, 18 U.S.C. § 455, [as] the relevant standard” to consider Commissioner recusal on due process grounds. The Commission noted that it is not necessary to “separately assess the impact of the Standards of Conduct” and the judicial recusal standard “because the reasonable person impartiality assessment therein mirrors what is contained in 28 U.S.C. 455(a).” *See Intel Corp.*, Docket No. 9341, Opinion and Order of the Commission Denying Motion for Disqualification (Public Version), at p. 5, n.10 (Dec. 18, 2009). Notably, the “federal statute arguably raises the bar higher [than the Standards of Conduct] by requiring recusal unless the parties’ consent is obtained and, unlike the Standards of Conduct, there is no provision for authorizing one’s participation in certain circumstances.” *Id.*

<sup>214</sup> 5 C.F.R. §§ 2635.101(b)(14).

<sup>215</sup> *Id.* § 2635.501(a).

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* at §§ 2635.502(a)(2).

<sup>218</sup> *Id.* at § 2635.502(c)(1).

<sup>219</sup> *Id.* at § 2635.502(e).

require the employee's disqualification.<sup>220</sup> In the same manner that an employee can receive authorization when there is a financial interest or covered relationship, the FTC ethics staff can authorize the employee to participate despite a regulatory catch-all concern.

The FTC ethics staff may authorize participation if the interest of the Government in the employee's participation outweighs the concern that a reasonable person may question the integrity of the proceedings.<sup>221</sup> In making this determination, the FTC ethics staff considers the following factors: "(1) the nature of the relationship involved; (2) the effect that resolution of the matter would have on the financial interest of the person involved in the relationship; (3) the nature and importance of the employee's role in the matter; (4) the sensitivity of the matter; (5) the difficulty of reassigning the matter to another employee; and (6) adjustments that may be made in the employee's duties that would reduce or eliminate the likelihood that a reasonable person would question the employee's impartiality."<sup>222</sup>

Federal Ethics Concerns Require Chair Khan's Disqualification

Chair Khan promised – at her confirmation hearing and under oath – that “there are instances where defendants before the Commission petition to have particular Commissioners recused, those cases are resolved on a case-by-case basis. There's no categorical decision about that. If it were to arise, I would seek the guidance of the relevant ethics officials at the agency and proceed accordingly.”<sup>223</sup> Chair Khan either: (1) did not “seek the guidance of the relevant ethics officials at the agency and proceed accordingly”; or (2) asked for guidance and then ignored the recommendation. Avoiding or ignoring unwanted guidance from the FTC ethics staff does not obviate the need for Chair Khan's recusal as an adjudicator for the Meta/Within Transaction. Notably, the decision by Chair Khan to decline to recuse herself is unprecedented because

[REDACTED]

[REDACTED]

<sup>220</sup> Compare *id.* at §§ 2635.502(e) and (c) to §§ 2635.501(a) and 2635.502(a)(2).

<sup>221</sup> *Id.* at § 2635.502(d).

<sup>222</sup> *Id.*

<sup>223</sup> Senator Mike Lee, *Senator Lee Questions FTC Nominee Lina Khan on Rulemaking, Antitrust Views*, YOUTUBE (April 21, 2021), [https://www.youtube.com/watch?v=PQSeqIW\\_3r8](https://www.youtube.com/watch?v=PQSeqIW_3r8).

[REDACTED]

[REDACTED]

Meta has not alleged that the Chair has a “covered relationship” or that this proceeding would affect the financial interests of a member of Chair Khan’s household. Absent those express ethics concerns, only the Standards of Conduct regulatory catch-all provision is relevant in the present situation.<sup>228</sup> Because this analysis falls into the catch-all provision [REDACTED]. Instead, it is up to Chair Khan in the first instance to determine<sup>230</sup> whether there is an appearance that the law or standards will be violated “from the perspective of a reasonable person with knowledge of the relevant facts.”<sup>231</sup> The standard under the federal ethics perspective is whether it is reasonable to conclude the employee *appears* biased – the standard does not require evidence of actual bias.<sup>232</sup>

[REDACTED]

<sup>228</sup> 5 C.F.R. §§ 2635.501(a) & 2635.502(a)(2). Chair Khan also fails to analyze the federal ethics catch-all provision and only analyzes the financial interest and covered relationship requirement. September 26 Statement, *supra* note 24, at 4-5.

