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.

On Petition for Review of an Order
of the Federal Trade Commission

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF RESPONDENT AND DENIAL OF THE PETITION FOR REVIEW

Nicolas A. Sansone
Allison M. Zieve
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Attorneys for Amicus Curiae
Public Citizen

August 1, 2023

SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

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Pursuant to this Court's Rule 29.2 and Federal Rule of Appellate Procedure 26.1, amicus curiae Public Citizen submits this supplemental certificate of interested persons to fully disclose all those with an interest in this brief and to provide the required information as to their corporate status and affiliations.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1, in addition to those listed in the briefs of the parties, have an interest in the

outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

A. Amicus curiae **Public Citizen** is a non-profit, non-stock corporation. It has no parent corporation, and no publicly traded corporation has an ownership interest in it of any kind.

B. The above-listed amicus curiae is represented by **Nicolas A. Sansone** and **Allison M. Zieve** of **Public Citizen Litigation Group**.

/s/ Nicolas A. Sansone
Nicolas A. Sansone

Attorney for Amicus Curiae Public Citizen

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae Public Citizen is a nonprofit consumer advocacy organization with members in all fifty states. Public Citizen works before Congress, administrative agencies, and courts to advance the interests of consumers, workers, and the public. Public Citizen has a longstanding interest in the robust enforcement of laws that protect consumers against unfair, deceptive, or anticompetitive business conduct, and it regularly calls for the Federal Trade Commission (FTC) to take action against corporate practices that harm the public. *See, e.g.*, Letter from Public Citizen to FTC re: Green Guides Review (Apr. 24, 2023), https://tinyurl.com/yck9u8f7; Letter from Public Citizen to FTC re: Non-Compete Clause Rulemaking (Apr. 19, 2023), https://tinyurl.com/5daffk3k. Public Citizen has also filed amicus briefs urging courts to recognize the FTC's authority to act decisively against unfair methods of competition and unfair or deceptive acts or practices. *See, e.g.*, *AMG Capital Mgmt., LLC v. FTC*, 141 S. Ct. 1341 (2021); *N.C. State Bd. of*

[1] This brief was not authored in whole or part by counsel for a party, and no one other than amicus curiae or its counsel made a monetary contribution to the preparation or submission of the brief. Counsel for all parties have consented to its filing.

Dental Examiners v. FTC, 574 U.S. 494 (2015). Public Citizen submits this brief because it is concerned that the constitutional arguments Petitioners Illumina, Inc., and Grail, Inc., raise in this case, if accepted, would dramatically compromise the FTC's ability to pursue its consumer-protective mission.

SUMMARY OF ARGUMENT

I. Claiming that the FTC Commissioners' protections against at-will removal by the President are unconstitutional, Petitioners advance an argument that the Supreme Court definitively rejected in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). That case upheld the FTC Commissioners' removal protections as consistent with the Constitution's separation of powers, and the Court has recently declined to revisit that binding precedent. Although Petitioners argue that the FTC has taken on a greater enforcement role since 1935, *Humphrey's Executor* expressly acknowledged the FTC's statutory duty to enforce the antitrust laws, and the FTC was active in carrying out that duty even prior to 1935.

Moreover, even if Petitioners could prevail on their removal theory despite Supreme Court precedent rejecting it, Petitioners would in any event not be entitled to the retrospective relief they seek. It is undisputed

that the Commissioners who issued the agency order that Petitioners challenge were properly appointed and acting within their lawful authority in adjudicating Petitioners' case. Under such circumstances, the Supreme Court has held, an unconstitutional removal protection can justify undoing an officer's past action only if the party challenging that action presents evidence that the action would have been different had the officer not been unconstitutionally insulated from removal. Petitioners here offer no such evidence, relying instead entirely on improbable speculation.

II. Petitioners' due process arguments also fail. Petitioners argue that the combination of investigative and adjudicatory functions within the FTC leaves the agency structurally incapable of issuing procedurally fair decisions. The Supreme Court, however, has held that such a combination of functions does not necessarily violate due process. And this Court has applied that holding to the FTC, rejecting essentially the same constitutional argument that Petitioners make here. Petitioners vaguely allude to certain features of the FTC's adjudicatory scheme that supposedly bolster their claim of structural bias, but they fail both to explain how these features give the FTC any advantage and to point to

any concrete evidence that would rebut the presumption that FTC adjudicators act in good faith. And to the extent that Petitioners make a case-specific claim of unconstitutional bias in the agency adjudication here, their bare disagreement with the FTC's unanimous conclusion that they violated the antitrust laws is insufficient to establish that one or more of the Commissioners prejudged this case.

