No. 23-60167

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ILLUMINA, INCORPORATED; GRAIL, INCORPORATED, NOW KNOWN AS GRAIL, L.L.C.,

Petitioners,

v.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL TRADE COMMISSION

BRIEF OF AMICUS CURIAE AMERICANS FOR PROSPERITY FOUNDATION IN SUPPORT OF PETITIONERS AND REVERSAL

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June 12, 2023

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for *amicus curiae* Americans for Prosperity Foundation certifies that the following listed persons and entities as described in Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case.

Illumina, Incorporated **Petitioner**	David R. Marriot; Christine A. Varney; Antony L. Ryan; Sharonmoyee Goswami; Michael J. Zaken; Jesse M. Weiss; Benjamin A. Atlas; Cravath, Swaine & Moore, L.L.P. **Counsel for Petitioner Illumina**
GRAIL, Inc., now known as GRAIL, L.L.C. **Petitioner**	Gregory G. Garre; Michael G. Egge; Marguerite M. Sullivan; Anna M. Rathbun; David L. Johnson; Alfred C. Pfeiffer; Latham & Watkins LLP **Counsel for Petitioner GRAIL, Inc.**
Federal Trade Commission **Respondent**	Matthew Michael Hoffman **Counsel for Respondent**
Washington Legal Foundation ***Amicus Curiae***	John M. Masslon II; Cory L. Andrews **Counsel for *Amicus Curiae* WLF**
Americans for Prosperity Foundation ***Amicus Curiae***	Michael Pepson **Counsel for *Amicus Curiae* AFPF**

Undersigned counsel further certifies that *amicus curiae* Americans for Prosperity Foundation is a nonprofit corporation. It has no parent companies, subsidiaries, or affiliates that have issued shares or debt securities to the public.

These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

/s/ Michael Pepson

Dated: June 12, 2023 Michael Pepson

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Americans for Prosperity Foundation ("AFPF") is a 501(c)(3) nonprofit organization committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. Some of those key ideas include the separation of powers and constitutionally limited government. As part of this mission, AFPF appears as *amicus curiae* before state and federal courts.

AFPF has a particular interest in this case because it believes the FTC's structure and existence offend the Constitution on many levels. The for-cause removal protections the FTC's Commissioners and Chief ALJ enjoy violate Article II, unconstitutionally shielding these officials from accountability to the President and thus to the American people. Worse, the FTC's administrative process—in which the FTC acts as investigator, prosecutor, and judge of its own cause—offends due process, Article III, and the Seventh Amendment. AFPF believes this unconstitutional arrangement cannot be allowed to stand and that the FTC's extralegal administrative prosecution is void ab initio.

[1] All parties have consented to the filing of this brief. Pursuant to FRAP 29(a)(4)(E), *amicus curiae* states that no counsel for a party other than AFPF authored this brief in whole or in part, and no counsel or party other than AFPF made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

As Justice Jackson explained long ago, "[t]he rise of administrative bodies probably has been the most significant legal trend of the last century[.]" *FTC v. Ruberoid Co*., 343 U.S. 470, 487 (1952) (dissenting). He continued: "They have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories much as the concept of a fourth dimension unsettles our three-dimensional thinking." *Id*. The problem is worse today, as Congress has devised more novel and powerful administrative bodies unmoored from the Constitution.

The FTC is an exemplar of administrative state's unconstitutionality. This administrative body wields vast legislative, executive, and judicial power, posing a grave threat to core private rights and individual liberty. As relevant here, it brings inhouse prosecutions where it acts as investigator, prosecutor, and judge of its own cause. The FTC also gets to make the rules for this slanted administrative process, further rigging the game in its own favor. Unsurprisingly, the Commission invariably finds in favor of itself, imposing liability in 100 percent of its inhouse cases for the past quarter century. The Commission is also unconstitutionally insulated from accountability to the political branches and, by extension, to the American People. Even the President cannot meaningfully restrain the agency. This unconstitutional arrangement cannot be allowed to stand.

Petitioners are entitled to a meaningful remedy for the government's separation-of-powers violations that will afford them complete redress. Because the Commissioners purported to wield Article III judicial power here to deprive Petitioners of their private rights, they were mere usurpers in an unlawful office and therefore this enforcement action against Petitioners is necessarily void ab initio and the FTC's Order must be vacated without remand.

ARGUMENT

I. The FTC's Administrative Prosecution Violates Article III and Is Therefore Void Ab Initio.

A. The FTC's Administrative Prosecution Implicates Private Rights.

In analyzing whether the FTC's inhouse administrative prosecution complies with the Constitution, a threshold inquiry is whether it implicates Petitioners' private (as opposed to public) rights. It does. "Private rights encompass the three absolute rights, life, liberty, and property[.]" *Axon Enter. v. FTC*, 143 S. Ct. 890, 907 (2023) (Thomas, J., concurring). Here, the FTC sought to deprive Petitioners of vested private property rights, infringe Petitioners' economic liberty and freedom of contract, penalize Illumina by forcing it to disgorge its profits, and impose other monetary harms in the form of compliance costs. *See* RAB 45–46.

