No. 23-60167

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ILLUMINA, INC. AND GRAIL, INC.,
Petitioners,
v.
FEDERAL TRADE COMMISSION,
Respondent.

BRIEF OF THE AMERICAN HOSPITAL ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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CERTIFICATE OF INTERESTED PERSONS

No. 23-60167 Illumina, Inc. v. Federal Trade Commission

The undersigned counsel certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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INTEREST OF *AMICUS CURIAE*

The American Hospital Association (AHA) represents nearly 5,000 hospitals, healthcare systems, and other healthcare organizations. Its members are committed to improving the health of the communities that they serve, and to helping ensure that care is available to and affordable for all Americans. The AHA educates its members on healthcare issues and advocates on their behalf, so that their perspectives are considered in formulating health policy. One way in which the AHA promotes its members' interests is by participating as an *amicus curiae* in cases with important and far-ranging consequences for healthcare.

The AHA's member-hospitals are frequent targets of FTC enforcement proceedings. They are certain to remain so in the future. The healthcare sector already is the target of *nearly half* of FTC enforcement actions, and the agency has declared hospitals to be a priority for the coming years. As one FTC official recently stated with respect to hospital mergers in particular and healthcare transactions more generally: "[w]e are feeling invigorated and looking to fulfill [President Biden's] executive order's call to be aggressive on antitrust enforcement."[1] But regrettably,

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[1] Harris Meyer, *FTC Official: Antitrust Push in Health Care Must Focus on a Merger's 'Human Impact*, KFF Health News (July 18, 2022), https://kffhealthnews.org/news/article/ftc-interview-antitrust-health-care-hospital-mergers-human-impact/.

the FTC's actual practice across decades demonstrates that the agency is fundamentally incapable of abiding by basic due process guarantees. As a result, the AHA and its members have an acute interest in the constitutional issues presented in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

When a hospital is targeted by the FTC, the process that results is costly, protracted, and stacked against the hospital—regardless of the merits of the FTC's position. This is all the more troubling given recent statements by the FTC's Chair, who has touted recent enforcement actions that "push the envelope."[2] "Even if FTC enforcement gets struck down as overreach, [the FTC Chair] said, 'there are huge benefits to still trying.'"[3] Hospitals are rightly concerned about such "overreach," and this Court should be too.[4]

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[2] Bryan Koenig, *FTC's Khan More Worried About Inaction Than Blowback*, Law360 (April 22, 2022), https://www.law360.com/articles/1486611.

[3] *Id.*

[4] *Id.; see* Asheesh Agarwal, *The FTC's Recent Moves Could Cost It in the Supreme Court*, Yale Journal on Regulation (Oct. 23, 2022), https://www.yalejreg.com/nc/ftc-recent-moves/ ("[T]he FTC is charging ahead with new rules and novel theories that stretch the limits of its authority.… These initiatives could prod the high court to take a hard look at the FTC's place in the constitutional order.").

But as disturbing as Chair Khan's statements are, they are mere extensions of systematic problems that have long plagued the FTC. Since the 1940s, "commentators, courts, and even the occasional FTC Commissioner has expressed concerns that the Commission's" practices "may at least appear to deny respondents their right to a fair hearing before an impartial decision-maker."[5] This unfairness—or appearance thereof—is caused by several interrelated features of the FTC's enforcement process. For starters, when the federal government is considering whether to bring an action, cases are arbitrarily divided between the FTC and DOJ, with important substantive consequences turning on this standardless assignment decision. Next, if a case is sent to the FTC, the Commissioners make another standardless determination whether to prosecute their case before an Article III district court (where, among other things, the Federal Rules of Evidence apply) or an Administrative Law Judge (where those Rules decidedly do not apply). Finally, if the case is brought in-house, the Commissioners who approved the prosecution of the case act as final adjudicators, with full authority to overrule the ALJ's factual findings on *de novo* review. Together, these practices pile arbitrariness on top of arbitrariness, while mixing in an unconstitutional dose of partiality, all of which "so

[5] Keith Klovers, *Three Options for Reforming Part III Administrative Litigation at the FTC* ("Reforming Part III"), Forthcoming, *Antitrust Law Journal*, https://ssrn.com/abstract=4270588.

endanger[] the appearance of neutrality that" the they "must be forbidden if the guarantee of due process is to be adequately implemented."[6]

If there were any doubts that these practices violate elemental due process principles, the FTC's record easily puts them to rest. Decades of actual FTC practice have borne out exactly as one would expect under a system like this. The FTC has not lost before the Commission *since the mid-1990s*. "Even the 1972 Miami Dolphins would envy that type of record."[7] With one-sided procedures that favor the agency and a win-loss tally that proves it, the only possible conclusion is that the FTC is not a fair, neutral, and unbiased tribunal, as required by the Due Process Clause.