ARGUMENT

I. FTC Commissioners' removal protections create no constitutional problem, let alone one requiring vacatur.

Petitioners argue that this Court should vacate the FTC order requiring them to dissolve their merger because the Commissioners who issued it were unconstitutionally insulated from the President's Article II authority to remove executive officers at will. Pet'rs' Br. 18–22. This argument is doubly wrong. First, binding Supreme Court precedent forecloses Petitioners' argument that the challenged removal protections are unconstitutional. Second, even under Petitioners' theory, Petitioners would be entitled to retrospective relief only to the extent necessary to redress any harm that the removal protections caused them. Because Petitioners have identified no such harm, vacatur would be unwarranted.

A. The Supreme Court confronted and rejected the precise Article II argument Petitioners raise here in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). There, the Court found it "plain under the Constitution that illimitable power of removal is not possessed by the President in respect of" FTC Commissioners. *Id.* at 629. This is so, the Court explained, because the FTC is an "administrative body" charged with performing regulatory and adjudicative functions "to carry into effect legislative policies embedded in [a] statute in accordance with the legislative standard therein prescribed," *id.* at 628, and because it is composed of "nonpartisan" members who are "called upon to exercise the trained judgment of a body of experts," *id.* at 624. Emphasizing the FTC's "quasi legislative and quasi judicial" activities, the Court concluded that Congress could permissibly "forbid [FTC Commissioners'] removal except for cause," allowing them to "maintain," to some degree, "an attitude of independence against the [President's] will." *Id.* at 629.

Petitioners claim that the directly on-point holding in *Humphrey's Executor* does not control here because circumstances have changed since the Supreme Court resolved the removal issue in 1935. *See* Pet'rs' Br. 21. To be sure, a "demonstration that circumstances have changed so

radically as to undermine" *Humphrey's Executor*'s "basic legal principles" or "critical factual assumptions" may be relevant to the *Supreme Court's* decision whether to overrule the precedent—a decision that would also need to weigh the "considerable reliance" the precedent has generated. *Randall v. Sorrell*, 548 U.S. 230, 244 (2006) (opinion of Breyer, J.). But the Supreme Court expressly declined to "revisit" *Humphrey's Executor* in 2020, *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2206 (2020), and the Court reaffirmed that refusal in 2021, *see Collins v. Yellen*, 141 S. Ct. 1761, 1783 (2021) (citing *Seila Law*, 140 S. Ct. at 2192). Contrary to Petitioners' argument, this Court is not free to take matters into its own hands and declare that *Humphrey's Executor* is no longer good law. As the Supreme Court cautioned mere weeks ago, "'[i]f a precedent of th[e] [Supreme] Court has direct application in a case,' … a lower court 'should follow the case which directly controls, leaving to th[e] [Supreme] Court the prerogative of overruling its own decisions.'" *Mallory v. Norfolk S. Ry. Co.*, 143 S. Ct. 2028, 2038 (2023) (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989)).

In any event, Petitioners are wrong that intervening developments have fatally undermined *Humphrey's Executor*. Certainly, as Petitioners

emphasize, *see* Pet'rs' Br. 19–20, the Supreme Court has since repudiated *Humphrey's Executor*'s statement that the FTC "exercises no part of the executive power." 295 U.S. at 628; *see Seila Law*, 140 S. Ct. at 2198 n.2 (noting that this statement "has not withstood the test of time"). But despite acknowledging that "the powers of the FTC at the time of *Humphrey's Executor* would at the present time be considered 'executive,'" *Morrison v. Olson*, 487 U.S. 654, 689 n.28 (1988), the Supreme Court recently made clear that this conceptual shift does not impugn the case's precedential vitality. To the contrary, the Court has characterized *Humphrey's Executor* as recognizing an "exception[ ]" to the President's "power to remove … those who wield *executive* power on his behalf," pursuant to which Congress may create "expert agencies led by a *group* of principal officers removable by the President only for good cause." *Seila Law*, 140 S. Ct. at 2191–92 (first emphasis added).

