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.

Petition for Review of
An Order of the Federal Trade Commission

BRIEF OF *AMICI CURIAE* ANTITRUST, PATENT, AND LAW-AND-ECONOMICS SCHOLARS AND JURISTS IN SUPPORT OF PETITIONERS

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June 12, 2023

SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case in addition to those listed by the petitioners. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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INTEREST OF *AMICI CURIAE*

Amici curiae are 12 law professors, economists, and former government officials with expertise in antitrust, patent law, and law and economics.[1] As scholars and former public servants, they have an interest in promoting the coherence and development of legal doctrines consonant with sound economic principles and in ensuring that both consumers and the general public benefit from new inventions and technologies. They have no stake in any party nor in the outcome of this proceeding. *Amici* write to serve the Court and the public interest by elaborating the legal and economic principles that frame this dispute. The *amici* and their affiliations are listed in the Appendix.

The *amici* have a substantial interest in this appeal for two reasons. First, *amici* are concerned by the impact of the Federal Trade Commission's ("FTC" or "Commission") structure and processes on the sound administration of antitrust law. Second, *amici* are concerned about multiple errors of antitrust law that appear in the FTC's opinion in this case.

[1] No counsel for any party authored this brief in whole or in part and no entity or person, aside from *amici curiae* or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case epitomizes numerous problems with the FTC and its current approach to antitrust law. The FTC's structure and procedures deviate from sound government. In particular, the FTC serves as investigator, prosecutor, and adjudicator, in violation of fundamental norms of due process. It is axiomatic that "no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome." *In re Murchison*, 349 U.S. 133, 136 (1955). Yet here the FTC approved the prosecution of the merger challenge and then overruled the judge who decided that it failed under currently applicable law. These structural and procedural deformities also enabled the FTC to change the rules of the game to its advantage in the middle of this merger challenge: the merging parties agreed upon their transaction when the agency adhered to one set of principles for assessing vertical mergers, only to discover that these principles were abandoned by their prosecutor in the middle of a challenge to their merger. These structures and procedures regrettably empowered the FTC to litigate and adjudicate this merger challenge under its preferred, yet untested, policy approach to vertical mergers, as opposed to well-established principles and precedent.

The result of these problematic structures and procedures are found in numerous substantive antitrust errors in the Commission's final decision. First, the Commission posited a "research and development" "market" that confounds basic principles of antitrust law. That supposed "market" has not yet produced any product, which necessarily renders any indication of anticompetitive harm speculative. Second, the Commission relegated the parties' binding contractual commitment to an afterthought, instead of treating it as the dominant market reality that it is. Not only does that reflect a deep misunderstanding of antitrust law, it discourages merging parties from trying to mitigate in advance of litigation any potential harms from a merger. Finally, the Commission appeared to disregard longstanding and basic principles of intellectual property and antitrust law, including the blackletter law doctrine set by the Supreme Court that a patent does not confer monopoly power, and that a patent can be part of a commercial plan that allows any given merger to produce legally cognizable efficiencies.

ARGUMENT

I. The FTC's Structure and Procedures Deviate from Sound Government, as Evidenced by This Case.

The FTC's structures and procedures as implemented in this case deviate from sound government practices. First, with respect to structure, the FTC now operates by principles very different from those in the U.S. Department of Justice in processing merger reviews and challenges. The FTC combines investigative, prosecutorial, and adjudicative powers for a single case in the same body. This combination raises fundamental due process concerns. Second, in this case the FTC changed the governing standards mid-stream. It would not be acceptable for an

Article III court to change its substantive rules in the middle of a case. Finally, in this case, the FTC simply rejected established precedent to further its new untested policy approach. The sounder view of government is to require law enforcement to convince independent adjudicators of new approaches.[2]

A. The FTC Combined Investigative, Prosecutorial, and Adjudicative Powers to Significant Effect in This Case.

Due process requires "a fair trial in a fair tribunal." *In re Murchison*, 349 U.S. at 136. A fair trial in a fair tribunal requires a lack of prejudgment by the adjudicator of the outcome and a lack of interest in the outcome. Those requirements are often encapsulated by the pithy maxims that "no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome." *Id.*

