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 from an Order of
the Federal Trade Commission
Agency No. 9401

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITIONERS & REVERSAL

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CERTIFICATE OF INTERESTED PERSONS

Per Fifth Circuit Rule 28.2.1, the Chamber of Commerce of the United States of America certifies that—in addition to the persons listed on the certificate of interested persons submitted by Petitioners Illumina, Inc. and Grail, Inc.—the following listed persons have an interest in the outcome of this case. These representations are made in order for the judges of this Court to evaluate possible disqualification or recusal.

1. The Chamber of Commerce of the United States, *Amicus Curiae*
2. Tyler S. Badgley, Counsel for *Amicus Curiae*
3. Jordan L. Von Bokern, Counsel for *Amicus Curiae*
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Dated: June 12, 2023 *<u>/s/ Jeffrey M. Harris</u>*

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INTEREST OF AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Chamber has a significant interest in preventing the government from adopting a novel and overly aggressive approach to vertical mergers, which—if embraced by this Court—would greatly undermine countless transactions that benefit consumers. The Chamber is very familiar with the issues in this case. For years, the Chamber has tried to call attention to the Federal Trade Commission's legally dubious approach to the Illumina-Grail merger. *See, e.g.*, Heather, *Inside the FTC's Ploy to Quash a BioTech Merger*, Chamber of Com. (Sept. 10, 2021), https://www.uschamber.com/international/inside-the-ftc-s-ploy-quash-biotech-merger. This includes efforts through Freedom of Information Act requests to uncover the FTC's early collusion with the

[1] In accordance with Federal Rule of Appellate Procedure 29(a)(4)(E), the Chamber certifies that this brief was authored by the Chamber's counsel and that no party or counsel for any party funded the preparation or submission of this brief. All parties have consented to the filing of this amicus brief.

European Commission to block the Illumina-Grail merger. *See Chamber of Com. of the U.S.A. v. FTC*, No. 1:22-cv-2070 (D.D.C.). The Chamber is also deeply concerned by the FTC's unconstitutionally structured proceedings and filed an amicus brief in *Axon Enterprise, Inc. v. FTC*, No. 21-86 (U.S.), to support the business community's ability to vindicate its rights. The Chamber thus has a significant interest in the proper resolution of this case.

SUMMARY OF THE ARGUMENT

This Court should closely scrutinize whether the FTC relied on real-world evidence of harm to competition to justify its decision to block the Illumina-Grail merger, a presumptively procompetitive vertical merger. The Clayton Act demands no less. Section 7 of the Act prohibits mergers "where in any line of commerce … the effect of such acquisition may be substantially to lessen competition." 15 U.S.C. § 18.

Congress *never* authorized the government or courts to block mergers based on a "'mere possibility"' of harm to competition *United States v. AT&T, Inc.*, 916 F.3d 1032, 1032 (D.C. Cir. 2019) (cleaned up). "'[A]ntitrust theory and speculation cannot trump facts,"' and real-world evidence of competitive harm is required. *United States v. AT&T, Inc.*, 310 F. Supp. 3d 161, 190 (D.D.C. 2018) (quoting *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 116 (D.D.C. 2004)). It is indisputable that the government "'has the ultimate burden of proving a Section 7 violation by a preponderance of the evidence."' *AT&T*, 310 F. Supp. 3d at 189. "[T]he Government's 'failure of proof in any respect will mean the transaction should not be enjoined.'" *Id.*

An agency's factual findings are ordinarily reviewed under the substantial evidence standard, and Petitioners ably explain why that standard is not met in this case. *See* Pet'rs-Br. 15. In addition, "[s]ubstantial evidence requires at least, in a word, *evidence*." *Schofield v. Saul*, 950 F.3d 315, 320 (5th Cir. 2020). Although courts generally consider the substantial evidence standard to be deferential, they do not simply rubberstamp the agency's findings. Instead, "the agency's decision must still be supported by 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Id.* (quoting *Consol. Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 229 (1938)). And as this Court recently emphasized, it is not sufficient for agencies to rely on "'clearly mistaken evidence, fake evidence, speculative evidence, and conclusory evidence'"—these are not "substantial evidence." *Id.* (quoting *Biestek v. Berryhill*, 139 S.Ct. 1148, 1160 (2019) (Gorsuch, J., dissenting)).

