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

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August 12, 2024

No. 24-20270

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee,
v.

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

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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E. Entities with a Financial Interest:

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.
   Wilmington, Delaware
2. U.S. Anesthesia Partners Intermediate Holdings, Inc.
   Wilmington, Delaware
3. U.S. Anesthesia Partners, Inc., *Defendant*
   Dallas, Texas
4. USAP (Texas), L.C.
   Dallas, Texas
5. U.S. Anesthesia Partners of Texas, P.A. (d/b/a USAP-Texas)
   Dallas, Texas
6. Various Shareholders of U.S. Anesthesia Partners Holdings, Inc.
7. Welsh, Carson, Anderson & Stowe XI, L.P., *Former Defendant*
   New York, New York
8. WCAS Associates XI, LLC, *Former Defendant*
   New York, New York
9. Welsh, Carson, Anderson & Stowe XII, L.P., *Former Defendant*
   New York, New York
10. WCAS Associates XII, LLC, *Former Defendant*
    New York, New York
11. WCAS Management Corporation, *Former Defendant*
    New York, New York

12. WCAS Management Corporation, *Former Defendant*
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13. WCAS Management, L.P., *Former Defendant*
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18. Hogan Lovells, *Counsel for Former Defendant Welsh Carson*
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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 10% of the stock of U.S. Anesthesia Partners, Inc.

/s/ *Geoffrey M. Klineberg*
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STATEMENT REGARDING ORAL ARGUMENT

This appeal presents substantial questions on the statutory and constitutional authority of a federal agency, the Federal Trade Commission. U.S. Anesthesia Partners, Inc., therefore respectfully requests oral argument.

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INTRODUCTION

This is a case of government overreach. U.S. Anesthesia Partners, Inc. is a leading physician-owned anesthesiology practice that provides high quality service to Texas hospitals and other healthcare facilities. But the Federal Trade Commission's antitrust enforcement action threatens that enterprise. That action reflects the FTC's ever-expanding view of its own authority: The agency is pursuing this misguided lawsuit without regard to clear statutory and constitutional limits on its ability to obtain injunctive relief in federal court.

To begin, the FTC's lawsuit ignores the express conditions Congress imposed on the agency's authority under Section 13(b) of the Federal Trade Commission Act. In the 1970s, Congress granted the FTC narrow authority to seek injunctive relief in federal court in aid of a pending agency adjudication. The point was to help the agency maintain the status quo while it brought administrative proceedings to get accused lawbreakers to cease and desist their misconduct. And that is how the FTC understood its power for nearly a decade. But apparently unsatisfied with the limited authority Congress had granted

it, the FTC later arrogated to itself the sole discretion to bypass its administrative forum and proceed only in federal court.

The FTC unearthed its novel enforcement authority in an exception to an exception to Section 13(b). But Congress would not have buried such a fundamental change to the agency's power 213 words into that provision, in an obscure proviso that received scant attention before passage. Every interpretive tool—context, the major questions doctrine, and constitutional avoidance—confirms that the FTC must pursue administrative proceedings, not standalone litigation in federal court.

Even if the FTC were right about the scope of its statutory authority, the case before the district court should still be dismissed. The FTC's interpretation of Section 13(b) creates two serious constitutional problems. *First*, the agency claims that Congress delegated to it unbounded discretion to choose whether to bring enforcement actions for injunctive relief in either federal court or within the agency. But that choice is inherently legislative. And Section 13(b) contains no intelligible principle to guide the FTC in making that call.

So Section 13(b), as interpreted and implemented by the FTC, is an unconstitutional delegation of legislative power.

Second, allowing the FTC to bring enforcement actions in federal court infringes on the separation of powers by granting executive enforcement authority to an agency insulated from Presidential oversight. This violation of Article II separately requires dismissing the FTC's lawsuit against USAP.

The district court erred in rejecting USAP's statutory and constitutional arguments. On the statutory argument, the court outsourced its interpretation to three out-of-circuit decisions that paid far more attention to legislative history than text and that predate recent Supreme Court guidance on the meaning of Section 13(b). The district court then ignored USAP's nondelegation argument. And the court concluded that the Article II argument was barred by *Illumina, Inc. v. FTC*, 88 F.4th 1036 (5th Cir. 2023), a decision that did not involve a federal court injunction proceeding and is inapplicable here.

The FTC never should have brought this action. In an analogous case, the Supreme Court concluded that Congress "could not have . . . inten[ded]" the FTC "to use § 13(b) as a substitute for" its own internal

administrative procedure. *AMG Cap. Mgmt., LLC v. FTC*, 593 U.S. 67, 78 (2021). But that is what the FTC has done. The proper remedy is to reverse the district court's erroneous ruling with instructions to dismiss this case.

JURISDICTIONAL STATEMENT

The district court had jurisdiction because this case arose under the federal antitrust laws. *See* 28 U.S.C. §§ 1331, 1337(a); ROA.40 (¶ 11). USAP appeals the district court's order denying its motion to dismiss, *see* ROA.2786-2808, and that order is immediately appealable as a collateral order, *see* 28 U.S.C. § 1291. The district court entered its order on May 13, 2024, *see* ROA.2808, and USAP timely noticed its appeal on June 12, 2024, *see* ROA.3253-3255.

The order is appealable because it is final for all "practical" purposes. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). 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 Enter., Inc. v. FTC*, 598 U.S.

175, 192 (2023) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). And the interests involved in this appeal are weighty: The FTC has ignored clear statutory and constitutional limitations on its power. That inflicts a "here-and-now injury" on USAP warranting immediate appellate review. *Id.* at 191 (quoting *Seila Law LLC v. CFPB*, 591 U.S. 197, 212 (2020)).

USAP's response to the FTC's motion to dismiss this appeal explains why this Court has jurisdiction to hear this appeal, so USAP will not retread those issues. *See generally* USAP's Resp. to FTC's Mot. To Dismiss (July 29, 2024), ECF No. 24. That said, USAP will address three points that the FTC raised for the first time in its reply brief. *See* FTC's Reply in Support of Mot. To Dismiss (Aug. 5, 2024), ECF No. 29.

First, the FTC now cites (at 5-6) *Persyn v. United States*, 935 F.2d 69, 73 (5th Cir. 1991), to support its faulty analogy to forum-transfer appeals. *Persyn* involved a transfer to the Court of Claims. The plaintiff raised jurisdictional objections to that transfer, which this Court held could be effectively reviewed after final judgment by the Federal Circuit. *See id.* *Persyn* is thus of vanishing relevance: The

argument here is not that the merits of the case should be litigated in a different court but that they should not be litigated in a court at all.

Second, the FTC draws (at 7) a new comparison between USAP's constitutional arguments and a standing challenge. It is true that here, as in a standing appeal, the argument is that the plaintiff lacks the authority to press its claim. But unlike a standing appeal, where the issue of standing is often bound up in the merits and thus best reviewed after final judgment, this appeal has nothing to do with the merits and requires review now. USAP's argument is that the FTC is violating federal law and the Constitution by bringing these enforcement proceedings only in federal court. The here-and-now injury that USAP suffers from continued subjection to unlawful proceedings "is impossible to remedy once the proceeding is over" because "[a] proceeding that has already happened cannot be undone." *Axon*, 598 U.S. at 191. The FTC ignores this reality.

Third, the FTC maligns (at 2, 11) USAP's intentions in bringing this appeal. To begin, the FTC's concerns about delay ring hollow because the agency's entire enforcement effort is stale. The FTC has challenged acquisitions that closed and contracts that expired years

ago—sometimes more than a decade ago. And in any event, USAP has a right to bring this appeal because it has a right not to be subjected to the FTC's unauthorized and unconstitutional prosecution. USAP's only purpose before this Court is to vindicate its statutory and constitutional rights not to stand trial before the district court below.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the FTC exceeded its statutory authority in pursuing this enforcement action under 15 U.S.C. § 53(b) in federal court without initiating administrative proceedings.