This case is the paradigmatic example of these due process maladies. Proceeding behind closed doors, a "black-box" decision was made to assign the case to the FTC, not the DOJ's Antitrust Division. Then, the Commission, acting as prosecutor, approved a complaint. Governed by no standard whatsoever, it chose to try the case before its ALJ, not a federal district court. (Adding to the appearance of bias, the Commission also initially sought a preliminary injunction in an Article III

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[6] *Williams v. Pennsylvania*, 579 U.S. 1, 14 (2016) (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

[7] *Axon Enterprise, Inc. v. FTC*, 986 F.3d 1173, 1187 (9th Cir. 2021).

court but quickly reversed course, keeping all consideration of the facts in-house.) When the ALJ ruled against the Commission—the first time in many decades that the FTC's ALJ dismissed an FTC merger challenge—the Commission stepped in as adjudicator and reversed. Alarmingly, it did so under series of "relaxed rules of procedure and evidence—rules [the Commissioners] ma[d]e for themselves."[8]

In both appearance and reality, this case does not display fairness and neutrality consistent with the Constitution. Unique among federal agencies, it is sadly par for the course with the FTC. So, while this appeal can be straightforwardly decided under *Jarkesy v. SEC*[9], *Jarkesy*'s uncertain future with the government's petition for *certiorari* pending counsels strongly in favor of deciding Illumina's due process claims as well.

To be clear: the AHA and its members have no quarrel with cases like *FTC v. Cement Institute*[10] or *Withrow v. Larkin*[11]. Nor does it seek to overturn the

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[8] *Axon Enterprise, Inc. v. FTC*, 143 S. Ct. 890, 917 (2023) (Gorsuch, J., concurring); *see* Petrs' Br. 25-26 (listing the Commission's evidentiary decisions in this case that were inconsistent with the Federal Rules of Evidence, including reliance on "nonparty testimony given in proceedings that neither Petitioners nor their counsel were permitted to attend" and the refusal to "consider evidence from FTC's own witnesses when it contradicted FTC's theory of the case").

[9] 34 F.4th 446 (5th Cir. 2022).

[10] 333 U.S. 683 (1948).

[11] 421 U.S. 35.

proposition that "the combination of investigative and adjudicative functions" does not "*necessarily* create[] an unconstitutional risk of bias in administrative adjudication."[12] Hospitals are regulated by numerous federal and state agencies, and they have fair and productive working relationships with them. But no court has considered whether *all* of the FTC's practices together violate the Due Process Clause. What's more, it important to bear in mind *Withrow*'s directive that courts "should be alert to the possibilities of bias that may lurk in the way particular procedures *actually work in practice*."[13] Decades of actual FTC practice—including in this case—make manifest the agency's due process defects.

The FTC has had more than half a century to demonstrate that its processes work fairly. It has failed. The regulated public, including hospitals and health systems, know that when it comes to FTC enforcement actions, the house always wins. But as the facts of this case and countless hospital mergers demonstrate, constitutional principles are not the only things at stake. The health of the public is too. Whether it is an acquisition that prevents a rural hospital from closing or, as here, the future of cutting-edge, life-saving medical technology, the FTC's unfair practices have stood in the way of improved healthcare again and again. It is long

[12] *Id*. at 47 (emphasis added).

[13] *Id*. at 54 (emphasis added).

past time to put an end to the FTC's unconstitutional enforcement practices. This Court should reverse.

ARGUMENT

I. THE FTC'S UNCONSTITUTIONAL ENFORCEMENT PRACTICES ARE PARTICULARLY HARMFUL TO HOSPITALS

A. The FTC subjects hospital mergers to disproportionate scrutiny.

Despite their pro-competitive and pro-patient benefits, hospitals mergers face disproportionate scrutiny from the FTC. As a 2019 analysis explains, "of the 154 merger enforcement actions that the FTC brought from the 2000 fiscal year through the 2018 fiscal year, 75 pertained to parts of the health care sector. The agency brought still more non-merger actions."[14] Likewise, 46% of the FTC's enforcement actions in 2020 were in the healthcare sector.[15]

In prepared remarks, an FTC Commissioner noted the 2019 study, then added that "a significant portion of [those actions] focused on healthcare providers

[14] Nathan E. Wilson, *Editor's Note: Some Clarity and More Questions in Health Care Antitrust*, 82 Antitrust L.J. 435 (2019).

[15] FTC, *Stats & Data 2020* (Apr. 2021), https://www.ftc.gov/reports/annual-highlights-2020/stats-data-2020.

generally and hospitals in particular."[16] Less than a year later, the FTC threatened to *increase* its targeting of hospitals.[17] Then, in July 2021, the FTC declared "hospitals" were a "[p]riority target."[18] Days later, President Biden issued an executive order urging the FTC to enforce the antitrust laws "vigorously" with a focus on a few key markets, including "hospitals."[19]

This lopsided scrutiny is, in itself, concerning. It is *especially* concerning when the agency conducting that scrutiny has engaged in a decades-long pattern of enforcement practices that cannot be squared with the Due Process Clause.

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[16] Rebecca Kelly Slaughter, *Antitrust and Health Care Providers: Policies to Promote Competition and Protect Patients*, Address to the Center for American Progress (May 14, 2019), https://www.ftc.gov/system/files/documents/public_statements/1520570/slaughter_-_hospital_speech_5-14-19.pdf.

