IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

TEMPUR SEALY INTERNATIONAL, INC. and MATTRESS FIRM GROUP, INC. Plaintiffs, vs. THE FEDERAL TRADE COMMISSION and LINA M. KHAN, REBECCA KELLY SLAUGHTER, ALVARO BEDOYA, MELISSA HOLYOAK, and ANDREW N. FERGUSON, in their official capacities as Commissioners of the Federal Trade Commission Defendants.	Civil Action No. 4:24-cv-03764

PLAINTIFFS TEMPUR SEALY'S AND MATTRESS FIRM'S
MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs Tempur Sealy International, Inc. ("Tempur Sealy") and Mattress Firm Group, Inc. ("Mattress Firm") move, pursuant to Rule 65(a) of the Federal Rules of Civil Procedure, for a preliminary injunction against Defendants* enjoining them from continuing with the ongoing administrative proceeding before the Federal Trade Commission ("FTC") against Plaintiffs pending resolution of Plaintiffs' request for a permanent injunction and declaratory relief in this Court. Oral argument is requested pursuant to Local Rule 7.5.

* Namely, Federal Trade Commission ("FTC"), Lina M. Khan, Rebecca Kelly Slaughter, Alvaro Bedoya, Melissa Holyoak, and Andrew N. Ferguson.

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INTRODUCTION

Through a pending in-house administrative proceeding, the Federal Trade Commission ("FTC") seeks to permanently prevent the merger of Tempur Sealy and Mattress Firm. This in-house administrative proceeding (the "FTC Proceeding") violates the U.S. Constitution twice over: *First*, the FTC Proceeding[1] violates Article III by purporting to adjudicate Tempur Sealy's and Mattress Firm's private rights, a function that remains the exclusive domain of Article III courts. *Second*, the FTC violates Article I by exercising unfettered legislative power to funnel enforcement actions to its in-house administrative tribunals. The law and recent Supreme Court precedent confirm that Tempur Sealy and Mattress Firm are substantially likely to succeed on the merits of their constitutional challenges.

Absent a preliminary injunction, Tempur Sealy and Mattress Firm will suffer irreparable harm because they will be subjected to an illegitimate and unconstitutional administrative proceeding. The burden of complying with that illegitimate proceeding imposes, *inter alia*, unrecoverable costs on Tempur Sealy and Mattress Firm.

Lastly, the balance of equities favors the granting of a preliminary injunction. The equities and public interest strongly favor Tempur Sealy and Mattress Firm, as the protection of constitutional rights is always in the public interest. There is no valid public interest in allowing the FTC to employ unconstitutional administrative proceedings.

The FTC Proceeding should be preliminarily enjoined.

[1] *In re Tempur Sealy Int'l, Inc.*, Dkt. No 9433 (FTC).

BACKGROUND

I. The FTC's Structure and Its Administrative Proceedings.

The Federal Trade Commission Act of 1914 established the FTC, an executive agency led by five Commissioners appointed by the President and confirmed by the Senate. *See* 15 U.S.C. § 41. The FTC is authorized to enforce Section 7 of the Clayton Act, which prohibits mergers that may substantially lessen competition. *Id.* §§ 18, 21(a).

Under the Hart-Scott-Rodino Act, parties to mergers exceeding a certain value are required to file premerger notifications with the FTC and the Antitrust Division of the Department of Justice (the "Antitrust Division"). *Id.* § 18a. Those premerger notifications also require the payment of fees ranging from $30,000 to $2,335,000, *id.* § 18a note; 89 Fed. Reg. 7708, 7709 (Feb. 5, 2024). The parties must then wait for, as relevant here, a minimum of 30 days before the merger can be consummated. 15 U.S.C. § 18a(b). But if the FTC or the Antitrust Division seeks more information (through what is commonly referred to as a "Second Request"), that clock resets—only to restart once the parties have "substantially compl[ied]" with the Second Request. *Id.* § 18a(e). Because the FTC and the Antitrust Division share jurisdiction over merger review, transactions are typically reviewed by only the agency that claims to have more expertise with the industry involved—but that determination is made on a case-by-case basis.