2. If the FTC has statutory authority to bring this action, whether Congress violated Article I's nondelegation doctrine by providing the agency the unguided discretion to choose whether to bring an action like this one in either Article III court or within its own administrative forum.

3. If the FTC has statutory authority to bring this action, whether the exercise of that core executive power violates Article II given that the agency's commissioners are shielded from removal by the President under 15 U.S.C. § 41.

STATEMENT OF THE CASE

I. Legal Framework

A. Article II of the Constitution vests "[t]he executive Power" in the "President of the United States of America," § 1, cl. 1, who must "take Care that the Laws be faithfully executed," *id.* § 3. Since 1789, those provisions have "been understood to empower the President to keep [federal] officers accountable—by removing them from office, if necessary." *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 483 (2010).

In its landmark decision *Myers v. United States*, 272 U.S. 52 (1926), the Supreme Court recognized the President's broad authority to supervise, direct, and remove subordinate officers in the Executive Branch. Writing for the Court, Chief Justice Taft confirmed that the President retains the "exclusive power [to] remov[e]" principal executive officers from duty. *Id.* at 122. "[T]o hold otherwise," the former President explained, "would make it impossible for the President, in case of political or other difference[s] with . . . Congress, to take care that the laws be faithfully executed." *Id.* at 164.

The Court recognized a narrow exception to the President's "illimitable power of removal" in *Humphrey's Executor v. United States*,

295 U.S. 602, 627 (1935). There, the Court upheld a statute protecting the Commissioners of the FTC from removal except for "inefficiency, neglect of duty, or malfeasance in office." 15 U.S.C. § 41. Reasoning that the President's removal power "will depend upon the character of the office" at issue, the Court stated that the FTC "exercise[d] no part of the executive power vested by the Constitution in the President." *Humphrey's Ex'r*, 295 U.S. at 628, 631. Instead, the FTC then exercised only "quasi legislative or quasi judicial powers," acting as a "body of experts" with staggered terms who "gain experience by length of service." *Id.* at 624-25, 628.

But as the Supreme Court has since admonished, *Humphrey's Executor* rested on the premise that the FTC—"as it existed in 1935"—exercised "'no part of the executive power.'" *Seila Law*, 591 U.S. at 215 (quoting *Humphrey's Ex'r*, 295 U.S. at 628). And the Court has made clear that *Humphrey's Executor* represents "'the outermost constitutional limit[]'" and should not be extended beyond the FTC "as it existed in 1935" and "the set of powers [*Humphrey's Executor*] considered as the basis for its decision." *Id.* at 215, 218 & n.4.

B. The FTC as it existed in 1935, and for decades after, had only limited means to police anticompetitive conduct and consumer fraud. Under Section 5 of the FTC Act, the agency's only remedy for such conduct was to obtain from an administrative law judge "an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice." Federal Trade Commission Act, ch. 311, 38 Stat. 717 (1914).

The problem with this arrangement was that the FTC's adjudicative process was slow and the agency had no means to seek interim relief while it played out. *See* Edward F. Cox, *The Nader Report on the Federal Trade Commission* 72-73 (1969). Administrative proceedings took an average of four years—four years during which there was nothing to prevent an accused violator from continuing its unlawful conduct. *See id.* For instance, a defendant accused of scamming consumers could continue to run false advertisements until the moment a cease-and-desist order was entered. The then-Chairman of the FTC thus emphasized the need for a provision to "authorize the Commission to go into federal court to seek temporary injunctions to prevent the continuation of particularly aggravated violations of the

laws under its jurisdiction, pending the completion of the lengthy administrative proceedings and appeals which lead to a final cease-and-desist order." Ltr. from Lewis A. Engman, Chairman, FTC, to Rep. Harold T. Johnson (Nov. 9, 1973), *reprinted in* 119 Cong. Rec. 36610 (1973).

Congress addressed this problem in 1973 when it enacted Section 13(b). That provision was introduced in a last-minute amendment to the Trans-Alaska Authorization Pipeline Act, which aimed to address a national energy crisis created by a shortage of domestic crude oil. *See* Pub. L. No. 93-153, Tit. II, 87 Stat. 576, 584 (1973); *see* 119 Cong. Rec. 36600 (1973). 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) (emphasis added).

Section 13(b) did not garner much discussion when enacted. And "[w]hat little debate there was evinces no indication that *anyone* understood [Section 13(b)] to do anything other than confer on the agency the authority to seek injunctive relief to end practices while administrative proceedings were on-going." J. Howard Beales III & Timothy J. Muris, *Striking the Proper Balance: Redress Under Section 13(b) of the FTC Act*, 79 Antitrust L.J. 1, 14-15 (2013); *see AMG Cap.*, 593 U.S. at 73 (citing the Beales & Muris article). For example, Lewis Engman, then Chairman of the FTC, noted that Section 13(b) would "close several long-overlooked gaps in the Commission's law enforcement authority," but emphasized that it would "in no way

extend" the "substantive reach" of the FTC's enforcement power. 119 Cong. Rec. 36610 (1973).

This case turns on the proper interpretation of Section 13(b)'s permanent-injunction proviso, emphasized above. That proviso, buried 213 words into Section 13(b), was the subject of "no discussion . . . during the debate on the Trans-Alaska Pipeline Act." Peter C. Ward, *Restitution for Consumers Under the Federal Trade Commission Act: Good Intentions or Congressional Intentions?*, 41 Am. U. L. Rev. 1139, 1178 (1992). According to the Senate report accompanying the provision, Congress's overall "purpose" in enacting Section 13(b) was to "permit the Commission to bring an immediate halt to unfair or deceptive acts or practices" that would otherwise "continue for several years *until agency action is completed*." S. Rep. No. 93-151, at 30 (1973) (emphasis added). Within this scheme, the permanent-injunction proviso played a limited role: Congress recognized that judges might be reluctant to issue preliminary relief (based on a *likelihood* of success on the merits) unless they could ensure that a final decision on the merits would be forthcoming. *See id.* at 30-31. So the permanent-injunction

proviso let the court "set a definite hearing date" for permanent relief (based on *actual* success on the merits). *Id.*

Despite this narrow purpose, and the textual requirement that any injunction be granted "pending the issuance of a complaint" by the FTC in its administrative forum, the agency has argued that the permanent-injunction proviso confers the power to bring standalone enforcement actions in federal district court, even where no administrative proceedings have occurred and no preliminary injunction has been granted. The FTC uses that proviso as its sole source of authority to "bring[] dozens of cases every year seeking a permanent injunction." FTC Br. at 8, *AMG Cap. Mgmt., LLC v. FTC*, No. 19-508 (U.S. Nov. 30, 2020), 2020 WL 7093938.

II. Procedural History

A. The FTC Seeks An Injunction Against USAP Without Separately Filing Administrative Proceedings

USAP is a physician-owned organization that provides anesthesia 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 twelve 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.

B. 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. Next, USAP argued that accepting the FTC's broad interpretation of its authority under Section 13(b) would pose two constitutional problems. *See* ROA.808-809. It would raise the question whether Congress violated Article I's nondelegation doctrine by granting the FTC unfettered discretion to choose whether to bring enforcement actions in federal court or within the agency. *See id.* And it would violate Article II by conferring core executive enforcement power on an agency shielded from Executive

Branch oversight. *See* ROA.809 n.7 (incorporating by reference argument made by former co-defendant, *see* Fed. R. Civ. P. 10(c)).

The district court denied USAP's motion to dismiss. *See* ROA.2786-2808. Although recognizing that USAP had "marshal[ed] eloquent and thorough arguments of statutory interpretation," ROA.2801, the court concluded that "every court to consider this issue" has understood Section 13(b) to empower the FTC to pursue standalone federal-court enforcement actions when it "seeks only injunctive relief," ROA.2802. The court also relied on "dicta" from *AMG Capital*, which it asserted showed the Supreme Court shared its view of Section 13(b). The district court did not address USAP's Article I nondelegation argument. The court then rejected USAP's Article II argument, which it construed as a challenge to the FTC's removal protections rather than its later-enacted authority under Section 13(b). *See* ROA.2806. The court concluded that such an attack was foreclosed by *Illumina*, 88 F.4th 1036, which in turn relied on *Humphrey's Executor*.