Consistent with this standard, the government cannot block a vertical merger (or even survive this Court's review under the substantial evidence standard) by relying on speculation or conjecture without real-world evidence. This Court must reverse to the extent the FTC failed to present real-world evidence—and instead used shortcuts, multifactor balancing, or mere possibilities—to block the Illumina-Grail merger.

This approach is consistent with: (1) the overwhelming consensus among courts, government officials, and scholars that vertical mergers are presumptively procompetitive and thus lawful; (2) the overwhelming caselaw rejecting the government's attempts

to use shortcuts and mere possibilities to block vertical mergers; and (3) the overwhelming consensus that vertical mergers should not be blocked in most cases.

ARGUMENT

I. Vertical mergers are presumptively procompetitive and beneficial to consumers, and thus lawful.

Petitioners ably explain that antitrust law distinguishes between vertical and horizontal mergers. Pet'rs-Br. 39-40. Indeed, courts and enforcement agencies—including the FTC until its recent, abrupt about-face—have long taken a skeptical approach toward arguments that vertical mergers harm competition based on an extensive body of research and scholarship showing that vertical mergers generally increase efficiency and benefit consumers. Vertical mergers "combine firms or assets at different stages of the same supply chain"—for instance, an upstream supplier and a downstream customer. FTC & DOJ, 2020 Vertical Merger Guidelines 2, https://perma.cc/7RC9-EADZ. Horizontal mergers, on the other hand, combine firms generally at the same stages of the supply chain that may directly compete against each other.

Courts initially adopted what many have described as a "draconian" approach toward vertical mergers. Bork, *The Antitrust Paradox: A Policy at War With Itself* 231 (Bork Publishing 2021) (discussing *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962)). "With *Brown Shoe*[,] the Supreme Court embarked on a substantial expansion of merger law, often on rationales that did more harm than good to competition," including "exaggerated theories of harm as well as the perverse idea that mergers should be condemned

because of efficiencies that served to harm rivals." Hovenkamp, *Competitive Harm from Vertical Mergers* 4 (2020), https://perma.cc/9LA2-YNP3; *but see Pulse Network, LLC v. Visa, Inc.*, 30 F.4th 480, 488 (5th Cir. 2022) ("'[T]he antitrust laws were enacted for the protection of *competition*, not *competitors*.'").

The Supreme Court reasoned in *Brown Shoe* that "[t]he primary vice of a vertical merger" was "foreclosing the competitors of either party from a segment of the market." 370 U.S. at 323-24. The theory goes that, for example, if a car manufacturer combines with a tire manufacturer, the tire manufacturer could disadvantage the car manufacturer's rivals by refusing to sell to them or raising the prices charged to them. *See Freuhauf Corp. v. FTC*, 603 F.2d 345, 349 (2d Cir. 1979). Or the car manufacturer could disadvantage the tire manufacturer's rivals by refusing to purchase tires from them. *See id. Brown Shoe*—based on a now-repudiated approach to economic realities—was considered an aggressive decision even at the time, as it "condemned a vertical merger that involved a potential foreclosure of less than 1 percent of a fragmented market." Bork, *The Antitrust Paradox*, at 232-32; *see also* Hovenkamp, *Vertical Mergers*, at 4.

Brown Shoe's "aggressive attitudes" toward vertical mergers have since been methodically critiqued and almost uniformly repudiated by courts and scholars alike. Hovenkamp, *Vertical Mergers*, at 5; *see also Alberta Gas Chems. Ltd. v. E.I. Du Pont De Nemours & Co.*, 826 F.2d 1235, 1244 (3d Cir. 1987) ("respected scholars question the anticompetitive effects of vertical mergers in general"); Bork, *The Antitrust Paradox*, at 232 (explaining why "[a]ntitrust's concern with vertical mergers is mistaken"); *see also id.*

at 245 ("[I]n the absence of a most unlikely proved predatory power and purpose, antitrust should never object to the verticality of any merger."); Chen & Hylton, *Procompetitive Theories of Vertical Control*, 50 Hastings L.J. 573, 576 (1999) (discussing "changed conventional judicial thinking" about vertical mergers).