[17] Rich Daly, *Increased FTC scrutiny of hospital deals coming, commissioner says*, Healthcare Financial Management Assoc. (Jan. 20, 2020), https://www.hfma.org/topics/news/2020/01/increased-ftc-scrutiny-of-hospital-deals-coming-commissioner-says.html.

[18] FTC, *FTC Authorizes Investigations into Key Enforcement Priorities* (July 1, 2021), https://www.ftc.gov/news-events/press-releases/2021/07/ftc-authorizes-investigations-key-enforcement-priorities.

[19] Exec. Order No. 14036, 86 Fed. Reg. 36987 (2021).

B. Hospital mergers reduce costs, improve care, and benefit patients.

It is unclear why the FTC has devoted such a disproportionate amount of its resources to hospitals. Hospital mergers provide a range of pro-competitive benefits—especially for small and rural hospitals, which typically operate, at best, on razor-thin margins.

Perhaps most important, mergers frequently allow struggling hospitals to remain open. Without mergers, hospitals would shutter, patients would lose access to care, and communities would suffer—particularly in rural and other underserved areas.[20] Even before the pandemic, "about one in five hospital partnership transactions involved a financially distressed hospital, many at risk of imminent closure."[21] The pressure on rural and smaller hospitals "has only accelerated" since COVID: "in 2020 alone, 21 rural hospitals closed their doors and more than three

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[20] *See* Kaufman Hall, *Partnerships, Mergers, and Acquisitions Can Provide Benefits to Certain Hospitals and Communities* 5 (2021). Four out of five bankrupt hospital acquisition targets were saved from bankruptcy in 31 recent hospital transactions, and almost four in 10 acquired hospitals added one or more services post acquisition, including tertiary and quaternary services. *Id*. at 9-11. As a result, patient outcomes in at-risk communities often improve.

[21] Kenneth Kaufman, *Industry Voices—In a time of need, hospitals must be able to transform*, Fierce Healthcare (May 27, 2021), https://www.fiercehealthcare.com/hospitals/industry-voices-a-time-need-hospitals-must-be-able-to-transform.

dozen entered bankruptcy."[22] As one observer put it, "immediate action is needed to help shore up" rural hospitals.[23] "One of the best ways to do this is for the FTC to remove the regulatory hurdles to hospital consolidation.… Sometimes it is the only means of preserving this critical access."[24]

Additional benefits of hospital mergers were recently catalogued in a comprehensive econometric analyses of contemporary hospital acquisitions.[25] This research found that hospital acquisitions generate substantial economic gains and reduce costs, including by increasing hospital scale, standardizing clinical practices, reducing hospitals' cost of capital, and allowing hospitals to avoid duplicative capital expenditures. Critically, these merger efficiencies allow struggling hospitals to pass cost savings on to their patients.[26] And if that were not enough, mergers enable hospitals to improve quality of patient care by standardizing clinical protocols,

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[22] *See* Ken Summers, *FTC Crackdowns on Mergers Could Harm Rural Healthcare*, RealClear Mkts. (Dec. 13, 2021) ("Summers, *FTC Crackdown*"), https://www.realclearmakets.com/artcles/2021/12/13/ftc_crackdowns_on_mergers_could_harm_rural_healthcare_807469.html.

[23] *Id*.

[24] *Id*.

[25] *See* Sean May, Monica Noether, and Ben Stearns, *Hospital Merger Benefits: An Econometric Analysis Revisited* at 1 (Aug. 2021), https://www.aha.org/system/files/media/file/2021/08/cra-merger-benefits-revisited-0821.pdf.

[26] *See* Monica Noether, Sean May, and Ben Stearns, *Hospital Merger Benefits: Views from Hospital Leaders and Econometric Analysis–An Update* 2 (Sept. 9, 2019).

investing to upgrade services at acquired hospitals, and deploying additional staff where needed. One recent study of more than 400 rural hospitals "found a significantly greater reduction in inpatient mortality for several common conditions (*i.e.*, heart failure, stroke, and pneumonia) among patients admitted to rural hospitals that merged or were acquired."[27]

Put simply, economic analysis makes clear that mergers allow hospitals to provide patients with better care at lower prices.

C. The FTC's disproportionate scrutiny deters pro-competitive hospital mergers.

Despite the many benefits that mergers bring, hospitals remain in the FTC's crosshairs. But simply because the FTC targets hospital mergers does not mean that its enforcement actions are justified. For instance, from 1994 to 1999, the FTC lost *four consecutive* hospital merger cases in the federal courts.[28]

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[27] H. Joanna Jiang, et al., *Quality of Care Before and After Mergers and Acquisitions of Rural Hospitals*, 2021 JAMA Network Open 4(9) 7 (Sept. 2021); *see* Erwin Wang, Simon Jones, Sonia Arnold, et al.; *Quality and Safety Outcomes of a Hospital Merger Following a Full Integration at a Safety Net Hospital*, JAMA Network Open 5(1) 1 (Jan. 2022) ("[A] full-integration approach to a hospital merger was associated with an absolute reduction in crude and adjusted mortality rates").