This timely appeal followed. *See* ROA.3253-3255.

SUMMARY OF ARGUMENT

I. The FTC Act's Section 13(b) permits the FTC to seek injunctive relief in federal court only as a support mechanism for ongoing administrative proceedings. The text of Section 13(b) specifies that any injunctive relief sought must be "pending the issuance of a complaint" by the FTC, indicating that administrative proceedings are a prerequisite. The agency's practice of initiating standalone federal court actions without concurrent administrative proceedings exceeds the statutory authority granted by Congress.

Traditional tools of statutory interpretation confirm this plain-text reading. The FTC locates its authority to bring standalone federal court actions in a subordinate proviso buried 213 words into Section 13(b). But a proviso—an exception—is only as broad as the language that came before it. And the language that came before the relevant proviso cabins the agency's authority to seek injunctive relief to cases where it initiates administrative proceedings. Historical context and the insights of the major questions doctrine confirm as much: If the FTC is right that Congress intended to grant the agency new enforcement powers untethered from its administrative forum, surely that proposal

would have warranted some debate. The absence of any such discussion, plus the fact that the agency itself termed Section 13(b) a minor amendment when passed, show that the FTC's expansive interpretation of that provision cannot be right.

The district court incorrectly concluded that Section 13(b) allows for standalone enforcement actions based on outdated statutory analysis in cursory appellate court decisions. The court then compounded that error by misinterpreting dicta from the Supreme Court's *AMG Capital* decision, which actually left the statutory question unresolved. The best reading is that Section 13(b) does not grant the FTC the power it has claimed here. And the proper remedy for that overreach is dismissal upon remand to the district court.

II. If Section 13(b) grants the FTC the power to seek permanent injunctive relief in federal court without also pursuing administrative proceedings, then the statute violates the Constitution twice over.

A. The FTC's reading of Section 13(b) violates Article I because it gives the FTC unfettered authority to bring actions for injunctive relief in either federal court or within the agency. Article I prohibits Congress from delegating its powers to another branch unless the

statute has an intelligible principle to guide the delegee's use of that power. Assigning cases to federal court or agency adjudication is a classic legislative power. Yet Section 13(b) provides no guidance about when the FTC should bring permanent injunction suits in federal court or the agency. That statutory silence flouts the nondelegation doctrine.

This Court held that a nearly identical grant of authority to the SEC violated Article I in *Jarkesy*. The Court there held that the SEC's unconstitutional enforcement action had no effect. This Court should do the same and dismiss the FTC's suit.

B. The FTC's reading of Section 13(b) also violates Article II because it gives the FTC executive power. In *Humphrey's Executor*, the Supreme Court upheld removal protections for the FTC Commissioners because the agency acted only as a legislative and judicial aid that exercised no executive powers. As an independent agency shielded from the President's control, the FTC cannot wield executive power. But if Section 13(b) means what the FTC asserts, then decades after *Humphrey's Executor*, Congress gave the FTC the executive power to bring freestanding enforcement actions in federal court. That later-

granted executive power is unconstitutional. The FTC therefore lacks authority to bring this suit, and the Court should dismiss it.

The district court erred in rejecting USAP's argument that Section 13(b) violates Article II. It misunderstood USAP to challenge the FTC's removal protections, rather than the FTC's later-granted executive litigation power. And it mistakenly found that *Illumina* forced its hand. The *Illumina* petitioners challenged the FTC's structure, not Section 13(b). *Illumina* thus did not address whether the FTC's reading of Section 13(b) exceeds Article II's limits. No precedent stands in the way of the Court reversing with instructions for the district court to dismiss this action.

ARGUMENT

I. The FTC Lacks Statutory Authority To Pursue This Enforcement Action

The FTC invokes Section 13(b) of the FTC Act as its sole source of authority to bring this suit in federal district court. *See* ROA.41 (¶¶ 18-19). The FTC's complaint exceeds its statutory authority: Section 13(b) authorizes the agency to proceed in federal court *only* to support enforcement proceedings in its own administrative forum; but the FTC

has instituted no such proceedings. The district court erred in excusing that noncompliance.

A. Section 13(b)'s Plain Text Permits The FTC To Seek Injunctive Relief In Federal Court Only To Support Ongoing or Imminent Administrative Proceedings

1. By its plain text, Section 13(b) does not permit the FTC to bring an independent federal court action. With that provision, 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. Mgmt., LLC v. FTC*, 593 U.S. 67, 78 (2021).

Before Congress enacted Section 13(b), the FTC had no authority to seek a court-ordered injunction to halt ongoing or imminent violations. *See id.* at 72-73. Congress thus enacted Section 13(b) 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.

Section 13(b) requires the FTC to proceed administratively. The agency can seek injunctive relief only "pending the issuance of a

complaint" in its administrative process.[1] Section 13(b)'s first proviso (the clause that begins, "Provided, however") confirms that any injunction obtained in federal court "shall be dissolved" if the FTC does not bring an administrative proceeding within twenty days of getting the injunction. So while Section 13(b) lets the FTC seek injunctive relief in court to aid its administrative proceedings, those administrative proceedings are a necessary predicate. The FTC cannot simply choose to litigate its antitrust claims solely in federal court.

2. The FTC's authority to seek a *permanent* injunction under Section 13(b) is similarly tied to administrative proceedings and not a warrant for independent federal court litigation. In its second proviso, Section 13(b) states: "*Provided further*, That in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction." As the Supreme Court has explained, "the

[1] "Complaint" here means an administrative complaint issued by the FTC under Section 5(b), 15 U.S.C. § 45(b). Section 13(b) provides for preliminary injunctive relief "pending the issuance of a complaint" and "until such complaint is dismissed by the [FTC] or set aside by the court on review, or until the order of the [FTC] made thereon has become final," which is a clear reference to the FTC's administrative adjudication procedures, *see id.* § 45(b), (c). The FTC did not dispute this point below.

appearance of the words 'permanent injunction' (as a proviso) suggests that those words are directly related to a previously issued preliminary injunction." *AMG Cap.*, 593 U.S. at 76. The Court was right. Because the FTC cannot have been "issued a preliminary injunction" without bringing administrative proceedings, it also cannot "seek" a permanent injunction from "*the* court" that issued a preliminary injunction without having brought administrative proceedings.

That conclusion flows from longstanding interpretive principles: "The 'grammatical and logical scope' of a proviso . . . 'is confined to the subject-matter of the principal clause' to which it is attached." *Abbott v. United States*, 562 U.S. 8, 25-26 (2010) (quoting *United States v. Morrow*, 266 U.S. 531, 534-35 (1925)). The principal clause here lets the FTC seek "a temporary restraining order or a preliminary injunction" only when tied to administrative proceedings. The permanent-injunction proviso that follows therefore necessarily also conditions the availability of a "permanent injunction" on the existence of those administrative proceedings.

B. Traditional Tools Of Statutory Interpretation Confirm The Plain Text Reading That The FTC Must Bring Administrative Proceedings To Seek Injunctive Relief

The Court can resolve this case on the plain text of Section 13(b). But traditional tools of statutory interpretation confirm USAP's argument because the FTC's assertion of litigation authority also clashes with Section 13(b)'s context, the major questions doctrine, and the canon of constitutional avoidance.

1. "[S]tatutory and historical context" show that Section 13(b) was not meant to provide an end run around the FTC's administrative process. *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 471 (2001). Since its creation in 1914, the FTC has had the power to enforce the FTC Act through administrative proceedings under Section 5. *See* 15 U.S.C. § 45. Given this long history, the Supreme Court has rejected the notion "that Congress, without mentioning the matter, would have granted the [FTC] authority so readily to circumvent its traditional § 5 administrative proceedings" by bringing a federal court action under Section 13(b) instead. *AMG Cap.*, 593 U.S. at 78. In *AMG Capital*, the Supreme Court held that, "[i]n light of the historical importance of administrative proceedings," allowing the FTC to go directly to federal

court to seek monetary relief without first engaging in administrative proceedings "would allow a small statutory tail to wag a very large dog." *Id*. at 77. That same logic applies here.