At the outset, *Brown Shoe* rested on dubious economic theory. "Profit-maximizing firms, regardless of whether they are vertically integrated, will sell to unintegrated rivals if the price paid by those rivals exceeds marginal cost and will purchase inputs from unintegrated rivals if the cost is lower than that of alternatives, including self-supply." Blair et al., *Analyzing Vertical Mergers: Accounting for the Unilateral Effects Tradeoff and Thinking Holistically About Efficiencies*, 27 Geo. Mason L. Rev. 761, 788 (2020); Bork, *The Antitrust Paradox*, at 248 ("To the extent that the ingot monopolist integrates vertically for the purpose of blocking entry, he will incur diseconomies."). In other words, the car manufacturer is generally incentivized to purchase tires from the tire manufacturer's rivals if it is cheaper to do so. And the tire manufacturer is incentivized to sell to the car manufacturer's rivals if it is profitable to do so. And the economic theory underlying *Brown Shoe* failed to account for the creation of other procompetitive effects, such as the reduction of transaction and inventory costs, and knowledge transfers. *See* Blair, et al., *Analyzing Vertical Mergers*, at 768-78.

Consistent with those developments in economic theory, courts now acknowledge the procompetitive nature of vertical mergers. "[V]ertical integration and vertical contracts are *procompetitive*" because they "encourage product innovation, lower

costs for businesses, and create efficiencies—and thus reduce prices and lead to better goods and services for consumers." *Comcast Cable Comm'cns, LLC v. FCC*, 717 F.3d 982, 991 (D.C. Cir. 2013) (Kavanaugh, J, concurring) (citing Ginsburg, *Vertical Restraints: De Facto Legality Under the Rule of Reason*, 60 Antitrust L.J. 67, 76 (1991)). Vertical mergers are less likely than horizontal mergers to cause competitive harm because "[a] vertical merger, unlike a horizontal one, does not eliminate a competing buyer or seller from the market." *Fruehauf*, 603 F.2d at 351. Instead, vertical mergers involve mergers of companies in a supplier-customer relationship, and by definition, "involve 'firms that do not operate in the same market.'" *AT&T*, 310 F. Supp. 3d at 192 (quoting DOJ, 1984 Merger Guidelines 24, https://perma.cc/QUA9-MWZK). "A single firm incorporating separate but closely related production processes can often be far more efficient than various independent entities transacting to produce the same good or bundle of goods." *It's My Party, Inc. v. Live Nation, Inc.*, 811 F.3d 676, 689 (4th Cir. 2016). Given this increase in efficiency, "it is no surprise that vertical integration has generally been permitted[.]" *Id.* at 689.

The enforcement agencies, too, have consistently taken the view that "non-horizontal mergers" are "less likely than horizontal mergers to create competitive problems." DOJ, 1984 Merger Guidelines 24. Indeed, the FTC's own staff have observed that "the overwhelming majority of vertical mergers increase efficiency." Roundtable on Vertical Mergers, *Note by the Delegation of the United States to the OECD* 7, ¶26 (Feb. 15, 2007), https://perma.cc/2DAM-D43P. The FTC even embraced the "broad consensus

in competition policy and economic theory that the majority of vertical mergers … reduce costs and increase the intensity of Interbrand competition." Hoffman, *Vertical Merger Enforcement at the FTC* 4 (Jan. 10, 2018), https://perma.cc/ET32-SFVK. In 2020, the FTC and the DOJ jointly issued the Vertical Merger Guidelines, in which they acknowledged that "vertical mergers often benefit consumers through elimination of double marginalization, which tends to lessen the risks of competitive harm." FTC & DOJ, 2020 Vertical Merger Guidelines 2, https://perma.cc/7RC9-EADZ.[2]

II. The government must present real-world evidence of harm and cannot use shortcuts or mere possibilities to establish the *prima facie* case in vertical merger cases.

Due in no small part to the exhaustive research and scholarship showing that vertical mergers are typically procompetitive, the government rightly bears a heavy burden in any case challenging such a merger.

Section 7 of the Clayton Act prohibits mergers "where in any line of commerce or in any activity affecting commerce …, the effect of such acquisition may be substantially to lessen competition." 15 U.S.C. § 18. Section 7 "applies a more stringent test than does the rule-of-reason analysis under … the Sherman Act" and thus sweeps more broadly to cover "'incipient monopolies and trade restraints outside the scope of the

[2] In 2021, with the addition of newly appointed Commissioners, the FTC (by a 3-2 vote) pulled the rug out from under from businesses by withdrawing the 2020 Vertical Merger Guidelines without any sound explanations. Because the 2020 Vertical Merger Guidelines still remain in place for the DOJ, *see* DOJ, *Justice Department Issues Statement on Vertical Mergers Guidelines* (Sept. 15, 2021), the FTC's unilateral withdrawal has created a schism—and great confusion—in antitrust law.