[2] The unusual procedures of the FTC were experienced by *amici* in this case. After filing an amici curiae brief before the ALJ, FTC staff, in opposing the brief's filing, requested that amici make disclosures above and beyond those required in federal courts, including, but not limited to, "all non-pecuniary ties" between the professors and their universities and respondents. Apparently, the FTC's staff concluded that it is improper for anyone at one of amici's universities to have undisclosed social "ties" with anyone at a charged company. *See* Complaint Counsel's Opposition to Non-Party Antitrust, Patent, and Law-and-Economics Scholars and Jurists Motion for Leave to File Brief as Amici Curiae Supporting Respondents, *In the Matter of Illumina, Inc. and Grail, Inc.*, No. 9401, at 6 (Oct. 29, 2021). At least, they make this demand only when amici oppose the staff. Notably, FTC staff did not make a similar request with respect to the nonprofit organization and amici that filed briefs in support of the staff's view. After receiving this opposition, the ALJ initially rejected *amici*'s brief, Order Denying Motion for Leave to File Amicus Curiae Brief, *In the Matter of Illumina, Inc. and Grail, Inc.*, No. 9401 (Nov. 5, 2021), although it was later accepted, Order Granting Leave to File Brief Amici Curiae, *In the Matter of Illumina, Inc. and Grail, Inc.*, No. 9401 (Nov. 29, 2022).

The combination of investigatory, prosecutorial, and adjudicatory powers in a single body threatens this basic principle of due process. In *In re Murchison*, for example, the Supreme Court held that the judge who sat as the investigative and prosecutorial grand jury could not also sit as the judge in the merits hearing. As the Court explained, the grand jury is "part of the accusatory process" and "[h]aving been a part of that process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused." *Id.* at 137.

In *Williams v. Pennsylvania*, similarly, the Supreme Court held that an attorney who served as a prosecutor on a matter and made a key prosecutorial decision could not then serve as a judge in the matter. 579 U.S. 1 (2016). The Court explained that "an unconstitutional potential for bias exists when the same person serves as both accuser and adjudicator in a case." *Id.* at 8. For the prosecutor turned judge, there is the "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.'" *Id.* at 9-10 (quoting *Withrow v. Larkin*, 421 U.S. 35, 57 (1975)).

In this case, the FTC's combination of investigative, prosecutorial, and adjudicative functions is on full display. The Commission approved the complaint, directed its staff to prosecute the case before the ALJ that it hired, and then overruled the ALJ after his exhaustive opinion against the Commission's position. There is no doubt that the FTC is, as Justice Gorsuch put it, serving as "investigator, prosecutor, and judge." *Axon Enter., Inc. v. FTC*, 143 S. Ct. 890, 917 (2023) (Gorsuch, J., concurring).

It is of course true that the combination of functions does not always raise due process concerns. *See Withrow*, 421 U.S. at 51-52. But if a decisions has a legal consequence for private parties and is not subject to plenary judicial review, the combination of functions is likely to violate due process. If there is any doubt about the threat to due process created by this combination of functions in a single agency here, the FTC's win rate dispels it. The estimate is that the FTC has prevailed in its in-house proceedings "only" ninety percent of the time. *Axon*, 143 S. Ct. at 917-19 (Gorsuch, J., concurring) (comparing representations about FTC win rate).

B. The FTC Changed the Rules in this Matter Mid-Stream.

"[C]ore due process concepts" include "notice, foreseeability, and, in particular, the right to fair warning." *Rogers v. Tennessee*, 532 U.S. 451, 459 (2001). These concepts prevent, for example, courts from changing their interpretation of a statute and applying the new version to conduct that already occurred. *Id.*; *see also Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964).