Statutory context confirm that Congress did not intend Section 13(b)'s permanent-injunction proviso to create a "separate, parallel enforcement path[]"—enabling the FTC to pick between federal court or administrative forum at will. *AMG Cap.*, 593 U.S. at 80; *see Morrow*, 266 U.S. at 535 (rejecting interpretation of proviso that would "introduce independent legislation"). If Congress actually *had* intended to create such an alternative to the FTC's administrative proceedings, it would not have buried that massive expansion of enforcement authority 213 words into a provision entitled "Temporary restraining orders; preliminary injunctions." *See United States v. Moore*, 71 F.4th 392, 397 (5th Cir. 2023) ("Titles . . . can be a helpful tool for statutory interpretation."). "Congress does not hide elephants in mouseholes." *AMG Cap.*, 593 U.S. at 78 (cleaned up) (quoting *Whitman*, 531 U.S. at 468).

2. "Nor does Congress typically use oblique or elliptical language to empower an agency to make a 'radical or fundamental

change' to a statutory scheme." *West Virginia v. EPA*, 597 U.S. 697, 723 (2022) (citation omitted). The major questions doctrine thus reinforces the conclusion that Congress did not grant the FTC authority to bring a standalone enforcement action in a proviso to a proviso in Section 13(b). That doctrine serves as an interpretive tool reflecting "common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). And common sense dictates that Congress did not so obliquely delegate the substantial enforcement authority the FTC claims from Section 13(b).

Two key "indicators" of agency overreach from the Supreme Court's major questions cases are present here. *See Biden v. Nebraska*, 600 U.S. 482, 504 (2023). *First*, the Court has been "[s]keptical of mismatches" between broad "invocations of power by agencies" and relatively narrow "statutes that purport to delegate that power." *In re MCP No. 165, OSHA, Interim Final Rule: Covid-19 Vaccination & Testing*, 20 F.4th 264, 272 (6th Cir. 2021) (Sutton, C.J., dissenting from denial of initial hearing en banc). Congress's use of a "subtle device" is

not authorization for agency action of "enormous importance." *MCI Telecomm. Corp. v. American Tel. & Tel. Co.*, 512 U.S. 218, 231 (1994). This principle explains why, in *West Virginia v. EPA*, the Supreme Court held that a "little-used backwater" provision in the Clean Air Act could not justify an EPA rule that would "restructur[e] the Nation's overall mix of electricity generation." 597 U.S. at 720, 730.

The same principle weighs heavily against the FTC's invocation of authority here. Section 13(b)'s permanent-injunction proviso was, by all accounts, a "backwater" addition: "[I]t is not at all clear that the grant of authority to seek *permanent* injunctive relief received much attention at all." Beales & Muris, *Striking the Proper Balance* 15. And Section 13(b)'s overall aim was to fill a particular, narrow gap: stopping ongoing violations while the agency pursued administrative proceedings. That is how the FTC's Chairman viewed the provision when it was under consideration. *See supra* pp. 12-13. And that is why he concluded that Section 13(b) would "in no way extend" the "substantive reach" of the FTC's enforcement power by permitting the agency to bring standalone federal court litigation—it would simply "close" a "long-overlooked gap[]" in the FTC's authority by empowering it to seek "preliminary"

relief in aid of its administrative process. Ltr. from Lewis A. Engman, Chairman, FTC, to Rep. Harold T. Johnson (Nov. 9, 1973), *reprinted in* 119 Cong. Rec. 36610 (1973). The Supreme Court has long said that a court "may consider the consistency of an agency's views when" it "weigh[s] the persuasiveness of any interpretation it proffers in court." *Bittner v. United States*, 598 U.S. 85, 97 (2023) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). The mismatch between the FTC's 1970s view of Section 13(b) (when requesting narrow authority from Congress) and its current expansionist view casts serious doubt on the FTC's interpretation here.

Second, the Supreme Court is similarly skeptical when "an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy.'" *Utility Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014). The agency's record can be particularly probative in this context: A longstanding "want of assertion of power by those who presumably would be alert to exercise it" may provide some clue that the power was never conferred. *FTC v. Bunte Bros., Inc.*, 312 U.S. 349, 352 (1941).

The FTC's enforcement record is probative here. For nearly a decade after Section 13(b) was enacted, the agency essentially never sought a permanent injunction without initiating administrative proceedings. In 1982, the Ninth Circuit noted that the agency had "rarely" done so—perhaps in "only one case." *FTC v. H. N. Singer, Inc.*, 668 F.2d 1107, 1111 (9th Cir. 1982), *abrogated on other grounds by AMG Cap.*, 593 U.S. at 71. Despite that observation, *Singer* erroneously blessed the FTC's conduct. *See infra* pp. 31-32. And the FTC now pursues dozens of standalone enforcement actions per year, exerting executive authority over a broad swath of the U.S. economy.

In short, this is a major questions case. And the Supreme Court's major questions precedents demonstrate that the FTC has gone far "beyond what Congress could reasonably be understood to have granted" in Section 13(b). *West Virginia*, 597 U.S. at 724. The FTC's "broad reading" of the permanent-injunction proviso, which "would allow it to use § 13(b) as a substitute for § 5," "could not have been Congress'[s] intent." *AMG Cap.*, 593 U.S. at 78.

3. Finally, accepting a broader interpretation of Section 13(b) "would raise serious constitutional problems" that a narrower

interpretation avoids. *Cargill v. Garland*, 57 F.4th 447, 471-72 (5th Cir. 2023) (en banc), *aff'd*, 602 U.S. 406 (2024) (cleaned up). The FTC's interpretation of Section 13(b) raises serious concerns under the nondelegation doctrine (which prohibits Congress from transferring its legislative power to another branch without clear guidance) and the separation of powers (which ensure that executive power is vested in the President and those directly accountable to him). *See infra* pp. 38-61. To avoid these constitutional issues, Section 13(b) should be interpreted narrowly, consistent with its text, to permit the FTC to seek injunctive relief in federal court only in support of ongoing or imminent administrative proceedings, not to authorize independent enforcement actions.

C. The District Court Erred In Permitting The FTC To Bring These Proceedings

The district court erred in concluding that the FTC need not initiate administrative proceedings as a condition for seeking a permanent injunction in federal court. In reaching that conclusion, the court conducted no statutory interpretation of its own. Instead, the court relied on three outdated court of appeals opinions from the 1980s and a snippet of dicta from *AMG Capital*. But 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 obligations: '(1) Read the statute; (2) read the statute; (3) read the statute!'") (quoting Hon. Henry J. Friendly, *Benchmarks* 202 (1967)). And the court erred by failing to properly engage with Section 13(b)'s text. The FTC, for its part, offered some textual analysis in opposing USAP's motion to dismiss, but its arguments lack merit.

1. The district court noted 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. *See* ROA.2802. But those decisions provide only cursory analysis of the statutory question. For example, in *Singer* the Ninth Circuit read Section 13(b)'s permanent-injunction proviso out of context. The court asserted in its single sentence of textual analysis that "[t]he proviso in question does not on its face condition the issuance of a permanent injunction upon the initiation of administrative proceedings." *Singer*, 668 F.2d at 1110. The court did not address that the meaning of a proviso is "'confined to the subject-

matter of the principal clause' to which it is attached." *Abbott*, 562 U.S. at 25-26. And then, having skipped this key point, the *Singer* court turned immediately to "legislative history." 668 F.2d at 1110. *Singer* concluded that legislative history supported its misreading of Section 13(b) because that history "sets out a clear and coherent policy underlying the new section." *Id.*

Over the next two years, the Seventh and Eleventh Circuits replicated *Singer*'s error. In *United States v. JS & A Group, Inc.*, 716 F.2d 451, 456 (7th Cir. 1983), the Seventh Circuit offered three conclusory sentences of statutory interpretation, ignored the usual methods for interpreting provisos, and then turned to "the legislative history." And in *FTC v. Oil & Gas Corp.*, 748 F.2d 1431, 1434 (11th Cir. 1984), *abrogated on other grounds by AMG Cap.*, 593 U.S. at 70, the Eleventh Circuit merely "agree[d] with *Singer*'s interpretation of § 13(b)."