At bottom, the "real question" for Article II purposes is not whether a tenure-protected officer holds an executive role, but whether the protections "are of such a nature that they impede the President's ability to perform his constitutional duty." *Morrison*, 487 U.S. at 691. As *Humphrey's Executor* held, and as the Court has continued to

acknowledge in the nearly ninety years since, the tenure protections Petitioners challenge here are not of such a nature. *Cf. Seila Law*, 140 S. Ct. at 2211 (plurality opinion) (suggesting that although a statutory provision protecting the head of a "single-Director agenc[y]" from at-will removal was unconstitutional, Congress could permissibly cure the defect by "converting the [agency] into a multimember agency" like the FTC).

Unable to identify any legal developments that would permit this Court to disregard *Humphrey's Executor*, Petitioners argue that *factual* developments have rendered "[t]he modern FTC" a meaningfully "different animal" from the expert body the Supreme Court considered in 1935. Pet'rs' Br. 20. This argument is long on atmospherics and short on specifics. Petitioners claim broadly that the FTC's contemporary enforcement activities "bear[ ] no resemblance" to the activities described in *Humphrey's Executor*, *id.*, but they overlook that *Humphrey's Executor* specifically quoted the FTC's statutory authority—indeed, mandate—to "prevent" covered entities "from using unfair methods of competition in commerce," including by issuing judicially enforceable cease-and-desist orders, 295 U.S. at 620–21 (quoting Pub. L. No. 63-203, § 5, 38 Stat. 717,

719 (1914)). Substantially identical statutory language describes the FTC's enforcement role today. *See* 15 U.S.C. § 45(a)(2).

Petitioners also claim—citing no authority—that "[w]hatever powers FTC possessed in 1935, the divestiture power invoked by FTC in this case" was not among them. Pet'rs' Br. 21. That claim is simply wrong, as the Court that decided *Humphrey's Executor* doubtless would have known. *See Arrow-Hart & Hegeman Elec. Co. v. FTC*, 291 U.S. 587, 599 (1934) (acknowledging the FTC's power to issue "an order of divestiture" requiring an antitrust violator to relinquish unlawfully acquired shares and forbidding the violator from acquiring any physical assets "represented by the shares"); *FTC v. W. Meat Co.*, 272 U.S. 554, 557–60 (1926) (upholding an FTC divestiture order).[2]

Similarly meritless is the notion advanced by one of Petitioners' amici that *Humphrey's Executor* no longer applies because the FTC has supposedly become more partisan and less expert since 1935. *See* Wash.

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[2] In 1950, Congress closed a loophole that had previously enabled antitrust violators to evade divestiture of assets, as opposed to shares, that the violator managed to acquire before the FTC could issue a final order. *See* Pub. L. No. 81-899, 64 Stat. 1125, 1127 (1950); *see also* Note, *Section 7 of the Clayton Act: A Legislative History*, 52 Colum. L. Rev. 766, 768–69 (1952) (describing the loophole). Petitioners do not contend that this legislative fix has any bearing on the Article II analysis.

Legal Found. Br. 8–11. Beyond being factually contentious,[3] this argument is conceptually backwards. *Humphrey's Executor* viewed the FTC's statutory design, including the Commissioners' tenure protections, as Congress's *means* of creating a nonpartisan, expert agency; the Court did not view the FTC's expertise and lack of partisanship as empirical prerequisites to be met before Congress's plan permissibly could take effect. *See* 295 U.S. at 625–26 (explaining Congress's "opinion that length and certainty of tenure would vitally contribute" to creating "a body of experts who shall gain experience by length of service" and who would be "free to exercise [their] judgment" without political interference). If, as amicus's argument runs, the FTC has strayed from its statutorily prescribed (and judicially upheld) role as a nonpartisan body of experts, invalidating a statutory safeguard *against* the agency's politicization would be an entirely illogical response.

