NO. 23-60167

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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

Petitioners,

v.

FEDERAL TRADE COMMISSION,

Respondent.

On Petition for Review from the Federal Trade Commission (Docket Number 9401)

BRIEF OF WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE SUPPORTING PETITIONERS AND REVERSAL

John M. Masslon II
Cory L. Andrews
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave. NW
Washington, DC 20036
(202) 588-0302
jmasslon@wlf.org

June 8, 2023

CERTIFICATE OF INTERESTED PERSONS

I certify that the following listed persons and entities have an interest in this case's outcome as described in the fourth sentence of Fifth Circuit Rule 28.2.1. These representations are made so that the judges of this Court may evaluate possible disqualification or recusal.

Party	Counsel
Illumina, Incorporated	David R. Marriott, Sharonmoyee Goswami, Christine A. Varney, Jesse M. Weiss, Michael J. Zaken, Antony L. Ryan, Benjamin A. Atlas *Cravath, Swaine & Moore LLP*
GRAIL Incorporated, now known as GRAIL, L.L.C.	Gregory G. Garre, Michael G. Egge, Marguerite M. Sullivan, Anna M. Rathbun, David L. Johnson, Alfred C. Pfeiffer *Latham & Watkins LLP*
Federal Trade Commission	Anisha S. Dasgupta, Joel Marcus-Kurn, Matthew M. Hoffman *Federal Trade Commission*
Washington Legal Foundation (amicus curiae)	John M. Masslon II, Cory L. Andrews *Washington Legal Foundation*

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/s/ John M. Masslon II
JOHN M. MASSLON II
Counsel for Amicus Curiae
Washington Legal Foundation

June 8, 2023

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(*continued*)

Page(s)

Constitutional Provisions

Statutes

Regulation

Rule

TABLE OF AUTHORITIES
(*continued*)

Page(s)

Other Authorities

TABLE OF AUTHORITIES
(*continued*)

Page(s)

INTEREST OF AMICUS CURIAE*

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It often appears as amicus opposing the accumulation of power in any one governmental branch, which violates the Constitution's careful separation of powers. *See, e.g.*, *Lucia v. SEC*, 138 S. Ct. 2044 (2018); *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477 (2010).

INTRODUCTION

The Government is on an antitrust losing streak in federal court that would make a serial pro se litigant blush. For example, the Government has gone to trial—and lost—in four criminal antitrust cases. *See* Mike Scarcella, *Aerospace managers acquitted in labor-related antitrust prosecution*, Reuters (Apr. 28, 2023), https://tinyurl.com/ymer48dr. One case was so weak that it ended on a motion for judgment of acquittal before jury deliberations. *Id.*

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* No party's counsel authored any part of this brief. No one, apart from WLF and its counsel, contributed money intended to fund the brief's preparation or submission. All parties consented to WLF's filing this brief.

The Federal Trade Commission has contributed to the losing streak. The FTC has lost unanimously in the Supreme Court. *See generally Axon Enter., Inc. v. FTC*, 598 U.S. 175 (2023). Even the Ninth Circuit has unanimously rejected the FTC's novel theories. *See generally FTC v. Qualcomm Inc.*, 969 F.3d 974 (9th Cir. 2020). The courts' continued rebukes of the FTC are unsurprising given the Commission's trajectory. Although it eventually retreated, the FTC sought to change its mission statement to include "target[ing] *legitimate* business activity." Andy Jung, *FTC Proposes Astounding Change to the Agency's Mission Statement*, WLF Legal Pulse (Dec. 7, 2021), https://tinyurl.com/4a3mzchn. This would have been a major change. For as long as it has had a mission statement, the FTC has not targeted businesses operating legally. Nor was that the FTC's only attempt at overstepping its statutory authority. *See* FTC Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the FTC Act (Nov. 10, 2022), https://tinyurl.com/3vnsz554; *Non-Compete Clause Rule*, 88 Fed. Reg. 3,482 (Jan. 19, 2023).

It's no secret why the FTC has embarked on this targeting of these legal business activities. It wants to change antitrust law through

administrative action rather than through Congress. Normally, the bipartisan nature of the FTC helps check the Commission's adopting extreme positions. But the FTC is no longer a bipartisan independent agency. Rather, all commissioners are from a single political party. Those three individuals have declared war on the business community and ignored the Constitution and United States Code. It is time to halt its illegal actions by reversing the FTC's order and declaring that the FTC's structure violates the Constitution.