The district court should not have outsourced its statutory interpretation to these courts. 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).

This Court—like most courts of appeals—has yet to consider whether Section 13(b) grants the FTC the power it claims. But in doing so, this Court should be guided by the statute's text and tools of statutory construction, not the decades-old errors of other appellate courts. *See Texas v. Nuclear Regul. Comm'n*, 78 F.4th 827, 840-42 (5th Cir. 2023) (adopting plain-text statutory interpretation and rejecting cases from other circuits that "assume[d] the Commission's authority without analyzing the statute"), *reh'g denied en banc*, 95 F.4th 935 (5th Cir. 2024). That is the tack the Supreme Court took in *AMG Capital*, where all nine Justices rejected the interpretation of "eight Circuits"—including the Ninth and Eleventh—that had accepted the FTC's expansive view of Section 13(b) while ignoring the statutory text. 593 U.S. at 81. The courts of appeals that confronted this question in the 1980s lacked the benefit of *AMG Capital*'s guidance. Here, as in *AMG*

Capital, Section 13(b)'s plain meaning controls. In disregarding that plain meaning, the district court erred.

2. Next, the district court erred in misreading *AMG Capital*. The court concluded that dicta from *AMG Capital* supported the FTC's interpretation of Section 13(b). *See* ROA.2802-2803. But the Supreme Court expressly reserved this question. 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." *AMG Cap.*, 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 possible constructions, observing 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 the dueling options, declined to pick a side, and left the issue for further development in the courts of appeals. The district court erred in concluding otherwise.

3. Below, the FTC drew largely on the canon against superfluity to justify its interpretation of Section 13(b) over USAP's; but its arguments on that score lack merit. *First*, the agency argued that the permanent-injunction proviso would serve no purpose if the FTC still had to seek an administrative cease-and-desist order. But initiating administrative proceedings as the statute commands would not render the court's permanent-injunction authority superfluous. Congress likely intended the permanent injunction option to play no more than a minor docket-management role: In circumstances "when a court is reluctant to grant a temporary injunction because it cannot be assured of a[n] early hearing on the merits," the proviso would allow the court (on the FTC's motion) to "set a definite hearing date," S. Rep. No. 93-151, at 30-31 (1973), at which point the court could convert the preliminary injunction into a permanent one and dispose of the case, rather than allowing it to languish on the docket indefinitely.

More fundamentally, the FTC's appeal to the canon against superfluity does not excuse the agency from compliance with the statute. Congress may have many reasons for establishing overlapping procedures, but "[r]edundancy is not a silver bullet," because "[s]ometimes the better overall reading of the statute contains some redundancy." *Rimini St., Inc. v. Oracle USA, Inc.*, 586 U.S. 334, 346 (2019). And in any event, even if the two parallel proceedings would ultimately accomplish the same end, Congress designed the FTC's administrative process to include unique protections for litigants that are not present in district court litigation. Most notably, 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. *See* 15 U.S.C. § 45(c). The mere possibility that a subsequent permanent injunction could diminish the practical import of administrative proceedings to some limited extent does not justify allowing the FTC to unilaterally sidestep such proceedings whenever it chooses, and thereby revoke the procedural rights that Congress conferred.

Second, the FTC mistakenly points to Section 13(b)'s reference to "proper cases" to claim that Congress authorized it to seek a permanent injunction without initiating administrative proceedings. But the phrase "proper cases" limits rather than expands the FTC's power. In other words, Congress further circumscribed the permanent injunction option by limiting it to "proper cases." *Id.* § 53(b). Congress did not explain what that term means, but it might reasonably refer to cases (1) involving obvious scams where the showing of liability is overwhelming, (2) where the scope of the FTC's cease-and-desist order requires additional court-ordered relief as a backstop, or (3) where the defendant agrees to such relief at an early stage of the proceedings. But whatever its meaning, Congress's inclusion of the proper-case limitation reflects an expectation that the same district court that issued the preliminary injunction would exercise its permanent-injunction authority in a discrete subset of cases, rather than allowing the FTC to bypass its administrative process altogether.

Third, the FTC's arguments about the supposed inefficiency of complying with the statute as Congress drafted lack merit. The FTC has claimed, for example, that seeking injunctive relief at the same

time as bringing administrative proceedings would result in "duplicative litigations." ROA.1221 n.3. But this argument misunderstands the setup that Congress envisioned, with federal court proceedings merely a helpful adjunct to the main-show administrative process. That is why contemporary commentators observed that Section 13(b) would permit the FTC to enlist federal courts to preserve the status quo while it pursued its own internal proceedings.

Section 13(b) does not authorize the FTC to seek a permanent injunction in the absence of parallel administrative proceedings. And in the end, the FTC's only defense for proceeding *ultra vires* in this manner is the agency's longstanding practice of doing so, plus its "understandable preference for litigating under Section 13(b), rather than in an administrative proceeding." *FTC v. Shire Viropharma, Inc.*, 917 F.3d 147, 159 (3d Cir. 2019). But that practice and that preference "do[] not justify [the FTC's] expansion of the statutory language." *Id.* And the district court erred in permitting that expansion.

II. The FTC Lacks Constitutional Authority To Pursue This Enforcement Action

If Section 13(b) grants the FTC the powers it claims, then the statute violates the separation of powers. It violates Article I because it

puts no bounds on the quintessentially legislative decision whether to assign a dispute to federal court or administrative proceedings. And it violates Article II because it grants to the FTC the executive power to prosecute enforcement actions in federal court, even though the FTC is insulated from Presidential control. Each of these constitutional violations independently requires dismissal of this enforcement action.

A. If The FTC Has Discretion To Bring Injunction Suits in Either Federal Court Or Administrative Proceedings, That Is An Unconstitutional Delegation Of Legislative Power

1. Congress cannot delegate legislative power

Under Article I, "[a]ll legislative Powers . . . shall be vested in a Congress of the United States." U.S. Const. art. I, § 1. Because that "text permits no delegation of those powers," *Whitman*, 531 U.S. at 472, the Supreme Court has long held that Congress "may not transfer to another branch 'powers which are strictly and exclusively legislative,'" *Gundy v. United States*, 588 U.S. 128, 135-36 (2019) (plurality op.) (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42-43 (1825)). This constitutional bar on congressional assignments of legislative power preserves government accountability and individual liberty. *See*

Consumers' Rsch. v. FCC, 2024 WL 3517592, at *10 (5th Cir. July 24, 2024) (en banc).

The nondelegation doctrine does "not prevent Congress from obtaining the assistance of its coordinate Branches." *Mistretta v. United States*, 488 U.S. 361, 372 (1989). But when Congress enlists "executive agencies to implement and enforce the laws," it must provide "an intelligible principle to guide [the agency's] use of discretion." *Gundy*, 588 U.S. at 135. This requirement ensures that "the agency exercises only executive power." *Jarkesy v. SEC*, 34 F.4th 446, 461 (5th Cir. 2022), *aff'd*, 144 S. Ct. 2117 (2024).[2]

To determine "whether Congress has supplied a sufficiently intelligible principle," the Court "must construe 'the challenged statute to figure out what task it delegates and what instructions it provides.'" *Consumers' Rsch.*, 2024 WL 3517592, at *10 (quoting *Gundy*, 588 U.S. at 136). A statute that "offer[s] no guidance" lacks an intelligible

[2] In affirming *Jarkesy*, the Supreme Court only addressed its jury-trial holding. *Jarkesy*'s undisturbed, "alternative" nondelegation holding remains "binding precedent and not obiter dictum." 34 F.4th at 459 n.9. This Court has thus relied on *Jarkesy*'s nondelegation holding even after the Supreme Court's affirmance on other grounds. *See*, *e.g.*, *Consumers' Rsch.*, 2024 WL 3517592, at *12.

principle and is "impermissible under the Constitution." *Jarkesy*, 34 F.4th at 460 (emphasis omitted). For that reason, a statute granting "unlimited authority," *Panama Refin. Co. v. Ryan*, 293 U.S. 388, 406 (1935), or "unfettered discretion," *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935), is unconstitutional.