The FTC's Final Order against Petitioners ordered divestiture of an already consummated acquisition. *See* Order § II.A. *Cf. Axon*, 143 S. Ct. at 911 (Thomas, J., concurring) ("FTC seeks to require Axon to transfer intellectual property to another

entity."). It also includes provisions that will force Illumina to incur substantial monetary compliance costs. Indeed, Complaint Counsel even sought disgorgement of Illumina's naturally earned profits.[2] *See* Proposed Order § II.B; RAB 46; Op. 97. That well describes core private rights.

"There must be *some* limit to the government's ability to dissolve the Constitution's usual separation-of-powers and due-process protections by waving a nebulous 'public rights' flag at a court."[3] *Calcutt v. FDIC*, 37 F.4th 293, 349 (6th Cir. 2022) (Murphy, J., dissenting), *rev'd*, 598 U.S. ____ (2023). The FTC's administrative prosecution exceeds that limit. *Cf. Axon*, 143 S. Ct. at 910 (Thomas, J., concurring) ("The rights at issue in these cases appear to be core private rights that must be adjudicated by Article III courts."). Petitioners are therefore entitled to the process the Constitution requires when private rights are at issue.

[2] The Final Order did not include such a provision, apparently in an effort to moot Petitioners' Seventh Amendment defense. *See* Op. 97–98 & n.80. But the Commission nonetheless claimed power to "order such a remedy where appropriate." Op. 97.

[3] The government's involvement is of no constitutional moment; "[t]he question is not just whether the government is a party, but also whether the right being vindicated is public or private, and how it is being vindicated." *Jarkesy v. SEC,* 34 F.4th 446, 458 (5th Cir. 2022), *reh'g en banc denied*, 51 F.4th 644 (5th Cir. 2023), *cert. pending*, Nos. 22-859, 22-991.

B. The Constitution Exclusively Vests the Judicial Power To Find Facts and Independently Interpret the Law in Article III Courts.

"[A]n exercise of the judicial power is required when the government wants to act authoritatively upon core private rights that had vested in a particular individual." *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 713 (2015) (Thomas, J., dissenting) (cleaned up); *see Axon*, 143 S. Ct. at 907 (Thomas, J., concurring) ("[W]hen private rights are at stake, full Article III adjudication is likely required."). *Cf. Newland v. Marsh*, 19 Ill. 376, 382 (Ill. 1857) ("The citizen cannot be deprived of his property by involuntary divestiture of his right to it, or by such transfer of it to another, except by judgment of law[.]"). "Article III of the Constitution begins with a clause that vests [this] particular kind of power in a specialized branch of the federal government." Evan D. Bernick, *Is Judicial Deference to Agency Fact-Finding Unlawful?*, 16 Geo. J.L. & Pub. Pol'y 27, 43 (2018). The Judicial Vesting Clause exclusively vests the "judicial Power of the United States" in Article III courts.[4] U.S. Const. Art. III, § 1; *see Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1381 (2018) (Gorsuch, J., dissenting) ("the federal 'judicial Power' is vested in independent judges"); *CFTC*

[4] "As originally understood, the judicial power extended to 'suit[s] at the common law, or in equity, or admiralty.'" *Oil States*, 138 S. Ct. at 1381 (Gorsuch, J., dissenting) (quoting *Murray's Lessee v. Hoboken Land & Improvement Co*., 59 U.S. 272, 18 How. 272, 284 (1856)); *see also* U.S. Const. Art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, [and] the Laws of the United States[.]").

v. Schor, 478 U.S. 833, 867 (1986) (Brennan, J., dissenting) ("Our Constitution unambiguously enunciates a fundamental principle—that the 'judicial Power of the United States' be reposed in an independent Judiciary.").

This sovereign function cannot be subdelegated. *See* Bernick, 16 Geo. J.L. & Pub. Pol'y at 43–46. "The allocation of powers in the Constitution is absolute[.]" *DOT v. Ass'n of Am. R.R.*, 575 U.S. 43, 69 (2015) (Thomas, J., concurring in judgment). And "[u]nder our Constitution, the 'judicial power' belongs to Article III courts and cannot be shared with the Legislature or the Executive." *B&B Hardware, Inc. v. Hargis Indus*., 575 U.S. 138, 171 (2015) (Thomas, J., dissenting) (citing *Stern v. Marshall*, 564 U.S. 462, 482–83 (2011)); *see also* Bernick, 16 Geo. J.L. & Pub. Pol'y at 45–46; Caleb Nelson, *Adjudication in the Political Branches*, 107 Colum. L. Rev. 559, 569–70 (2007). It "can no more be shared with another branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto." *Stern*, 564 U.S. at 483 (cleaned up). "Article III could neither serve its purpose in the system of checks and balances nor preserve the integrity of judicial decisionmaking if the other branches of the Federal Government could confer the Government's 'judicial Power' on entities outside Article III."[5] *Id.* at 484.