STATEMENT

Today one of the first things that newly expectant parents do when they learn of a pregnancy is undergo prenatal genetic testing. These tests help detect genetic abnormalities. Although some data is used to prepare parents for the birth of their child, other test results may help save a baby's life. With medical advances, some abnormalities can be treated in utero, increasing the chance of the child's survival. *See, e.g.*, *NHS launches sight-saving NIPT test*, Genomics Educ. Programme (May 13, 2022), https://tinyurl.com/yckvtcnm.

Prenatal testing has become so common because of advances in medical technology. Illumina has been at the forefront of these

advancements. It has pioneered next generation sequencing, which improves the accuracy of genetic and genomic analyses. Besides prenatal screening, the technology Illumina has developed is also used for cancer screening.

Illumina sought to find a single blood test that could detect most cancers. It thus founded GRAIL, hoping to develop this blood test. Two years later, Illumina recognized that the costs associated with the project were too high. So it spun off GRAIL into a separate company. This allowed outside investors to fund the project's necessary research. That investment paid dividends. The blood test, called Galleri, now screens for more than 50 cancers and locates where in the body the cancer originated.

While GRAIL was a standalone company, Illumina kept at least a 12% interest. But in late 2020, the two companies decided that Galleri was most likely to succeed commercially if the two companies combined. In short, Illumina's ability to streamline GRAIL's supply chain and operations would help to lower the cost of Galleri from its current $1,000 per test price tag.

The FTC sued in district court to block the transaction and force Illumina and GRAIL to unwind their transaction. But soon the FTC had

second thoughts about its chances before an Article III judge. So it withdrew the action and began in-house proceedings. After a five-week trial, the FTC's own ALJ saw through the baseless allegations and held that the vertical merger was legal.

Displeased, the FTC appealed the decision to the Commission. As expected, the commissioners overruled the ALJ's decision and found that the transaction violated the antitrust laws. Illumina and GRAIL now petition for review of that decision.

SUMMARY OF ARGUMENT

I. The Supreme Court has held that the President may remove principal officers of the United States for any reason. For-cause removal protections are permitted only in limited circumstances. Members of multi-member administrative agencies, for example, may enjoy protection if the agency is (A) balanced along partisan lines; (B) consists of experts; and (C) does not exercise any executive authority. Today, the FTC (A) has three commissioners, all whom are Democrats; (B) includes at least one nonexpert commissioner; and (C) exercises executive power. Thus, the for-cause removal protection that FTC members enjoy is unconstitutional.

II.A. At our nation's founding, "due process of law" was understood to mean judicial process—not administrative process. Because the Fifth Amendment's Due Process Clause treats private rights differently than public rights, the Framers believed that only Article III courts could deprive parties of private rights. But under the FTC's current process, an administrative agency can adjudicate these private rights without meaningful review of the agency's factual findings by an Article III court. This violates parties' rights under Article III and the Due Process Clause.

B. Having a prosecutor also serve as the judge of the case sounds like how the North Korean legal system works—not America's. But that is what the FTC does. Here it served as both the prosecutor and the judge. This process violates the common-law notion of due process. The delta between the FTC's in-house win rate and its winning percentage in federal court confirms an actual bias by the FTC, and at a minimum lends an appearance of bias to any reasonable observer. This is another way in which the FTC's process violates parties' due-process rights.

ARGUMENT

I. THE FTC'S STRUCTURE IS UNCONSTITUTIONAL.

Congress may restrict the President's ability to remove principal officers in limited cases. *Humphrey's Ex'r v. United States*, 295 U.S. 602, 621-32 (1935). But as *Seila Law LLC v. Consumer Fin. Prot. Bureau* explained, the congressional restrictions on the President's power to remove FTC commissioners recognized in *Humphrey's Executor* are at "the outermost constitutional limits of permissible congressional restrictions on the President's removal power." 140 S. Ct. 2183, 2200 (2020) (quotation omitted).