[3] Amicus emphasizes that the FTC currently has only "three [C]ommissioners, all [of] whom are Democrats." Wash. Legal Found. Br. 9. But at the time the FTC issued its order in this case—as at the time *Humphrey's Executor* was decided—the FTC had four sitting Commissioners, drawn from both parties. *See* FTC, *Commissioners, Chairwomen and Chairmen of the Federal Trade Commission* (Mar. 2023), https://tinyurl.com/2e9vwrz8. All four agreed that Petitioners had violated the antitrust laws.

B. Even if the Supreme Court were one day to overrule *Humphrey's Executor* and hold the FTC Commissioners' tenure protections unconstitutional, Petitioners would still not be entitled to vacatur of the FTC order they challenge. Where the Supreme Court has held that a statutory restriction on the President's ability to remove an agency's officers is unconstitutional, it has been careful to note that "the existence of the [agency] does not [itself] violate the separation of powers" and that the proper remedy is to sever the restriction—such that the officers are removable at will—and otherwise leave the agency free to carry out its functions. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 508–09 (2010); *see also Seila Law*, 140 S. Ct. at 2208–09 (plurality opinion) (rejecting the idea that an unconstitutional removal provision "means the entire agency is unconstitutional and powerless to act"). As for *past* actions of a properly appointed officer who has been unconstitutionally insulated from removal, the Supreme Court has held that it is "neither logical nor supported by precedent" to deem those actions "void *ab initio*." *Collins*, 141 S. Ct. at 1787.

The Court's recent decision in *Collins v. Yellen*, 141 S. Ct. 1761 (2021), describes why this is so. *Collins* explains that, in contrast to the

actions of an officer who has not been "properly *appointed*," the actions of a duly appointed officer subject to an invalid removal restriction do not "involve[ ] a Government actor's exercise of power that the actor did not lawfully possess" because "there is no basis for concluding that [the officer] lacked the authority to carry out the functions of the office." *Id.* at 1787–88; *see id.* at 1789 (Thomas, J., concurring) ("The Government does not necessarily act unlawfully even if a removal restriction is unlawful in the abstract."). Because a properly appointed officer's actions are lawful notwithstanding unconstitutional restrictions on the officer's removal, there is no basis for granting a remedy against those actions unless the actions have a causal link with the removal restrictions themselves. *See id.* at 1788–89 (majority opinion); *id.* at 1801 (Kagan, J., concurring in part and concurring in the judgment) (agreeing that "plaintiffs alleging a removal violation are entitled to … a rewinding of agency action … only when the President's inability to fire an agency head affected the complained-of decision"). *But see id.* at 1794 (Thomas, J., concurring) (questioning whether retrospective relief would be appropriate *even if* a plaintiff could show that an unconstitutionally

insulated officer "might have acted differently if he knew that he served at the pleasure of the President" (emphasis omitted)).

Petitioners here offer no basis for concluding that the FTC order they seek to vacate would have been different in any way if the Commissioners that issued it had been subject to at-will removal by the President. Petitioners have not shown, for example, that the President "attempted to remove a [Commissioner] but was prevented from doing so" or that he even "made a public statement expressing displeasure with actions taken by a [Commissioner]." *Id.* at 1789 (majority opinion). And because they lack evidence of "a substantiated desire by the President to remove [an] unconstitutionally insulated actor" and "a perceived inability to remove the actor due to the [allegedly] infirm provision," they cannot establish any "nexus between [a] desire to remove and the challenged actions taken by the insulated actor." *Cmty. Fin. Servs. Ass'n of Am., Ltd. v. CFPB*, 51 F.4th 616, 632 (5th Cir. 2022), *cert. granted* 143 S. Ct. 978 (2023) (granting review of a separate issue). Moreover, even if Petitioners had produced evidence of presidential dissatisfaction with one of the Commissioners who resolved their case, they *still* would not be entitled to vacatur. All four Commissioners who considered Petitioners' case

concluded that Petitioners violated the antitrust laws. The President would have needed to remove *two* members of this unanimous quartet to create the possibility of a different outcome.