[5] The Framers understood that keeping the judiciary "truly distinct from both the legislature and the Executive" was important to protecting the "general liberty of the

C. The FTC Cannot Possess or Exercise Article III Judicial Power.

"Administrative agencies" like the FTC "have been called quasi-legislative, quasi-executive or quasi-judicial, as the occasion required, in order to validate their functions within the separation-of-powers scheme of the Constitution." *FTC v. Ruberoid Co*., 343 U.S. at 487 (Jackson, J., dissenting). But merely labeling their function as "adjudicative" cannot change that *all* "federal administrative agencies are part of the Executive Branch[.]" *B&B Hardware*, 575 U.S. at 171 (Thomas, J., dissenting). And "[e]ven when an executive agency acts like a legislative or judicial actor, it still exercises executive power." *Garcia v. Garland*, 64 F.4th 62, 70 n.7 (2d Cir. 2023). Indeed, "under our constitutional structure," *all* of the FTC's activities, including bringing inhouse administrative prosecutions, "*must be* exercises of" Article II executive power. *City of Arlington v. FCC*, 569 U.S. 290, 304 n.4 (2013); *see also Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2198 n.2 (2020) ("The Court's conclusion [in *Humphrey's Executor*] that the FTC did not exercise executive power has not withstood the test of time."); *Bowsher v. Synar,* 478 U.S. 714, 761 n.3 (1986) (White, J., dissenting); Daniel Crane, *Debunking Humphrey's Executor,* 83 Geo. Wash. L. Rev. 1835, 1839, 1870–71 (2015).

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people." The Federalist No. 78 (Hamilton). As the Framers recognized, "'there is no liberty, if the power of judging be not separated from the legislative and executive powers.'" *Id.* (quoting 1 Montesquieu, Spirit of Laws 181).

The FTC Commissioners and ALJ are executive officials housed within an Article II agency, who therefore cannot possess or exercise Article III judicial power, or for that matter Article I legislative power. U.S. Const. Art. III, § 1; *see Stern*, 564 U.S. at 482–84; *see also B&B Hardware*, 575 U.S. at 171 (Thomas, J., dissenting) ("Because federal administrative agencies are part of the Executive Branch, it is not clear that they have power to adjudicate claims involving core private rights."). "[F]actfinding" and "deciding questions of law" "are at the core of judicial power, as Article III itself acknowledges." *Axon,* 143 S. Ct. at 910 (Thomas, J., concurring) (citing U.S. Const. Art. III, § 2, cl. 2)); *see also* Bernick, 16 Geo. J.L. & Pub. Pol'y at 46 ("The determination of facts, no less than the interpretation of law, is part and parcel of the exercise of judicial power."). Accordingly, the Constitution bars the FTC from making factual findings and deciding questions of law in disputes implicating core private rights. But that is exactly what the FTC's administrative prosecution scheme allows it to do. *Cf. Calcutt*, 37 F.4th at 348 (Murphy, J., dissenting).

The FTC "houses (and by design) both prosecutorial and adjudicative activities," *Axon*, 143 S. Ct. at 902, "combin[ing] the functions of investigator, prosecutor, and judge under one roof," *id.* at 917 (Gorsuch, J., concurring in judgment). "The agency effectively fills in for the district court, with the court of appeals providing judicial review." *Id.* at 900 (majority opinion). Further still, the

Commission's factual findings are subject to great deference: "The findings of the Commission as to the facts, if supported by evidence, shall be conclusive."[6] 15 U.S.C. § 45(c). This Circuit has said "[t]his deferential review should be no more searching than if [an appellate court] were evaluating a jury's verdict."[7] *Impax Labs., Inc. v. FTC,* 994 F.3d 484, 492 (5th Cir. 2021).

This arrangement violates the separation of powers and Article III. *See* Philip Hamburger, Is Administrative Law Unlawful?, 319 (2012). As Justice Thomas recently suggested, FTC's administrative process "may violate the separation of powers by placing adjudicatory authority over core private rights—a judicial rather than executive power—within the authority of Article II agencies" and "violate Article III by compelling the Judiciary to defer to administrative agencies regarding matters within the core of the Judicial Vesting Clause." *Axon*, 143 S. Ct. at 909–10 (Thomas, J., concurring). *Cf. Lorenzo v. SEC*, 872 F.3d 578, 602 (D.C. Cir. 2017) (Kavanaugh, J., dissenting) ("[A]gency-centric process is in some tension with

[6] The Commission reviews the ALJ's factual findings and "inferences drawn from those facts" *de novo*. *See McWane, Inc*., F.T.C. No. 9351, 2014 FTC LEXIS 28, at *30 (Jan. 30, 2014); 16 C.F.R. § 3.54. In 2009, FTC amended its Rules of Practice to grab powers that had been previously exercised by the ALJ. 74 Fed. Reg. 1,804, 1,808–11 (Jan. 13, 2009). Under these changes, the same Commission that votes out the Complaint (not the ALJ) decides dispositive motions, *see* 16 C.F.R. § 3.22(a), and has greater case-management authority.

[7] The inquiry should be more searching where, as here, the ALJ ruled in favor of respondents. *See Schering-Plough Corp. v. FTC,* 402 F.3d 1056, 1062–63 (11th Cir. 2005).

Article III of the Constitution[.]"). *Cf. Calcutt*, 37 F.4th at 336 (Murphy, J., dissenting) ("[O]ne might wonder whether the agency exercises judicial power by adjudicating cases that deprive individuals of private rights."). Exactly so.