Sherman Act.'" *AT&T*, 916 F.3d at 1032. But despite the broad language, "the word 'may' [in § 7 of the Clayton Act] should not be taken literally, for if it were, every acquisition would be unlawful." *FTC v. Elders Grain, Inc.*, 868 F.2d 901, 906 (7th Cir. 1989). And courts have recognized that § 7 of the Clayton Act does not authorize courts and enforcement agencies to block a merger based solely on theories and speculation. *See, e.g.*, *United States v. UnitedHealth Grp. Inc.*, 2022 WL 4365867, at *6 (D.D.C. Sept. 21). Courts further recognize that "[o]nly examination of the particular market—its structure, history[,] and probable future—can provide the appropriate setting for judging the probable anticompetitive effect of the merger." *AT&T*, 310 F. Supp. 3d at 190. Thus, a § 7 violation can be found only if there is "real-world evidence that the specific merger under review is likely to substantially lessen competition." *UnitedHealth*, 2022 WL 436587, at *6.

It is undisputed that the government bears the "ultimate burden of proving a Section 7 violation." *AT&T*, 310 F. Supp. 3d at 189. This Court has used a "burden-shifting framework for deciding Clayton Act section 7 actions." *Chi. Bridge & Iron Co. N.V. v. FTC*, 534 F.3d 410, 423 (5th Cir. 2008); *see also United States v. Baker Hughes, Inc.*, 908 F.2d 981, 982-83 (D.C. Cir. 1990)). Although this framework was developed in the horizontal merger context, it has been also used by courts in vertical merger cases. *See, e.g.*, *AT&T*, 916 F.3d at 1032; *UnitedHealth*, 2022 WL 4365867, at *6.[3]

[3] This Court has not yet held whether the burden-shifting framework applies to vertical mergers.

Under this framework, the government bears the initial burden to "establish a *prima facie* case that the merger is likely to substantially lessen competition in the relevant market." *AT&T*, 916 F.3d at 1032; *see also Chi. Bridge*, 534 F.3d at 423. In *AT&T*, the D.C. Circuit applied this burden-shifting framework, but "stopped at the first step after finding the [government] had failed to prove that the transaction would allow the merging parties to raise rivals' costs," thus resulting in anticompetitive harms. Blair et al., *Analyzing Vertical Mergers*, at 821.

Once the *prima facie* case is established, "the burden shifts to the defendant to present evidence that the *prima facie* case 'inaccurately predicts the relevant transaction's probable effect on future competition.'" *AT&T*, 916 F.3d at 1032; *see also Chi. Bridge*, 534 F.3d at 423. Upon such rebuttal, "'the burden of producing additional evidence of anticompetitive effects shifts to the government, and merges with the ultimate burden of persuasion, which remains with the government at all times.'" *AT&T*, 916 F.3d 1029 (quoting *Baker Hughes*, 908 F.2d at 983); *see also Chi. Bridge*, 534 F.3d at 423.

Petitioners cogently explain why the FTC failed to make its *prima facie* showing here (Pet'rs-Br. 39-58) and why the FTC erroneously tossed out compelling evidence of efficiencies created by the proposed merger (*id.* at 58-71). Those explanations need not be repeated here; instead, amicus urges this Court to apply the following overarching principles as it reviews the FTC's decision.

A. The government cannot use "shortcuts" in vertical merger cases.

The government cannot use horizontal merger–specific shortcuts to make a *prima facie* case in vertical merger cases. In horizontal merger cases, the government often uses a "short cut," *AT&T*, 916 F.3d at 1032, by "putting forward statistics to show that the proposed 'merger would produce a firm controlling an undue percentage share of the relevant market, and would result in a significant increase in the concentration of firms in that market.'" *AT&T*, 310 F. Supp. 3d at 192. Once it does so, this "triggers a 'presumption that the merger will substantially lessen competition.'" *Id.*; *see also Baker Hughes*, 908 F.2d at 982.

