No. 24-20270

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee,

v.

U.S. ANESTHESIA PARTNERS, INC.,
Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of Texas
No. 4:23-CV-03560
Hon. Kenneth M. Hoyt

OPPOSITION OF U.S. ANESTHESIA PARTNERS, INC. TO MOTION TO DISMISS APPEAL

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 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.

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The following is a list of "all persons, associations of persons, firms, partnerships, corporations, affiliates, parent corporations, or other entities that are financially interested in the outcome of this litigation." Where "a group can be specified by a general description," USAP has not made an "individual listing" of each interested person:

1. U.S. Anesthesia Partners Holdings, Inc.
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2. U.S. Anesthesia Partners Intermediate Holdings, Inc.
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4. USAP (Texas), L.C.
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F. Federal Rule of Appellate Procedure 26.1:

Defendant-Appellant U.S. Anesthesia Partners, Inc. certifies that no publicly held corporation owns more than ten percent of the stock of U.S. Anesthesia Partners, Inc.

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INTRODUCTION

As in most collateral order appeals, the question here is ultimately whether this case should have been brought at all. Appellant U.S. Anesthesia Partners, Inc. (USAP), faces the unenviable prospect of years of litigation against an agency acting as if it were unbound by law. The Federal Trade Commission Act provides that the FTC may not seek an injunction unless it initiates administrative enforcement proceedings. But here, as in dozens of cases per year, the agency has ignored that limitation on its power, bypassing its administrative process to seek a permanent injunction in federal court.

The FTC's overreach requires immediate review. The agency has neither the statutory nor the constitutional authority to pursue a standalone action in federal court. As a result, the FTC breaks the law every day it presses forward below—inflicting a "here-and-now injury" by forcing USAP to defend itself in a case that should not exist. *Axon Enter., Inc. v. FTC*, 598 U.S. 175, 191 (2023) (quoting *Seila Law LLC v. CFPB*, 591 U.S. 197, 212 (2020)). Without appellate review now, USAP will lose its right to challenge the FTC's arrogation of power later, as the injury-causing proceedings will already be over.

USAP's opening brief on its statutory and constitutional defenses is due in two weeks. The issue for present purposes is whether the district court's order rejecting those defenses is an appealable "final decision" under 28 U.S.C. § 1291. The Supreme Court has long held that "finality" is a pragmatic concept, focusing on the harm to the legal system that would accompany delayed appeal. And that structural harm is apparent here: The FTC is acting not only without statutory authority, but also in violation of the Constitution. As an independent agency insulated from Presidential oversight, the FTC cannot exercise executive power to bring enforcement actions like this one.

The FTC's counterarguments fail to address the gravity of these issues. USAP's defenses are not mere procedural objections; they raise fundamental questions about the agency's authority and the rights of parties subject to it. Immediate appellate review is essential to ensure that the FTC operates within the legal boundaries set by Congress and the Constitution.

The Court should deny the FTC's motion to dismiss and allow this appeal to proceed. Or, in the alternative, the Court should carry this motion with the appeal to allow it to be decided alongside the merits.

BACKGROUND

The FTC's motion to dismiss this appeal rests in large part on its assertion that USAP's arguments on the merits are not serious. USAP provides the following background to demonstrate why the FTC is mistaken and why an immediate appeal is necessary and appropriate.

A. Congress Granted The FTC The Power To Seek Injunctions In Order To Preserve Its Administrative Process

The Federal Trade Commission Act prohibits, and authorizes the FTC to prevent, "[u]nfair methods of competition" and "unfair or deceptive acts or practices." 15 U.S.C. § 45(a)(1)-(2). Ever since the FTC was created in 1914, it has had the power to enforce the Act through its own administrative proceedings. *See* 15 U.S.C. § 45(b)-(g).

But until the 1970s, the FTC had no authority to seek a court-ordered injunction to halt ongoing or imminent violations while its administrative process played out. *See AMG Cap. Mgmt., LLC v. FTC*, 593 U.S. 67, 72 (2021). Congress thus enacted Section 13(b)—the provision at issue here—to "address[] a specific problem, namely, that of stopping seemingly unfair practices from taking place while the Commission determines their lawfulness" in parallel administrative proceedings. *Id.* at 76.