[REDACTED]

<sup>229</sup> Office of Government Ethics, 01 x 8 Letter to a Designated Agency Ethics Official at 3 (August 23, 2001), [https://www.oge.gov/Web/OGEnsf/News+Releases/7DB99717325C175C852585BA005BED74/\\$FILE/fc6e7b3215f0429c9db09162f5cfaef73.pdf](https://www.oge.gov/Web/OGEnsf/News+Releases/7DB99717325C175C852585BA005BED74/$FILE/fc6e7b3215f0429c9db09162f5cfaef73.pdf).

<sup>230</sup> 5 C.F.R. §§ 2635.502(a)-(b).

<sup>231</sup> *Id.* at §§ 2635.101(b)(14). [REDACTED]

<sup>232</sup> See *id.* at § 2635.101(b)(14); *id.* §§ 2635.501 & 2635.502. [REDACTED]

The facts described above with respect to Chair Khan’s prior statements and written work are also relevant here. Specifically, Chair Khan’s prior statements and written work include claims about Meta’s acquisition strategy and violation of antitrust laws, including in the virtual reality space. Chair Khan has called for the FTC – at whose helm she now sits – to “prohibit mergers between [Meta] ... [and] other new and promising products and services.”<sup>233</sup> Chair Khan stated that “if Facebook tomorrow announces that it’s acquiring another company, I would hope the FTC would look at that very closely and block it.”<sup>234</sup> Chair Khan’s academic writings claim that Meta “systematically copied” apps that “it deemed competitive threats” and Meta “thwart[s] rivals and strengthen[s] its own position, either through introducing replica products or buying out nascent competitors.”<sup>235</sup> Chair Khan accused Meta of “following this playbook in the virtual reality space” by “using [the] same ‘copy-acquire-kill’ strategy it used to monopolize social networking.”<sup>236</sup> Chair Khan noted that the “[k]ey task for enforcers is to prevent a repeat[.]”<sup>237</sup> In other words, Chair Khan called on enforcers to prevent a repeat of an acquisition strategy she already deemed illegal and publicly characterized as the same strategy Meta is repeating in virtual reality.

Chair Khan now leads the enforcement agency that can declare this strategy in virtual reality by Meta illegal and block Meta’s future acquisitions. If not recused, Chair Khan will sit as a judge if the Meta/Within Transaction is appealed to the Commission. Even before that, if not recused, Chair Khan will participate in ruling on substantive and procedural adjudicatory issues even as the Part 3 proceeding progresses before the administrative law judge.<sup>238</sup> These circumstances would make a reasonable person with knowledge of Chair Khan’s written work and statements question her impartiality to adjudicate the Meta/Within Transaction.

Chair Khan also led<sup>239</sup> the House Subcommittee’s investigation that focused on Meta and three other companies,<sup>240</sup> collected 1.3 million documents,<sup>241</sup> and held seven hearings –

---

<sup>233</sup> Press Release, Open Markets Inst., *Open Markets Institute Calls on the FTC to Block All Facebook Acquisitions* (Nov. 1, 2017), <https://www.openmarketsinstitute.org/publications/open-markets-institute-calls-on-the-ftc-to-block-all-facebook-acquisitions>. See also 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), <https://www.openmarketsinstitute.org/publications/fines-for-facebook-arent-enough-the-open-markets-institute-calls-on-ftc-to-restructure-facebook-to-protect-our-democracy> (“Open Markets [Institute] call[ed] on the FTC to ... prohibit all future acquisitions by Facebook for at least five years.”).

