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Brief of Administrative Law Scholars as Amici Curiae in Opposition to Petitioners' Request for Reversal

Jeffrey Lubbers

No. 23-60167

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ILLUMINA, INC. AND GRAIL, INC.,

Petitioners,

v.

FEDERAL TRADE COMMISSION,

Respondent.

On Review of an Order of the Federal Trade Commission

BRIEF OF ADMINISTRATIVE LAW SCHOLARS AS *AMICI CURIAE* IN OPPOSITION TO PETITIONERS' REQUEST FOR REVERSAL

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CERTIFICATE OF INTERESTED PERSONS

Illumina, Inc., et al, v. Federal Trade Commission, No. 23-60167

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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INTEREST OF AMICI CURIAE[1]

Amici curiae are administrative law scholars from universities around the United States. They are:

- William D. Araiza, Professor of Law and Dean of Brooklyn Law School;
- Blake Emerson, Professor of Law at UCLA School of Law;
- Jeffrey Lubbers, Professor of Practice in Administrative Law at American University Washington College of Law;
- Todd Phillips, Assistant Professor of Business Law at Georgia State University J. Mack Robinson College of Business; and
- Beau Baumann, Doctoral candidate at Yale Law School.

Amici have a strong interest in how the Court's decision will affect the field of administrative law and the enforcement of properly issued regulations and statutes. *Amici* seek to assist this Court in resolving questions of law that go to the core of their professional expertise and scholarship, namely the application of the nondelegation doctrine to statutory structures that provide agencies with multiple avenues for enforcement.

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[1] In accordance with Fed. R. App. P. 29(a)(2), counsel for *amici* sought and received consent to the filing of this brief from all parties. Pursuant to Fed. R. App. P. 29(a)(4)(E), no party's counsel authored this brief in whole or in part, and no party, party's counsel, or other person—besides *amici* and their counsel—contributed money to the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress has long relied on the "flexibility and practicality" of delegating to expert agencies when it enacts regulatory legislation. *See Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019). And it has relied for a century on the Federal Trade Commission ("FTC" or "Commission") to execute Congressional directives on antitrust law and to articulate standards for the prosecution of restraints on trade. *See* Neil W. Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act*, 21 B.C. L. Rev. 227, 232–33 (1980) [hereinafter "Averitt"]. Petitioners ask the Court to upend both, drastically limiting Congress's ability to rely on expert agencies like the FTC generally, and the FTC's ability to enforce antitrust law specifically. The Court should decline to do so.

In 1914, Congress enacted the Federal Trade Commission Act ("FTCA"), creating the FTC and vesting it with authority to identify and prosecute unfair methods of competition and unfair and deceptive acts and practices. Federal Trade Commission Act, ch. 13, 38 Stat. 717, 719 (1914) (codified as amended at 15 U.S.C. § 45). To that end, Congress provided in Section 5(b) of the FTCA that the Commission "shall

issue . . . a complaint" and hold a hearing giving the entity "complained of . . . the right to appear" whenever it finds evidence of such methods or practices and that there is a public interest in the Commission's attention to them. 15 U.S.C. § 45(b) ("Section 5(b)").

By 1973, however, Congress was convinced that the administrative procedure established in Section 5(b) was "inadequate" and had caused "significant delays" to critical trade investigations. Pub. L. No. 93-153, 87 Stat. 576 § 408(A)(1) (1973). Thus, "to insure prompt enforcement of the laws" and more efficient use of agency resources, Congress added Section 13(b) of the FTCA, which gave the FTC statutory authority to sue in federal court. *Id.* § 408(B); 15 U.S.C. § 53(b) ("Section 13(b)"). Specifically, the amendment authorized the FTC to seek "a temporary restraining order or preliminary injunction," whenever the Commission has reason to believe a violation of "any provision of law enforced by the [FTC]" is ongoing or likely to take place, and "in proper cases" to seek a "permanent injunction." 15 U.S.C. § 53(b).

A half-century later, Petitioners claim that the FTC's ability to choose whether to conduct an administrative hearing under Section 5(b), to seek an injunction in federal court under Section 13(b), or to pursue

both options violates the Constitution. They argue Congress failed to give the FTC clear enough guidance on how to select between these enforcement options, and so impermissibly delegated its legislative authority. Pet. Br. at 16–18. But the FTCA provides "'an intelligible principle to which' [the FTC] 'is directed to conform,'" which is all the Constitution requires. *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (citing *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)).