[28] *See FTC* v. *Tenet Healthcare Corp.*, 186 F.3d 1045 (8th Cir. 1999); *FTC* v. *Butterworth Health Corp.*, 946 F. Supp. 1285 (W.D. Mich. 1996), *aff'd*, 121 F.3d 708 (6th Cir. 1997); *FTC* v. *Freeman Hosp.*, 911 F. Supp. 1213 (W.D. Mo. 1995), *aff'd*, 69 F.3d 260 (8th Cir. 1995); *FTC* v. *Hosp. Bd. of Directors of Lee Cty.*, 1994-1 Trade Cas. (CCH) ¶ 70,593 (M.D. Fla.), *aff'd*, 38 F.3d 1184 (11th Cir. 1994).

Even when such wrongful enforcement actions are defeated outside of the agency, however, they take a toll—both in terms of the costs of defense and in deterring pro-competitive mergers. After all, a hospital contemplating a merger does not know whether the FTC will arbitrarily choose to bring an enforcement action in its home court, thereby inflicting years of costs before the merging parties can ever get before a neutral Article III decision-maker.

Unfortunately, the very hospitals that are most likely to need to consolidate are also those most unlikely to have the resources to sustain a prolonged struggle against the FTC. Although small and rural hospitals often need to merge into large healthcare systems to survive, they cannot afford to resist an FTC enforcement action—and certainly not one that requires them to litigate for years under unconstitutional enforcement procedures. Responding to FTC investigations and enforcement actions is often prohibitively expensive. Given the thin margins for many hospitals, the cost of a defense alone can chill or kill a pro-competitive, pro-patient transaction.

The prospect of having to defend transactions at great cost before the FTC has deterred many hospitals and health systems from pursuing lawful, pro-competitive transactions that would benefit the communities and patients that they serve. And it is not only small hospitals that are chilled. Larger healthcare providers—like Inova

Health System Foundation,[29] OSF Healthcare System,[30] and Reading Health System[31]—have simply abandoned proposed transactions rather than face a lengthy and expensive administrative litigation with the FTC.

Unconstitutional enforcement actions thus derail efficient mergers that would improve patient care simply because hospitals know that the FTC's enforcement process is arbitrary, biased, and ultimately stacked against them. That may count as a victory for the FTC, but it is not a victory for patients, hospitals, the economy, or the rule of law.

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[29] Shannon Henson, *Facing FTC Challenge, Hospitals Drop Merger Plans*, Law360 (June 10, 2008), http://www.law360.com/articles/58795/facing-ftc-challenge-hospitals-drop-merger-plans.

[30] Stewart Bishop, *Ill. Health Systems Ditch Merger Plans After FTC Antitrust Suit*, Law 360 (Apr. 12, 2012), http://www.law360.com/articles/329680/ill-health-systems-ditch-merger-plans-after-ftc-antitrust-suit.

[31] Dan Packel, *Pa. Hospital Merger Killed After FTC Broaches Challenge*, Law360 (Nov. 19, 2012), http://www.law360.com/articles/395215/pa-hospital-merger-killed-after-ftc-broaches-challenge.

II. THE FTC'S ENFORCEMENT PRACTICES VIOLATE THE DUE PROCESS CLAUSE

A. The FTC's enforcement practices implicate three interrelated due process principles.

Three due process principles lie at the heart of this case. *First*, due process requires "[a] fair trial in a fair tribunal."[32] Under this "neutrality requirement," a tribunal is considered fair if it is "impartial and disinterested."[33] To determine whether a tribunal is neutral, courts "ask not whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, the average judge in his position is *likely* to be neutral, or whether there is an unconstitutional *potential* for bias."[34]

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[32] *In re Murchison*, 349 U.S. 133, 136 (1955).

[33] *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980).

[34] *Williams*, 579 U.S. at 16 (quotation marks omitted); *see Rippo v. Baker,* 580 U.S. 285, 287 (2017) ("Recusal is required when, objectively speaking, the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." (quotation marks omitted)).

Second, due process abhors arbitrariness. Indeed, the protection against arbitrary action is "the very essence of due process."[35] "Arbitrary power and the rule of the Constitution cannot both exist. They are antagonistic and incompatible forces; and one or the other must of necessity perish whenever they are brought into conflict."[36] Accordingly, the Due Process Clause prohibits the government from taking away someone's life, liberty, or property under rules that are "so standardless that [they] invite[] arbitrary enforcement,"[37] Standardless rules threaten arbitrary consequences because they "reflect not an application of law but a decisionmaker's caprice."[38]

Third, the Due Process Clause protects *both* "the appearance and reality of fairness."[39] "An insistence on the appearance of neutrality is … an essential means of ensuring the reality of a fair adjudication. Both the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements

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[35] *Slochower v. Board of Higher Education*, 350 U.S. 551, 559 (1956); *see Glossip v. Gross*, 576 U.S. 863, 915 (2015) (Breyer, J, dissenting) ("The arbitrary imposition of punishment is the antithesis of the rule of law.").

[36] *Jones v. SEC*, 298 U.S. 1, 24 (1936).

[37] *Johnson v. United States*, 576 U.S. 591, 595 (2015).