If the FTC believes that a proposed merger will violate the antitrust laws, the Commissioners may, by majority vote, authorize the FTC directly to bring a suit in federal court to challenge the merger. 16 C.F.R. § 3.11(a); 15 U.S.C. § 53(b). To initiate that suit, the FTC must issue and serve a complaint stating its charges. *Id.* § 45(b).

As a matter of practice, though, the FTC typically launches its own administrative process. It does so by filing an Administrative Complaint in-house with one of its Administrative Law Judges, who are employed by the FTC. 16 C.F.R. § 3.42. Pursuant to the FTC's administrative rules, *id.* §§ 3.1–3.83, the ALJ will hold an administrative hearing, which can last up to 210 hours, and will then issue a "recommended decision" as to whether to block the merger. *Id.* §§ 3.41(b), 3.51(a)(1). By contrast, when the Antitrust Division seeks to challenge a merger, it must file a complaint seeking to enjoin the merger in federal court.

Thus, in the FTC's administrative proceedings, FTC employees both draft and resolve the charges brought against the parties to a merger agreement. That "recommended decision" may then be appealed to the Commissioners, the same body that voted to issue the Administrative Complaint in the first place. *Id.* § 3.54.

The final decision of the Commissioners is subject to limited judicial review by a U.S. Court of Appeals, where the court is bound by the Commission's factual determinations so long as they are supported by such relevant evidence as a reasonable mind might accept as adequate. 15 U.S.C. § 45(c). That is so even if suggested alternative conclusions may be equally or even more reasonable and persuasive. *Illumina, Inc. v. FTC*, 88 F.4th 1036, 1046 (5th Cir. 2023).

When the FTC challenges a pending merger in its administrative court, it also typically authorizes its staff to seek a preliminary injunction in federal court (as it has done against Tempur Sealy and Mattress Firm), because the FTC does not itself have the power to issue preliminary or emergency injunctive relief. 15 U.S.C. § 53(b). But as discussed

in more detail below, in such cases the FTC insists that the merits will be tried before the FTC, not in the federal court, whose role the FTC claims is highly circumscribed.[2]

II. The FTC's Proceeding Against Tempur Sealy and Mattress Firm.

Tempur Sealy, a mattress manufacturer, entered into an agreement to acquire Mattress Firm, a mattress retailer. Ex.1 at 12-14. Like most vertical mergers, the proposed transaction is procompetitive. It will enhance competition, increase innovation, and reduce costs—all to the benefit of American consumers.[3]

In July 2024, the Commissioners voted to authorize the FTC to file an Administrative Complaint in-house seeking an administrative order permanently blocking the merger and blocking either Tempur Sealy or Mattress Firm from engaging in a merger with any "other company" without FTC approval for an indefinite "period of time." Ex.1 at 2; Ex.2 at 46.

At the same time, the FTC filed a suit in this District seeking to preliminarily enjoin the acquisition pending resolution of the administrative proceedings. *See* Ex.1. The FTC's filings in that case make plain its strategy: The agency has no interest in asking the court to decide "whether Defendants' proposed acquisition actually violates Section 7 of the

[2] Although many (if not most) Part III proceedings are never completed, because HSR-reportable mergers nearly always stand or fall based on the preliminary federal court injunction decision given appellate, timing, and other commercial considerations, the mere threat of the Part III proceedings gives the FTC unmerited negotiating leverage over the merging parties and, when not abandoned, afford the FTC a lower standard of review, and, ultimately, an *in terrorem* device to force the abandonment of any unconsummated merger that might actually be subjected to it.

[3] *See, e.g.*, Ronald H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937); Joshua D. Wright & Murat C. Mungan, *The Easterbrook Theorem: An Application to Digital Markets*, 130 YALE L.J.F. 622, 630–31 (2021) ("As far as vertical arrangements are concerned, the empirical evidence suggests anticompetitive conduct is exceedingly rare; on the other hand, there is no shortage of uncontroversial evidence of procompetitive benefits.").