Petitioners' argument thus fails for two reasons. First, the Court should find an intelligible principle in the FTCA's requirement that the FTC consider the public interest when it chooses a particular enforcement path. Courts have, "without deviation," upheld "Congress' ability to delegate power under broad standards," including by finding that similar "public interest" language provides a sufficiently intelligible principle. *See Mistretta*, 488 U.S. at 373; *infra* Part II.A. Moreover, the statutory structure and background of the FTCA provide the Commission with still more direction on how Congress intended for it to understand the "public interest" requirement and to choose between enforcement options. *Infra* Part II.B. The text, informed by the structure and purpose

of Sections 5(b) and 13(b), thus confirms that the FTC is guided by an intelligible principle. That conclusion is fatal to Petitioners' nondelegation argument.

But the Court need not consider the merits of Petitioners' nondelegation claim. Even if Petitioners were correct that the FTCA provides the Commission with insufficient guidance, their argument would still fail because the proper remedy for their asserted injury would be to sever the statutory provision that created the constitutional tension and to leave the rest of the statutory scheme intact. *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2208–09 (2020). Here, that would require the Court to strike the later-enacted Section 13(b), not the preexisting Section 5(b). But Petitioners lack standing to make such an argument, because the FTC proceeding they challenge was held under Section 5(b). Any hypothetical nondelegation harm is thus neither traceable to the Section 5(b) proceeding nor redressable by its reversal. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992).

For all these reasons, regardless of whether the authority to choose a forum for enforcement is properly considered a legislative power,[2] the Court should reject Petitioners' nondelegation argument.

ARGUMENT

I. The Constitution permits Congress to delegate broadly to the Executive Branch.

Since the founding, it has been clear that "Congress may certainly delegate to others[] powers which the legislature may rightfully exercise itself." *Wayman v. Southard*, 23 U.S. 1, 43 (1825). Congress may therefore "use officers of the executive branch within defined limits, to secure the exact effect intended by its acts of legislation, by vesting discretion in such officers to make public regulations interpreting a statute and directing the details of its execution." *J.W. Hampton,* 276

[2] Petitioners rely heavily on the holding in *Jarkesy v. SEC*, 34 F.4th 446 (5th Cir. 2022), *cert. granted*, *SEC v. Jarkesy*, 2023 WL 4278448 (June 30, 2023) (No. 22-859), that "the power to assign disputes to agency adjudication is a legislative power." Pet. Br. at 17 (citing 34 F.4th at 461). It is not clear that is correct, for the reasons explained by the Commission in its opinion accompanying its Final Order, *see In re Illumina, Inc., and GRAIL, Inc.*, FTC 201-0144, Op. of the Comm'n, at 88 n.71 (March 31, 2023). The Supreme Court has never found a nondelegation violation in a statute giving an agency procedural choice concerning enforcement mechanisms, and the Supreme Court has issued a writ of *certiorari* to review *Jarkesy*. But for purposes of this brief, *amici* assume that *Jarkesy* will remain governing law in this Circuit.

U.S. at 406. Indeed, Congress is permitted to "confer *substantial discretion* on executive agencies to implement and enforce the laws." *Gundy*, 139 S. Ct. at 2123 (emphasis added). "Congress simply cannot do its job" otherwise. *Id.* (quoting *Mistretta*, 488 U.S. at 372). Since its earliest days, Congress has indeed relied on such interbranch coordination.

Congress may not, of course, give away its authority "to make a law." *Wilkerson v. Rahrer*, 140 U.S. 545, 562 (1891); *see J.W. Hampton*, 276 U.S. at 406. But legislating under "broad general directives" does not amount to such an abdication, *Gundy*, 139 S. Ct. at 2123 (quoting *Mistretta*, 488 U.S. at 372), provided Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority," *Mistretta*, 488 U.S. at 372 (quoting *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)). As the Supreme Court has "held, time and again," that requirement is met where Congress supplies an "intelligible principle" by which the delegated authority shall be exercised. *Gundy*, 139 S. Ct. at 2123. Congress did exactly that when it promulgated the FTCA.

II. The FTCA provides an intelligible principle that sufficiently guides the FTC's enforcement under Section 5(b).

Petitioners claim that "[t]he Commission acted under an improper delegation of legislative power" when it exercised its Section 5(b) authority and initiated an administrative proceeding. Pet. Br. at 16. They describe the FTCA as giving the Commission "unfettered and unguided discretion to decide whether to bring antitrust enforcement actions in administrative proceedings instead of in Article III courts." *Id* at 17. But the FTCA's clear language directs the Commission to conform itself to the public interest, and that clear language "derive[s] meaningful content from the purpose of the statute and its factual background and the statutory context in which the standards appear." *United States v. Womack*, 654 F.2d 1034, 1037 (5th Cir. Unit B 1981). The FTCA thus provides the Commission with constitutionally sufficient guidance that "clearly delineates the general policy" of efficiently enforcing the antitrust laws; identifies the FTC as "the public agency which is to apply it"; and sets "the boundaries of this delegated authority" to encompass only actions that are in the public interest, subject to the specific requirements of its authorizing provisions. *Mistretta*, 488 U.S. at 373 (quoting *Am. Power*, 329 U.S. at 105).