2. The FTC's reading of Section 13(b) violates the nondelegation doctrine

The FTC argued in the district court that it has discretion under Section 13(b) to "litigate its entire case in federal court without initiating an administrative proceeding." ROA.1216. The FTC has said the same to other courts, arguing that Section 13(b) authorizes it to "dispense with the administrative process and instead seek a permanent injunction in district court." FTC Br. at 35, *Shire v. Viropharma, Inc.*, No. 18-1807 (3d Cir. June 19, 2018), 2018 WL 3101438.[3] If that is, indeed, what Section 13(b) allows, then it violates the nondelegation doctrine under this Court's decision in *Jarkesy*.

[3] Indeed, the FTC goes so far as to claim that Section 13(b) "confers upon it *unreviewable* discretion" to determine when a violation is ongoing, such that it may seek injunctive relief in federal court "rather than via the administrative remedy set forth in Section 5." *Shire*, 917 F.3d at 155, 159 n.17 (emphasis added).

There, this Court applied the nondelegation doctrine to a Dodd-Frank Act provision authorizing the SEC to bring securities fraud actions for monetary penalties within the agency instead of in federal court, where it had always brought such actions. *See Jarkesy*, 34 F.4th at 459-63. That was a "delegation of legislative power," the Court explained, because the power "to assign certain actions to agency adjudication" is "a power that Congress uniquely possesses." *Id.* at 461-62. Yet the Court found that the statute "did not provide the SEC with an intelligible principle" to guide that choice because it "said nothing at all" about when the SEC should "bring securities fraud enforcement actions within the agency instead of in an Article III court." *Id.* at 462. The "total absence of guidance" gave the SEC "exclusive authority and absolute discretion" to "make that call in any give case." *Id.* The Court thus held that the Dodd-Frank Act provision was "impermissible under the Constitution." *Id.*

The FTC's interpretation of Section 13(b) suffers from the same flaws. Like the Dodd-Frank provision in *Jarkesy*, Section 13(b) would allow the FTC to "determine which subjects of its enforcement actions

are entitled to Article III proceedings . . . and which are not." *Id.* at 461. That is a "uniquely" legislative power. *Id.* at 462.

But like the statute in *Jarkesy*, the FTC's reading of Section 13(b) lacks an intelligible principle to limit the agency's power. On its view, Section 13(b) empowers the FTC to seek permanent injunctive relief in federal court "[w]henever the Commission has reason to believe" that "any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the" FTC and an injunction "would be in the interest of the public." 15 U.S.C. § 53(b). That language says "nothing at all" about how the FTC should "decide whether to bring [permanent injunction] actions within the agency instead of in an Article III court." *Jarkesy*, 34 F.4th at 462. Instead, it gives the FTC carte blanche to pick its preferred litigation forum. *See Consumers' Rsch.*, 2024 WL 3517592, at *11, *16 (statute allowing FCC to impose tax "as FCC thinks is good" raised "grave" nondelegation concerns).

Nor does any other provision of the FTC Act cabin the agency's discretion to pick between federal court or its in-house forum. Section 5(b), which authorizes the FTC to seek a cease-and-desist order through

agency adjudication, is silent on the issue. *See* 15 U.S.C. § 45(b) (authorizing administrative actions "[w]henever the Commission shall have reason to believe" a "person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce"). So like the statute in *Jarkesy*, Section 13(b) is "an open-ended delegation of legislative power." 34 F.4th at 462. It follows that Section 13(b) "is impermissible under the Constitution." *Id.*

3. The remedy for this unconstitutional delegation is to invalidate Section 13(b) and dismiss this enforcement action

A violation of the nondelegation doctrine requires setting aside the action taken under the unlawful delegation of legislative power. For example in *Schechter Poultry*, the Supreme Court held that the unconstitutional executive order was "invalid" and "reversed" the petitioner's "judgment of conviction" imposed for violating the order. 295 U.S. at 551. And in *Panama Refining*, the Court directed the lower courts to "restrain[] the Secretary of the Interior from enforcing the unconstitutional orders." 293 U.S. at 433.

This Court followed the same approach in *Jarkesy*, vacating the SEC's decision brought under the defective Dodd-Frank Act provision. 34 F.4th at 463; *cf. Consumers' Rsch.*, 2024 WL 3517592, at *31 (vacating tax imposed under statute that violated separation of powers). The Court should do the same here and reverse with instructions to the district court to dismiss the FTC's unconstitutional suit against USAP.

4. The FTC's likely counterarguments lack merit

The FTC may argue, as it did below, that *Illumina, Inc. v. FTC*, 88 F.4th 1036 (5th Cir. 2023), forecloses USAP's nondelegation challenge. That argument overreads *Illumina* and cannot be squared with *Jarkesy*.

First, *Illumina* did not confront the constitutional question presented here. The petitioners in *Illumina* appealed an FTC divesture order, arguing that the FTC's administrative proceedings—brought under Section 5(b), not Section 13(b)—"were the result of an unconstitutional delegation of legislative power." *Id.* at 1046. The Court rejected that argument, reasoning that the availability of damages under Section 5(b) but not Section 13(b) cabined the FTC's discretion. *Id.* As a result, *Illumina* did not confront the constitutional problem here that Section 13(b) provides no guidance on when the FTC

should bring a stand-alone case in federal court for injunctive relief rather than within the agency.

Second, *Illumina*'s conclusion that Section 5(b) comports with the nondelegation doctrine is not a binding holding. A prior panel's statement is precedent "if it is necessary to the result." *International Truck & Engine Corp. v. Bray*, 372 F.3d 717, 721 (5th Cir. 2004). But *Illumina*'s constitutional analysis was not necessary to its result. Rather, the Court vacated the FTC's divesture order because the FTC "held Illumina to a rebuttal standard that was incompatible with the plain language of Section 7 of the Clayton Act." 88 F.4th at 1058. The constitutional analysis "could have been deleted without seriously impairing the analytical foundations" of that holding. *International Truck*, 372 F.3d at 721; *see Central Green Co. v. United States*, 531 U.S. 425, 431 (2001) (statements that are "not essential" to the judgment are "unquestionably dictum"). The Court is thus free to examine whether Section 13(b) violates Article I, no matter *Illumina*'s remarks on the nondelegation doctrine.

Third, even if *Illumina* had decided the nondelegation challenge that USAP raises here, *Jarkesy* would control under this Court's "rule of

orderliness." *Newman v. Plains All Am. Pipeline, L.P.*, 23 F.4th 393, 400 (5th Cir. 2022). The rule of orderliness requires a panel to "follow a prior panel's decision on an issue." *Id.* So "when two published panel decisions conflict," the panel "must follow the earlier" decision, including its "implicit reasoning," *id.* at 400 & n.28, and the second-in-time decision is "inoperative." *Thompson v. Dallas City Atty's Off.*, 913 F.3d 464, 468 (5th Cir. 2019).

If the Court reads *Illumina* to conclude that Section 13(b) is a valid delegation of power, then that result conflicts with *Jarkesy*. *Jarkesy*'s core holding is that "Congress unconstitutionally delegate[s] legislative power" when it gives agencies "unfettered authority to choose whether to bring enforcement actions in Article III courts or within the agency." 34 F.4th at 459 & n.9. But *Illumina* did not mention *Jarkesy*, much less try to explain how Section 13(b) is different from the Dodd-Frank Act provision *Jarkesy* held invalid.