In Section 13(b), which is titled "Temporary restraining orders; preliminary injunctions," Congress granted the FTC limited authority to seek injunctive relief in federal district court "while administrative proceedings are foreseen or in progress." *AMG Cap.*, 593 U.S. at 78. Section 13(b) states in full:

> **Temporary restraining orders; preliminary injunctions**
>
> Whenever the Commission has reason to believe—
>
> (1) that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and
>
> (2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final, would be in the interest of the public—
>
> the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States to enjoin any such act or practice. Upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond: Provided, however, That if a complaint is not filed within such period (not exceeding 20 days) as may be specified by the court after issuance of the temporary restraining order or preliminary injunction, the order or injunction

> shall be dissolved by the court and be of no further force and effect: *Provided further, That in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction.*

15 U.S.C. § 53(b)(1)-(2) (emphasis added). Though Section 13(b) ties any injunction to "the issuance of a complaint by the Commission" in its administrative tribunal, the FTC has claimed the right to bypass its own administrative process altogether. Here, as in many other cases, the FTC has argued that Section 13(b)'s second proviso (emphasized above) confers on it the extraordinary executive authority to bring standalone enforcement actions in federal district court.

B. The FTC Seeks An Injunction Against USAP Without First Filing Administrative Proceedings

USAP is a physician-owned organization that provides anesthesia and pain management services to patients throughout Texas. *See* ROA.41 (¶ 21). USAP did not exist until 2012, when it acquired a preexisting practice called Greater Houston Anesthesiology. *See* ROA.41, 61 (¶¶ 21, 95). For the last 12 years, USAP providers have cared for patients across Texas in both inpatient and outpatient facilities, no matter the patients' insurance status or ability to pay. *See* ROA.32, 51 (¶¶ 3, 57).

Last year, the FTC sued USAP in the Southern District of Texas for alleged antitrust violations, seeking a permanent injunction. The sole source of statutory authority the FTC invoked was Section 13(b). *See* ROA.41 (¶¶ 18-19). But the FTC did not pursue the action in its own administrative tribunal, as Section 13(b) requires; indeed, it has not brought any administrative proceedings against USAP.

C. The District Court Denies USAP's Motion To Dismiss These Proceedings

USAP moved to dismiss the enforcement action. USAP argued first that the FTC lacked statutory authority to bypass its administrative process. *See* ROA.804-812. Section 13(b), by its plain text, authorizes the FTC to proceed in federal district court *only* when doing so would aid parallel proceedings in the FTC's own administrative forum. But because the FTC has not brought those parallel administrative proceedings, it lacks the power to pursue this standalone injunction suit. As the Supreme Court recently observed in an analogous case, Congress "could not have . . . inten[ded]" the FTC to "use § 13(b) as a substitute for" its own internal administrative procedure. *AMG Cap.,* 593 U.S. at 78.

Next, USAP argued that accepting the FTC's broad interpretation of its authority under Section 13(b) would pose two distinct constitutional problems. The first is a nondelegation problem. *See* ROA.808-809. Under the FTC's view of Section 13(b), Congress "gave the [agency] the unfettered authority to choose whether to bring enforcement actions in Article III courts or within the agency." *Jarkesy v. SEC*, 34 F.4th 446, 459 (5th Cir. 2022), *aff'd*, 144 S. Ct. 2117 (2024). But such an unguided grant of enforcement power would violate the constitutional rule that Congress cannot delegate legislative authority without providing an "intelligible principle by which to exercise that power." *Id.* at 462; *see also Consumers' Rsch. v. FCC*, 2024 WL 3517592, at *12 (5th Cir. July 24, 2024) ("But saying telecommunications services 'should' remain 'affordable' amounts to '*no guidance*' whatsoever." (quoting *Jarkesy*, 34 F.4th at 462)).