Clayton Act." Ex.3 at 32. "Instead, that decision will be made in an administrative proceeding." *Id.* Put differently, the FTC itself will "adjudicate the merger's legality." Ex.3 at 31.

The preliminary-injunction hearing before this Court is set to begin on November 12, 2024, Ex.4 at 3, and the FTC Proceeding is set to begin on December 4, 2024, Ex.5 at 4.

ARGUMENT

This Court should preliminarily enjoin the FTC Proceeding to prevent Tempur Sealy and Mattress Firm from suffering irreparable injury.

A movant is entitled to preliminary injunctive relief upon its showing "(1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest." *Mock v. Garland*, 75 F.4th 563, 577 (5th Cir. 2023) (en banc) (quoting *Byrum v. Landreth*, 566 F.3d 442, 445 (5th Cir. 2009)).

The "first factor—likelihood of success on the merits—is 'the most important.'" *United States v. Abbott*, 110 F.4th 700, 706 (5th Cir. 2024) (quoting *Mock*, 75 F.4th at 587 n.60). And the last two factors merge where, as here, the government is a party. *See Mock*, 75 F.4th at 577.

I. Tempur Sealy and Mattress Firm Are Substantially Likely to Succeed on the Merits of their Constitutional Claims.

Tempur Sealy and Mattress Firm are substantially likely to show that the FTC Proceeding is unconstitutional. *First*, the FTC Proceeding usurps Article III of the Constitution by purporting authoritatively to adjudicate Tempur Sealy's and Mattress Firm's private rights. *Second*, the FTC violates Article I of the Constitution by exercising unfettered legislative power in channeling its enforcement actions to administrative tribunals.

A. The FTC Proceeding Violates Article III by Adjudicating Tempur Sealy's and Mattress Firm's Private Rights in an Administrative Tribunal.

1. History and Tradition Establish That the FTC Proceeding Concerns a Traditional Legal Claim.

"Article III, § 1, of the Constitution commands that '[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.'" *Stern v. Marshall*, 564 U.S. 462, 469 (2011). "Under the 'basic concept of separation of powers,'" that grant of judicial Power "cannot be shared with the other branches." *SEC v. Jarkesy*, 144 S. Ct. 2117, 2131 (2024) (quoting *Stern*, 562 U.S. at 483). Thus, "[o]nly courts satisfying the requirements of Article III may exercise the federal judicial power." *In re BP RE, L.P.*, 735 F.3d 279, 283 (5th Cir. 2013) (quotation omitted).

By virtue of this constitutional separation of powers, disputes that implicate any "matter concerning private rights" "must be decided" by Article III courts. *Jarkesy*, 144 S. Ct. at 2131–32 (cleaned up). As the Supreme Court has "repeatedly explained," one of

the "hallmark" methods of "determining if a suit concerns private rights" is to ask whether that suit "is made of 'the stuff of the traditional actions at common law tried by the courts at Westminster in 1789." *Id.*, 144 S. Ct. at 2132 (citations omitted); *see also Consumers' Rsch. v. FCC*, 109 F.4th 743, 779 (5th Cir. 2024) (en banc) (regarding "the separation of powers[,] . . . reviewing courts must consider a government program['s] . . . compatibility with our constitutional history and structure."). The inquiry centers on the "relationship between the cause[] of action in this case" and "its common law 'ancestor.'" *Jarkesy*, 144 S. Ct. at 2130 (citation omitted).

Crucially, that the instant claim "is statutory is immaterial to th[e] analysis." *Id.* at 2128 (citation omitted). Nor do the claims have to be identical. *Id.* at 2131. So long as their relationship is "close"—*e.g.*, both claims "target the same basic conduct" or the latter uses "common law terms of art"—"then the matter presumptively concerns private rights, and adjudication by an Article III court is *mandatory*." *Id.* (citation omitted) (emphasis added). Put another way, mere technical variances in scope, or the burdens or elements of proof, will not withdraw a cause of action "from judicial cognizance." *Id.* at 2131-32.