[38] *Philip Morris USA v. Williams*, 549 U.S. 346, 352 (2007) (quotation marks omitted).

[39] *Marshall*, 446 U.S. at 242.

and thus to the rule of law itself."[40] As this Court has pithily put it: "Fairness is upheld by avoiding even the appearance of partiality."[41] And as the Supreme Court has (even more) pithily put it: "[J]ustice must satisfy the appearance of justice."[42]

Separately and together, these interrelated principles are at the core of the due process requirements that federal agencies must follow. As explained below, the FTC's enforcement procedures cannot be—and long have not been—exercised consistenty with these guarantees.

B. The FTC's enforcement practices violate core due process principles.

Just as this case implicates three due process principles, it requires this court to consider whether three features of its enforcement practices comply with those principles. When those three practices are considered together, it is clear that they do not.

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[40] *Williams*, 579 U.S. at 15-16; *see Marshall*, 446 U.S. at 242, (noting the importance of "preserv[ing] both the appearance and reality of fairness," which "'generat[es] the feeling, so important to a popular government, that justice has been done'") (quoting *Joint Anti–Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring)).

[41] *Miller v. Sam Houston State Univ.*, 986 F.3d 880, 883 (5th Cir. 2021).

[42] *Offutt v. United States*, 348 U.S. 11, 14 (1954).

Standardless Determination of Enforcement Agency. Arbitrariness begins to infuse the FTC's enforcement at the very outset of the process—namely, the division of labor between the Commission and the Justice Department's Antitrust Division. Merger cases are divvied up between the two agencies. In the healthcare industry, for example, DOJ has traditionally handled health insurers and the FTC has handled hospitals. It is unclear why. Unfortunately for regulated parties like hospitals and health systems, this assignment process is not dictated by any statute, rule, or regulation. It depends entirely on a "black-box" system without any public articulation of the sorting criteria.

This standardless assignment system would be problematic enough for purposes of the Due Process Clause. But it is made immeasurably worse by the material differences between the Justice Department's merger challenges and those of the FTC. Parties haled before the FTC receive less procedural protection, are subject to different substantive standards, and have less opportunity for judicial review. As a result, "the choice of which antitrust enforcement agency is to review a proposed merger is outcome-determinative."[43]

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[43] Raymond Z. Ling, *Unscrambling the Organic Eggs: The Growing Divergence Between the DOJ and the FTC in Merger Review After* Whole Foods, 75 Brook. L. Rev. 935, 938 (2010).

Whereas the Justice Department litigates transactions in a full hearing on the merits in federal court before an impartial judge, the FTC's can pursue a preliminary injunction in federal court while at the same time commencing internal administrative proceedings in which the agency has a decided advantage and a demonstrated appearance of partiality.[44] But even at the preliminary injunction stage, federal judges apply a different—and more deferential—standard of review to a request from the FTC, as compared to the same request from the Justice Department.[45] As then-Judge Kavanaugh once observed, the standard is so deferential that the FTC can "just snap its fingers and temporarily block a merger."[46] Thus, parties whose transaction is reviewed by the FTC can expect an immediate halt to their merger, a

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[44] *See* Antitrust Modernization Commission, *Report and Recommendations* 130 (Apr. 2007) ("Antitrust Modernization Report") ("The DOJ generally seeks a permanent injunction . . ., resolving the question fully and completely in a single proceeding before a judge," whereas "the FTC seeks only preliminary injunctions—not permanent injunctions—in federal district court" while pursuing "administrative Part III proceedings" that continue even "if it fails to obtain a preliminary injunction").

[45] *Id.*; *see FTC* v. *Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1042 (D.C. Cir. 2008) (holding that the FTC may obtain an injunction under a standard "more lenient" than "the more stringent, traditional 'equity' standard for injunctive relief").

[46] *Id.* at 1052 (Kavanaugh, J., dissenting).

more burdensome enforcement process, a higher likelihood of having to abandon the transaction, and likely a different substantive outcome.[47]

Standardless Determination About Where To Bring The Enforcement Action. Once a case is assigned to the FTC, the Commission has another arbitrary decision to make: whether to bring its enforcement action before an in-house ALJ or in federal district court. By statute, the Commission can choose to initiate a complaint in either venue.[48] Yet again, this standardless decision carries meaningful substantive consequences.

If the FTC chooses to seek relief in district court, all of the familiar Article III procedural protections are in play. For example, judges must apply the Federal Rules of Evidence and courts of appeals review the district court's findings of fact for clear error.

By contrast, if the FTC chooses to file a complaint in-house, many of those Article III protections disappear.[49] For several decades, ALJs have functioned as the

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[47] *See* Antitrust Modernization Report at 131.

[48] 15 U.S.C. § 45(b) (authorizing administrative litigation); *id*. § 53(b) (authorizing actions in federal court seeking permanent injunctive relief).

[49] *See* Petr's Br. 25-26 (listing evidentiary rulings in this case that violated the Federal Rules of Evidence).