The second constitutional issue is an executive power problem. *See* ROA.809 n.7, 869-874. Congress shielded the FTC from Executive Branch oversight by limiting the President's power to appoint and remove its Commissioners. *See* 15 U.S.C. § 41. The Supreme Court upheld that structure in 1935 based on its understanding then that the

FTC "exercis[ed] 'no part of the executive power.'" *Seila*, 591 U.S. at 215 (quoting *Humphrey's Ex'r v. United States*, 295 U.S. 602, 628 (1935)). But if the FTC is right that Section 13(b)—added in 1973—now permits it to bring enforcement actions in federal court, then the exercise of that core executive power violates Article II.

The district court denied USAP's motion to dismiss. *See* ROA.2786-2808. This timely appeal followed. *See* ROA.3253-3255 (notice of appeal).

ARGUMENT

The threshold question in this appeal is whether the Court has jurisdiction to hear it. That question turns on the proper construction of 28 U.S.C. § 1291, which grants jurisdiction over appeals from "final decisions of the district courts." The operative term—"final decisions"—has been given a "practical rather than a technical construction" for nearly 200 years. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949) (collecting cases dating to 1828).

Over time, the Supreme Court has "distilled" this practical finality requirement "to three conditions: that an order '[1] conclusively determine the disputed question, [2] resolve an important issue

completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment.'" *Will v. Hallock*, 546 U.S. 345, 349 (2006) (citation omitted). But ultimately, the inquiry "boils down to 'a judgment about the value of the interests that would be lost through rigorous application of a final judgment requirement.'" *Id.* at 351-52 (quoting *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 878-79 (1994)). And key to that judgment is whether a decision must "be treated as 'final'" to vindicate the "object of efficient administration of justice in the federal courts." *Digital Equip.*, 511 U.S. at 867-68, 884; *see Cobbledick v. United States*, 309 U.S. 323, 326 (1940) ("[Finality] is not a technical concept of temporal or physical termination. It is the means for achieving a healthy legal system.").

The order on appeal is final in all the ways that matter. The district court conclusively decided that the FTC had statutory and constitutional authority to bring this action; those issues are separate from the merits of the FTC's antitrust claims; and USAP's asserted right not to undergo these proceedings will be "'effectively lost' if review is deferred until after trial." *Axon*, 598 U.S. at 192 (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). And the interests involved in this

appeal are weighty: The FTC has acted unconstrained by what should be clear statutory and constitutional limitations on its power. That is an injury not just to USAP, but also to the legal system, and it warrants immediate appellate review.

I. USAP Will Effectively Lose Its Right To Raise Its Defenses Without Immediate Appeal

A. Prejudgment decisions are "effectively unreviewable" when they reject a defense based on a "right not to be tried" or face other burdens of litigation. *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 269, 270 (1982). Those decisions cannot be deferred until after trial because the litigant, having gone through trial, has lost its right not to be tried—"[a] proceeding that has already happened cannot be undone." *Axon*, 598 U.S. at 191.

To count as a right not to be tried, rather than a mere defense against liability, an asserted protection must reflect a "value of a high order." *Hallock*, 546 U.S. at 352. That is in part because the notion of a "right to avoid trial" plays into "the lawyer's temptation to generalize." *Id.* at 350; *see Digital Equip.*, 511 U.S. at 873 (acknowledging that "there is no single, 'obviously correct way to characterize'" some asserted rights (citation omitted)). As such, a litigant must offer a

"justification for immediate appeal" that is "sufficiently strong to overcome the usual benefits of deferring appeal until litigation concludes." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 107 (2009). And one well-established way to demonstrate the requisite strength is to show that the asserted protection against the burdens of litigation "is embodied in a constitutional or statutory provision." *Digital Equip.*, 511 U.S. at 879; *see id.* ("Where statutory and constitutional rights are concerned, 'irretrievable loss' can hardly be trivial, and the collateral order doctrine might therefore be understood as reflecting the familiar principle of statutory construction that, when possible, courts should construe statutes (here § 1291) to foster harmony with other statutory and constitutional law." (cleaned up)).

B. Anything other than an immediate appeal will foreclose all meaningful appellate review of USAP's important statutory and constitutional arguments, both of which independently justify this immediate appeal.