There is no distinction to draw. The Dodd-Frank provision authorizes the SEC to bring actions that had always been litigated in federal court in administrative proceedings against "any person [who] is violating, has violated, or is about to violate" the securities laws. 15

U.S.C. § 78u-3(a). Between Section 5(b) and the FTC's reading of Section 13(b), the FTC can bring actions in federal court or within the agency against "any person, partnership, or corporation" the FTC has "reason to believe" is engaged in unfair competition if it concludes the action would be in "the interest of the public." *Id.* §§ 45(b), 53(b).[4] The FTC Act thus grants the same unfettered discretion to the FTC that *Jarkesy* held "impermissible under the Constitution." 34 F.4th at 462.

Illumina "turn[ed] a blind eye" to *Jarkesy*, and as a result, the two decisions are "irreconcilable." *Thompson*, 913 F.3d at 468. *Illumina* is therefore "inoperative, and has been since it was decided." *Id.*

[4] The two provisions are identical in every way that matters. Section 5(b) authorizes administrative actions for injunctive relief "[w]henever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act" and "it shall appear to the Commission that a proceeding . . . would be to the interest of the public." 15 U.S.C. § 45(b). Meanwhile, Section 13(b) authorizes actions in federal court "[w]henever the Commission has reason to believe . . . that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and . . . that the enjoining thereof . . . would be in the interest of the public." *Id.* § 53(b).

B. If The FTC Can Bring Enforcement Actions In Federal Court, That Is An Unconstitutional Delegation Of Executive Power

1. The FTC is unaccountable to the President

Under Article II, "the 'executive Power'—all of it—is 'vested in a President.'" *Seila Law LLC v. CFPB*, 591 U.S. 197, 203-04 (2020) (quoting U.S. Const. art. II, §§ 1, 3). The President may "rely on subordinate officers for assistance." *Id.* But to ensure that "[t]he buck stops with the President," the "executive power include[s] a power to oversee executive officers through removal." *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 492-93 (2010). Otherwise the President "could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else." *Seila Law*, 591 U.S. at 204 (cleaned up).

The President's "unrestricted removal power" is thus "the rule, not the exception." *Id.* at 228. In 1935, the Supreme Court recognized one exception to that rule in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). There, the Court upheld a statute protecting the FTC Commissioners from removal except for "inefficiency, neglect of duty, or malfeasance in office." *Id.* at 619, 632; *see* 15 U.S.C. § 41. As *Seila Law*

explained, *Humphrey's Executor* rested on the Court's view that "the FTC (as it existed in 1935)" exercised "'no part of the executive power.'" *Seila Law*, 591 U.S. at 215 (quoting *Humphrey's Ex'r*, 295 U.S. at 628). Instead, the FTC exercised "only . . . quasi-legislative or quasi-judicial powers," with its "powers of investigation" serving only the legislative function of "making reports" to Congress. *Id.* (quoting *Humphrey's Ex'r*, 295 U.S. at 628).

The FTC Commissioners still enjoy removal protection today. That means the President cannot fire the Commissioners based on "disagreement with [their] policies or priorities." *Free Enter.*, 561 U.S. at 502. Nor can the President replace a Commissioner with someone "of [the President's] own choosing." *Wiener v. United States*, 357 U.S. 349, 356 (1958). All of this curtails the President's ability "to keep these officers accountable." *Free Enter.*, 561 U.S. at 483.

2. The FTC's reading of Section 13(b) gives the FTC substantial executive power

If Section 13(b) authorizes the FTC to seek permanent injunctive relief in federal court, then today's FTC possesses executive powers. As the Solicitor General told the Court in *Seila Law*, "the ability to bring enforcement suits in federal court . . . 'cannot possibly be regarded' as

anything other than an exercise of executive power." U.S. Br. at 32, *Seila Law LLC v. CFPB*, No. 19-7 (U.S. Dec. 9, 2019), 2019 WL 6727094 ("*Seila Law* U.S. Br."). The Supreme Court agreed, holding that the power to bring "enforcement" actions against "private parties on behalf of the United States in federal court" is a "quintessentially executive power." *Seila Law*, 591 U.S. at 219.

The FTC's asserted executive litigation power was "not considered in *Humphrey's Executor*." *Id.* That is because "the FTC in 1935" could not pursue a permanent injunction in federal court. *Seila Law* U.S. Br. at 32. It was not until 1973 that Congress enacted Section 13(b), which the FTC now claims authorizes it to seek permanent injunctive relief in federal court untethered to any agency adjudication. *See* Pub. L. No. 93-153, Tit. IV, § 408(f), 87 Stat. 576, 592 (1973) (codified as amended at 15 U.S.C. § 53(b)). *Humphrey's Executor* therefore provides no protection for the FTC's claim of authority.

If Section 13(b) means what the FTC asserts, then it violates Article II. The FTC is unaccountable to the President. As a result, the FTC cannot possess executive power—including the quintessentially executive power to bring enforcement actions in federal court. That is

"incompatible with our constitutional structure" and "enough to render [Section 13(b)] unconstitutional." *Seila Law*, 591 U.S. at 222-25.

The Supreme Court has repeatedly struck down grants of executive power to officers the President cannot control. In *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), for example, the Court addressed provisions in the Federal Election Campaign Act of 1971 authorizing the Federal Election Commission to bring enforcement actions for injunctive relief in federal court against election-law violators. *See id.* at 111-12, 138-40. The Court explained that the power to "vindicat[e] public rights" through "civil litigation in the courts of the United States" belongs "to the President, and not to the Congress." *Id.* at 138, 140. The Court held that the provisions granting the commission those enforcement powers "violate[d] Art. II . . . of the Constitution" because Congress had appointed a majority of the commissioners. *Id.* at 140.

The Supreme Court took the same tack in *Bowsher v. Synar*, 478 U.S. 714 (1986). There, the Court held that the Gramm-Rudman-Hollings Act "intruded into the executive function" by empowering the Comptroller General—"an officer of the Legislative Branch" removable only by Congress—to require the President to make spending cuts to

reduce the federal deficit. *Id.* at 728, 731, 734. Because Congress, not the President, "retained removal authority," the Comptroller General could "not be entrusted with executive powers." *Id.* at 732.

Just as the statutes in *Buckley* and *Bowsher* violated Article II by granting executive authority to officers outside of the President's control, so too does Section 13(b) under the FTC's expansive reading. The FTC claims the authority to "conduct[] civil litigation in the courts of the United States for vindicating public rights"—an "executive power" reserved for officers accountable to the President. *Buckley*, 424 U.S. at 139-40. But like the Federal Election Commission and Comptroller General, the FTC Commissioners are insulated from Presidential control. That grant of executive litigation power to officers outside the President's chain of command offends Article II.

3. The remedy for Congress's unconstitutional transfer of executive power to the FTC is to invalidate Section 13(b) and dismiss this enforcement action

The FTC brought this enforcement action against USAP solely under Section 13(b). *See* ROA.31. So if the Court concludes that Section 13(b) is an unconstitutional grant of executive power, the remedy is to invalidate Section 13(b) and dismiss the FTC's suit. That

remedy, which would preserve the FTC upheld in *Humphrey's Executor*, follows from basic severability principles for three reasons.

First, "where Congress added an unconstitutional amendment to a prior law," courts treat "the original, pre-amendment statute as the valid expression of the legislative intent." *Barr v. American Ass'n of Pol. Consultants, Inc.*, 591 U.S. 610, 630 (2020) (plurality op.) (cleaned up). The "unconstitutional statutory amendment" is deemed "a nullity and void." *Id.* (cleaned up); *see Collins v. Yellen*, 594 U.S. 220, 259 (2021) ("an unconstitutional provision is never . . . governing law").