FTC's initial hearing body, whereby they render a decision on both law and facts.[50] At this point, the process becomes "unusual," as some FTC officials have described it.[51] The ALJ's decision is appealable to the Commission, which "will, to the extent necessary or desirable, exercise all the powers which it could have exercised if it had made the initial decision."[52] In other words, the Commission conducts a *de novo* review of the factual findings and legal conclusions, despite the Commission not having an opportunity to assess witness credibility and despite all the resources that were put into the ALJ proceeding. As the FTC itself explained to the OECD, this is a "key, substantive difference between proceedings before the FTC and those before a federal circuit court."[53] Adding to the unusualness, appeals of the Commission's decisions to federal circuit courts of are typically reviewed under the forgiving "substantial evidence" standard, which provides another procedural advantage to the

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[50] *See* Note by the United States to the OECD Directorate for Financial and Enterprise Affairs, Competition Committee, Working Party No. 3 on Co-operation and Enforcement, The Standard of Review by Courts in Competition Cases ¶ 14 n.7, June 4, 2019 ("OECD Note"), https://one.oecd.org/document/DAF/COMP/WP3/WD(2019)22/en/pdf ("[T]he standard, current practice is to refer the matter to the ALJ to both conduct the hearing and issue an initial decision.")

[51] D. Bruce Hoffman & M. Sean Royall, *Administrative Litigation at the FTC: Past, Present, and Future*, 71 Antitrust Law Journal 319, 324 (2003). Hoffman and Royall were the Deputy Director and Associate Director for Regional Litigation of the FTC's Bureau of Competition when they wrote this article.

[52] 16 C.F.R. § 3.54(a).

[53] OECD Note ¶16.

FTC under this in-house route.[54] All in all, the FTC's standardless discretion to pursue its case internally results in critical substantive differences that heavily favor the Commission.

Combining Adjudicatory and Prosecutorial Functions. Having made the arbitrary decisions to prosecute a particular case and then bring that case before the agency instead of a federal court, the FTC's due process problems continue by allowing the Commission to adjudicate its own allegations.

A brief review of the FTC's in-house process may be useful. The Commissioners investigate claims. Like a prosecutor, the Commissioners then initiate enforcement proceedings by filing a complaint.[55] The ALJ then adjudicates the complaint and issues a decision.[56] But then, the Commissioners take over as the

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[54] To be sure, this Court (and others) have reviewed the Commission's factual determinations "more carefully" when they differ from the ALJ's. *Chicago Bridge & Iron Co. v. FTC*, 534 F.3d 410, 431 (5th Cir. 2008). But that is cold comfort for a hospital that must spend time and resources defending itself for years before the Commission. And the need for a judge-made rule like this should be a strong signal that something is rotten with the FTC's procedures.

[55] 15 U.S.C. § 45(b).

[56] Just this month, the Commission arrogated even more power to itself, amending its rules so that ALJs will now issue "recommended" decisions that are reviewed *automatically*, even if a party would choose not to appeal, rather than "initial" decisions that can be appealed to the Commission. *See FTC Approves Publication of Federal Register Notice on Revisions to Parts 0-4 of the Commission's Rules of Practice* (June 2, 2023), https://www.ftc.gov/news-events/news/press-releases/202

arbiters of whether the defendant has violated any laws. Crucially, this appeal happens under a *de novo* standard of review—effectively allowing the Commissioner to review the validity of their own action in bringing the case in the first place.[57]

This practice is riddled with constitutional infirmities. The Supreme Court has "determined that an unconstitutional potential for bias exists when the same person serves as both accuser and adjudicator in a case."[58] The reasons why are self-evident and commonsensical:

3/06/ftc-approves-publication-federal-register-notice-revisions-parts-0-4-commissions-rules-practice.

[57] *See* 16 C.F.R. §§ 3.51(b), 3.52. To make matters worse, nothing requires the Commission to rely on ALJs for initial determinations. In one 2008 hospital merger challenge, the FTC took the extraordinary step of appointing a sitting Commissioner to serve as the presiding ALJ. *See* Jeffrey W. Brennan & Sean P. Pugh, *Inova and the FTC's Revamped Merger Litigation Model*, 23 Antitrust 28 (2008). Commissioner Rosch participated in the FTC's merger investigation, meeting with the FTC's investigatory staff as the FTC weighed whether to challenge the merger. Commissioner Rosch met with the respondents, their lawyers, and their retained economists, who were presenting their case to him in his capacity as a Commissioner. Less than a month later, the FTC announced Rosch's appointment as the presiding ALJ. Remarkably, Commissioner Rosch denied the motion to recuse himself. *Inova Health Sys. Found.*, No. 9326, 2008 WL 2307161, at *1 (F.T.C. May 29, 2008). This was not merely an agency wearing two hats; it was the same *individual* within the agency doing so. Not surprisingly, with the outcome preordained, the respondents abandoned the merger a week later. Nothing in the FTC's procedures prevents this astonishing practice from happening again.

[58] *Williams*, 579 U.S. at 8.