The concerns animating this doctrine against retroactive decisionmaking are present in this matter. Illumina, Inc. ("Illumina") and GRAIL, Inc. ("GRAIL") agreed to their transaction in September, 2020. *See* Complaint, *In the Matter of*

Illumina, Inc. and GRAIL, Inc., No. 9401, ¶23 (Mar. 30, 2021). At that time, the FTC applied the 2020 Vertical Merger Guidelines. U.S. DEP'T OF JUSTICE AND FED. TRADE COMM'N, VERTICAL MERGER GUIDELINES 12 (June 30, 2020).

The parties could, and did, assess their transaction against those guidelines. Those guidelines recognized the benefits of vertical mergers and set forth a framework by which the agency would assess such mergers. The Commission challenged the transaction when those guidelines were still in place. Indeed, as one commissioner noted, the staff applied those guidelines in recommending a challenge to the merger. *See* Dissenting Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson Regarding the Commission's Rescission of the 2020 FTC/DOJ Vertical Merger Guidelines and the Commentary on Vertical Merger Enforcement, at n.8 (Sept. 15, 2021).

Subsequently, in the middle of a challenge to this transaction, the FTC withdrew those Guidelines in a split 3-2 decision. *See* Statement of Chair Lina M. Khan, Commissioner Rohit Chopra, and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Vertical Merger Guidelines, Commission File No. P810034 (Sept. 15, 2021). That withdrawal favored a ruling against the transaction. In Article III courts, the withdrawal of the governing substantive standard would not pass muster during the pendency of a proceeding. Here, Illumina and GRAIL were forced to continue defending their merger in an ongoing enforcement action against them as if nothing happened.

C. The FTC Diverged from District Court Practice in Relying on a Long-Abandoned Approach Disfavoring Vertical Mergers That It Prefers as a Matter of Policy.

The withdrawal of the Vertical Merger Guidelines mid-stream in this matter goes hand-in-hand with another troubling development: the FTC's decision to resuscitate a long-abandoned approach to vertical mergers that it favors as a policy matter even though it has been decisively rejected by courts. Federal courts would not (indeed, have not) followed this approach, further confirming that the FTC's structure and procedures call into question the fundamental fairness of its actions.

To understand the FTC's radical divergence from federal court practice, it is first important to recognize that vertical mergers differ from horizontal mergers. The key difference between vertical and horizontal mergers is that the latter eliminate competition among substitute firms, whereas vertical mergers bring complementary firms together, thereby reducing the coordination problems at different stages of production in bringing new products to market. *See* ABA Section of Antitrust Law, Mergers and Acquisitions 439 (3d ed. 2008).

Horizontal mergers, that is, mergers of competitors, pose an inherent risk of reducing competition. Higher market concentrations, as measured by the Herfindahl-Hirschman Index, have the potential to weaken competition through higher prices or lower quality for consumers. *See* Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶ 901a (5th ed. 2020). Antitrust law, therefore, justifiably scrutinizes most horizontal mergers to see if their efficiency gains outweigh their restrictive effects.

By contrast, vertical mergers, that is, mergers among firms at different levels in a supply chain, do not carry these inherent risks: "In contrast to horizontal mergers, which have certain inherent anticompetitive consequences, vertical mergers generally have no inherent anticompetitive characteristics." 4 Earl W. Kintner *et al.*, Federal Antitrust Law § 35.3 (2020); *see also* Oliver E. Williamson, *Economics as an Antitrust Defense: The Welfare Tradeoffs*, 58 *Am. Econ. Rev.* 18 (1968) (advancing the standard model to weigh the efficiency gains versus against the restrictive effects of these mergers).

That is the current state of play. But long ago, scholars worried that vertical mergers would harm competition by raising barriers to entry. If a manufacturer were allowed to buy one of its retailers, for example, then competing manufacturers would lose access to that retailer, leading to the (dubious) inference that this change in supply practices must harm competition. *See* Ralitza A. Grigorova-Minchev & Thomas W. Hazlett, *Policy-Induced Competition: The Case of Cable TV Set-Top Boxes*, 12 MINN. J. L. SCI. & TECH. 279, 284 (2011) (first describing and then refuting this historical concern). Commentators and legal authorities also used to express concerns that a manufacturer with a monopoly on a particular good might stop selling that good to competitive retailers.