Bowsher is instructive. After finding a separation-of-powers violation, the Court "turn[ed] to the final issue of remedy." 478 U.S. at 734. The Court declined to nullify the Comptroller General's 65-year-old removal protections because "recasting the Comptroller General as an officer of the Executive Branch" "would significantly alter" the office "Congress had in mind" when it created the Comptroller General in 1921. *Id.* at 734-35. Instead, consistent with a statutory "fallback" provision, the Court invalidated the later-granted executive budget powers. *Id.* at 735-36.

The Supreme Court took the same approach in *Barr*. That case concerned a 2015 amendment to the Telephone Consumer Protection Act of 1991 exempting certain calls to collect government debt from the statute's ban on robocalls. *See Barr*, 591 U.S. at 613. That amendment, the Court held, converted the preexisting general ban on robocalls into a content-based speech restriction. *See id.* at 618-21. But the Court rejected the challengers' contention that the 2015 amendment rendered the 1991 statute unconstitutional. *See id.* at 621-24. Instead, applying the Court's "strong presumption of severability," the Court invalidated the 2015 amendment exempting government debt-collection calls so that "the original law stands." *Id.* at 630.

As in *Bowsher* and *Barr*, the pre-Section 13(b) FTC Act—including the FTC's removal protections—is the "valid expression" of Congress's intent. *Id.* It is Congress's later-in-time grant of executive power to the FTC in Section 13(b) to bring enforcement actions solely in federal court that would be "void." *Id.* at 631. Section 13(b) thus "has no effect on the original statute." *Id.*

That makes this case altogether different from *Seila Law* and *Free Enterprise*, where the Court severed the unconstitutional removal

protections, rather than undo the challenged agency actions. *See Seila Law*, 591 U.S. at 230-38; *Free Enter.*, 561 U.S. at 508-10. Those cases involved agencies that had executive powers and incompatible removal protections from the start, raising the question "whether Congress would have preferred no [agency] to [an agency] led by a Director removable at will by the President." *Seila Law*, 591 U.S. at 237. There is no such question here: Congress created the FTC as an independent agency to serve "as a legislative or . . . judicial aid," *id.* at 215, decades before it supposedly received executive litigation powers.

Second, severability principles require excising Section 13(b) from the FTC Act, rather than taking a hammer to the FTC's structure. "[W]hen confronting a constitutional flaw in a statute," courts "limit the solution to the problem, severing any problematic portions while leaving the remainder intact." *Free Enter.*, 561 U.S. at 508 (cleaned up). Severing Section 13(b) is a narrow solution tailored to the problem Congress created by vesting executive litigation powers in an otherwise-valid, independent agency. Doing so would restore the FTC to the agency Congress originally established—shielded from the President but "exercising 'no part of the executive power.'" *Seila Law*, 591 U.S.

at 215 (citation omitted). By contrast, striking down the FTC's century-old removal protections would create a new agency no Congress contemplated. *See id.* at 237-38 (courts may "disregard an unconstitutional enactment" but "cannot re-write Congress's work") (citation omitted)).

Third, the FTC Act's severability provision confirms that it is Section 13(b), not the FTC's removal protections, that must fall. The severability provision, enacted after *Humphrey's Executor* but before Section 13(b), serves to preserve the FTC's original structure. It provides that "[i]f any provision of [the FTC] Act . . . is held invalid, the remainder . . . shall not be affected thereby." Wheeler-Lea Act, Pub. L. No. 75-447, § 4, 52 Stat. 111, 114, 117 (1938) (codified as amended at 15 U.S.C. § 57). Following the remedy Congress specifically prescribed, the Court should sever the invalid portion of Section 13(b), leaving the FTC's removal protections untouched.

If Section 13(b) is unconstitutional, then the FTC "lacked authority" to bring this case, and this action is "void ab initio." *Noel Canning v. NLRB*, 705 F.3d 490, 493 (D.C. Cir. 2013), *aff'd*, 573 U.S. 513 (2014); *see Collins*, 594 U.S. at 258 (collecting cases); *see CFPB v.*

All Am. Check Cashing, Inc., 33 F.4th 218, 241 (5th Cir. 2022) (Jones, J., concurring) ("invalidation" is "the remedy" for "a Government actor's exercise of power that the actor did not lawfully possess").

4. The district court erred in rejecting USAP's constitutional challenge to the FTC's law enforcement powers

The district court doubly erred when it rejected USAP's contention that Section 13(b) violates Article II. The court first erred when it concluded that USAP was asking to declare the FTC's structure unconstitutional. *See* ROA.2806. USAP's actual argument is that the FTC's exercise of executive enforcement power is unconstitutional. And that mistake led the court to erroneously conclude that *Humphrey's Executor* foreclosed USAP's Article II challenge. *See* ROA.2806.

To start, the district court misunderstood USAP's argument as asking the court "to declare the FTC is unconstitutionally constituted because its commissioners are not removable at will by the President." ROA.2806. USAP did not challenge the FTC's structure or its for-cause removal protections upheld in *Humphrey's Executor*. It argued that if Congress granted "law-enforcement power" to the FTC in Section 13(b), that "would create [an] Article II problem" because the FTC is outside

the President's control. ROA.1146 n.7; *see* ROA.869-874. That is an argument about the FTC's authority, not its structure.

In any case, *Humphrey's Executor* does not control the result here because the Court upheld the New-Deal-era FTC, and that FTC bears little resemblance to today's version. As *Seila Law* explained, *Humphrey's Executor* "limited its holding" to the "characteristics of the agency before the Court"—the FTC "as it existed in 1935." *Seila Law*, 591 U.S. at 215. And back in 1935, the FTC was seen as "exercising no part of the executive power," having only the limited authority to act "as a legislative or as a judicial aid." *Id.* (cleaned up).

The *Humphrey's Executor* Court's "conclusion that the FTC did not exercise executive power has not withstood the test of time." *Id.* at 216 n.2. "Unlike the FTC in 1935," the FTC now claims "the ability to bring enforcement suits in federal court." *Seila Law* U.S. Br. at 32. That "quintessentially executive power" was "not considered in *Humphrey's Executor*." *Seila Law*, 591 U.S. at 219. It follows that *Humphrey's Executor* does not foreclose USAP's constitutional challenge to Section 13(b) and the FTC's invocation of it here in federal court.

Nor does *Illumina* foreclose USAP's challenge, as the district court said. The *Illumina* petitioners did not challenge Section 13(b). Instead, they argued that the "Commissioners' insulation from accountability and removal by the President" was "unconstitutional," which required the Court to "strik[e] the statutory removal protections" and then vacate the FTC order. Pet'rs Br. at 37, *Illumina, Inc. v. FTC*, No. 23-60167 (5th Cir. June 5, 2023), 2023 WL 4014761. The Court rejected that argument, observing that *Humphrey's Executor* remains binding precedent upholding those protections. *See Illumina*, 88 F.4th at 1047. *Illumina* thus did not consider Section 13(b)'s constitutionality.

And the constitutional argument in *Illumina* was far weaker than the one here. It involved an administrative adjudication before the FTC (the very proceeding that the FTC chose not to pursue here). *See id.* at 1044. That administrative adjudication process is an exercise of "quasi-legislative/quasi-judicial authority" that the Supreme Court blessed in *Humphrey's Executor*. Indeed, the FTC had the power to conduct administrative proceedings to remedy unfair methods of competition in 1935. *See* Federal Trade Commission Act, ch. 311, § 5, 38 Stat. 719 (1914) (15 U.S.C. § 45(b)). "Rightly or wrongly," the *Humphrey's*

Executor Court viewed that "as exercising 'no part of the executive power.'" *Seila Law*, 591 U.S. at 215 (citation omitted).

But administrative proceedings are nothing like the core executive powers the FTC purports to wield here in federal court. For this reason, too, the constitutional argument USAP raises—about the FTC exercising executive litigation powers under Section 13(b) while shielded from the President's supervision—is an issue *Illumina* did not address.

CONCLUSION

The Court should reverse and remand with instructions to dismiss this case.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on August 12, 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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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 11,654 words, as determined by the word-count function of Microsoft Office Word 2016, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Fifth Circuit Rule 32.2.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 in 14 point, Century Schoolbook.

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