First, USAP asserts a statutory right not to be tried. The relevant language in Section 13(b) spans a single sentence: The first part empowers the FTC to seek preliminary injunctive relief only "pending

the issuance of a[n] [administrative] complaint," and requires the court to dissolve any preliminary injunction "if a complaint is not filed within . . . 20 days." 15 U.S.C. § 53(b)(2). The second part states: "*Provided further*, That in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction." *Id.* (emphasis in original). The FTC contends that this second proviso provides an independent cause of action. But the language "*Provided further*" refers back to the same proceeding and to "*the* court" where the agency first sought a preliminary injunction; it is not an authorization to bring a completely new proceeding. The provision's plain language thus requires the agency to invoke its administrative process before seeking a permanent injunction in federal court. If the FTC fails to initiate an administrative proceeding within 20 days, the court "shall" dissolve any injunctive relief ordered, functionally ending the federal court proceedings before trial. *See Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 546 n.12 (1987) ("The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success.").

This is not, as the FTC contends (at 15), a "garden-variety claim of procedural error." And the FTC's treatment of the statutory limits on its authority as a box-checking exercise is revealing. Instead, USAP's argument "challeng[es] the Commissions' power to proceed at all." *Axon*, 598 U.S. at 192. The harm to USAP as the FTC nonetheless seeks a permanent injunction is straightforward: Having to defend these proceedings, which should have never been brought, is a "here-and-now injury." *Id.* at 191 (cleaned up).

Second, USAP likewise asserts a constitutional right not to stand trial. The harm USAP suffers is from "being subjected" to these enforcement proceedings brought by "an unconstitutionally insulated" agency. *Id.* at 191. "The claim, again, is about subjection to an illegitimate proceeding, led by an illegitimate decisionmaker." *Id.* "That harm may sound a bit abstract," but "it is impossible to remedy once the proceeding is over," as appellate review "would come too late to be meaningful." *Id.*; *cf. Trump v. United States*, 144 S. Ct. 2312, 2354 (2024) (Barrett, J., concurring) ("[W]here trial itself threatens certain constitutional interests, we have treated the trial court's resolution of

the issue as a 'final decision' for purposes of appellate jurisdiction." (citation omitted)).

C. The FTC's counterarguments lack merit. *First*, the FTC notes (at 14, 19) that collateral-order appeals generally have been limited to a "narrow class" of cases, such as those involving "claims of immunity." But that is the functional equivalent of what USAP is asserting. As the Supreme Court noted in *Axon*, an argument about "subjection to an unconstitutionally structured decisionmaking process" is analogous "to our established immunity doctrines." 598 U.S. at 192. Both such claims are effectively unreviewable if appeal must wait until the harm-causing proceedings are over.

Second, the agency draws a faulty comparison (at 15-16) to forum-selection appeals, which generally fall outside the collateral order doctrine. In a forum-selection appeal, the defendant is arguing that its case belongs in a different *court*. That is why the usual remedy is "transferring the case rather than dismissing it." *Pugh v. Arrow Elecs., Inc.*, 304 F. Supp. 2d 890, 896 (N.D. Tex. 2003). Transfer, not dismissal, is appropriate in such cases because the defendant "is obviously not entitled . . . to avoid suit altogether." *Lauro Lines s.r.l. v. Chasser*, 490

U.S. 495, 501 (1989). But that is precisely what USAP has argued here: This case does not belong in federal court at all, so dismissal is the proper remedy. The district court, of course, would have no authority to "transfer" this case into the FTC's administrative forum.

The FTC's arguments on this point (at 15-16) follow from its incorrect view that there is no relevant difference between administrative and federal court proceedings. But agency adjudications and "Article III proceedings" have different accompanying "*legal processes*." *Jarkesy*, 34 F.4th at 462 (emphasis in original). (That is why "the power to assign disputes to agency adjudication is 'peculiarly within the authority of the legislative department.'" *Id.* at 461 (quoting *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909)).) For example, here, "a party before the agency's internal tribunal retains an ultimate right of appeal to a court of appeals of that party's choosing in the event the FTC prevails." ROA.2182. The choice between federal court and administrative agency thus is not like the choice between one court and another. And the cases the FTC cites are about that court-to-court difference, not the court-to-agency one. *See Lauro Lines*, 490 U.S.