> When a judge has served as an advocate for the State in the very case the court is now asked to adjudicate, a serious question arises as to whether the judge, even with the most diligent effort, could set aside any personal interest in the outcome. There is, furthermore, a risk that the judge would be so psychologically wedded to his or her previous position as a prosecutor that the judge would consciously or unconsciously avoid the appearance of having erred or changed position. In addition, the judge's own personal knowledge and impression of the case, acquired through his or her role in the prosecution, may carry far more weight with the judge than the parties' arguments to the court.[59]

Ultimately, when an adjudicator has had a "significant, personal involvement in a critical decision" in a case, there is an "unacceptable risk of actual bias."[60] And, as the Supreme Court has held, "[t]his risk so endanger[s] *the appearance of neutrality* that his participation in the case 'must be forbidden if the guarantee of due process is to be adequately implemented.'"[61]

These exact due process defects are present in the FTC's enforcement practices. But do not take the AHA's word for it.

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[59] *Id*. at 8-9 (citations and quotation marks omitted); *id*. at 9 (finding a "duty to withdraw in order to ensure the neutrality of the judicial process in determining the consequences that his or her own earlier, critical decision may have set in motion").

[60] *Id*. at 14; *see Isom v. Arkansas*, 140 S.Ct. 342, 344 (2019) (Sotomayor, J., statement respecting denial of certiorari) ("I write, however, to encourage vigilance about the risk of bias that may arise when trial judges peculiarly familiar with a party sit in judgment of themselves. The Due Process Clause's guarantee of a neutral decisionmaker will mean little if this form of partiality is overlooked or underestimated.").

[61] *Id*. (emphasis added) (quoting *Withrow*, 421 U.S. at 47).

- A blue-ribbon American Bar Association panel explained more than three decades ago: "[N]o thoughtful observer is entirely comfortable with the FTC's . . . combining of prosecutory and adjudicatory functions. Whenever the same people who issued a complaint later decide whether it should be dismissed, concern about at least the appearance of fairness is inevitable."[62]

- Having observed decades of FTC practice, one former Acting Assistant Attorney General for the DOJ's Antitrust Division explained: "despite the best efforts of the Commissioners… there is substantial reason to believe that Commissioners inherently and unavoidably lack the independence that we expect from adjudicative factfinders. That is likely to affect outcomes in at least some cases."[63]

- And *based on his own personal experience*, one FTC Chair observed:

> Unlike judges, who sit as neutral and detached adjudicators, agency members who are responsible for deciding the particular case are also responsible for advancing the goals and effectuating policies of the statutes which the agency administers. Its success

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[62] *Report Of The American Bar Association Section Of Antitrust Law Special Committee To Study The Role Of The Federal Trade Commission* (1989), reprinted in 58 Antitrust L.J. 43, 119 (1989).

[63] A. Douglas Melamed, Comments Submitted to the Federal Trade Commission, Workshop Concerning Section 5 of the FTC Act 17 (Oct. 14, 2008) ("Melamed Comment"), https://www.ftc.gov/sites/default/files/documents/public_comments/section-5-workshop-537633-00004/537633-00004.pdf.

> or failure is measured by the general results or lack of them which the agency achieves in carrying out its statutory mission. Unlike a judge, an agency member cannot overlook the effect which a decision in a particular proceeding may have on related proceedings before the agency.[64]

Taken together, the three FTC practices described above deprive defendants, like those here, of basic due process protections. Critically, no court has ever considered *all* of these factors together. The AHA recognizes that the Supreme Court has considered certain of these features in cases like *FTC v. Cement Institute* and *Withrow v. Larkin*. But no court has ever fully grappled with the fact that the FTC (1) has standardless discretion to bring a case rather than the DOJ, (2) has standardless discretion to file in-house, where the agency has distinct procedural advantages, (3) can ignore an ALJ's findings of fact despite not having observed

[64] *In the Matter of the House of Lord's, Inc*. (FTC. Dkt. No. 8631) (Jan. 18. 1966) (Chair Elman, dissenting); *see* Philip Elman, *Administrative Reform of the Federal Trade Commission*, 59 Geo. L.J. 777, 810 (1971) (admitting that if the Commission dismissed a complaint, it could be viewed as "an admission of costly error—costly both in time and taxpayer money"); Melamed Comment 16 ("As I understand it, the implication of Chairman Elman's analysis is this: The Sherman Act cases are usually selected by the Commission to establish a legal principle or further an enforcement policy objective. The Commissioners quite appropriately have a stake in their policy objectives. Because of that however, and despite their best intentions, they cannot avoid having that policy objective influence their resolution of what are often difficult, close and subtle questions involving the facts and law of a particular case. The Commissioners, in other words, unavoidably lack sufficient independence to live up to the standards that we normally require for fact-finding by adjudicative tribunals.").

witnesses and not applying the Federal Rules of Evidence, and (4) will ultimately decide its case after having chosen to initiate it in the first place, including when it decided to pursue a case to achieve agency-wide policy objectives. Considered together, these "special facts and circumstances" establish that "the risk of unfairness is intolerably high."[65] What's more, those more-than-half-century-old cases do not account for more recent Supreme Court decisions, like *Williams v Pennsylvania*, that have undertaken a far more critical analysis where an adjudicator evaluates her own prosecutorial decision—including by emphasizing the *appearance* of bias.[66]

But most important, neither *Cement Institute* nor *Withrow* accounts for *Withrow*'s admonition that courts "should be alert to the possibilities of bias that may lurk in the way particular procedures *actually work in practice*."[67] And here, a decades-long track record makes clear that the FTC's internal enforcement proceedings carry an intolerable appearance of bias, if not a proven probability of actual bias. "One would expect roughly a 50-50 split of litigated cases because, as

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[65] *Withrow*, 421 U.S. at 58.