Here, Tempur Sealy and Mattress Firm have entered into an agreement by which Mattress Firm will sell its property to Tempur Sealy. Despite the transaction's procompetitive effects, the FTC is attempting to void that agreement and planned property transfer. Worse still, the FTC seeks to dismantle that transaction through an *in-house* proceeding that will be refereed by one of *the FTC's own* employees, and then, reviewed by *the same FTC Commissioners* who voted to block the merger in the first place.

The cause of action underlying the FTC Proceeding mirrors that of "the traditional actions at common law tried by the courts at Westminster in 1789." *Id.* at 2132 (citations omitted). Specifically, the FTC relies on Section 7 of the Clayton Act to assert that Tempur Sealy's and Mattress Firm's proposed transaction is predicted to impact future competition negatively. Ex.3 at 32.

The FTC's chosen cause of action is not novel. Suits seeking to restrain transactions on the basis of anticompetitive market effects have long been the purview of common-law courts. Indeed, its genesis traces back to 1601, when Queen Elizabeth and Parliament struck a compromise to allow "cases involving the legality of monopolies to be heard in common law court."[4] The result of that compromise was the seminal 1603 case of *Darcy v. Allen*, wherein the common-law courts struck down the legality of a monopoly over the production, importation, and sale of trading cards in England. *See* Calabresi & Leibowitz at 991-92. And any doubt to their jurisdiction was further eliminated by the Statute of Monopolies in 1624—section two of which made plain that litigation involving "monopolies . . . shall be for ever [sic] hereafter examined, heard, tried, and determined, by and according to *the common laws of this realm, and not otherwise*." Statute of Monopolies, 1623, 21 Jac. 1, c. 3, § 2 (Eng.) (emphasis added); *see also Golden Glow Tanning Salon, Inc. v. City of Columbus*, 52 F.4th 974, 983 (5th Cir. 2022) (Ho, J., concurring) (citing *Calabresi & Leibowitz* at 999), *cert. denied*, 143 S. Ct. 1085 (2023).

[4] Steven G. Calabresi & Larissa C. Leibowitz, *Monopolies and the Constitution: A History of Crony Capitalism*, 36 HARVARD J.L. & PUB. POL. 983, 991 (2013) (citing Thomas B. Nachbar, *Monopoly, Mercantilism, and the Politics of Regulation*, 91 VA. L. REV. 1313, 1330–31 (2005)) [hereinafter "Calabresi & Leibowitz"].

That British tradition—of adjudicating suits relating to restraints of trade before the common-law courts—formed the basis for founding-era caselaw in both the federal courts and the courts of the several states. Notably, the Supreme Court recognized as much in *Charles River Bridge v. Warren Bridge*, 36 U.S. 420 (1837)—expressly relying on, *inter alia*, the English common-law tradition of "restraining, within the strictest limits, the spirit of monopoly, and the exclusive privileges in the nature of monopolies" in concluding that American courts disfavored the same as a matter of constitutional history and public policy. *Id.* at 545–46. It should come as no surprise, then, that courts, both state and federal, were adjudicating suits challenging the validity of exclusive dealing arrangements as unlawful restraints on trade and of mergers as injurious to market competition even *before* the Sherman Act was enacted. *See, e.g.*, *Or. Steam Navigation Co v. Winsor*, 87 U.S. 64 (1874) (invalidating portion of non-compete covenant as unreasonable restraint of trade); *Richardson v. Buhl*, 43 N.W. 1102 (Mich. 1889) (blocking merger as injurious to competition); *People v. Chi. Gas Tr. Co.*, 22 N.E. 798 (Ill. 1889) (same); *Distilling & Cattle Feeding Co. v. People*, 41 N.E. 188 (Ill. 1895) (same); *see also, e.g.*, *W. Union Tel. Co. v. Balt. & Ohio Tel. Co.*, 23 F. 12 (C.C.D. Ind. 1885) (invalidating unlawful restraint of trade); *The Express Cases*, 117 U.S. 1 (1886) (adjudicating challenge to an exclusive-dealing arrangement).

