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 AMICUS CURIAE THE COMMITTEE FOR JUSTICE IN SUPPORT OF PETITIONERS

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SUPPLEMENTAL STATEMENT OF INTERESTED PERSONS

Pursuant to Local Rule 29.2, the Committee for Justice certifies that—in addition to the entities and persons identified in the certificates of interested persons contained in the brief of Illumina and Grail and all amicus briefs submitted up to this point, the following persons have an interest in the outcome of this case. These disclosures are made to assist the judges of this Court in evaluating the possibility of disqualification or recusal.

1. The Committee for Justice, amicus curiae.
2. John M. Reeves, counsel for amicus curiae.
3. Curt Levey, counsel for amicus curiae.

The Committee for Justice further declares that it is a non-profit corporation with no parent companies, subsidiaries, or affiliates.

Dated: June 12, 2013 */s/ John M. Reeves*

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INTEREST OF AMICUS CURIAE[1]

The Committee for Justice (CFJ) is a non-profit legal and policy organization founded in 2002. It is dedicated to preserving both the Constitution's limits on governmental power and its separation of powers. Central to that mission is ensuring that the federal courts push back against, rather than defer to, administrative agencies when they exceed their constitutional role. Consistent with this mission, CFJ files amicus briefs in key cases, supports constitutionalist nominees to the federal judiciary, and educates the American public and policymakers about the proper roles of our federal courts and administrative agencies. This case, challenging the for-cause removal provisions for the commissioners of the Federal Trade Commission (FTC), represents one of the most important separation-of-powers challenges brought in the last several decades. Consequently, CFJ has a strong interest in demonstrating to this Court why the FTC's current structure is unconstitutional.

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[1] In accordance with Fed. R. App. P. 29(a)(2), all parties have consented to the filing of this brief. Pursuant to Fed. R. App. P. 29(a)(4)(E), no party's counsel authored this brief in whole or in part, and no party, party's counsel, or other person—besides amicus curiae and its counsel—contributed money that was intended to fund preparing or submitting this brief.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Constitution divides our government into three branches—the legislative branch, the executive branch, and the judicial branch. Enforcement of our laws is vested with the executive branch, and the executive branch alone. There is no "fourth branch" consisting of an administrative state that enforces the laws separate from the executive branch. Yet that is exactly what the FTC is today—an unaccountable law enforcement agency outside the executive branch. The for-cause removal provisions of the Federal Trade Commission Act prevent the President, as the head of the executive branch, from exercising the fullness of his office as he cannot dismiss its commissioners in the event of a policy disagreement. *See* 15 U.S.C. § 41 (2018). For decades, the FTC has exercised this executive authority independent of the President due to the Supreme Court rejecting a separation-of-powers constitutional challenge to this for-cause removal provisions in *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935). But the Supreme Court has greatly narrowed *Humphrey's* in the years since it was handed down, to the extent that today the Court's holding only applies to the FTC as it existed in 1935. *See Selia Law LLC v.*

Consumer Fin. Protection Bureau, 140 S.Ct. 2183, 2200 n.4 (2020). A historical analysis of the FTC's actual authority in 1935 demonstrates that it was a far different creature from what exists today in terms of its executive enforcement powers, and that *Humphrey's* does not prohibit this Court from declaring the FTC as it exists today to be unconstitutional.

For all of its bombast, the FTC as it existed from 1914 until 1938—that, is, until three years after the Court handed down *Humphrey's*—was weak when it came to enforcing its own decisions. So weak was it that it is difficult—if not impossible—to ascribe to it the notion of prosecutorial authority that it would subsequently come to possess. During its entire existence, the FTC has had the authority -to bring defendants before it in an administrative setting to determine whether it should issue a cease-and-desist order against them for alleged anticompetitive behavior. But before 1938, the penalties that attached to violating such cease-and-desist orders were practically nonexistent. Such orders only prohibited future conduct, and did not penalize any prior conduct. But even more critically, cease-and-desist orders were not, of themselves, considered final and enforceable. If a defendant was

found to have violated a cease-and-desist order, the FTC had to petition a federal appellate court for a ruling to make the cease-and-desist order final and enforceable. And even if the federal appellate court did so, this ruling could have no retroactive effect upon the defendant's conduct. It was only if the defendant *again* violated the cease-and-desist order that the FTC could ask the appellate court to punish the defendant. And even then, the punishment meted out by the appeals court was limited to finding the defendant was in contempt of court.