at 496 (U.S. vs. Italian court); *Poirrier v. Nicklos Drilling Co.*, 648 F.2d 1063, 1064-65 (5th Cir. 1981) (federal vs. state court).[1]

The analogy to forum-selection appeals also does not aid the FTC because forum-selection issues are often too bound up in the merits of the case to warrant appeal before trial. For example, the FTC cites *Van Cauwenberghe v. Biard*, 486 U.S. 517 (1988), which involved the denial of a motion to dismiss on *forum non conveniens* grounds. But that case turned not on whether that denial would be effectively unreviewable on appeal, but on whether it was too "entangled in the merits of the underlying dispute" to count as collateral. *Id.* at 528. There, resolving relevant issues such as "the availability of witnesses" would have required the district court to "scrutinize the substance of the dispute." *Id.* Here, by contrast, everyone agrees that USAP's statutory and constitutional defenses are "completely separate from the merits" of the FTC's antitrust claims. *Hallock*, 546 U.S. at 349 (citation omitted).

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[1] The FTC also cites *Leonard v. Martin*, 38 F.4th 481 (5th Cir. 2022), and *In re Deepwater Horizon*, 793 F.3d 479 (5th Cir. 2015), but does not explain why. Neither case involved an asserted right not to be sued in a particular court. *See Leonard*, 38 F.4th at 487; *Deepwater Horizon*, 793 F.3d at 485.

Third, the FTC misunderstands USAP's constitutional challenge when it leans (at 19-21) on cases such as *United States v. Valencia*, 940 F.3d 181 (5th Cir. 2019), and *Collins v. Yellen*, 594 U.S. 220 (2021). In those cases, the litigant directly challenged the appointment of a federal official—the Acting Attorney General and the Federal Housing Finance Agency Director, respectively. *See Valencia*, 940 F.3d at 183; *Collins*, 594 U.S. at 257. But USAP's argument is not that the FTC's Commissioners were unconstitutionally appointed or that their removal protections are themselves unconstitutional. Instead, USAP's argument is that Congress violated Article II by giving the FTC executive litigation powers decades after the Supreme Court upheld the FTC as an independent agency shielded from Presidential accountability. So it is Section 13(b), not the FTC's removal protections, that violates the Constitution. In any event, *Valencia* was a criminal collateral order appeal, and "federal courts apply the collateral [order] doctrine 'with the utmost strictness' in criminal cases." *United States v. Brown*, 218 F.3d 415, 421 (5th Cir. 2000) (citation omitted); *see id.* (the federal policy of finality "is most compelling in the criminal context"). And in *Collins*, unlike here, appellate jurisdiction was not in dispute.

Fourth, the FTC strains (at 21-23) to distinguish *Axon*. The FTC emphasizes (at 21) that the defendant company there was seeking review by a federal district court rather than a court of appeals. But nothing in *Axon*'s discussion of the collateral order doctrine turned on that distinction. The decision's reasoning, rather than its procedural posture, is the important point: *Axon* drew on collateral order precedents to explain that litigants need not wait before appealing certain claims that they are being subjected to unlawful agency authority. *See* 598 U.S. at 192. The FTC characterizes the arguments raised in *Axon* (at 22) as "far-reaching," "fundamental," and "extraordinary." But the same is true here—if USAP is correct, then the FTC is acting *ultra vires* when it uses Section 13(b) to "bring[] dozens of cases every year seeking a permanent injunction." Br. for the FTC at 8, *AMG Cap. Mgmt., LLC v. FTC*, 593 U.S. 67 (2021) (No. 19-508). And while the FTC notes (at 22) that *Axon* proclaimed no "newfound enthusiasm for interlocutory review," no new enthusiasm is necessary here, as USAP's appeal falls within the heartland of the collateral order doctrine, as demonstrated above.