Lacking evidence that the challenged removal provision affected the agency action at issue here, Petitioners resort to speculation. Because the challenged FTC order unwound a "high-profile merger" and supposedly "elicited a strong public reaction," the argument runs, some unspecified members of a dissatisfied public would have put political pressure on the President to exercise "oversight" over the agency's activities had the President realized that it was within his power to remove a Commissioner at will. Pet'rs' Br. 22. There is no foundation, however, for the fanciful assumption that the President would consider unseating not just one, but two Commissioners as to whom he had previously expressed no dissatisfaction, solely in the hope of directing the outcome in a single adjudication. Making Petitioners' counterfactual theory still more improbable, Petitioners fail to identify even one presidential comment reflecting *awareness* of this supposedly "high-profile" adjudication, let alone opposition to the outcome. *See Collins*, 141 S. Ct. at 1802 (Kagan, J., concurring in part and concurring in the

judgment) (observing that *Collins*'s remedial approach "protect[s] agency decisions that would never have risen to the President's notice"). To grant vacatur based on Petitioners' uncorroborated *ipse dixit* regarding a link between the challenged removal protections and the FTC order here would essentially render *Collins*'s remedial holding a nullity.

II. Petitioners identify no feature of their FTC adjudication that raises a due process concern.

Petitioners contend that the FTC "violated due process by exercising investigative, prosecutorial and adjudicative powers in the same case." Pet'rs' Br. 23. It is unclear whether Petitioners claim that the FTC's procedures are inherently unconstitutional or that the FTC applied its otherwise permissible procedures in an unconstitutionally "biased manner" in this particular case. *Id.* at 23 n.8. Either way, Petitioners' due process argument is meritless.

A. Due process permits the combination of investigative and adjudicatory roles within an agency.

To the extent that Petitioners maintain that FTC adjudications by their nature present an intolerable "potential for unconstitutional bias" due to the combination of functions the agency performs, Pet'rs' Br. 24, the Supreme Court has unanimously rejected that argument. In *Withrow*

v. Larkin, 421 U.S. 35 (1975), the Court found "no support for the bald proposition … that agency members who participate in an investigation are [constitutionally] disqualified from adjudicating." *Id.* at 52. Adopting that proposition, the Court explained, "would bring down too many procedures designed, and working well, for a governmental structure of great and growing complexity." *Id.* at 49–50 (quoting *Richardson v. Perales*, 402 U.S. 389, 410 (1971)). Because "[t]he incredible variety of administrative mechanisms in this country will not yield to any single organizing principle," *id.* at 52, and because "those serving as adjudicators" are entitled to "a presumption of honesty and integrity," *id.* at 47, the Court held that "the combination of investigative and adjudicative functions does not, without more, constitute a due process violation," *id.* at 58. Rather, a party challenging an adjudication by an agency that has also performed an investigatory role must present a "specific foundation … for suspecting that the [adjudicatory body] ha[s] been prejudiced by its investigation or would be disabled from hearing and deciding on the basis of the evidence to be presented at [a] contested hearing." *Id.* at 55; *see also id.* at 58 (requiring the party challenging an

adjudication to identify "special facts and circumstances" particular to the adjudication that render "the risk of unfairness … intolerably high").

Relying on *Withrow*, this Court has already rejected the "weak[ ] argument" that "the FTC system of prosecution-adjudication deprives [regulated parties] of their right to … due process." *Gibson v. FTC*, 682 F.2d 554, 559–60 (5th Cir. 1982); *see also id.* at 560 (citing *Withrow* and noting that "[t]he combination of investigative and judicial functions within an agency has been upheld against due process challenges, both in the context of the FTC and other agencies").

Furthermore, the FTC has created procedural protections precisely aimed at ensuring adjudicatory impartiality. *See, e.g.*, 16 C.F.R. § 4.7(b)(1) (prohibiting any FTC employee "who performs investigative or prosecuting functions in [an] adjudicative proceeding[ ]" from holding *ex parte* communications with any FTC employee "who is or who reasonably may be expected to be involved in the decisional process in the proceeding"). And where, as here, FTC administrative proceedings culminate in a cease-and-desist order, the party subject to the order can seek judicial review in federal court, where that party can challenge the FTC's legal conclusions and any factual findings that are unsupported by

substantial evidence. 15 U.S.C. § 21(c); *see also Yarbrough v. Decatur Hous. Auth.*, 941 F.3d 1022, 1028 (11th Cir. 2019) ("The substantial-evidence standard is … more demanding than the form of limited evidentiary review contemplated by procedural due process.").