This is a far cry from the prosecutorial authority that the FTC would later come to possess. Prosecutorial authority implies having the authority to seek a particular enforceable punishment against a defendant. But the FTC at the time of *Humphrey's* had no authority to do this. While it could institute an administrative proceeding against a defendant to obtain a cease-and-desist order, these orders were of themselves unenforceable and did not carry any penalties with them. The only true punishment that could be imposed upon a defendant was the common law contempt of court punishment. This was less for violating the FTC's order than it was for disrespecting the authority of the court.

It was only after the Court handed down *Humphrey's* that Congress unlawfully vested the FTC with executive prosecutorial authority. The FTC now uses that authority more aggressively than ever to prosecute what it perceives to be violations of antitrust law, all without any ability of the executive branch to supervise it. Even worse, its current chairwoman has admitted that the agency is inherently political in nature and not an apolitical group of supposedly disinterested experts. Given this, the FTC's as it currently exists violates Article II, which vests prosecutorial and all other executive authority with the President, and should be struck down. And because the FTC as it existed in 1935, at the time of *Humphrey's*, did not exercise any form of executive prosecutorial authority, this Court can do so without contradicting *Humphrey's*.

ARGUMENT

I. The for-cause requirements governing the removal of FTC Commissioners violate Article II of the Constitution, and this Court can invalidate them—along with the FTC's cease-and-desist order—without contradicting *Humphrey's*.

Our Constitution vests all executive authority in the President of the United States. U.S. Const. art. II, § 1, cl. 1; *Myers v. United States*, 272 U.S. 52, 117 (1926). This executive authority includes prosecutorial

powers. *See Morrison v. Olson*, 487 U.S. 654, 691 (1988). Since one man cannot perform these duties alone, the President may select subordinate officials to assist him in this task. *Myers*, 272 U.S. at 117. But these subordinate officials must remain accountable to him, given that they exercise his authority. *Selia*, 140 S.Ct. at 2197. Accordingly, the President must be unhindered in his authority to remove such officials, as otherwise he would be unable to execute the law in the manner he sees fit and according to his policy preferences. *See Myers*, 272 U.S. at 164 ("[T]o hold otherwise would make it impossible for the President, in case of political or other differences with the Senate or Congress, to take care that the laws be faithfully executed.").

Despite this principle—which is fundamental to the separation-of-powers under our Constitution—in 1935, the Supreme Court rejected an Article II constitutional challenge to the Federal Trade Commission Act's provision that the President may only remove the FTC's commissioners for cause. *Humphrey's*, 295 U.S. at 619-32. Currently codified at 15 U.S.C. § 41 (2018), this provision prevented (and still prevents) the President from removing FTC commissioners due to policy disagreements over how to implement antitrust law. *Humphrey's*, 295

U.S. at 619-20. The Court justified upholding the for-cause removal protections on the ground that the FTC's "duties are neither political nor executive, but predominately quasi judicial and quasi legislative." *Id.* at 624. In more recent years, the Court has not hesitated to broadcast its buyer's remorse over much of the rationale it gave for this holding. *See, e.g., Selia*, 140 S.Ct. at 2198 (2020) ("Rightly or wrongly, the Court viewed the FTC (as it existed in 1935) as exercising 'no part of the executive power.'") (quoting *Humphrey's*, 295 U.S. at 628). It has strongly suggested in dicta that its conclusion "that the FTC did not exercise executive power has not withstood the test of time." *Id.* at 2198 n.2.