Antitrust scholarship, however, has long since exposed these historical concerns as fundamentally misconceived. Judge Richard Posner long ago explained why these concerns, which animate the Commission's theory in this case, are unsound:

> Suppose, for example, that kryptonite is an indispensable input in the manufacture of widgets. A owns all the kryptonite in the universe and also manufactures widgets. He could, of course, refuse to sell kryptonite to B, a prospective entrant into widget production. The cost to A of this refusal is the price B would have been willing to pay. Stated differently, by his control of kryptonite A can extract any monopoly rents available in the widget industry without denying a place in widget manufacture to others [sic] firms. If there is a proper antitrust objection, it is to the kryptonite monopoly rather than to vertical integration.

Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 936-37 (1979). In other words, some monopoly rent is assured whether or not the monopolist licenses its product to others. Hence, if licensing to others is more efficient, then firms will engage in that practice without any antitrust compulsion. Thus the FTC's asserted fear of inevitable market foreclosure following a merger is baseless given that the only way the firm can foreclose downstream competitors is to undermine its own business success.

Today, Judge Posner's conclusion—that a company cannot double its monopoly profits just by vertically merging with another firm—is widely accepted in both economic theory and antitrust law. The leading antitrust treatise notes that,

> [a]s a general proposition, the profit-maximizing price is determined by the willingness to pay of end-use consumers, and a firm monopolizing a single stage of the production process can obtain all the monopoly profits that are available for that product. Adding another stage cannot simply "leverage" additional profits or lead to higher prices.

Areeda & Hovenkamp, *supra*, ¶ 1003a (footnote omitted).

Indeed, modern commentators recognize that vertical mergers usually benefit consumers by achieving efficiencies. Areeda and Hovenkamp take the view "that most vertical mergers are procompetitive," since "most instances of vertical integration, even by a monopolist, are competitive." *Id.* at subchapter 10A-1 Introduction. Efficiencies outweigh any potential restrictive effects because vertical mergers are generally motivated by legitimate business considerations—such as reducing costs—that increase, rather than stifle, competition. *See* 4 Kintner *et al.*, *supra*, § 35.6 ("The same factors that make a vertical merger advantageous from a business viewpoint also may make the merger procompetitive."); ABA Section of Antitrust Law, *supra*, at 440 (noting economists' view that, because vertical mergers involve complements rather than substitutes, such mergers are "more likely to be motivated by a desire to reduce, rather than increase, the prices of the parties' products").

These efficiencies include the reduction of various transaction costs, such as various breakdown and hold-up problems that can plague distribution chains when separate firms engage in sequential activities, each of which is necessary to produce the finished product. Vertical mergers can also facilitate intra-firm coordination that improves products or service. *See* 2 Julian von Kalinowski *et al.*, Antitrust Laws and Trade Regulation §§ 30.03-.04 (2d ed. 2021). An acquired firm may also be made a stronger competitor through infusions of capital, new management, or reduced overhead costs, all of which can lead to more competitive pricing or expanded production. *See* 4 Kintner *et al.*, *supra*, § 35.6. The downstream firm can also reduce uncertainty in the demand for the upstream supplier's products, which can further reduce costs and consumer prices. *See* 2 Kalinowski *et al.*, *supra*, § 30.03.

In this case, the debate between the majority and the concurrence in the Commission's final decision demonstrates that the FTC revived the debunked historical approach to vertical mergers.[3] Their debate focused on the now-abrogated 2020 Vertical Merger Guidelines, which generally recognized the foregoing developments in law and economics. Specifically, the Guidelines assessed vertical mergers through ability and incentive analysis, not through the discredited approach of early twentieth-century antitrust law that was informed by mistaken economic

[3] The concurrence, although more correct in its approach, errs in its discussion of foreclosure and the open offer for the reasons stated below.

assumptions. Under ability and incentive analysis, the key question is whether a transaction would increase the ability or incentive of the combined firm to foreclose rivals from inputs, or perhaps distribution outlets.