"Requiring judges in core-private-rights cases to defer to facts found by administrative agencies effectively divests the courts of a key component of judicial power—and therefore violates Article III."[8] Bernick, 16 Geo. J.L. & Pub. Pol'y at 46. "It is no answer that an Article III court may eventually review the agency order and its factual findings under a deferential standard of review." *Axon*, 143 S. Ct. at 910 (Thomas, J., concurring). For as Professor Jennifer Mascott has explained: "when agency adjudicators stray outside the proper limits of executive adjudication, such as by depriving individuals of vested property rights, they must not serve even as fact-finders subject to judicial deference. All cases and controversies subject to the federal judicial power—or parts of those cases and controversies—must be evaluated and determined by Article III judges[.]" J. Mascott, *Constitutionally Conforming Agency Adjudication*, 2 Loyola U. Chi. J. Reg. Compliance 22, 25 (2017) (footnotes omitted). At the least, "Article III requires de novo review, of both fact and law, of all agency adjudication that is properly classified as 'judicial'

[8] This practice also violates the Seventh Amendment jury-trial right. *See Jarkesy,* 34 F.4th at 453–59; *Axon*, 143 S. Ct. at 910 (Thomas, J., concurring) (citing *Tull v. United States*, 481 U. S. 412, 417 (1987)).

activity." Gary Lawson, *The Rise and Rise of the Administrative State*, 107 Harv. L. Rev. 1231, 1248 (1994).

D. The Commissioners Are Usurpers In An Unlawful Office Whose Inhouse Enforcement Actions Are Void Ab Initio.

Because Congress has assigned the FTC "judicial Power"—a sovereign function it cannot possess—the FTC's administrative tribunal cannot constitutionally exist, and its Commissioners are mere usurpers, whose inhouse enforcement actions are void ab initio. *Cf. Hildreth's Heirs v. M'Intire's Devisee*, 24 Ky. 206, 208 (1829) ("The offices attempted to be created, never had a constitutional existence; and those who claimed to hold them, had no rightful or legal power."). *See generally Calcutt*, 37 F.4th at 344–45 (Murphy, J., dissenting) (surveying case law). As the Supreme Court explained long ago: "Where no office legally exists, the pretended officer is merely a usurper, to whose acts no validity can be attached[.]"[9] *Norton v. Shelby Cnty.*, 118 U.S. 425, 449 (1886). "The Supreme Court's modern cases also treat an officer's actions as void if the generic office could 'not lawfully possess' the power to take them." *Calcutt*, 37 F.4th at 344 (Murphy, J., dissenting) (citing *Collins v. Yellen*, 141 S. Ct. 1761, 1788 (2021)); *see, e.g.*,

[9] "This rule extended to constitutional defects. The Supreme Court may have followed it as early as *United States v. Yale Todd* (U.S. 1794)." *Calcutt*, 37 F.4th at 344 (Murphy, J., dissenting) (citing *United States v. Ferreira*, 54 U.S. 40, 52–53 (1851) (note by Taney, C.J.)).

Stern, 564 U.S. at 503. *Cf. Young v. United States ex rel. Vuitton et Fils S.A.,* 481 U.S. 787, 815 (1987) (Scalia, J., concurring in judgment).

Here, the Commission cannot, under the Constitution, lawfully possess the "judicial Power" the Commissioners exercised in this case. Therefore, the Commission's actions are void ab initio. Put another way, because the FTC's administrative prosecution was brought and decided by "a 'mere usurper' in an unlawful [office] (whose actions were void)," *Calcutt*, 37 F.4th at 342 (Murphy, J., dissenting), the FTC's Order is a nullity that must be vacated without remand.

II. The FTC's Administrative Prosecution Violates Due Process.

The FTC's Order cannot stand for a second reason: The FTC's administrative prosecution violated Illumina's due-process rights.

A. The FTC's Administrative Process Is Rigged Against Respondents.

To put Petitioners' due-process claims into context, it is important to understand, as a descriptive matter, the degree to which the FTC's administrative process stacks the deck against respondents. After all, the FTC "combines the functions of investigator, prosecutor, and judge under one roof." *Axon*, 143 S. Ct. at 917 (Gorsuch, J., concurring in judgment). It "employ[s] relaxed rules of procedure and evidence—rules they make for themselves."[10] *Id.* (Gorsuch, J., concurring in

[10] *See supra* note 6; Illumina Br. 25–26. Nor do FTC's Rules even obligate Complaint Counsel to provide exculpatory evidence to Respondents. This is because FTC, unlike other agencies, has resisted incorporating the *Brady* rule into its

judgment). And, unsurprisingly, the FTC invariably finds in favor of itself. *Cf. Axon Enter. v. FTC*, 986 F.3d 1173, 1187 (9th Cir. 2021), *rev'd*, 143 S. Ct. 890 (2023) ("FTC does not appear to dispute[] that [it] has not lost a single case in the past quarter-century.").