II. USAP's Appeal Raises Serious And Unsettled Legal Questions

In this circuit, an order must also present serious and unsettled legal issues to qualify for collateral appeal. *See Kershaw v. Shalala*, 9 F.3d 11, 14 (5th Cir. 1993). USAP's statutory and constitutional defenses meet this requirement because they are both serious and unsettled.

A. The district court's ruling that the FTC can sue for a permanent injunction under Section 13(b) without first initiating an administrative action presents a serious and unsettled question. The Supreme Court has all but expressly said as much. In *AMG Capital*, the Court first observed, on the one hand, that "the appearance of the words 'permanent injunction' (as a proviso) suggests that those words are directly related to a previously issued preliminary injunction." 593 U.S. at 76. The Court then acknowledged, on the other hand, that the provision "*might also be read*, for example, as granting authority for the Commission to go one step beyond the provisional and ('in proper cases') dispense with administrative proceedings." *Id.* (emphasis added). Two pages later, the Court repeated those options, observing first that the FTC might "use § 13(b) to obtain injunctive relief while administrative

proceedings are foreseen or in progress," or, under the other reading, "when it seeks only injunctive relief." *Id.* at 78. These are the two competing interpretations that USAP and the FTC have advanced. The Supreme Court recognized these dueling options, declined to pick a side, and left the issue for further development in the courts of appeals. The fact the Supreme Court recognized two sides to the Section 13(b) issue should be dispositive proof that it is unsettled and thus a proper subject of appeal.[2]

This Court—like most courts of appeals—has yet to consider this issue. And its approach to statutory interpretation provides reason to think it will reject the FTC's expansive reading of Section 13(b). In this Court, "text is always the alpha." *Whitlock v. Lowe*, 945 F.3d 943, 947 (5th Cir. 2019); *see also United States v. Koutsostamatis*, 956 F.3d 301, 306 (5th Cir. 2020) ("In statutory interpretation, we have three

[2] As several courts have recognized, the Supreme Court did not decide this issue in the FTC's favor. *See*, *e.g.*, *FTC v. Neora LLC*, 552 F. Supp. 3d 628, 634 (N.D. Tex. 2021) ("The Supreme Court in *AMG Capital* made no definitive statement regarding the availability of permanent injunctions vis-à-vis administrative enforcement proceedings . . . ."); *FTC v. Cardiff*, 2021 WL 3616071, at *20 (C.D. Cal. June 29, 2021) ("The Supreme Court in *AMG* did not directly address this interpretation of the 'permanent injunction' proviso." (citation omitted)).

obligations: '(1) Read the statute; (2) read the statute; (3) read the statute!'" (quoting Hon. Henry J. Friendly, *Benchmarks* 202 (1967))). And in recent cases, this Court has applied that text-first approach to statutory grants of agency authority, rebuffing longstanding interpretations from other courts that had "assume[d]" an agency had authority "without analyzing the statute." *Texas v. Nuclear Regul. Comm'n*, 78 F.4th 827, 840-42 (5th Cir. 2023), *reh'g denied en banc*, 95 F.4th 935 (5th Cir. 2024). Strict adherence to statutory text favors USAP's interpretation, which tracks the grammar and structure of Section 13(b), over the FTC's, which is a near boundless assertion of enforcement authority that may benefit the agency but that leaves other aspects of the provision's text unintelligible or unexplained. *Cf. FTC v. Shire Viropharma, Inc.*, 917 F.3d 147, 159 (3d Cir. 2019) ("The FTC's understandable preference for litigating under Section 13(b), rather than in an administrative proceeding, does not justify its expansion of the statutory language.").

While it is true, as the FTC notes (at 17-18), that three courts of appeals—the Ninth, Seventh, and Eleventh—held decades before *AMG Capital* that the FTC may seek a permanent injunction without

bringing administrative proceedings, those decisions provide only cursory analysis of the statutory question. *See*, *e.g.*, *FTC v. H. N. Singer, Inc.*, 668 F.2d 1107, 1110 (9th Cir. 1982) (reading Section 13(b)'s second proviso out of context and then turning immediately to "legislative history"). Most significantly, the three decisions—from 1982, 1983, and 1984, respectively—pay almost no attention to the statutory text and structure and rely heavily on legislative history, reflecting a now-disfavored "mid–20th century . . . approach" to statutory interpretation. *Ziglar v. Abbasi*, 582 U.S. 120, 131 (2017); *see also Azar v. Allina Health Servs.*, 587 U.S. 566, 579 (2019) ("[L]egislative history is not the law." (citation omitted)). And none of those cases had the benefit of the Supreme Court's textual analysis in *AMG Capital*.