This modern approach contrasts with what the Commission calls a "*Brown Shoe* approach" that focuses on more simplistic measures, such as market share. But, as discussed above, courts, commentators, and government regulators have relegated the so-called "*Brown Shoe* approach" to the dustbin. As Commissioner Wilson summarized, "all recent litigated vertical merger cases employ only the ability and incentive analysis" and the last opinion to employ a "*Brown Shoe* approach" was in 1979. Concurrence of Commissioner Christine S. Wilson, *In the Matter of Illumina, Inc. and GRAIL, Inc.*, No. 9401, at 2 (Apr. 3, 2023) (hereinafter Conc.). That is because the "*Brown Shoe* approach" has been repudiated by "the economic writing since the 1980s" as overly simplistic. Herbert J. Hovenkamp, Competitive Harm from Vertical Mergers 5, U. of Penn. Inst. For Law & Econ. Research Paper No. 20-51 (2020). For vertical mergers, as the Department of Justice stated in *AT&T*, "there is no short-cut way to establish anticompetitive effects, as there is with horizontal mergers." *United States v. AT&T Inc.*, 310 F. Supp. 3d 161, 192 (D.D.C. 2018), *aff'd* 916 F.3d 1029 (D.C. Cir. 2019).

In light of these developments in law and scholarship, federal courts would be remiss to apply the type of legally anachronistic and economically discredited analysis employed by the Commission in this case. This radical divergence from existing antitrust doctrine on vertical mergers is symptomatic of the fundamental unfairness that results from an agency's departure from the separation of powers principles and due process requirements as evidenced by the FTC's structures and procedures.

II. The Commission Misapplied the Antitrust Laws.

The preceding section explained how the Commission's structure and processes give rise to significant due process concerns and enabled the Commission to enforce its dubious policy approach instead of the law. This section explains that the fruit of these flawed structures and processes consists of a series of significant, specific legal errors of antitrust law.

A. The Commission Erred in Its Discussion of a So-called R&D Market.

The FTC discussed at length supposed competition in a "market" for research and development of MCED tests. *See* Opinion of the Commission, *In the Matter of Illumina, Inc. and GRAIL, Inc.*, No. 9401, at 30-34 (Apr. 3, 2023) (hereinafter FTC Op.). This analysis is not consistent with antitrust law.

Antitrust law defines markets through the "practical indicia" test of *Brown Shoe* or the hypothetical monopolist test typical of horizontal merger analysis. *See*

Op. Br. 34 (collecting citations).[4] In either case, courts focus on an existing product or service that is sold or purchased by buyers or sellers.

The problem for the FTC's focus on research and development, in light of this precedent, is twofold. First, research and development is by definition focused on the development of future products or services. It is entirely speculative for the FTC to rely on supposed competition in a market that has not yet produced and may never produce an actual product or service.

Second, the buyers and sellers of research and development that would be harmed from an antitrust law violation are at best unclear. To a significant extent, the buyers and sellers of research and development are the investment firms that fund biomedical research. But the FTC has provided no analysis of harm to those firms. Nor has there been any analysis that the merging firms' rivals are unable to secure funding for research and development. Rather, the supposed harms related to the so-called research and development market purportedly occur in a different product market whose products have not yet been developed.

B. The Commission Erred in Its Treatment of the "Open Offer."

1. Illumina's contractual commitments in its Open Offer program defeat the FTC's claim of market foreclosure.

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[4] This part of *Brown Shoe*, unlike its market share approach to vertical mergers, has withstood economic scrutiny.