[66] In addition, this Court has interpreted *Cement Institute* as resting on "necessity," *i.e.*, that no other entity could have acted on the complaint. *Pillsbury Co. v. FTC*, 354 F.2d 952, 965 (5th Cir. 1966). There would be no such issue if the FTC were required to only bring cases in federal court or implement other potential procedural protections that would create a greater probability (or appearance) of fairness.

[67] 421 U.S. at 54 (emphasis added).

a general matter, parties litigate only close cases and settle cases where it is clear which party has the better case. A [perfect] record is far afield from any reasonable expectation of the outcomes of litigation."[68] But the Commission has, in fact, found liability *in every case* brought before it since 1995.[69] "[I]n 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."[70] Needless to say, this case ran up the FTC's perfect score.

Crucially, the FTC's unblemished win-loss record cannot be "explained by flawless case selection" or any other factor.[71] For example, the Commission has "far

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[68] Melamed Comment 14-15.

[69] A longer historical view further supports the data from the past quarter-century. One 2013 study found that the Commission dismissed only 20 percent of its in-house antitrust cases on the merits in the 1950s, 15 percent in 1960s, 13 percent in the 1970s, 40 percent in the 1980s, 24 percent in the 1990s, and 0 percent in the 2000s. *See* Nicole Durkin, Comment, *Rates of Dismissal in FTC Competition Cases from 1950–2011 and Implications for Fairness*, 81 Geo. Wash. L. Rev. 1684, 1699 (2013). This study concluded, moreover, that the dismissal rate of the 1980s was a historical "outlier" and "thus cannot be relied upon in concluding that FTC adjudication is free from bias." *Id*.

[70] Joshua D. Wright, Commissioner, Fed. Trade Comm'n, *Section 5 Revisited: Time for the FTC to Define the Scope of Its Unfair Methods of Competition Authority* 6 (Feb. 26, 2015), https://www.ftc.gov/system/files/documents/public_statments/626811/150226bh_section_5_symposium.pdf.

[71] Melamed Comment 15.

less success when litigating cases initiated in federal court, so they are demonstrably not flawless in selecting sound cases."[72] Also, "the Commission has lost a fair number of [its] cases on appeal to the Courts of Appeal, even though the courts have only limited opportunity to review fact-finding by the Commission and are generally focused on the Commission's conclusions of law."[73] Thus, the only plausible explanation for the Commission's immaculate record is the obvious one: the FTC's practices and procedures are so arbitrary and biased that defendants cannot get a fair shake. At the very least, it creates the appearance that the FTC will not treat defendants fairly. This case only magnifies to that perception.

The FTC has had more than a half-century to demonstrate that it is a fair, neutral, and unbiased tribunal "in the way [its] particular procedures actually work in practice."[74] It has failed, as the facts of this case epitomize. Here, and in cases involving hospitals and health systems, the FTC has certainly vindicated the concerns that led the Framers to establish a constitutional right to due process. But

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[72] *Id.*; *see* Reforming Part III at 11 ("By comparison, the Commission loses challenges in federal district court with some frequency.").

[73] *Id.*; *see* David A. Balto, *The FTC at a Crossroads: Can It Be Both Prosecutor and Judge?*, 28 Wash. Legal Found. Legal Backgrounder 1, 3 (Aug. 23, 2013) ("[T]he Commission is reversed by federal courts of appeals at a far higher rate (over 20%) than district court antitrust decisions (under 5%).… [T]he FTC's almost two decade history of *always* ruling in its own favor creates a strong impression of unfairness.").

[74] *Withrow*, 421 U.S. at 54.

it has not vindicated due process itself. It is long past time for this Court to conclude that the FTC's procedures and actual practices are irredeemably unconstitutional.

CONCLUSION

The FTC's role of promoting a healthy economy by preventing anti-competitive mergers is an important one. But to ensure that its enforcement does not chill important pro-competitive activity, the FTC must play that role consistent with the Due Process Clause. Under current FTC practices and procedures, hospital mergers have been blocked, and others have been deterred, even though they would improve patient wellbeing and care for the community. The Commission's decision should be reversed.

Respectfully submitted,

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Dated: June 12, 2023
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CERTIFICATE OF SERVICE

This is to certify that the foregoing instrument has been served via the Court's ECF filing system in compliance with Rule 25(b) and (c) of the Federal Rules of Appellate Procedure, on June 12, 2023, on all registered counsel of record, and has been transmitted to the Clerk of the Court. I further certify that the participants in the case are CM/ECF users and that service will be accomplished by using the appellate CM/ECF system.

/s/ Chad Golder
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4. All parties have consented to the filing of this brief.

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