In any event, *Humphrey's* remains binding case law, but confined only to the FTC's powers as they existed in 1935. *See Selia Law*, 140 S.Ct. at 2200 n.4. There is no question that today's FTC utilizes prosecutorial powers—an executive function—even in its administrative proceedings. *See Axon Enter., Inc. v. Fed. Trade Com'n*, 143 S.Ct. 890, 902 (2023) ("[The FTC] houses (and by design) both prosecutorial and adjudicative activities."). But an examination of the FTC's actual powers as they existed in 1935 reveals—surprisingly—that the FTC did

not, in fact, have what could be considered prosecutorial authority. From 1914 to 1938—that is, until three year after *Humphrey's*—the FTC was a surprisingly weak agency in terms of its actual enforcement powers. This is especially so if viewed in the context of the subsequent prosecutorial enforcement powers that Congress would, post-*Humphrey's*, grant to it and that it uses today. This difference between the FTC's powers as they existed in 1935 and its powers as they exist today is critical, for it means that this Court can easily invalidate the for-cause removal provisions for FTC commissioners as violating Article II without in any way discarding or contradicting *Humphrey's*.

A. At the time of Humphrey's, *the FTC did not possess executive, prosecutorial powers.*

As surprising as it may seem today, the FTC "was conceived [in 1914] not as a prosecutorial or enforcement body, but as an expert administrative tribunal vested with the responsibility for developing an enlightened antitrust policy and given the tools to carry out that task." Philip Elman, *Admin. Reform of the Federal Trade Comm'n*, 59 Geo. L. J. 777, 781 (1971). Certainly, it had many features we are familiar with today. Then, as today, the FTC had the authority to bring administrative proceedings against a defendant it believed had violated

antitrust law. Then, as today, if the defendant was found guilty of such a violation, the FTC could issue a cease and desist order against the defendant. *Compare* 15 U.S.C. § 45 (1934) *with* 15 U.S.C. § 45(c) (2018). But that is where the similarities end. Today, a cease and desist order is final and enforceable 60 days after entry unless—as in this case—stayed pending review by a federal appellate court. 15 U.S.C. §§ 45(c), 45(g) (2018). Moreover, today a violation of a cease and desist order carries with it a civil penalty of $10,000, and the FTC is authorized to initiate proceedings in a federal district court to enforce this civil penalty. 15 U.S.C. §§ 45(l)), 56(a) (2018). But in 1935 a very different situation existed.

In 1935, an FTC administrative enforcement action seeking a cease-and-desist order carried consequences of a completely different nature for defendants compared to the consequences of today. An FTC cease-and-desist order, standing alone, was not enforceable as a matter of law, and did not carry with it any penalty of any kind. Indeed, it was not even considered to be "final" in the first place. *See* William S. Doenges, *Present Enf't of FTC Clayton Act Orders Issued Prior to the Adoption of the Finality Act*, 3 Tulsa L.J. 180, 182 (1966) ("The cease

and desist order had no practical efficacy at this point, nor did the order become final within a specified number of days."); 15 U.S.C. § 45 (1934); *Fed. Trade Com'n v. Balme*, 23 F.2d 615, 618 (2d Cir. 1928) (joined by Hand, J.) ("The statute does not impose any penalty for violation of the [FTC's] order . . . ."). If the FTC desired to make its cease-and-desist order final and enforceable, it had to wait for the defendant to actually violate the order. Then, it had to file an application with the relevant circuit court of appeals to make the order enforceable. *See* 15 U.S.C. § 45 (1934). The circuit court would conduct a review of the proceedings in a matter practically identical to how it reviews a defendant's petition challenging an enforcement order. *Compare* 15 U.S.C. § 45 (1934) *with* 15 U.S.C. § 45(c) (2018). If the circuit court sided with the FTC, it would issue a final, enforceable judgment. *See* 15 U.S.C. § 45 (1935); *see* Doenges, *supra* at 182-83. But even this final judgment implementing the cease-and-desist order only applied prospectively. It did not punish any conduct that had occurred prior to the circuit court's entry of judgment—neither the defendant's original violation of antitrust law that had led to the FTC action in the first place, nor the defendant's second violation of antitrust law following the cease-and-desist order.