Illumina's Open Offer program is an extensive, binding, and largely airtight set of contractual constraints on Illumina's power to exclude rivals. It grants customers the right "to purchase Illumina's products on terms and conditions 'substantially similar'" to what they enjoyed prior to acquisition, and it offers similar terms to the ones afforded "similarly situated customers," *Initial Decision, In the Matter of Illumina, Inc. and GRAIL, Inc.*, No. 9401, at 98 ¶ 850 (Sept. 9, 2022) (hereinafter Initial Decision), thus preventing Illumina from discriminating in favor of GRAIL or any other for-profit rival. It prevents Illumina from sharing with GRAIL any customer's confidential or proprietary information or data. The guarantees apply to service and product supply arrangements. *See* Initial Decision at 98-100 ¶¶ 850-863, 104-05 ¶¶ 890-95, 107-08 ¶¶ 905-14.

In vertical mergers, contracts such as these can effectively vitiate any incentive to behave anticompetitively, particularly where the incentive was tenuous to begin with. The Commission should not have presumed that a contractually bound party to a vertical merger will shirk its obligations. Moreover, the terms are readily enforceable; even as to matters like service quality, there are performance metrics (such as product downtime) that can be tracked readily and enforced to ensure contract compliance. *See* Initial Decision at 104 ¶ 893. At a minimum, when considering a party's incentive to foreclose, the Commission should have recognized the likely costs to the party of breaching its contractual obligations. Judge Chappell found those costs to Illumina to be high. *See id.* at 182-85.

When companies know that foreclosure is a losing option, they lose nothing—but gain much—by guaranteeing that their trading partners will not be subject to holdout problems down the road. These guarantees can be enforced through a number of mechanisms, including the baseball-style arbitration provided in Illumina's Open Offer, that avoid the potential harms to consumers of enjoining the merger altogether. Indeed, if any residual doubts remains, the FTC could hold that it regards any breach of these agreements as an antitrust violation for essentially introducing a form of foreclosure (which as noted above) cannot occur.

The FTC speculates that GRAIL would get these unfair advantages: advance notice of changes in the next generation of products; technological improvements to the platform tailored to GRAIL's interests; and enforcement mechanisms that would allow Illumina to adhere to its commitments in name but not in substance with respect to those other than GRAIL. *See* FTC Op. at 70-73. Even if credited, these allegations fall short of proving that "the substantial lessening of competition will be 'sufficiently probable and imminent' to warrant relief." *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 115 (D.D.C. 2004) (quoting *United States v. Marine Bancorporation*, 418 U.S. 602, 623 n.22 (1974)).

2. The FTC argued that the Open Offer should be treated as a remedy rather than a factor in assessing the prima facie case. *See* FTC Op. at 61-65. The Open Offer is better considered a market fact that affects whether the acquisition is substantially likely to affect competition. The burden on the FTC should be to prove not only Illumina's incentive to foreclose downstream competition at the expense of upstream revenues, but also Illumina's incentive and ability to foreclose in light of its binding and readily enforceable contractual commitments.

Courts appropriately treat contractual commitments as factors that must be considered by the government in proving substantial foreclosure. For example, in *AT&T*, the D.C. Circuit treated AT&T's similar offers as going directly to the government's prima facie case, asking whether, in light of current offers, the government had established that the merger was likely to substantially harm competition. 916 F.3d at 1038; *see also id.* at 1031 (faulting the government for not taking into account a merging company's "irrevocable offers of no-blackout arbitration agreements"); *cf. United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 503-04 (1974) (noting that a merging company's long-term contracts, among other factors, effectively rebutted the government's prima facie case); *United States v. UnitedHealth Grp. Inc.*, No. 1:22-CV-0481 (CJN), 2022 WL 4365867 (D.D.C. Sept. 21, 2022).

Nor does it make sense to analyze the Open Offer only as a potential remedy and to ignore its *a priori* effect on Illumina's abilities and incentives to foreclose downstream competitors. Unlike *United States v. Aetna, Inc.*, 240 F. Supp. 3d 1 (D.D.C. 2017), which the FTC invokes for this proposition, *see* FTC Op. at 61-62, the Open Offer already binds Illumina; it is not a proposed remedy, but a constraint already in place. The Commission should not have hypothesized an unlikely competitive harm, only to conclude wrongly that there is no extant constraint that effectively counteracts it.