In vertical merger cases, however, it is well established that this "'familiar' horizontal merger playbook is of little use." *AT&T*, 310 Supp. 3d at 192. The government cannot use "statistics about the change in market concentration" as a "short cut" to trigger a presumption of harm because "vertical mergers produce no immediate change in the relevant market share." *AT&T*, 916 F.3d at 1032 (citing DOJ, 1984 Merger Guidelines 24); *see also Fruehauf*, 603 F.2d at 351. Courts have held that "the government must make a 'fact-specific' showing that the proposed merger is 'likely to be anticompetitive.'" *AT&T*, 916 F.3d at 1032; *UnitedHealth*, 2022 WL 4365867, at *7 ("the government meets its *prima facie* burden in vertical merger cases by making a 'fact-specific showing that the proposed merger is likely to be anticompetitive'"). This principle is so well established that the DOJ in *AT&T* conceded the point without much controversy. *See AT&T*, 310 F. Supp. 3d at 192 ("The parties … agree that in this case 'there is no

short-cut way to establish anticompetitive effects, as there is with horizontal mergers.'"). Scholars also agree. *See, e.g.*, Areeda & Hovenkamp, *Antitrust Law* ¶1000a ("[T]he basic economic reason for limiting horizontal mergers is … generally accepted: horizontal mergers increase market concentration…. Unfortunately, there is no comparable theoretical basis for dealing with vertical mergers.").

Here, the FTC seeks to circumvent the "no-shortcuts" principle by invoking *Brown Shoe*'s multifactor test. We urge the Court to reject this effort. The FTC asserted that *Brown Shoe* "examine[s] the 'share of the market foreclosed' and identif[ies] 'various economic and historical factors' that a court should review in determining whether a vertical merger may substantially lessen competition." FTC-Op. 40 (quoting *Fruehauf*, 603 F.2d at 352-53). According to the FTC, these additional factors are: "the nature and purpose of the transaction"; "barriers to entry"; "whether the merger will eliminate potential competition by one of the merging parties"; and "the degree of market power that would be possessed by the merged enterprise as shown by the number and strength of competing suppliers and purchasers." *Id.* at 40-41; *see also Brown Shoe*, 370 U.S. at 328-29.

The FTC's reliance on *Brown Shoe* cannot be reconciled with modern judicial decisions that analyze vertical mergers without it. *See*, *e.g.*, *AT&T*, 916 F.3d at 1032; *UnitedHealth*, 2022 WL 4365867, at *7. Moreover, the FTC's invocation of *Brown Shoe* is riddled with problems and is inconsistent with the legal precedent and economic scholarship that underpin sound antitrust law. The FTC's approach relies on the thoroughly

repudiated notion that market concentration is nearly dispositive. *See* Hovenkamp, *Vertical Mergers*, at 5 ("[B]oth Harvard and Chicago School thinking pushed back at the aggressive attitudes about industrial concentration, as well as the idea that merger-induced efficiency was an affirmative harm."); Bork, *The Antitrust Paradox*, at 245 ("[I]n the absence of a *most unlikely* proved predatory power and purpose, antitrust should never object to the verticality of any merger." (emphasis added)); Blair et al., *Analyzing Vertical Mergers*, at 810 ("Although the Second Circuit [in *Fruehauf*] believed … *Brown Shoe* occasionally 'appear[ed] to encourage' a legal rule proscribing 'any vertical foreclosure,' it concluded that '[t]he Supreme Court's insistence that the Clayton Act protects '*competition*, not *competitors*,' contravenes the notion that a significant level of foreclosure itself is the proscribed effect.'").

The FTC also assumes in conclusory fashion without evidence that foreclosure of a downstream rival is likely to occur following a vertical merger. *But see* Blair et al., *Analyzing Vertical Mergers*, at 788 (observing that the "logic of foreclosure as an antitrust theory of harm" rests on assumptions for which "[t]here is little support"); *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 887, 892 (2007) (observing that "vertical agreements setting minimum resale prices can have procompetitive justifications"); Bork, *The Antitrust Paradox*, at 239 ("The Clayton § 7 theory of automatic foreclosure is here, as in all contexts, completely improper."). And the FTC assumes—again without evidence—that foreclosure automatically results in anticompetitive harm, even though courts and scholars have long repudiated such a view. *See* Blair et al., *Analyzing Vertical*

Mergers, at 809 (describing how more recent Supreme Court caselaw deviates from *Brown Shoe*).