Seila Law addressed a challenge to the constitutionality of for-cause removal protection for the Consumer Finance Protection Bureau's director. The Court reiterated that "officers must remain accountable to the President, whose authority they wield." *Seila Law*, 140 S. Ct. at 2197. There are "only two exceptions to the President's unrestricted removal power." *Id.* at 2192. For principal officers—like FTC commissioners—Congress may "give for-cause removal protections to a multimember body of experts, balanced along partisan lines, that perform[s] legislative and judicial functions and [does] not [] exercise any executive power." *Id.* at

2187. As the FTC fails all three prongs of this test, the for-cause removal protection that FTC commissioners enjoy is unconstitutional.

A. The FTC Is Not Balanced Along Partisan Lines.

The history of the FTC's creation and *Humphrey's Executor* shows what type of body that Congress and the Court thought the FTC was. As Representative Morgan said at the time of the FTC's creation, "it is unsafe for . . . a great political party . . . to hold the power of life and death over the great business interests of this country." 51 Cong. Rec. 8,857 (1914). So he supported "taking these business matters out of politics." *Id.* He thought that an "independent" commission was the best way to do that. *See id.* Congress thus decided to give FTC commissioners for-cause removal protections in the FTC Act.

Representative Morgan's focus on avoiding one political party's control of government and its threat to business shows that Congress was confident that the FTC would be a bipartisan agency and would not be controlled by a single party. That also explains why the FTC Act requires that no more than three of the five commissioners be from one political party. 15 U.S.C. § 41.

Humphrey's Executor took Congress at its word. The Court explained that the FTC "is to be nonpartisan; and it must, from the very nature of its duties, act with entire impartiality." 295 U.S. at 624. Not only was the FTC itself to be nonpartisan, but Congress thought it "essential" that the FTC not even be "open to the suspicion of partisan direction." *Id.* at 625 (citing S. Rep. No. 63-597 (1914)). Besides limiting the number of commissioners from one party, Congress believed it imperative that FTC commissioners be men of "dignity." S. Rep. No. 63-597 at 22.

Of course, today's FTC looks nothing like the nonpartisan body Congress thought it was creating and the Supreme Court approved of in *Humphrey's Executor*. Now the FTC has three commissioners, all whom are Democrats. No other party has a commissioner. This means that the FTC no longer resembles the agency that existed at the time of its creation or twenty years later when the Supreme Court blessed its structure.

Even Chairman Khan thinks that the days of the FTC's being nonpartisan and removed from politics are in the past. *See* Corbin K. Barthold, *Regulator Beware: Will FTC chairwoman Lina Khan's*

aggressive posture invite a judicial rebuke, City Journal (Dec. 2, 2021), https://tinyurl.com/26ddehvk (Chairman Khan said that "all decisions are political." (citing Fox Business Network, *Break Up Amazon as a Monopoly?*, YouTube (June 23, 2017), https://tinyurl.com/yhw722en)). This marked departure from how the FTC functioned in 1935 is reason enough to hold that the FTC's structure is unconstitutional.

B. The FTC Is Not A Body Of Experts.

Another key aspect of *Humphrey's Executor*'s analysis was that the FTC was "a body of experts." 295 U.S. at 624 (quotation omitted); *id.* at 625. That may have been true when the FTC was created and even in the 1930s. The first Chairman of the FTC, for example, was an attorney who previously served as the head of the Bureau of Corporations, the predecessor to the FTC. Before that, he was a practicing lawyer for over ten years. The three other original commissioners were not legal experts. But they were business experts. (The fifth commissioner was a recess appointee whom the Senate rejected.)

But the FTC is not comprised of experts today. All three commissioners held partisan positions in Congress before their appointment; one had sufficiently little legal practice experience that she

would have been ineligible for bar admission on motion in some jurisdictions when she was appointed. *See, e.g.*, Conn. Bar Examining Comm. R. 2-13(a)(2). Rather than a body of experts, the current FTC operates as a body of partisan politicians with a mandate to adopt radical policies through the FTC. This is the opposite of what Congress thought it was doing in creating the FTC and what the Supreme Court thought it was blessing in *Humphrey's Executor*.