Id. at 183 ("No penalty attached to this second violation [that had led the FTC to petition the circuit court for enforcement], other than the entry of a decree enforcing the order."). Only if the defendant continued his illegal conduct after the circuit court entered its judgment—that is, only if the defendant violated antitrust law a *third* time—could the FTC seek to impose any actual punishment.[2] *Id.*

[2] This was known as the "three bites at the apple" rule. *See* H. Thomas Austern, *Five Thousand Dollars a Day*, 51 Ky. L.J. 481, 485 (1963). It is worth quoting in full a summary of how this procedure worked, as demonstrates just how difficult and cumbersome it was for the FTC to attach any practical consequences—however small—to its administrative enforcement actions in 1935:

> Before any consequences attached to a violation of the [cease and desist] order it must have been reinforced by a judicial decree of enforcement. To obtain the enforcement decree in the court of appeals, a second violation had to be shown. This was done by the [FTC] again ordering an investigation appointing a hearing officer, and, usually, holding a hearing. If a violation was found, the [FTC] then sought enforcement in the court of appeals. No penalty attached to this second violation, other than the entry by the court of a decree enforcing the order. The order was thus still lacking in practical efficacy, but thereafter, contempt of court penalties could be imposed by a showing of another violation. This would, however, require still a third hearing before the agency as to any disputed factual

Even if the FTC succeeded in "punishing" a defendant for its third violation of antitrust law, the nature of this punishment differed in kind—not only in degree—from a civil (or criminal) monetary penalty or an injunction. It consisted only of being found in contempt of court, pursuant to the circuit court's inherent powers to compel adherence to its orders, rather than of any statutorily-imposed punishment, and the court determined the nature of the punishment. *See, e.g.*, *Federal Trade Com'n v. Hoboken White Lead & Color Works, Inc.*, 67 F.2d 551, 554 (2d Cir. 1933) (finding the defendant in contempt and fining it $500 based on the court's "inherent power . . . to administer punishment."). More fundamentally, the contempt stemmed from having violated the order of the *circuit court*, and not the FTC's original cease-and-desist order. This reflects how "[a]ny adverse consequences [due to violating a cease and desist order] . . . would come from the courts, not the [FTC]." Peter C. Ward, *Restitution for Consumers Under the Federal Trade Com'n Act: Good Intentions or Congressional Intentions?*, 4 Am. U. Law Rev. 1139, 1148 (1992). In other words, the defendant was punished not so much

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> question, and a review there of by the court of appeals.

Doenges, *supra* at 182-83.

for his violation of antitrust law as he was for having refused to obey the circuit court's authority.[3] This differs fundamentally from a executive authority using its prosecutorial power to seek a fine, jail time, or an injunction against a defendant due to an alleged violation of the law.

This procedure can be roughly compared with how the Senate can initiate civil contempt proceedings to compel compliance with its subpoenas or orders pursuant to the Ethics in Government Act. *See* 2 U.S.C. § 288d(a) (2018). That Act explicitly authorizes the Senate to bring a civil suit in its own name to compel compliance with its subpoenas. *Id*. If an individual refuses to comply with a Senate subpoena, that legislative body may bring suit in a federal district court asking for a court order directing compliance. *In re Application of U.S. Senate Permanent Subcommittee on Investigations*, 655 F.2d 1232, 1238 (D.C. Cir. 1981). If the district court issues an order mandating compliance, and the individual in question still refuses to cooperate, the Senate can file a motion to hold him in civil contempt. *See id.* Yet

[3] The circuit court's judgment finalizing the cease-and-desist order was not an injunction, as the FTC lacked any authority to seek injunctive relief at this time.

nobody could possibly conclude from this scheme that in filing a suite to enforce a subpoena or in seeking a holding of contempt that the Senate—one part of our bicameral Legislative Branch under Article I—is exercising a form of prosecutorial power that is part of the executive branch. Merely seeking to hold somebody in civil contempt for failure to obey a court order is not enough, without more, to amount to an assertion of executive authority under Article II.