Congress itself relied on that well-established body of common-law in passing the Sherman Antitrust Act of 1890. Indeed, the Act's very sponsor explicitly acknowledged that its purpose "was to codify at the federal level the common law rule, which existed in many states, outlawing private contracts that operated as restraints on trade." Calabresi &

Leibowitz at 1063 (quotation omitted); *see Harriet Hubbard Ayer, Inc. v. FTC*, 15 F.2d 274 (2d Cir. 1926) ("The [Sherman Act] was intended to make the common law applicable in federal cases . . . ."). Same too with the Clayton Act of 1917, which Congress passed to reinforce the same basic principles that underpinned its predecessor, the Sherman Act. *See* Calabresi & Leibowitz at 1062-63 (citing ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 63 (The Free Press 1993) (1978)). Providing further inspiration for both statutes was the 1624 English Statute on Monopolies—so much so, in fact, that "[e]very major feature of modern antitrust law appears in it"—including, critically, all three statutes' "trust in common-law courts and juries to apply [their] prohibitions." Jay Dratler Jr., *Does Lord Darcy Yet Live—The Case against Software and Business-Method Patents*, 43 SANTA CLARA L. REV. 823, 825 (2003).

Given that robust historical record, courts were quick to recognize that the Sherman Act and Clayton Act were Congress's *codifications* of pre-existing common-law principles. And it is for that reason that the Supreme Court has consistently recognized that those acts should be construed in light of their common-law background. *See, e.g.*, *Ohio v. Am. Express Co.*, 585 U.S. 529, 540 (2018) (interpreting Sherman Act "in view of the common law and the law in this country" (cleaned up)); *Assoc. Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 531 (1983) (same); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 211 (1959) (explaining that the Sherman Act "adopt[ed] the common-law proscription of all 'contracts or acts which it was considered had a monopolistic tendency' and which interfered with the 'natural flow' of an appreciable amount of interstate commerce" (cleaned up)); *Standard Oil Co. v. United*

States, 283 U.S. 163, 169 n.2 (1931) (citing *Darcy* and Statute of Monopolies); *United States v. Line Material Co.*, 333 U.S. 287, 308 (1948) (citing *Darcy* as evidencing public policy against monopolies).

In sum, the federal antitrust statutes are planted in "common law soil." *Jarkesy*, 144 S. Ct. at 2137. The scope of conduct they target "draws from common-law antecedents" and has been shaped over time through "common-law tradition." *Assoc. Gen. Contractors*, 459 U.S. at 531-32 (citations omitted). The subject matter of the FTC Proceeding therefore concerns Tempur Sealy's and Mattress Firm's private rights. Thus, "adjudication by an Article III court is mandatory." *Jarkesy*, 144 S. Ct. at 2132.

2. The Public Rights Exception Is Inapplicable.

The FTC is wrong to the extent it asserts that the "public rights exception" applies to the administrative adjudication at hand. As explained by the Supreme Court, the public rights exception finds "no textual basis in the Constitution," so "each asserted application" must be justified "in that particular instance" on the basis of "background legal principles." *Id.* at 2134. Accordingly, cognizable public rights are those that "historically could have been determined exclusively by the executive and legislative branches." *Id.* at 2132 (cleaned up) (applying the public-rights exception only after finding "an unbroken tradition—long predating the founding").

The historical record is replete with antitrust claims of the same ilk as those that the FTC now brings against Tempur Sealy and Mattress Firm. But that very record tips definitively towards a "centuries-old" tradition of adjudicating such claims in the common law courts established by Article III of the Constitution. *See supra* part I.A.1. Indeed,

private plaintiffs still often challenge mergers in federal court—not in some administrative forum—and such challenges can be subject to jury trials. *See, e.g.*, *Steves & Sons, Inc. v. JELD-WEN, Inc.*, 988 F.3d 690, 703, 710 (4th Cir. 2021). Try as it may, the FTC cannot point to "a serious and unbroken historical pedigree" suggesting otherwise, thereby precluding the application of the public rights exception.