The room for doubt here weighs heavily in favor of appeal. The words Congress enacted in Section 13(b) provide ample reason to doubt the FTC's claim of broad discretion to bring enforcement actions untethered to administrative proceedings. And the "health [of the] legal system," *Cobbledick*, 309 U.S. at 326, would be well served by immediate review of this important question.

B. USAP's constitutional arguments are also serious and unsettled. USAP has argued that if the FTC has statutory authority to bring these enforcement proceedings, the exercise of that "quintessentially executive power," *Seila*, 591 U.S. at 219, is unconstitutional given that the FTC is an independent agency whose Commissioners cannot be removed at will by the President, *see* 15 U.S.C. § 41. The FTC's own citation (at 23-25) proves the unsettled nature of this issue: In *Consumers' Research v. CPSC*, Judge Willett, writing for the panel majority, characterized it as "one of the fiercest (and oldest) fights in administrative law." 91 F.4th 342, 345 (5th Cir. 2024). Judge Jones wrote separately to note the "uncertainty" in Supreme Court doctrine. *Id.* at 356. Then at the *en banc* stage, the full Court declined rehearing by a 9-8 vote. *Consumers' Rsch. v. CPSC*, 98 F.4th 646, 647 (5th Cir. 2024). Judge Willett wrote to concur in the denial, but also to urge the Supreme Court to consider reversing him. *See id.* at 650 ("[T]his cert petition writes itself.").

Contrary to the FTC's suggestion (at 23-25), *Illumina, Inc. v. FTC* did not resolve USAP's constitutional argument. 88 F.4th 1036 (5th Cir. 2023). That case involved an administrative adjudication before

the FTC (the very proceeding that the FTC chose not to pursue here) in which the FTC determined that Illumina's acquisition of Grail, Inc., was unlawful. *Id.* The Court of Appeals upheld the constitutionality of that administrative adjudication process, which is arguably much closer to the exercise of "quasi-legislative/quasi-judicial authority" that the Supreme Court blessed in *Humphrey's Executor*. But that process is not at all like the purely Executive Branch conduct associated with bringing a standalone enforcement action in federal court. Thus the argument here—about the FTC's executive power to seek injunctive relief in federal court under Section 13(b)—is an issue *Illumina* did not address.

In any case, even if *Illumina* were controlling, it based its holding on *Humphrey's Executor*, and USAP has a right to petition the Supreme Court to distinguish, cabin, or overrule that outlier decision. *Cf. Illumina*, 88 F.4th at 1047 ("[W]hether the FTC's authority has changed so fundamentally as to render *Humphrey's Executor* no longer binding is for the Supreme Court, not us, to answer.").

III. This Motion Should Be Carried With The Case

As the above discussion should illustrate, the appellate-jurisdictional issues here are deeply intertwined with the statutory and

constitutional arguments USAP and the FTC will address in the already scheduled briefing. Although the Court can deny the FTC's motion for the reasons discussed above, this Court often elects to carry a motion to dismiss an appeal with the case, permitting the merits panel to resolve the motion with the benefit of full briefing. *See*, *e.g.*, *Prewett v. City of Palestine*, 281 F.3d 1278 (5th Cir. 2001). That would be the appropriate course here if the Court declines to deny the FTC's motion outright.

CONCLUSION

The Court should deny the Federal Trade Commission's Motion To Dismiss.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on July 29, 2024, I electronically filed the foregoing brief with the Clerk of the Court by using the appellate CM/ECF system. I further certify that the participants in this case are CM/ECF users and that service will be accomplished by using the appellate CM/ECF system.

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July 29, 2024

CERTIFICATE OF COMPLIANCE

This brief contains 4,866 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Century Schoolbook font) using Microsoft Word.

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