"The numbers reveal just how tilted this game is." *Axon*, 143 S. Ct. at 917 (Gorsuch, J., concurring in judgment). A former FTC Commissioner put it thus:

> The FTC has voted out a number of complaints in administrative adjudication that have been tried by administrative law judges in the past nearly twenty years. In each of those cases, after the administrative decision is appealed to the Commission, the Commission has ruled in favor of FTC staff and found liability. In other words, in 100 percent of cases where the administrative law judge ruled in favor of the FTC staff, the Commission affirmed liability; and in 100 percent of the cases in which the administrative law judge ruled found no liability, the Commission reversed.

Joshua D. Wright, Comm'r, FTC, *Section 5 Revisited*, 6 (Feb. 26, 2015), *available at* http://bit.ly/2c3FSYZ. "This is a strong sign of an unhealthy and biased institutional process." *Id. Cf. Axon*, 986 F.3d at 1187 (noting "legitimate questions about whether the FTC has stacked the deck in its favor"). "Even the 1972 Miami Dolphins would envy that type of record." *Axon,* 986 F.3d at 1187. So too here.

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administrative adjudication scheme. *See, e.g., Amrep Corp*., 102 F.T.C. 1362, 1371 (1983); *see also* Justin Goetz, Note, *Hold Fast the Keys to the Kingdom: Federal Administrative Agencies and the Need for* Brady *Disclosure*, 95 Minn. L. Rev. 1424, 1433 & n.63 (2011).

B. The FTC's Combination of Investigative, Prosecutorial, and Judicial Functions Violates Due Process.

This arrangement is unconstitutional. Due process demands that FTC may not act as investigator, prosecutor, and judge of its own cause. *See Williams v. Pennsylvania*, 579 U.S. 1, 8 (2016) ("[A]n unconstitutional potential for bias exists when the same person serves as both accuser and adjudicator in a case."). *Cf. FTC v. Facebook, Inc.*, 581 F. Supp. 3d 34, 63 (D.D.C. 2022) ("So what role does provide the best analogy for analyzing Chair Khan's actions in voting to file this case? The Court concludes it is that of a prosecutor."). *See generally* Andrew N. Vollmer, *Accusers as Adjudicators in Agency Enforcement Proceedings*, 52 U. Mich. J.L. Reform 103 (2018). "In this country, judges have no more power to initiate a prosecution of those who come before them than prosecutors have to sit in judgment of those they charge." *Donziger v. United States*, 143 S. Ct. 868, 870 (2023) (Gorsuch, J., dissenting from denial of certiorari).

More broadly, as Professors Chapman and McConnell have explained:

> The basic idea of due process, both at the Founding and at the time of adoption of the Fourteenth Amendment, was that the law of the land required each branch of government to operate in a distinctive manner, at least when the effect was to deprive a person of liberty or property. . . . The judiciary was required to adjudicate cases in accordance with longstanding procedures, unless the legislature substituted alternative procedures of equivalent fairness.

Nathan Chapman & Michael McConnell, *Due Process as Separation of Powers*, 121 Yale L.J. 1672, 1781–82 (2012). "Fundamentally, . . . [due process] was about

securing the rule of law. It ensured that the executive would not be able unilaterally to deprive persons within the nation of their rights of life, liberty, or property except as provided by common law or statute and as adjudicated by independent judicial bodies[.]"[11] *Id.* at 1808. Experience confirms that FTC's biased inhouse enforcement process fails this test. *See* Section II.A, *supra*.

This should not be allowed to stand. If FTC wants to prosecute Illumina to deprive it of private rights, Article III and due process require FTC to do so in federal court.[12] *See Axon,* 143 S. Ct. at 910 (Thomas, J., concurring) (FTC review scheme "may violate due process by empowering entities that are not courts of competent jurisdiction to deprive citizens of core private rights."); *see also United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1993 (2021) (Gorsuch, J., concurring in part, dissenting in part) ("Any suggestion that the neutrality and independence the framers guaranteed for courts could be replicated within the Executive Branch was never more than wishful thinking.").

[11] As Professor Philip Hamburger put it: "The guarantee of due process . . . bars the government from holding subjects to account outside courts and their processes. This was the history of the principle from the very beginnings, and this was how the Fifth Amendment was drafted in 1791." Hamburger, *supra*, 256.

[12] The FTC *did* file a case against Illumina in federal district court but then withdrew it, opting for its inhouse court instead.

III. The FTC's Structure Violates Article II and the Separation of Powers.

The FTC's administrative prosecution scheme suffers from two additional constitutional infirmities: the statutory for-cause removal protections for Commissioners, 15 U.S.C. § 41, and multi-tier ALJ removal protections violate Article II and the separation of powers, *id.*; 5 U.S.C. § 7521(a) (ALJ for-cause removal protection); 5 U.S.C. § 1202(d) (MSPB for-cause removal protection).[13]

A. The President's Constitutional Removal Power Protects Liberty and Ensures Agency Accountability.

"The President's power to remove derives from Article II of the Constitution, not from Congress." *Exela Enter. Sols., Inc. v. NLRB*, 32 F.4th 436, 442 (5th Cir. 2022) (citing *Myers v. United States*, 272 U.S. 52, 163–64 (1926)). Article II "provides that '[t]he executive Power shall be vested in a President of the United States of America.'" *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 492 (2010). Under our constitutional structure "[t]he entire 'executive Power' belongs to the President alone," *Seila Law*, 140 S. Ct. at 2197; *see* U.S. Const. art. II, § 1, "including the power of appointment and removal of executive officers," *Myers*, 272 U.S. at 164. And "[t]he buck stops with the President," *Free*

[13] This Court should reach the merits of these claims. Because the FTC's Order must be vacated without remand on independent grounds, this Court need not opine on the question of remedy. *See Jarkesy*, 34 F.4th at 463 n.17 ("Because we vacate the SEC's judgment on various other grounds, we do not decide whether vacating would be the appropriate remedy based on this error alone.").