Here, the FTC cannot meaningfully distinguish the legal principles at play in *Jarkesy* from the adjudication at hand. As discussed above, the public rights exception turns on "the substance of the suit"—that is, a "centuries-old" tradition of exclusive adjudication in the executive and legislative branches. *See Jarkesy*, 144 S. Ct. at 2132, 2136. Attempting meaningfully to distinguish *Jarkesy* would ring hollow, as the Seventh Amendment jury trial right at issue in that case "requires the same answer as the question whether Article III allows Congress to assign adjudication of [a] cause of action to a non-Article III tribunal." *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 53 (1989).

Any attempt by the FTC to manufacture variations between the common law and the antitrust statutes would prove fruitless. That approach is squarely foreclosed by *Jarkesy*'s holding that differences in coverage, burdens of proof, and essential elements of a claim *would not* defeat "the close relationship between federal securities fraud and common law fraud." 144 S. Ct. at 2131. A statute that is broader in some respects and narrower in others still targets the *same basic conduct* as its common law ancestors. *See id.* at 2130. After all, the precise metes and bounds of a common-law claim is not set in amber but, instead, exists as part of "an evolving body of law." *Assoc. Gen. Contractors*, 459 U.S. at 534 n.28.

For that reason, it would also be misplaced for the FTC to analogize to pre-*Jarkesy* caselaw that applies the public rights exception. For example, it is true that *Crowell v. Benson*, 285 U.S. 22 (1932), and *Atlas Roofing Co. v. Occupational Safety Health Review Comm'n*, 430 U.S. 442 (1977), both considered federal agency adjudications. But *Jarkesy* reminds us that, for purposes of the public rights exception, "what matters is the substance of the suit, not where it is brought, who brings it, or how it is labeled." 144 S. Ct. at 2136.

Following *Jarkesy*'s command, it quickly becomes apparent that the *substance* of the claims in *Crowell* and *Atlas Roofing* are wholly inapposite to the antitrust claims at hand. The adjudication at issue in *Crowell* concerned a dispute within "the admiralty jurisdiction." *See* 285 U.S. at 45. Crucially, "tribunals sitting in admiralty in England and America alike had long heard certain matters falling within the public rights exception" and "had long tolerated some flexibility in procedures," including "restricted appellate review of factual findings." *Jarkesy*, 144 S. Ct. at 2148 (Gorsuch, J., concurring). Thus, *Crowell* does not speak to the applicability of the exception outside of the "discrete arena[]" of admiralty—an area where the Constitution has been "traditionally permissive." *Culley v. Marshall*, 601 U.S. 377, 398 (2024) (Gorsuch, J., concurring). In a similar vein, the regulatory regime at issue in *Atlas Roofing* was, "self-consciously novel" "[i]n both concept and execution," borrowing neither "its cause of action from the common law" nor "common law terms of art." *Jarkesy*, 144 S. Ct. at 2137. Thus, *Atlas Roofing* does not disturb the longstanding rule of adjudicating common-law claims before Article III courts. *Id.* at 2137-38 (*Atlas Roofing* "applied the exception to actions that were 'not suits at common law or in the nature of such suits.'" (quoting *Atlas Roofing*, 430 U.S. at 453) (cleaned up)).

Neither *Crowell* nor *Atlas Roofing* provide the FTC with a foothold to assert that the public rights exception applies to its antitrust claim against Tempur Sealy and Mattress Firm. As already discussed at length above, antitrust claims draw from common-law claims and common-law terms of art. Consequently, the public rights exception does not apply.

B. The FTC's Unfettered Discretion to Proceed Administratively Violates the Non-Delegation Principle.

Consistent with the principle of separation of powers, Congress's delegations of power are constitutional only if it "lay[s] down . . . an intelligible principle to which the [agency] is directed to conform." *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928). That requires Congress "clearly [to] delineate[]" the "boundaries of th[e] delegated authority." *Skinner v. Mid-Am. Pipeline Co.*, 490 U.S. 212, 219 (1989).