<sup>234</sup> The Bernie Sanders Show, *The Greatest Threat to Our Democracy?* (May 15, 2018) (starting at 20:29), <https://www.youtube.com/watch?v=wuCAy10hIHI>.

<sup>235</sup> Khan, *The Separation of Platforms and Commerce*, *supra* note 54, at 1002-3.

<sup>236</sup> Petition for Recusal, *supra* note 2, at ex. D.

<sup>237</sup> *Id.* at ex. D.

<sup>238</sup> For example, motions to stay and motions for summary judgment can be decided by the Commission before an initial decision by the ALJ is ever appealed.

<sup>239</sup> *Id.* at ex. C.

<sup>240</sup> Majority Staff Report, *supra* note 39, at 6.

<sup>241</sup> *Id.*

including one with Meta's CEO.<sup>242</sup> The investigation analyzed Meta's acquisitions and strategies across its product lines, including in the virtual reality space.<sup>243</sup> The investigation's report, co-authored by Chair Khan, found that "Facebook's serial acquisitions reflect the company's interest in purchasing firms that had the potential to develop into rivals before they could fully mature into strong competitive threats."<sup>244</sup> Chair Khan's leading role in the investigation that included Meta's acquisition strategy (including in the virtual reality space) and the investigation's conclusions (through a staff report co-authored by Chair Khan) that Meta's strategy is illegal, would make a reasonable person with knowledge of Chair Khan's role in the House Subcommittee's investigation question her impartiality to sit as judge in a Part 3 proceeding for the Meta/Within Transaction.

[REDACTED]

[REDACTED]

---

<sup>242</sup> *Id.*

<sup>243</sup> See *supra* notes 47-50 and accompanying text.

<sup>244</sup> Majority Staff Report, *supra* note 39, at 150.

[REDACTED]

[REDACTED]

Chair Khan could still participate, despite ethics concerns in this matter or any future matter, if the FTC ethics staff were to authorize her participation<sup>255</sup> using the six-factor analysis outlined above.<sup>256</sup> [REDACTED]

Both the Majority Opinion and the Chair rely heavily on Judge Boasberg's opinion in the FTC's conduct case against Meta.<sup>260</sup> As discussed in the preceding section, that reliance is misplaced because that opinion analyzed Chair Khan's role as a prosecutor, not as an adjudicator.<sup>261</sup> As noted above, the analysis under federal ethics may produce different determinations based on whether the role under consideration is one of prosecutor or adjudicator.

[REDACTED] For this reason, Judge Boasberg's analysis is unavailing here.

---

[REDACTED]

[REDACTED]

<sup>255</sup> 5 C.F.R. § 2635.502(d).

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

[REDACTED]

[REDACTED]

<sup>260</sup> September 26 Statement, *supra* note 24; Majority Opinion, *supra* note 167, at 2, 6, 12 & 14.

<sup>261</sup> *Facebook*, 581 F. Supp. 3d at 63.

[REDACTED]

[REDACTED]

## Federal Ethics Related Redactions

The redactions imposed on this dissent are inconsistent with precedent. A 1984 policy prevents individual Commissioners from revealing predecisional advice without the consent of a majority of participating Commissioners.<sup>264</sup> Nothing in the policy prevents the Commission from waiving any alleged deliberative process privilege for the sake of transparency at a government agency. In at least five instances, the Commission disclosed staff materials allegedly protected by deliberative process privilege.<sup>265</sup> In addition, the Commission has released or quoted DAEO recusal opinions.<sup>266</sup> Similarly, the FTC's Administrative Law Judge has disclosed DAEO recusal opinions.<sup>267</sup> Other agencies have also disclosed or quoted DAEO recommendations,<sup>268</sup> including at least four disclosures that discussed a DAEO recommendation under the catch-all provision.<sup>269</sup>

\* \* \*



<sup>264</sup> 140 Commission Minutes 674-675 (July 25, 1984).