Enter. Fund, 561 U.S. at 493, who "is responsible for the actions of the Executive Branch and cannot delegate that ultimate responsibility or the active obligation to supervise that goes with it." *Arthrex,* 141 S. Ct. at 1978–79 (cleaned up).

"[T]he constitutional text and the original understanding, including the Decision of 1789, established that the President possesses the power under Article II to remove officers of the Executive Branch at will." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 537 F.3d 667, 692 (D.C. Cir. 2008) (Kavanaugh, J., dissenting), *overruled*, 561 U.S. 477 (2010); *see also Seila Law*, 140 S. Ct. at 2197; *Feds for Med. Freedom v. Biden*, 63 F.4th 366, 389–92 (5th Cir. 2023) (en banc) (Ho, J., concurring); *Fleming v. U.S. Dep't of Agric.*, 987 F.3d 1093, 1114 (D.C. Cir. 2021) (Rao, J., concurring in part, dissenting in part) ("Debates in the First Congress, the so-called Decision of 1789, made clear that the President is vested with plenary removal power."). "Under our constitutional structure, an agency untethered from the President's control may not wield his power." *Consumer Fin. Prot. Bureau v. Seila Law LLC*, 997 F.3d 837, 848 (9th Cir. 2021) (Bumatay, J., dissenting from denial of rehearing en banc). And for good reason. Given that the President's "selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he can not continue to be responsible." *Myers*, 272 U.S. at 117; *see Free Enter. Fund,* 561 U.S. at 492.

"[B]ecause the President, unlike agency officials, is elected," the President's removal power "is essential to subject Executive Branch actions to a degree of electoral accountability." *Collins,* 141 S. Ct. at 1784. For "[w]ithout presidential responsibility there can be no democratic accountability for executive action." *Arthrex*, 141 S. Ct. at 1988 (Gorsuch, J., concurring in part, dissenting in part). After all, the theory is that administrative bodies "have political accountability, because they are subject to the supervision of the President, who in turn answers to the public." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2413 (2019). "At-will removal ensures that the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community." *Collins*, 141 S. Ct. at 1784 (cleaned up).

"If anything, removal restrictions may be a greater constitutional evil than appointment defects." *Id.* at 1796 (Gorsuch, J., concurring in part). "In the case of a removal defect, a wholly unaccountable government agent asserts the power to make decisions affecting individual lives, liberty, and property. . . . Few things could be more perilous to liberty than some 'fourth branch' that does not answer even to the one executive official who is accountable to the body politic." *Id.* at 1797 (Gorsuch, J., concurring in part) (citing *FTC v. Ruberoid Co*., 343 U.S. at 487 (Jackson, J., dissenting)). So too here. That well describes FTC.

B. The Commission Cannot Seek Refuge in *Humphrey's Executor.*

Contrary to the Commission Opinion, *see* Op. 90, *Humphrey's Executor v. United States,* 295 U.S. 602 (1935), does not apply to *today*'s FTC and cannot immunize the Commissioners' removal protections against constitutional scrutiny. To be sure, *Humphrey's Executor* was wrongly decided then, has not withstood the test of time, and, to the extent it has any continuing vitality, the Supreme Court should overrule it. *See Seila Law*, 140 S. Ct. at 2212 (Thomas, J., concurring in part, dissenting in part). But Petitioners do not ask this Court to overrule *Humphrey's* but rather faithfully apply *Myers*, *Seila Law*, and the Constitution's original public meaning. *See* Illumina Br. 18–21.

Article II's "text, first principles, the First Congress's decision in 1789, *Myers*, and *Free Enterprise Fund* all establish that the President's removal power is the rule, not the exception." *Id.* at 2206 (majority opinion). And *Seila Law* makes pellucid that *Humphrey*'s exception "for multimember expert agencies that do not wield substantial executive power" is at the "outermost constitutional limits of permissible congressional restrictions on the President's removal power" the Court has recognized.[14] *Id.* at 2199–2200 (citation omitted). This exception is very narrow. *See Exela Enter. Sols.*, 32 F.4th at 444. And it plainly does not apply here.