Rather than confronting *Withrow* and *Gibson*, Petitioners contend that FTC adjudications *must* be inherently biased because "[s]ome say" that the FTC has regularly prevailed in them in recent years. Pet'rs' Br. 24 (quoting *Axon Enter., Inc. v. FTC*, 143 S. Ct. 890, 917 (2023) (Gorsuch, J., concurring in the judgment)). Petitioners cite no evidence to support this contention. In any event, biased adjudication is not the only—or even the most likely—possible reason for the FTC's alleged success rate in administrative proceedings[4]: Perhaps FTC investigators abandon all but the strongest cases. Perhaps a high in-house success rate reflects the FTC's decisions about which cases to pursue through administrative proceedings and which to pursue directly in federal court. *See* 15 U.S.C. §§ 21(b), 53(b) (authorizing the FTC to proceed through agency

[4] *Cf.* U.S. Courts, *Criminal Federal Judicial Caseload Statistics* (Mar. 31, 2023), https://tinyurl.com/57kucd8t (reflecting that over 90 percent of criminal cases filed in federal district courts during a recent twelve-month period—where charges must be proved beyond a reasonable doubt—ended in conviction).

adjudication or in federal court). Perhaps companies facing administrative adjudications often prefer the certainty of settlement to the risks of proceeding with litigation. In refusing to entertain any benign possibilities for the FTC's success rate, Petitioners flip *Withrow*'s "presumption of honesty and integrity," 421 U.S. at 47, on its head.

Petitioners' fleeting suggestion that certain features of the FTC's adjudicatory scheme support an inference of structural bias also lacks merit. First, Petitioners note that the FTC's evidentiary rules differ in some respects from the Federal Rules of Evidence. Pet'rs' Br. 25. Petitioners fail to explain, however, how any particular evidentiary rule or set of rules favors the FTC over regulated parties. And to the extent Petitioners argue that compliance with the Federal Rules of Evidence is itself a constitutional due process requirement, this Court has held that "[a] breach of the Federal Rules of Evidence does not, in itself, offend the Constitution." *United States v. Hernandez-Guevara*, 162 F.3d 863, 876 n.3 (5th Cir. 1998); *cf. United States v. Grandlund*, 71 F.3d 507, 509–10 (5th Cir. 1995) (noting that due process is satisfied during a hearing on whether to revoke a defendant's supervised release—a context in which "a person's liberty is at stake" but "the rules of evidence are not applied

mandatorily"—if the defendant has "a fair and meaningful opportunity to refute and challenge adverse evidence").

Second, Petitioners note the government's practice of assigning review of some mergers to the FTC and review of other mergers to the Department of Justice (DOJ). Pet'rs' Br. 24. While Petitioners do not explain whether or how they believe this practice contributes to any due process violation, one of Petitioners' amici contends that the assignment system is "standardless" and therefore unconstitutionally promotes "[a]rbitrariness." Am. Hosp. Ass'n Br. 17. But Congress specifically—and permissibly—gave both the FTC and the DOJ concurrent jurisdiction to institute "simultaneous … proceedings" against the same companies based on the same conduct. *FTC v. Cement Inst.*, 333 U.S. 683, 694–95 (1948); *accord FTC v. AT&T Mobility LLC*, 883 F.3d 848, 862 (9th Cir. 2018) (en banc). Where, as here, multiple enforcement authorities have independent authority to act, it does not violate due process for one to act and the other to forbear—"despite the absence of guidelines" regarding the allocation of responsibility—unless there is case-specific "proof that the choice … was improperly motivated or based on an impermissible classification as a matter of constitutional law." *United States v.*

Williams, 963 F.2d 1337, 1342 (10th Cir. 1992) (second quoting *United States v. Morehead*, 959 F.2d 1489, 1499 (10th Cir. 1992)); *accord United States v. Carter*, 953 F.2d 1449, 1461–62 (5th Cir. 1992).