<sup>265</sup> See *Kellogg Co.*, 92 F.T.C. 938, 1978 WL 206543 (Dec. 8, 1978); *American Brands, Inc.*, 77 F.T.C. 1623, 1970 WL 117288 (May 1, 1970); *Shell Oil Co.*, 62 F.T.C. 1488, 1963 WL 66699 (Feb. 1, 1963); *In the Matter of Gen. Motors Corp.*, 103 F.T.C. 58, 1984 WL 565314 (1984); Press Release, Fed. Trade Comm'n, Following Federal Trade Commission Staff Recommendation to Challenge Transaction, Two Health Care Systems in Central Georgia Abandon Proposed Merger (March 3, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/03/following-federal-trade-commission-staff-recommendation-challenge-transaction-two-health-care>.

<sup>266</sup> Press Release, Fed. Trade Comm'n, FTC Issues Statements Regarding Recusal Petition for Review of Proposed Acquisition of Hellman & Friedman Capital Partners V, LP (DoubleClick, Inc.) By Google, Inc (Dec. 14, 2007), <https://www.ftc.gov/news-events/news/press-releases/2007/12/ftc-issues-statements-regarding-recusal-petition-review-proposed-acquisition-hellman-friedman#pjj>.

<sup>267</sup> Order Denying Motion to Disqualify Richard G. Parker, Esq., In the Matter of Intel Corp., No. 9288 (Feb. 9, 1999), <https://www.ftc.gov/sites/default/files/documents/cases/1999/02/990209orddm1.pdf>.

<sup>268</sup> Notice to Show Cause, District Hospital Partners, L.P., Case 05-CA-216482 (July 14, 2022); Notice to Show Cause, CVS/Pharmacy, Case 13-UC-266228 (Jan. 7, 2022); Notice to Show Cause, Marathon Petroleum Co., Case 09-CA-162710 (Jan. 7, 2022); Notice to Show Cause, Exxon Mobil Research & Engineering, Case 22-CA-218903 (Jan. 7, 2022); Statement of FCC Commissioner Robert M. McDowell, WC Docket No. 06-74 (De. 18, 2006), [https://transition.fcc.gov/commissioners/mcdowell/mcdowell\\_att\\_bellsouth\\_statement.pdf](https://transition.fcc.gov/commissioners/mcdowell/mcdowell_att_bellsouth_statement.pdf).

<sup>269</sup> National Labor Relations Board's Ethics Recusal Report at 40-48 (Nov. 19, 2019), <https://www.nlr.gov/sites/default/files/attachments/pages/node-6353/ethics-recusal-review-incorporating-jan-9-2020-revisions.pdf> (discussing the DAEO's reasoning in *Hy-Brand*); Notice to Show Cause at 4-7, National Labor Relations Board, In the Matter of Universal Health Services, Inc., 05-CA-230128 (July 14, 2022), <https://apps.nlr.gov/link/document.aspx/09031d45837f1be1>; Letter from Lauren McFerran to Congress (Nov. 5, 2021), <https://www.nlr.gov/sites/default/files/attachments/pages/node-166/mcferran-ltr-re-oversight-on-members-participation-in-seiu-lawsuit-final-for-nov-5-002.pdf>; Statement of FCC Chairman William E. Kennard Concerning His Participating in the Personal Attack and Political Editorial Rule Proceeding, Fed. Communications Comm'n (Sept. 18, 2000), <https://www.fcc.gov/document/statement-fcc-chairman-william-e-kennard-concerning-his-participation>.

“A fair trial in a fair tribunal is a basic requirement of due process.”<sup>270</sup> “[E]very procedure which would offer a possible temptation to the average man as a judge ... not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law.”<sup>271</sup> “Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, ‘justice must satisfy the appearance of justice.’”<sup>272</sup> Here, justice demands that Chair Khan be recused from serving in an adjudicative role with respect to the Meta/Within Transaction.

---

<sup>270</sup> *American Cyanamid*, 363 F.2d 763 (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)).

<sup>271</sup> *Id.* (quoting *Tumey v. State of Ohio*, 273 U.S. 510, 532 (1927)).

<sup>272</sup> *Id.* (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)).