Most importantly, the FTC's reliance on *Brown Shoe* effectively results in using a shortcut to establish a *prima facie* case without real-world evidence. *See AT&T*, 916 F.3d at 1032; *UnitedHealth*, 2022 WL 4365867, at *7. In the vertical merger context, it is simply insufficient for the government to rely on statistical data regarding the "'share of the market foreclosed'" and "'various economic and historical factors'" that have no bearing on the real-world impact of the challenged transaction. FTC-Op. 40 (quoting *Fruehauf*, 603 F.2d at 352-53). And the ALJ's initial opinion dismissing the complaint correctly understood that "the government cannot use a short cut to establish a presumption of anticompetitive effect through statistics about the change in market concentration." ALJ-Op. 195 ¶ 7. This is precisely what the *Brown Shoe* factors would allow the FTC to do. This circumvention ignores the fact that courts have understood the more recent Supreme Court caselaw to have rejected the approach taken by *Brown Shoe*. *See, e.g.*, Blair et al., *Analyzing Vertical Mergers*, at 809.

B. The government cannot use mere possibilities of harm to block a vertical merger.

The government also cannot establish a *prima facie* case with mere possibilities of competitive harm. This principle is also well established. *See, e.g.*, *AT&T*, 916 F.3d at 1032 ("Section 7 requires more than a 'mere possibility' of competitive harm."). Courts have recognized that "the word 'may' [in § 7 of the Clayton Act] should not be taken

literally, for if it were, every acquisition would be unlawful." *Elders Grain*, 868 F.2d at 906.

Rather, courts have interpreted the Clayton Act to deal with probabilities of future competitive harm. Courts have also recognized that § 7 effectively requires "weighing the parties' competing visions of the future of the relevant market and the challenged merger's place within it." *AT&T*, 310 F. Supp. 3d at 165. This "'uncertain task'" necessarily requires courts to engage in "a comprehensive inquiry into the future competitive conditions in that market."' *Id.* Because courts must reject mere possibilities of anticompetitive harm, they are also rightly skeptical of enforcement efforts based on speculation, conjecture, or theoretical harms. "'[A]ntitrust theory and speculation cannot trump facts."' *Id.* at 190 (quoting *Arch Coal*, 329 F. Supp. 2d. at 116-17). "[T]hose theories don't generally predict harm from vertical mergers; they simply show that harm is possible under certain conditions." Hoffman, *Vertical Merger Enforcement at the FTC* 3. Instead, "prediction must be based on real-world evidence related to the 'structure, history[,] and probable future' of the relevant markets." *UnitedHealth*, 2022 WL 4365867, at *24. The ALJ properly applied this principle when he demanded more than "[a]ntitrust theory and speculation" about competitive harm from the FTC's complaint counsel and ultimately concluded that "[t]he evidence fail[ed]" to prove a *prima facie* case. ALJ-Op. 197 ¶¶ 31, 34. The stark contrast between the ALJ's opinion and the FTC's opinion can only be explained by the FTC's heavy reliance on theories and possibilities, which Petitioners ably explain. *See* Pet'rs-Br. 41.

This Court has also observed that "[a] probability signifies that an event has a better than fifty percent chance of occurring," and "[a] 'reasonable' probability"—the threshold for finding anticompetitive effect—"represents an even greater likelihood of the event's occurrence." *Mercantile Tex. Corp. v. Bd. of Governors of Fed. Rsrv. Sys.*, 638 F.2d 1255, 1258 (5th Cir. 1981); *see also Yamaha Motor Co., Ltd. v. FTC*, 657 F.2d 971, 977 (8th Cir. 1981). The "'reasonable' probability standard" also requires the government to "specif[y] subsidiary findings that must be compared before the ultimate finding of a reasonable probability is made." *Mercantile Tex.*, 638 F.2d at 1268-69.

Enabling the government to prove anticompetitive harms with mere theories or possibilities—even in the absence of real-world data or evidence—would mean a return to the era of over-aggressive and over-expansive interpretation of the Clayton Act. *See* Bork, *The Antitrust Paradox*, at 233 (criticizing *Brown Shoe* for "actually striking" "the attainment of new efficiency," "not the lessening of competition"). For instance, "[w]hile vertical integration can certainly foreclose rivals in theory, there is only limited empirical evidence supporting that finding in real markets." Ginsburg et al., *The Federal Trade Commission's Hearings on Competition and Consumer Protection in the 21st Century, Vertical Mergers* 8-9, Geo. Mason Univ. (Sept. 6, 2018). And allowing mere possibilities to establish anticompetitive harm would eschew this Court's articulation of the burden on the government to "specif[y] subsidiary findings" that would support a greater-than-fifty-percent chance of the anticompetitive harm occurring.