The scheme in effect in 1935 reflects how the FTC, as originally created, was not meant to be a prosecutorial authority. *See* Elman, *supra* at 781. Rather, it was viewed as a body of enlightened experts whose cease-and-desist orders, as originally issued, would be merely "precatory admonition[s]" that "the business community would welcome" as a clarification on the types of activities that were and were not permitted under antitrust law. H. Thomas Austern, *Five Thousand Dollars a Day*, 51 Ky. L. J. 481, 483, 485 (1963). "What was plainly contemplated was general obedience, and resort to court review or enforcement procedures only in rare instances." *Id*. at 485 n.13. But even in the "enforcement" context, the punishment meted out was not for violating any antitrust law, but for not obeying a court order.

Given this, it cannot be said that the FTC exercised any executive prosecutorial authority in 1935 when the Supreme Court decided *Humphrey's*. Therefore, that case does not stand as a barrier to this Court declaring the for-removal provisions for FTC commissioners unconstitutional today, when the agency does, in fact, exercise such executive power.

As demonstrated below, Congress would unconstitutionally vest the FTC with such executive power only three years after *Humphrey's*, power which Congress only further strengthened—unlawfully—in the 1970s.

B. In 1938, the Wheeler-Lea Act unlawfully vested the FTC with executive prosecutorial authority, and Congress unconstitutionally strengthened this authority in the 1970s.

So long as the FTC lacked any prosecutorial authority, it could be said that the Federal Trade Commission Act's for-cause removal provisions for the FTC's commissioners were constitutional as there was no risk they would interfere with the President's executive authority to enforce the laws via prosecution. But this would soon change when Congress vested the FTC with executive prosecutorial authority. By vesting the FTC with this authority while still shielding its

commissioners from removal without cause by the President, Congress blatantly violated Article II of the Constitution.

In 1938, Congress fundamentally altered the nature of the FTC's powers by enacting the Wheeler-Lea Act. *See* Austern, *supra* at 485. Passed with little debate, this act "in amazingly casual fashion completely changed the method of enforcement [for the FTC's cease and desist orders]." *Id.* This act made FTC cease-and-desist orders themselves final sixty days after entry, unless the defendant filed a petition for review with the relevant circuit court of appeals. 15 U.S.C. §§ 45(b), 45(g) (1940). If the defendant filed a petition for review, the order became final if and when the circuit court affirmed it, assuming the defendant declined to petition the Supreme Court for certiorari. 15 U.S.C. §§ 45(c), 45(g) (1940). Even more critical "was the entire novel concept of punishment by civil penalty action." Austern, *supra* at 485. For the first time, violation of a final FTC cease-and-desist order was made punishable by a civil penalty, specifically of $5,000. 15 U.S.C. § 45(l) (1940). The FTC was to seek this penalty through the initiation of a civil lawsuit by the United States in federal district court. *Id.*. No longer did the FTC have to wait for the defendant to take "three bites of

the apple" before it could seek to impose any practical consequences on it for violating antitrust law. *See id*. Now, the FTC could impose punishment by the bringing of a civil action for violating a final cease-and-desist order. And unlike contempt of court, which imposes punishment for disregarding a court's authority rather than for violating a law, this civil penalty explicitly imposed punishment for engaging in a violation of antitrust law.