C. The FTC Exercises Executive Power.

Seila Law's analysis of the CFPB's director's for-cause removal protection mainly focused on executive power. It continually returned to the idea that the CFPB exercises executive power while, at most, the Court in *Humphrey's Executor* viewed the FTC as exercising "executive function" rather than "executive power." *Seila Law*, 140 S. Ct. at 2198 (cleaned up).

When an agency exercises executive power, "the general rule that the President possesses the authority to remove those who assist him in carrying out his duties" prevails. *Seila Law*, 140 S. Ct. at 2198 (cleaned up). Now the FTC exercises executive power. It routinely "seek[s] daunting monetary penalties against private parties on behalf of the

United States in federal court." *Seila Law*, 140 S. Ct. at 2200; *see generally AMG Cap. Mgmt., LLC v. FTC*, 141 S. Ct. 1341 (2021). It also "issue[s] final decisions awarding legal and equitable relief in administrative adjudications." *Seila Law*, 140 S. Ct. at 2200. One need look no further than the order here to see the breadth of legal equitable relief the FTC orders in its own administrative proceedings.

As the Supreme Court recently explained, both functions are exercises of "quintessentially executive power not considered in *Humphrey's Executor*." *Seila Law*, 140 S. Ct. at 2200 (footnote omitted). The only reasonable interpretation of *Seila Law* is that the FTC exercises executive power today, even if it did not do so 88 years ago. So the FTC's structure is unconstitutional.

II. THE FTC'S ENFORCEMENT PROCESS VIOLATED THE DUE PROCESS CLAUSE BY HAVING AN EXECUTIVE AGENCY ADJUDICATE PRIVATE RIGHTS.

A. The Constitution Requires Article III Adjudication Of Private Rights.

The Framers recognized the importance of judicial process before ratifying the Fifth Amendment. *Cf.* 3 Elliot's Debates 451 (George Nicholas, Virginia Convention) (arguing that the Constitution allowed

courts to apply due-process principles). The text and structure of the Constitution confirms this pre-ratification interpretation.

"The judicial Power of the United States" is "vested in one supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." U.S. Const. art. III, § 1. This power "extend[s] to all Cases, in Law and Equity, arising under the Constitution [and] the Laws of the United States." *Id.* art. III, § 2, cl. 1. Although the Constitution does not define the term, the judicial power is "the power to bind parties and to authorize the deprivation of private rights." William Baude, *Adjudication Outside Article III*, 133 Harv. L. Rev. 1511, 1513-14 (2020).

After the Constitution and Bill of Rights were ratified, the founding generation understood that only Article III courts could adjudicate private rights while the precursors to today's administrative state could adjudicate only public rights. *See Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 711 (2015) (Thomas, J., dissenting). In other words, the due-process protections afforded to parties depended on whether the government was infringing on a private right. *See* John Harrison,

Jurisdiction, Congressional Power, and Constitutional Remedies, 86 Geo. L.J. 2513, 2516 (1998).

The Supreme Court has embraced this understanding of what constitutes the judicial power of the United States. The distinction "between 'public rights' and 'private rights'" shapes the Court's definition of "Article III judicial power." *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1373 (2018). If private rights are at issue, only an Article III court may adjudicate disputes.

When public rights are at issue, adjudication outside of Article III is permissible. *See Oil States*, 138 S. Ct. at 1373. These public rights are today called "[g]overnment benefits and entitlements." *Axon*, 598 U.S. at 199 (Thomas, J., concurring). The Government can take away these public rights without using judicial process; administrative process suffices to satisfy the Fifth Amendment's Due Process Clause. *See Sessions v. Dimaya*, 138 S. Ct. 1204, 1246 (2018) (Thomas, J., dissenting). In other words, "the rights-privilege distinction [i]s fundamental to the structural allocation of responsibility and in particular to determining the judicial role." Harrison, 86 Geo. L.J. at 2516.

Illumina's merger with GRAIL implicates private, not public, rights. "The three classic private rights[are]life, liberty, and property." *Ortiz v. United States*, 138 S. Ct. 2165, 2185 (2018) (Thomas, J., concurring). Stopping the merger between GRAIL and Illumina implicates the property rights of both parties. *See Axon*, 598 U.S. at 203-04 (Thomas, J., concurring). Thus, under the original public meaning of the Fifth Amendment's Due Process Clause and Article III, an executive agency cannot adjudicate these private rights. Rather, an Article III court must adjudicate them.