In any event, Petitioners concede that the FTC and DOJ typically "allocate [cases] between them by industry based on past practice." Pet'rs' Br. 28. It is hardly arbitrary for the agencies to conserve resources by allocating enforcement authority among themselves rather than bringing duplicative enforcement actions. And in making this allocation, it is hardly arbitrary to group cases in a way that enables each agency to develop industry-specific expertise. Especially given "the Executive Branch's traditional discretion over whether to take enforcement actions against violators of federal law," *United States v. Texas*, 143 S. Ct. 1964, 1975 (2023), the bare fact that two agencies with overlapping duties coordinate their enforcement activities raises no constitutional concern.[5]

[5] Petitioners claim that the FTC and DOJ's method of allocating cases violates equal protection as well as due process. *See* Pet'rs' Br. 26–28. But just as the agencies' practice of allocating cases in a way that avoids redundancy and cultivates agency expertise is non-arbitrary for purposes of the Due Process Clause, it is also non-arbitrary for purposes of the Equal Protection Clause.

B. Petitioners offer no case-specific evidence that the FTC's adjudicatory proceedings here were infected by unconstitutional bias.

To the extent that Petitioners argue that the FTC proceedings in their particular case—as opposed to the FTC's adjudicatory scheme more generally—evince unconstitutional bias, their due process claim still fails. Petitioners' argument in this respect rests principally on the fact that the Commissioners reversed an Administrative Law Judge (ALJ) decision that was adverse to the FTC and on the Commissioners' decision to consider certain contested evidence. *See* Pet'rs' Br. 25–26. But "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion" and "can only in the rarest circumstances evidence the degree of favoritism or antagonism required" to disqualify an adjudicator. *Liteky v. United States*, 510 U.S. 540, 555 (1994); *see Knapp v. U.S. Dep't of Agric.*, 796 F.3d 445, 468 (5th Cir. 2015) (rejecting a claim of bias raised against an agency adjudicator who imposed a statutorily authorized penalty "far greater" than what an ALJ had ordered).

Although Petitioners claim that the FTC "colluded with the European Commission to undermine the normal process of U.S. merger enforcement," Pet'rs' Br. 24–25, the letter they cite for this tendentious

proposition states only that the European Commission ruled against Petitioners' merger and does not suggest that the FTC played any role in that ruling. *See* Letter from Sen. Bill Hagerty, et al., to Sec'y Anthony Blinken, et al. (Oct. 20, 2022), https://shorturl.at/adEF3. Moreover, even if Petitioners had presented evidence that the FTC coordinated to some extent with the European Commission, interaction between domestic and international antitrust authorities is not only unremarkable but congressionally authorized. *See, e.g.*, 15 U.S.C. §§ 46(j)(2), 6201.

Further undermining Petitioners' bias argument, Petitioners never identify which among the four bipartisan Commissioners who unanimously ruled against them had an "irrevocably closed" mind regarding this case. *Knapp*, 796 F.3d at 468 (citation omitted). Given that "bias by an adjudicator is not lightly established," any claim that *all four* Commissioners prejudged this case would break dramatically from "two strong presumptions" this Court has recognized: "the presumption of honesty and integrity of the adjudicators" and "the presumption that those making decisions affecting the public are doing so in the public interest." *Valley v. Rapides Parish Sch. Bd.*, 118 F.3d 1047, 1052–53 (5th Cir. 1997). Petitioners' statement that the Commissioners' decision

"belie[s] any appearance of … neutral[ity]," Pet'rs' Br. 25, is inadequate to rebut these presumptions as to one Commissioner—let alone as to all four Commissioners, who each independently agreed on this case's outcome.

CONCLUSION

This Court should deny the petition for review.

Respectfully submitted,

/s/ Nicolas A. Sansone
Nicolas A. Sansone
Allison M. Zieve
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Attorneys for Amicus Curiae Public Citizen

August 1, 2023

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B)(i) because, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and the Rules of this Court, it contains 4,698 words.

This brief also complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 29(a)(4), 32(a)(5), and 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook.

/s/ Nicolas A. Sansone
Nicolas A. Sansone
Attorney for Amicus Curiae
Public Citizen

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Brief of Amicus Curiae Public Citizen with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit on August 1, 2023, using the Appellate Electronic Filing 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/ Nicolas A. Sansone
Nicolas A. Sansone
Attorney for Amicus Curiae Public Citizen