[14] "[T]he Supreme Court has applied the *Humphrey's Executor* exception only twice—in *Humphrey's Executor* and *Wiener*, where the multimember commissions did not exercise substantial executive power." *Consumers' Rsch. v. Consumer Prod.*

On its terms, "*Humphrey's Executor* permitted Congress to give for-cause removal protections to a multimember body, balanced along partisan lines, that performed legislative and judicial functions *and was said not to exercise any executive power*." *Seila Law*, 140 S. Ct. at 2199 (emphasis added). It "relies on one key premise: the notion that there is a category of 'quasi-legislative' and 'quasi-judicial' power that is not exercised by Congress or the Judiciary, but that is also not part of 'the executive power vested by the Constitution in the President.'"[15] *Id.* at 2216 (Thomas, J., concurring in part and dissenting in part) (quoting *Humphrey's Ex'r*, 295 U.S. at 628). Indeed, the *Humphrey's* Court placed great weight on its view that the FTC's "duties are neither political nor executive, but predominantly quasi-judicial and quasi-legislative." *Humphrey's Ex'r*, 295 U.S. at 624.

"Rightly or wrongly, the [*Humphrey*'s] Court viewed the FTC (as it existed in 1935) as exercising 'no part of the executive power.'" *Seila Law*, 140 S. Ct. at 2198. It described the 1935 FTC as "an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the

Safety Comm'n, 592 F. Supp. 3d 568, 583 (E.D. Tex. 2022), appeal docketed, No. 22-40328 (5th Cir. May 18, 2022).

[15] "The problem is that the [*Humphrey's*] Court's premise was entirely wrong. The Constitution does not permit the creation of officers exercising 'quasi-legislative' and 'quasi-judicial powers' in 'quasi-legislative' and 'quasi-judicial agencies.'" *Seila Law*, 140 S. Ct. at 2216 (Thomas, J., concurring in part and dissenting in part) (quoting *Humphrey's Ex'r*, 295 U.S. at 628–29).

legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial aid." *Humphrey's Ex'r*, 295 U.S. at 628; *Exela Enter. Sols.*, 32 F.4th at 444. "Such a body," the Court found, "cannot in any proper sense be characterized as an arm or an eye of the executive." *Humphrey's Ex'r*, 295 U.S. at 628. Based upon this understanding of the 1935 FTC, the Court concluded this administrative body did not "exercise executive power in the constitutional sense." *Id.* And thus FTC Commissioners "occup[y] no place in the executive department and . . . exercise[] no part of the executive power vested by the Constitution in the President." *Id.*

Humphrey's "conclusion that the FTC did not exercise executive power has not withstood the test of time." *Seila Law*, 140 S. Ct. at 2198 n.2; *see City of Arlington*, 569 U.S. at 304 n.4. The relevant yardstick is the 1935 FTC, as understood by the Supreme Court in *Humphrey's Executor*. *See Seila Law*, 140 S. Ct. at 2200 n.4 ("[W]hat matters is the set of powers the [Supreme] Court considered as the basis for its decision [in *Humphrey's*], not any latent powers that the agency may have had not alluded to by the Court."). And measured against that yardstick, *today's* FTC does not remotely resemble and is easily distinguishable from the 1935 FTC.

To put this in perspective, in 1935 the FTC did not have independent litigating authority, let alone the power to seek civil penalties. *See* Crane, 83 Geo. Wash. L. Rev. at 1864; *see also* David M. FitzGerald, *The Genesis of Consumer Protection*

Remedies Under Section 13(b) of the FTC Act, 2–6 (Sept. 23, 2004) (describing evolution of FTC's powers), http://bit.ly/2kUIIcf. Indeed, the 1935 FTC lacked power to seek *any* retrospective relief, including restitution. *See Heater v. FTC*, 503 F.2d 321, 321–22 (9th Cir. 1974); *FTC v. Cement Inst.*, 333 U.S. 683, 706 (1948).

It was not until 1938 that Congress for the first time granted the FTC authority to sue in federal court for preliminary injunctive relief. Wheeler-Lea Act, Pub. L. No. 447, § 13(a), 52 Stat. 111, 115 (1938) (codified at 15 U.S.C. § 53(a)); *see* Fitzgerald, *supra*, at 4. In 1973, Congress broadened the FTC's authority to seek injunctions in federal court. *See* Trans-Alaska Pipeline Authorization Act, Pub. L. No. 93-153, § 408(b),(f), 87 Stat. 576, 591–92 (1973) (codified at 15 U.S.C. § 53(b)). "Two years later, in 1975, Congress granted the FTC additional powers to seek monetary relief[.]" Crane, 83 Geo. Wash. L. Rev. at 1865 (citing 15 U.S.C § 57b); *see* Fitzgerald, *supra*, at 6–7; *see also* 15 U.S.C. § 45(m)(1)(a). Since then, Congress has continued to expand the FTC's authority to seek civil penalties directly in federal court. *See, e.g.,* 15 U.S.C. § 1681s(a)(2); *id.* § 6505(d).

Today's FTC has a Criminal Liaison Unit;[16] the agency also routinely brings contempt actions resulting in incarceration. *E.g., FTC v. Cardiff*, No. 18-2104, 2020 U.S. Dist. LEXIS 137800, at *22–24 (C.D. Cal. July 24, 2020). FTC has even been

[16] FTC, Criminal Liaison Unit, https://www.ftc.gov/enforcement/criminal-liaison-unit

appointed as a "special prosecutor." *FTC v. Am. Nat'l Cellular*, 868 F.2d 315, 322–23 (9th Cir. 1989). In short, "its predominant character is that of a law enforcement agency." Crane, 83 Geo. Wash. L. Rev. at 1871. "The upshot is that the FTC has essentially become the executive agency that the *Humphrey's Executor* Court denied it was." *Id.* at 1839; *see also AMG Capital Mgmt., LLC v. FTC*, 141 S. Ct. 1341, 1345–47 (2021).