While the law also provided that the Attorney General, and not the FTC, was the governmental entity that needed to bring the civil penalty suit, *see* 15 U.S.C. § 56 (1940), this does not change the fact that the FTC was vested with executive prosecutorial authority over the matter. If the FTC had reason to believe that an entity had violated a final cease-and-desist order, it was "to certify the facts to the Attorney General," who would then bring the civil penalty lawsuit. *See id*. The Second Circuit, in the only case to construe this section, concluded that the Attorney General could *not* bring a civil penalty suit on its own initiative, without previous certification from the FTC. *See U.S. v. St. Regis Paper Co.*, 355 F.2d 688, 690-94 (2d Cir. 1966). "The fact that the FTC has the exclusive power and expertise to formulate policy in its

efforts to maintain competition and regulate unfair business practices commands the conclusion that Congress intended it to have the exclusive power to implement that policy by initiating civil penalty suits . . . ." *Id.* at 694. While the Attorney General could, in his discretion, veto a certification from the FTC, this was as far as his prosecutorial authority could go absent authorization from the FTC. *See id.* This demonstrates that, in enacting the Wheeler-Lea Act in 1938, Congress for the first time vested the FTC with executive prosecutorial authority. While the FTC had to exercise this prosecutorial authority in conjunction with the Attorney General, this did not in any way lessen the nature of its authority.

And Congress did not stop with the Wheeler-Lea Act. To the contrary, it continued to strengthen the FTC's executive prosecutorial authority, eventually transforming it into the unaccountable administrative behemoth it is today. In 1973, it amended the Federal Trade Commission Act to enable the FTC itself, without the Attorney General's Office, to bring a civil enforcement lawsuit if it previously notified the Attorney General's Office of its intentions and the Attorney General declined to initiate the action within a particular time period.

See Trans-Alaska Pipeline Authorization Act, Pub. Law 93-153, November 16, 1973, 87 Stat 576. That same year, Congress authorized the FTC "to proceed directly to court (prior to issuing a cease and desist order) to obtain a 'temporary restraining order or a preliminary injunction, and also . . . to obtain a court-ordered 'permanent injunction.'" *AMG Capital Mgmt., LLC v. Fed. Trade Com'n*, 141 S.Ct. 1341, 1346 (2021) (quoting 15 U.S.C. § 53b(b) (2018)).

In short, following *Humphrey's* Congress transformed the FTC from an almost-advisory group of supposed experts on antitrust law into an administrative law enfor-cement agency armed with powerful executive prosecutorial enforcement weapons to impose punishment on those it believed to be violating antitrust law. The powers it now possesses are unquestioningly executive powers, and as such are unconstitutional due to the for-cause provisions governing removal of the FTC's commissioners. In light of this transformation, this Court can declare the FTC as it exists today unconstitutional and vacate its cease and desist order without in any way violating *Humphrey's*.[4]

[4] Should this Court nevertheless conclude that *Humphrey's* still prohibits it from declaring the FTC unconstitutional, *amicus curiae* CFJ agrees with Illumina and Grail that *Humphrey's* itself should be

II. The modern FTC is a highly political entity vested with prosecutorial authority that must be subject to full control by the Executive Branch under Article II of the Constitution.

A. The FTC has abandoned any pretense of being a disinterested group of nonpolitical, enlightened experts.

Prior to the vesting of executive prosecutorial powers with the FTC in 1938, one could perhaps maintain that the FTC was what it was originally meant to be—a non-partisan, apolitical, impartial agency consisting of enlightened experts dispassionately furthering the goals of antitrust law, free from interference by pesky elected officials. *See* Elman, *supra* at 779 ("The Commission is supposed to be the architect of an enlightened antitrust policy . . . ."); *Humphrey's*, 295 U.S. at 624 ("The commission . . . must, from the very nature of its duties, act with entire impartiality . . . . Its duties are [not] political . . . ."). But today this view is untenable not only in light of Congress subsequently vesting the FTC with prosecutorial powers as a matter of law, but also in light of recent actions and comments by the FTC's leadership. These actions and comments make clear that the FTC, far from being a disinterested group of enlightened experts, is as political an agency as

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overruled and joins in their argument to preserve this for review before the Supreme Court. (Illumina and Grail Brief at 21 n.5).

any other governmental department, and as such must be subject to full control of the Executive Branch under Article II of the Constitution.