C. The government must present real-world evidence of harm to establish its *prima facie* case.

The government must present real-world evidence that reflects more than mere possibilities to make a *prima facie* case in vertical merger cases. This proposition is also well established. *See, e.g.*, *AT&T*, 310 F. Supp. 3d at 192 ("[T]he Government concedes that … it must make a 'fact-specific' showing that the effect of the proposed merger 'is likely to be anticompetitive'"); *UnitedHealth*, 2022 WL 4365867, at *24 (requiring "real-world evidence" to make a "'predictive judgment'" about the competitive effect of a merger).

In demanding real-world evidence from the FTC, this Court could draw from previous vertical merger cases. In particular, this Court should scrutinize whether the FTC provided sufficient, real-world evidence to show that Illumina would have the ability and incentive to use its market share in the upstream next-generation sequencing market to foreclose rivals in the downstream multicancer early detection test market. *See* Pet'rs-Br. 43, 47-58. And it should reverse to the extent that the FTC has failed to present such evidence. *See id.*

In *AT&T*, the government argued that a vertical merger between AT&T (downstream content distributor) and Time Warner (upstream content programmer) would enable AT&T to use Time Warner's content to disadvantage its rivals, including by raising the rivals' video programming costs or driving those same rivals' customers to its subsidiary, DirecTV. 310 F. Supp. 3d at 164. The district court rejected that argument for multiple reasons, including: "unrebutted findings that similar past vertical mergers

did not result in price increases"; "disbelief that the improvement to AT&T's bargaining leverage would be substantial"; "failure to account for AT&T's long-term contract offers"; and "poor quality inputs to the DOJ's expert model." Blair et al., *Analyzing Vertical Mergers*, at 786 & n.12 (citing *AT&T*, 310 F. Supp. 3d at 216, 224, 226, 239-40). In the district court's view, these flaws undermined the value of the purportedly real-world evidence presented by the government. The D.C. Circuit agreed. *See* 916 F.3d at 1040-41. These evidentiary considerations are highly relevant to assessing the FTC's decision here. *See* Pet'rs-Br. 47-58.

UnitedHealth is also instructive. There, the government presented one horizontal and two vertical theories of anticompetitive harm to block the merger between UnitedHealth Group (consisting of health insurance and health services provider subsidiaries) and Change Healthcare (healthcare technology company). 2022 WL 4365867, at *7. The district court rejected all such theories. *Id.* at *8. As relevant here, the government argued that the merger would allow the United subsidiaries to disadvantage their rivals by gaining rivals' information for their benefit through Change or foreclosing rivals' access to key inputs. *Id.* at *15. The district court rejected the "data-misuse" theory, finding that the government's allegations rested on "speculation rather than real-world evidence." *Id.* at *16. As the court described it, "[e]ach step of the Government's argument [needed to] be true for its theory to work, yet each step suffer[ed] from serious flaws," including "the failures to prove (1) that United is likely to misuse the data … and (2) that rival payers will innovate less as a result." *Id.* at *25. That analysis, too, is

highly relevant to assessing the FTC's assertion here about Illumina's purported ability and incentive to wage "a campaign of 'death by a thousand cuts'" against multicancer early detection test (MCED) developers. FTC-Op. 58; *see also* Pet'rs-Br. 51.

UnitedHealth is also relevant to assessing the FTC's analysis regarding the future of the MCED test market. *See* Pet'rs-Br. 53-54. In *UnitedHealth*, the district court rejected the government's second vertical theory. The government argued that United "will have the ability and incentive to" foreclose its rivals because it would be able to control a key input (healthcare IT products) for "the downstream commercial health insurance markets." 2022 WL 4365867, at *25. The court rejected this argument because the evidence did not show that the United subsidiaries were likely to withhold a key input for rivals. *See id.* at *25-26.