Humphrey's Executor therefore no longer controls. And any suggestion that *Humphrey's* blessed for-cause removal restrictions for agencies that do wield substantial executive Powers—like today's FTC—should be rejected. *See Seila Law*, 140 S. Ct. at 2200 (describing power to seek civil penalties directly in federal court as "a quintessentially executive power not considered in *Humphrey's Executor*"). *Cf. FTC v. Walmart Inc.*, No. 22-CV-3372, 2023 U.S. Dist. LEXIS 51445, at *64 (N.D. Ill. Mar. 27, 2023) ("The litigation authority given to the FTC in the 1970s may have taken the Commission's for-cause protections past the outermost constitutional limits on the President's removal power." (cleaned up)).

C. This Court Should Enforce the Constitution's Original Public Meaning.

"[T]he Constitution's original meaning is law, absent binding precedent to the contrary." *United States v. Rife*, 33 F.4th 838, 843–44 (6th Cir. 2022). As Judge Ho put it: "judges swear an oath to uphold the Constitution, consistent of course with a judicial system based on precedent. That should mean that [judges] decide

every case faithful to the text and original understanding of the Constitution, to the maximum extent permitted by a faithful reading of binding precedent." *Texas v. Rettig*, 993 F.3d 408, 409 (5th Cir. 2021) (Ho, J., dissenting from denial of rehearing en banc). That resonates here. To be sure, this Court is bound by existing Supreme Court precedent. But here, *Humphrey's* does not answer the constitutional question before this Court. And this Court should decide it based on the original public meaning of the Constitution.

As Judge Ho put it: "[I]f [courts] are forced to choose between upholding the Constitution and extending precedent in direct conflict with the Constitution, the choice should be clear: '[O]ur duty [is] to apply the Constitution—not extend precedent.'" *Id.* at 417 (Ho, J., dissenting from denial of rehearing en banc) (citation omitted). So too here. This Court should interpret "precedent that has been eroded by more recent jurisprudence" in light of the Constitution's text, structure, and original understanding, *see Int'l Ass'n of Bridge, Structural, Ornamental, & Reinforcing Iron Workers, Local 229, AFL-CIO*, 974 F.3d 1106, 1116–17 (9th Cir. 2020) (Bumatay, J., dissenting from denial of rehearing en banc) (citation omitted), and "tread carefully before extending it," *see id.* (quoting *Garza v. Idaho*, 139 S. Ct. 738, 756 (2019) (Thomas, J., dissenting)). While courts must "faithfully follow" Supreme Court precedents, courts "should resolve questions about the scope of those precedents in light of and in the direction of the constitutional text and constitutional

history." *Edmo v. Corizon, Inc.*, 949 F.3d 489, 506 (9th Cir. 2020) (Bumatay, J., dissenting from denial of rehearing en banc) (cleaned up). Here, that direction shows that the Commissioners' for-cause removal restrictions are unconstitutional.

D. The ALJ's Multi-Tier Removal Protections Are Unconstitutional.

Finally, because the FTC ALJ is an Officer of the United States, *see Lucia v. SEC*, 138 S. Ct. 2044, 2051–56 (2018); *Burgess v. FDIC*, 871 F.3d 297, 303 (5th Cir. 2017); *Calcutt*, 37 F.4th at 320, who presumably "perform[s] substantial executive functions," *Jarkesy*, 34 F.4th at 463; *but cf. Calcutt*, 37 F.4th at 348-49 (Murphy, J., dissenting), the multi-tier removal restrictions violate Article II,[17] *see Jarkesy*, 34 F.4th at 463–65; *Fleming*, 987 F.3d at 1113–23 (Rao, J., concurring in part, dissenting in part).

CONCLUSION

For these reasons, this Court should vacate the Commission's Order without remand.

[17] This constitutional infirmity underscores and exacerbates the due process problems inherent in inhouse administrative prosecutions implicating private rights. *See also* Kent Barnett, *Resolving the ALJ Quandary*, 66 Vand. L. Rev. 797, 801 (2013) ("[I]ncreasing presidential control over ALJs would create impartiality concerns under the Due Process Clause.").

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of FRAP 29(a)(5) and FRAP 32(a)(7)(B) because it contains 6,270 words. This brief also complies with the typeface and type-style requirements of FRAP 32(a)(5)-(6) because it was prepared using Microsoft Word 2013 in Times New Roman 14-point font.

/s/ Michael Pepson
Michael Pepson

Dated: June 12, 2023

CERTIFICATE OF SERVICE

I hereby certify that on June 12, 2023, I electronically filed the above Brief of Amicus Curiae Americans for Prosperity Foundation in Support of Petitioners with the Clerk of the Court by using the appellate CM/ECF system. I further certify that service will be accomplished by the appellate CM/ECF system.

/s/ Michael Pepson
Michael Pepson

Dated: June 12, 2023