But that is not what happened here—or in any other proceeding that the FTC initiates in-house. Rather than having an Article III court provide judicial process—which equates to due process—the FTC provides only administrative process. As administrative agencies cannot adjudicate private rights under Article III and the Fifth Amendment's Due Process Clause, this Court should reverse the FTC's decision and require it to pursue its claims in an Article III court.

Administrative agencies like the FTC and SEC may choose whether to sue in federal court or bring in-house administrative complaints. *See* 15 U.S.C. §§ 45(b) and 53(b) (FTC); 78u(d) and 78u-2 (SEC). The choice

the agency makes is not just a matter of form. It greatly affects how the case proceeds.

When the FTC institutes in-house proceedings, an ALJ hears all the evidence and makes findings of fact and conclusions of law. When, as here, the FTC doesn't like its own ALJ's factual findings or legal conclusions, it simply appeals the decision to . . . itself! It "review[s] the ALJ's findings of fact and conclusions of law de novo." *LabMD, Inc. v. FTC*, 894 F.3d 1221, 1226 (11th Cir. 2018); *cf.* Jennifer L. Mascott, *Constitutionally Conforming Agency Adjudication*, 2 Loy. U. Chi. J. Reg. Compliance 22, 41 (2017) (discussing how little deference ALJ decisions receive (citations omitted)). The FTC makes credibility findings despite not hearing the witnesses or viewing their demeanor during testimony.

The FTC therefore makes credibility findings based on a cold record. Yet "[o]ne of the most important principles in our judicial system is" that when private rights are at issue, "factual findings may not be made by someone who decides on the basis of a cold record without the opportunity to hear and observe the witnesses in order to determine their credibility." *Louis v. Blackburn*, 630 F.2d 1105, 1109 (5th Cir. 1980) (citations omitted).

Unsurprisingly, the FTC doesn't have trouble making credibility findings that help its own case when deciding its own appeal of an ALJ's decision. (It also doesn't have a problem agreeing with an ALJ's findings when that helps its case.) Still worse, FTC factual findings are nearly impossible to overturn on review by an Article III tribunal. *See* 15 U.S.C. § 45(c) (factual findings are binding "if supported by evidence"); *see also id.* § 78y(a)(4) (SEC findings are "conclusive" if "supported by substantial evidence").

This bears no resemblance to "the system that prevailed for the first century of our Nation's existence. During that period, judicial review was 'all-or-nothing'; 'either a court had authority to review administrative action or not, and if it did, it decided the whole case.'" *Axon*, 598 U.S. at 197 (Thomas, J., concurring) (quoting Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 Colum. L. Rev. 939, 952 (2011)). "This all-or-nothing model rested on a conceptual distinction between core private rights, on the one hand, and mere public rights and governmental privileges, on the other." *Id.*

The current system of having administrative agencies adjudicate disputes over private rights while Article III courts only review for legal errors or clearly erroneous factual findings is hardly judicial process. And again, the core of due process is judicial process. The FTC's system of in-house adjudication—rather than Article III adjudication—violates Article III and the Fifth Amendment's Due Process Clause. This alone warrants reversing the FTC's order and making it file a civil action in district court.

B. The Constitution Bars One Agency From Acting As Prosecutor And Judge When Adjudicating Private Rights.

The FTC acted as prosecutor and judge when adjudicating the claims against Illumina and GRAIL. The FTC voted to bring the claims and when the FTC didn't like its ALJ's decision, it sat as an appellate court and reversed that ruling. An agency cannot serve as both the prosecutor and judge when adjudicating private rights without violating fundamental due-process principles.

The FTC's serving as prosecutor and judge in the same proceeding deprives parties of due process. "[B]ias [] occurs when an individual adjudicates an issue with which she has had prior involvement, either in

the position of an advocate or as a judge in an earlier stage of the case." Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 Yale L.J. 455, 502 (1986). The adjudicator "has a strong motivation to hold that her initial decision was the correct one, and to a certain extent she acts as judge in her own case." *Id.* at 502-03. This happens when the FTC "was previously responsible for initiating the prosecution." *Id.* at 503.