In 2021, President Biden appointed Lina Khan as Chairwoman of the FTC. Khan has not been shy about what she believes to be the inherently political nature of antitrust enforcement, declaring several years prior to her appointment that "[m]arket structure is deeply political." Zephyr Teachout & Lina Khan, *Market Structure and Political Law: A Taxonomy of Power*, 9 Duke J. of Const. L. & Pub. Pol'y 37 (2014). "Because market structure is political," she continued, "legal rules . . . can shape economic power and potentially divest it when it threatens to undermine the political system." *Id*. She has also admitted to believing that "all decisions are political in so far as government agencies are bringing them." Fox Business Network, *Break Up Amazon as a Monopoly?*, YouTube at 2:44 (June 23, 2017), bit.ly/3N2tF9w.

These comments reflect Khan's adherence to the "Neo-Brandeisian" school of antitrust enforcement. Corbin K. Barthold, *Khan's Crusade*, City Journal (June 22, 2022), bit.ly/3oOiVn1. Despite claiming to derive their philosophy from the very individuals who laid the foundation for the modern, supposedly apolitical administrative state—such as Louis

Brandeis and Woodrow Wilson—"the Neo-Brandeisians reject the belief that antitrust law is above or outside of politics." Christine S. Wilson, *Marxism and Critical Legal Studies Walk into the FTC: Deconstructing the Worldview of the Neo-Brandeisians* at 7, FTC (April 8, 2022), bit.ly/3IXF0WY. Rather, they "believe that antitrust enforcement is a politicized exercise that serves as a tool of oppression to reinforce existing inequities," and that as such it must be reformed. *Id.* at 9.

Not surprisingly, Khan began implementing major structural and policy changes at the FTC almost immediately upon becoming chairwoman. Long a critic of the consumer welfare standard[5] that has dominated FTC antitrust enforcement for decades, Khan and two other

[5] The consumer welfare standard holds that the ultimate goal of antitrust is to protect competition for the benefit of consumers, and not merely to protect competitors in their own right. Under this theory, a "big business" that comes to dominate the market over its smaller competitors will not, for this sole reason, be found to have violated any antitrust law. Only if the "big business" employed inefficient prices or practices that were detrimental to consumers will it be found to have violated antitrust law. *See generally* Robert H. Bork, *The Antitrust Paradox: A Policy at War with Itself* (1978). Naturally, Neo-Brandeisians look upon this policy with suspicion if not outright disdain as a tool of oppressing small businesses. Barry Lynn, one of Khan's mentors, describes it as "an idiot science, to blind the law to dangerous concentrations of power, to blind the citizenry to the fist of monopoly." Josh Sisco, *An Agitator Disrupts an Antitrust Garden Party*, The Information (April 12, 2022), theinformation.com/articles/an-agitator-disrupts-an-antitrust-garden-party.

Neo-Brandeisian FTC commissioners voted to withdraw the Statement of Enforcement Principles Regarding "Unfair Methods of Competition," under the FTC Act, that had been in place since 2015. *See* Statement of the Commission on the Withdrawal of the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act, FTC (July 9, 2021), bit.ly/3CeusyW.