Congress has purportedly delegated to the FTC the power to decide permanently to block a merger through (a) the FTC's in-house administrative proceedings or (b) an Article III court. Wholly absent from that delegation, however, is any guidance directing the FTC on *how* it may exercise that discretionary power. That much is apparent from the face of the FTC Act, which only provides, in relevant part, "[t]hat *in proper cases* the Commission may seek . . . a permanent injunction." 15 U.S.C. § 53(b) (emphasis added); *see FTC v. Ameridebt, Inc.*, 373 F. Supp. 2d 558, 562 (D. Md. 2005) ("The FTC [contends] that a 'proper case' . . . is simply one that involves a violation 'of any provision of law enforced by the Commission.'").[5]

[5] And, of course, it need hardly be said that federal courts are well competent to adjudicate merger challenges. They do so in every merger challenge brought by the Antitrust Division, which has no administrative tribunal (and *must* proceed in federal court), as well as in nearly every merger challenge brought by the FTC, where the court's "preliminary" injunction decision almost invariably turns out to be permanent. Indeed, only further underscoring the arbitrariness of the FTC's unbridled discretion to choose

Tempur Sealy and Mattress Firm acknowledge that *Illumina, Inc. v. FTC*, 88 F.4th 1036 (5th Cir. 2023), rejected a challenge to the constitutionality of section 53(b)'s delegation of power, *see id*. at 1046. Nonetheless, Tempur Sealy and Mattress Firm respectfully posit that *Jarkesy v. SEC*, 34 F.4th 446 (5th Cir. 2022), provides the controlling rule of decision under the Fifth Circuit's rule of orderliness. The Supreme Court affirmed the decision in *Jarkesy* on another ground and did not reach the nondelegation doctrine, *Jarkesy*, 144 S. Ct. at 2128, leaving the Fifth Circuit's decision intact on that issue. Thus, the earlier panel decision in *Jarkesy* is controlling. *Sw. Bell Tel. Co. v. City of El Paso*, 243 F.3d 936 (5th Cir. 2001) (applying earlier-in-time decision where two published decisions conflict).

As relevant here, *Jarkesy* held (1) that the decision whether to proceed administratively or judicially is a legislative power "that Congress uniquely possesses" because it effectively determines "which defendants should receive *certain legal processes*" and (2) that delegations that do not indicate "how [an agency] should make [the] call in any given case"—are akin to "a total absence of guidance" incapable of supplying a requisite "intelligible principle." 34 F.4th at 461-62.

Given that "total absence of guidance," *Illumina*'s upholding the constitutionality of section 53(b)'s delegation conflicts with *Jarkesy*'s earlier-in-time holding. Thus, the court should apply *Jarkesy* as the controlling rule of decision and find that Congress's

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the forum in which to bring its actions is that such discretion *itself* flows entirely from *yet another* exercise of discretion—namely, the DOJ's and the FTC's deciding which agency will investigate which mergers (another process for which Congress has provided little guidance).

delegation to the FTC is unconstitutional. *See Song v. JFE Franchising, Inc.*, 394 F. Supp. 3d 748, 755-56 (S.D. Tex. 2019) (applying earlier-in-time Fifth Circuit decision to resolve conflict).

II. Tempur Sealy and Mattress Firm Are Suffering and Will Continue to Suffer Irreparable Harm.

Subjecting Tempur Sealy and Mattress Firm to an unconstitutional administrative proceeding does and will continue to inflict irreparable harm. *See generally* Ex. 6; Ex. 7. Absent an injunction, Tempur Sealy and Mattress Firm incur *process harms* through an illegitimate proceeding—a "here-and-now injury" that is "impossible to remedy once the proceeding is over." *Axon Enter., Inc. v. FTC*, 598 U.S. 175, 191 (2023). "A proceeding that has already happened cannot be undone. Judicial review of [Tempur Sealy's and Mattress Firm's] structural constitutional claims would come too late to be meaningful." *Id.*; *see also Cochran v. SEC*, 20 F.4th 194, 212 (5th Cir. 2021) (en banc) (subjecting plaintiff to "a constitutionally defective proceeding" is a concrete injury).