III. The government will fail to carry its burden in most vertical merger cases.

As explained above, there is a broad scholarly and judicial consensus that vertical mergers are generally procompetitive, and thus lawful. Moreover, starting with "[t]he FTC's loss in *Fruehauf*, … vertical merger litigation became more difficult" as the government has become "burdened by the requirement to demonstrate that a vertical merger would cause anticompetitive effects." Blair et al., *Analyzing Vertical Mergers*, at 810. The recent cases in *AT&T* and *UnitedHealth* further prove this point. *See, e.g.*, Sokol, *Vertical Mergers and Entrepreneurial Exit*, 70 Fla. L. Rev. 1357, 1377-78 (2018) ("Vertical mergers should be presumed … to be competitively beneficial or neutral. In terms of

the burden of proof, … the government[t] should bear the burden of demonstrating a net harm to consumers."); Carl Shapiro, *Antitrust in a Time of Populism*, 61 Int'l J. Indus. Org. 714, 740 (2018) (explaining the difficulty of proving how a vertical merger "would significantly increase concentration in a well-defined market, which is normally a key element of the government's case").

The widespread view that vertical mergers are unlikely to harm consumers or competition explains the paucity of government enforcement seeking to block vertical mergers. The D.C. Circuit's 2019 decision in *AT&T*, 916 F.3d at 1031-32, "[was] the first litigated vertical merger case [brought by the government] in 40 years." Wrobel, *Spotlight on U.S. Vertical Merger Enforcement: Burden of Proof and Revised Enforcement Guidelines*, 33 Antitrust 3, 3 (2019); *accord* Blair et al., *Analyzing Vertical Mergers*, at 813 (noting the same). And even where a challenge is brought, "[i]n the majority of challenged merger cases, courts have approved vertical mergers because their 'anticompetitive effects are outweighed by potential efficiencies or because there are no anticompetitive effects.'" Ossorio, Note, *Drawing the Line: Refining the Baker Hughes Burden-Shifting Framework for Vertical Mergers*, 73 Fla. L. Rev. 199, 201 (2021); *see also* Ginsburg, *Hearing on Vertical Mergers*, at 8-9. It shouldn't come as any surprise, then, that the FTC's own ALJ—for the first time in the FTC's recent history—ruled in favor of the Illumina-Grail merger. *See* Pet'rs-Br. 10.

Expecting the government to present real-world evidence of anticompetitive harm—which will not exist in most circumstances—is consistent not only with the

economic and legal realities, but also with desirable policy outcomes. "[A]llocation of the burdens of proof assumes particular importance." *Baker Hughes*, 908 F.2d at 991. Leaving courts with "complex and elusive" economic data to make "a prediction [of a merger's] impact upon competitive conditions in the future" sets those courts up for failure. *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 362 (1963). Such uncertainties would also make it difficult for companies to commit to investments required for vertical mergers. "An overly aggressive enforcement posture towards vertical mergers would run the risk of hindering the ongoing realignment of firm boundaries that is necessary to maintaining an efficient allocation of resources in a dynamic economy." OECD Note at 10, ¶37. "With advances in modern technology comes even greater potential for efficient integration…. It would be unfortunate if an overly aggressive tying doctrine were to impede that innovation." *It's My Party*, 811 F.3d at 689.

Moreover, merger enforcement should be more reliable and predictable than the enforcers' ability to cherry-pick "gotcha" documents in the record or speculative comments made by purported competitors' statement of harm—which often carry only "marginal probative value." *AT&T*, 310 F. Supp. 3d at 204. Allowing the government to use a framework based on shortcuts and possibilities, unmoored from real-world evidence, would chill vertical mergers that are widely considered to be procompetitive. *See Phila. Nat'l Bank*, 374 U.S. at 362 ("unless business[es] can assess the legal consequences of a merger with some confidence, sound business planning is retarded").

CONCLUSION

This Court should grant Illumina and Grail's petition for review and reverse the FTC's decision.

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Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with Local Rule 29.3 because it contains 5,436 words, excluding the parts that can be excluded. This brief also complies with Federal Rule of Appellate Procedure 32(a)(5)-(6) because it has been prepared in a proportionally spaced face using Microsoft Word 2016 in 14-point Garamond font.

Dated: June 12, 2023 */s/ Jeffrey M. Harris*

CERTIFICATE OF SERVICE

I e-filed this brief with the Court, which will email everyone requiring notice.

Dated: June 12, 2023 */s/ Jeffrey M. Harris*