Amicus curiae CFJ believes that the FTC's abandonment of the consumer welfare standard under Lina Khan has been disastrous for antitrust policy, resulting in bad enforcement decisions like the present matter in which the agency is seeking to punish Illumina and Grail for nothing more than entering into a vertical merger that will have untold benefits for the early detection and treatment of cancer. *See* Abbott B. Lipsky, Jr., *With Challenge of Illumina-Grail Merger, Biden Antitrust Policy Claims its First Victim: Cancer Patients*, Wash. Legal Found. (July 15, 2021), bit.ly/42wfyPt. But from the perspective of the separation-of-powers under Article II of the Constitution, the merit or lack thereof of the FTC's abandonment of consumer welfare standard is beside the point. What matters for purposes of the separation-of-powers is that this is a policy decision on the part of the FTC over who to

prosecute and who to not prosecute for alleged violations of antitrust law, and the President lacks any authority to control this policy decision due to his inability to remove the FTC commissioners at will. The FTC's current policy is seemingly in full agreement with that of the Biden administration. But again, that is beside the point. As the FTC's own chairwoman has recognized, the agency's prosecutorial decisions are inherently political in nature. As such, they must be subject to the President's ultimate control. The current removal provisions for the FTC's commissioners prevent this from being the case.

B. The FTC's "culture of consent" has greatly harmed businesses engaged in legitimate competitive behavior, making it all the more urgent to ensure the FTC is subject to full control by the executive branch.

Perhaps nowhere is the FTC's prosecutorial authority on display more than in its reflexive use of consent orders to resolve administrative cases. Such orders, which FTC regulations have authorized since the 1960s, enable the FTC to settle a case with a defendant, compel the defendant to abide by a cease-and-desist order, and enable the FTC to claim victory on the merits in an antitrust enforcement action. "Just as the vast majority of criminal cases, for antitrust violations as for other crimes, are resolved by a plea bargain,

so too are the great majority of antitrust agency matters resolved by a settlement agreement [in the form of a consent order]." Douglas A. Ginsburg & Joshua D. Wright, *Antitrust Settlements: The Culture of Consent*, 1 William E. Kovacic: An Antitrust Tribute 177, 180 (2012); *see also* Joshua D. Wright & Douglas A. Ginsburg, *The Economic Analysis of Antitrust Consents*, 46 Eur. J. of Law and Econ. 245 (2018). As early as 1964, "more than 75% of the [FTC's] formal cases [were] disposed of by consent orders." *St. Regis Paper Co.*, 355 F.2d at 698, n.13. That number has only risen in the decades since, with well over 90% of the FTC's cases ending in consent decrees as of 2012. *See* Ginsburg & Wright, *supra* at 178.

Not surprisingly, consent judgments are far easier for the FTC to obtain than victories on the merits. The vast majority of companies against whom the FTC brings a lawsuit do not have the financial resources to defend themselves on the merits for a protracted period of time. As such, it makes far more financial sense for them to settle the case early and be done with the matter. But as understandable as this is, it enables the FTC to bring many lawsuits which it might not otherwise bring were the agency to know that it would have to justify

its prosecutorial actions on the merits before a federal court. This aggressive use of prosecutorial authority makes for bad policy but more importantly, it cannot be justified absent any oversight by the President. As with the FTC's embrace of the Neo-Brandeisian school of antitrust law, whether the current administration agrees with the FTC's use of consent judgments or not is beside the point. What matters is that the President has no control over this matter, despite it being an essential part of executive prosecutorial power. Should a new administration come into office hoping to reform the use of consent judgments in FTC administrative proceedings, the for-cause removal provisions will hamper the President from installing commissioners willing to implement his policy preferences.

CONCLUSION

This Court should declare the Federal Trade Commission Act's for-cause removal provisions unconstitutional and vacate its cease-and-desist order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on **June 12, 2023,** I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ John M. Reeves

CERTIFICATE OF COMPLIANCE

I certify that this brief contains **5,506** words, excluding those parts exempted by Fed. R. App. P. 32(f). I further that certify this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) as it is written in proportionally-spaced, 14-point Century font using Microsoft Office Word 2016.

Dated; June 12, 2023 */s/ John M. Reeves*