There is nothing to distinguish this type of bias from the type of bias that the Supreme Court condemned in *Williams v. Pennsylvania*, 579 U.S. 1 (2016). There, the chief justice of the Supreme Court of Pennsylvania had acted in a ministerial capacity by signing a document when he was the District Attorney of Philadelphia County. *See id.* at 5 (citation omitted).

The Supreme Court explained that "[d]ue process guarantees 'an absence of actual bias' on the part of a judge." *Williams*, 579 U.S. at 8 (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)). This means that "no man can be a judge in his own case." *Id.* at 9. But that maxim "would have little substance if it did not disqualify a former prosecutor from

sitting in judgment of a prosecution in which he or she had made a critical decision." *Id.*

Yet the FTC commissioners did that here. They made many critical decisions, including whether to challenge the merger. This was much more than the mere ministerial task carried out by the district attorney turned chief justice in *Williams*. Still, there the Supreme Court found that due process required vacating the Supreme Court of Pennsylvania's decision and remanding for a hearing before an impartial court. After launching the prosecution, the FTC commissioners then served as judge, finding for the agency. This is the type of due-process violation that the Supreme Court rejected in *Williams* and that this Court should reject here.

The result is the same even if this Court applies other Supreme Court precedent. "[T]he combination of investigative and adjudicative functions does not, without more, constitute a due process violation." *Withrow v. Larkin*, 421 U.S. 35, 58 (1975). To show this "more," a party "must convince [courts] that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual

bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." *Id.*; *see also Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 884 (2009) (citation omitted). Here, that burden is easily satisfied.

The FTC prevails in between 90 and 100 percent of the cases it adjudicates in-house. *Axon*, 598 U.S. at 215-16 (Gorsuch, J., concurring) (citations omitted). The number is about the same for the SEC. *See id.* This compares to a 69% success rate when the SEC sues in federal court. *Id.* (citing Gideon Mark, *SEC Enforcement Discretion*, 94 Tex. L. Rev. 261, 262 (2016)).

There is no innocent explanation for agencies' high win rate in in-house cases compared to cases tried in Article III courts. The cases brought in federal court do not differ in a way that explains the delta in win rates. This shows that there is actual bias with the FTC acting as both prosecutor and judge. So even under the Supreme Court's *Withrow* opinion, the FTC's process of serving as both prosecutor and judge cannot withstand due-process scrutiny.

In sum, there are at least two serious due-process problems with the FTC's adjudication here. First, as an Article II administrative agency,

the FTC could not provide the judicial process that the Due Process Clause requires when adjudicating private rights. Second, the FTC's serving as both prosecutor and judge meant that Illumina and GRAIL received due process in name only. This Court should therefore reverse the FTC's order.

* * *

Who should have access to a potentially life-saving test that can alert to hidden cancer and its origin? The FTC's answer is only those who can afford to pay the $1,000 out-of-pocket cost. As well-compensated bureaucrats who can afford Galleri's price tag, the commissioners saw no problem with making it harder for everyday Americans to access this diagnostic tool. They could do so because of the unconstitutional removal protections they enjoy and because the FTC's adjudicative process violated Illumina's and GRAIL's due-process rights. This Court should not allow that to happen. It should help all Americans detect cancer and reverse the FTC's decision.

CONCLUSION

This Court should reverse.

Respectfully submitted,

/s/ John M. Masslon II
John M. Masslon II
Cory L. Andrews
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave. NW
Washington, DC 20036
(202) 588-0302
jmasslon@wlf.org

Counsel for Amicus Curiae
Washington Legal Foundation

June 8, 2023

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limits of Federal Rule of Appellate Procedure 29(a)(5) because it contains 4,171 words, excluding the parts exempted by Federal Rule of Appellate Procedure 32(f).

I also certify that this brief complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5) and (6) because it uses 14-point Century Schoolbook font.

/s/ John M. Masslon II
JOHN M. MASSLON II
Counsel for Amicus Curiae
Washington Legal Foundation

June 8, 2023

CERTIFICATE OF SERVICE

I hereby certify that, on June 8, 2023, I served all counsel of record via the Court's CM/ECF system.

/s/ John M. Masslon II
JOHN M. MASSLON II
Counsel for Amicus Curiae
Washington Legal Foundation

June 8, 2023