Furthermore, the irreparable nature of this here-and-now injury is particularly acute as the sovereign immunity of the federal government will ensure that Tempur Sealy and Mattress Firm will *never* recover the cost of complying with the FTC's illegitimate, lengthy, and burdensome adjudicatory proceeding. Those "non-recoverab[le] . . . financial losses" constitute irreparable harms because "they cannot be recovered in the ordinary course of litigation." *MCR Oil Tools, L.L.C. v. DOT*, No. 24-60230, 2024 WL 2954416, at *8 n.15 (5th Cir. June 12, 2024) (unpublished) (quoting *Texas v. EPA*, 829 F.3d 405, 433 n.41 (5th Cir. 2016)). Additionally, those continuing compliance costs do not begin

to account for the resources that Tempur Sealy and Mattress Firm *have already spent* in filing fees to notice the proposed merger and to prepare relevant "documentary material and information" for the FTC's preclearance review. 15 U.S.C. § 18a; *see also* Ex. 6; Ex. 7. Thus, Tempur Sealy's and Mattress Firm's financial injury is substantial and irreparable. *See Wages & White Lion Investments, L.L.C. v. FDA*, 16 F.4th 1130, 1142 (5th Cir. 2021).

III. The Balance of Equities Favor a Preliminary Injunction.

Since the government is a party, the third and fourth preliminary injunction factors merge. *See Mock*, 75 F.4th at 577.

First, there is no threat of harm to third parties. The FTC is already seeking a preliminary injunction of the merger in a *separate* Article III proceeding. Nothing stops the FTC from seeking a permanent injunction in federal court—if it elected to do so. Accordingly, if the FTC believes that the merger will result in harm to consumers or other third parties, it has ample tools at its disposal to enjoin it. Tempur Sealy's and Mattress Firm's motion merely seeks preliminarily to stop the FTC's unconstitutional use of its in-house administrative proceedings.

Second, the equities favor Tempur Sealy and Mattress Firm, as "[i]t is always in the public interest to prevent the violation of a party's constitutional rights." *Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 458 n.9 (5th Cir. 2014) (quotation omitted); *see MCR Oil Tools*, 2024 WL 2954416, at *9 ("There is a 'substantial public interest in having governmental agencies abide by the federal laws that govern their existence and operations.'" (quoting *Texas v. United States*, 40 F.4th 205, 229 (5th Cir. 2022)). Conversely, for the FTC, the government suffers no injury when a court prevents it from

enforcing an unlawful law. *See Book People, Inc. v. Wong*, 91 F.4th 318, 341 (5th Cir. 2024). "Neither the State nor the public has any interest" in subjecting Tempur Sealy and Mattress Firm to an illegitimate and unconstitutional administrative proceeding. *Id.* (cleaned up).

In sum, the public interest and balance of equities strongly favors a preliminary injunction preventing the FTC from proceeding with the unlawful administrative adjudication and from violating Tempur Sealy's and Mattress Firm's constitutional rights.

CONCLUSION

For the reasons described above, Tempur Sealy and Mattress Firm respectfully request this Court grant its motion for a preliminary injunction.

Dated: November 5, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this document was served on the following counsel of record in this matter via CM/ECF on this 5th day of November, 2024.

/s/ Alex B. Roberts
Alex B. Roberts

CERTIFICATE OF CONFERENCE

I hereby certify that I have conferred with Defendants' counsel related to the relief requested in this Motion and Defendants are opposed.

/s/Alex B. Roberts
Alex B. Roberts

CERTIFICATE OF WORD COUNT

Pursuant to Court Procedure 16(c), I certify that this motion contains 4,993 words from the beginning of the introduction to the start of the signature blocks.

/s/Alex B. Roberts
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