Treating the Open Offer (and similar voluntary ex ante constraints) as purely remedial would also discourage companies from the salutary practice of building these constraints into their acquisitions. Ideally, companies looking to merge would be encouraged to structure such mergers in a way that effectively removes anticompetitive incentives by the time the merger is consummated. This effectively prevents or reduces the substantial transaction costs associated with enforcement—for the merging parties as well as consumers affected by delay or uncertainty. It also allows market participants, rather than courts or regulators, to structure efficient arrangements well-suited to their industries. If the agreements do not sufficiently counteract the merged company's ability and incentive to foreclose competition, then the merger can still be enjoined. But allowing parties to comply with the Clayton Act by consensual contract reduces the need for ex post enforcement.

Reducing necessary enforcement in turn removes a potential chill on beneficial and ultimately procompetitive mergers that would otherwise be put off by the unneeded risk that the government will demand court approval of some ill-defined post hoc remedy.

Thus, once Illumina has bound itself to avoid foreclosure, its ability to foreclose competition in the downstream market is largely taken off the table, so that the evident efficiencies of sharing information between Illumina and GRAIL are no longer offset by any restrictive practices. And why does Illumina do this? Because it has already gone through the same basic analysis to conclude that foreclosure of downstream rivals is a losing business strategy. Hence, once this fundamental, truth is accepted, it makes the approval of the Illumina-GRAIL relationship all the easier. Originally, the two companies were wholly subject to common ownership, under which preferential forms of self-dealing were always allowed. But Illumina then spun off 88 percent GRAIL for business reasons, which it might not have done if the possibility of its later reacquisition was uncertain. The Open Offer precludes the risk of anticompetitive effects from the reacquisition of GRAIL. The Commission has no legitimate reason to block a merger when its actions are likely to forestall the entry of new and innovative remedies for deadly cancers into the market place.

C. The Commission Erred in Its Discussion of Pro-Competitive Phenomena Such as Patents and Efficiencies.

The FTC also disregarded clear antitrust precedent in two additional ways. First, the FTC appears to presume that the patents on new technologies create market power, which underlies its assertion that Illumina is a monopolist that will exercise illegal power to constrain competition, reduce output, and raise prices. *See* FTC Op. at 7 ("Illumina's advanced performance characteristics are protected by its intellectual property"), 39 n.22 ("There are also intellectual property barriers to entry. For example, Illumina maintains patents over innovations that 'touch[] every aspect . . . ."), 42 (discussing that rivals "suffer from intellectual property or other entry barriers"), 73 (discussing entry). Yet the FTC does not recognize this line of reasoning has rightly been discarded by the Supreme Court. *See, e.g.*, *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28, 44-45 (2006) (abrogating the "patent equals market power" presumption in favor of rule-of-reason analysis).

Second, and as Commissioner Wilson pointed out, the FTC opinion issues "sweeping" criticisms of the role of efficiencies in justifying mergers. FTC Op. at 74-86; Conc. at 5. That approach is embraced by the FTC notwithstanding the agencies' longtime assessment of efficiencies and judicial acceptance of efficiencies. *See, e.g.*, U.S. DEP'T OF JUSTICE AND FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 10 & n.14 (Aug. 19, 2010); *AT&T*, 310 F. Supp. 3d at 194, 215.

CONCLUSION

For the reasons above, this Court should grant the petitioners' requested relief.

Dated: June 12, 2023

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the length limitations of Federal Rule of Appellate Procedure 29(a)(5) because this brief, excluding the portions excepted by the rules, contains 4,995 words, according to the word-count feature of the software used to generate this brief.

I certify that this brief complies with the typeface and type style requirements of Federal Rule of Appellate Procedure 32(a)(5)–(6).

/s/ Stephen B. Kinnaird
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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of June 2023, I electronically filed the foregoing brief with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit by using the Court's CM/ECF system. I certify that all participants in the case are registered CM/ECF users, and that service will be accomplished by the appellate CM/ECF system.

/s/ Stephen B. Kinnaird
Stephen B. Kinnaird