A. The public interest is an intelligible principle.

Sections 5(b) and 13(b) of the FTCA explicitly require the Commission to consider how the public interest will be served when deciding whether to initiate an administrative hearing (under Section 5(b)) or an action in federal court (under Section 13(b)). *See* 15 U.S.C. §§ 45(b), 53(b). Specifically, the FTC may only initiate an administrative proceeding against anticompetitive behavior "if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public." *Id.* § 45(b). Under Section 13(b), the Commission must consider whether a court-issued injunction "would be in the interest of the public." *Id.* § 53(b).

Thus, before selecting a particular enforcement strategy, the Commission is constrained by its obligation to serve the "public interest." 15 U.S.C. §§ 45(b), 53(b). The Supreme Court has long held that a delegation of legislative authority guided by the "public interest" does not run afoul of Article I. *See Mistretta*, 488 U.S. at 373 (generally affirming, "again without deviation, Congress' ability to delegate power under broad standards," including by instructing agencies to regulate in the public interest) (citation omitted); *Nat'l Broad. Co. v. United States*, 319 U.S.

190, 216 (1943) (holding that "the public interest . . . is as concrete as the complicated factors for judgment in such a field of delegated authority may permit" and is "not . . . so indefinite as to confer an unlimited power") (citations omitted); *N.Y. Cent. Secs. Corp. v. United States*, 287 U.S. 12, 24 (1932) (similar);[3] *see also Big Time Vapes, Inc. v. Food & Drug Admin.*, 963 F.3d 436, 442 n.18 (5th Cir. 2020) *cert. denied*, 141 S. Ct. 2746 (2021) (collecting cases upholding the "public interest" as an intelligible principle). Those words should suffice here, too.

Plainly, requiring an agency to act in the "public interest" confers "broad discretion" regarding implementation. *See Gibson v. FTC*, 682 F.2d 554, 572 (5th Cir. 1982) ("The Commission has broad discretion in determining whether the public interest requires an order."). But "the use of the words 'public interest' in a regulatory statute is not a broad license to promote the general public welfare." *NAACP v. Fed. Power Comm'n*, 425 U.S. 662, 669 (1976); *see also FTC v. Klesner*, 280 U.S. 19, 28 (1929) ("[T]he public interest must be specific and substantial.").

[3] More recently, a plurality of the Court cited this line of cases with approval in *Gundy*. 139 S. Ct. at 2129 (citations omitted).

"Rather, the words take meaning from the purposes of the regulatory legislation." *NAACP*, 425 U.S. at 669.

This long line of Supreme Court cases guides the Court's task of "evaluating whether Congress laid down a sufficiently intelligible principle" in the FTCA, which calls for the Court to "to consider 'the purpose of the [act], its factual background[,] and the statutory context.'" *Big Time Vapes*, 963 F.3d at 443 (quoting *Am. Power*, 329 U.S. at 104).

Petitioners assert, without further elaboration, that the "public interest" cannot provide an intelligible principle to choose between the provisions because it appears in both. Pet. Br. at 18 n.3. But the statutory text and context in which the words "public interest" appear show that the phrase applies differently in Section 5(b) than it does in Section 13(b). The nondelegation doctrine does not require that Congress provide intelligible principles through unique terms, only that it provide sufficient guidance to the agency on how the law should be carried out. *See Mistretta*, 488 U.S. at 371–72. The fact that the FTCA instructs the Commission to be guided by the public interest—a common phrase for regulatory statutes—in two different provisions does not dilute or confuse its meaning in the FTCA. Rather, the text in which it appears

gives it meaning—and in this case, gives two texts two different meanings.

Under Section 5(b), the Commission must find "that a proceeding *by it* in respect thereof would be to the interest of the public" before bringing such a proceeding—that is, whether the public has an interest in the agency's deliberative process as applied to the issue before it. 15 U.S.C. § 45(b) (emphasis added). Before bringing a civil suit, by contrast, it must find that "enjoining [an extant or imminent violation] . . . would be in the interest of the public"—in other words, that the public has an interest in a particular form of relief, rather than the proceeding itself. *Id.* § 53(b). Section 5(b) reflects the public's interest in the Commission's expert process of investigation and in the careful delineation of complex antitrust principles in cases where it makes sense for the Commission to speak, both of which take time. On the other hand, Section 13(b) reflects the public's simultaneous and sometimes conflicting interest in the FTC swiftly moving to adjudicate and enjoin certain ongoing harms, which is more easily done in federal court. Thus, while both provisions are concerned with violations of antitrust laws, only Section 13(b) is

preoccupied with prospective equitable relief in situations where the "public interest" would be served by maintaining the status quo.

The "purpose [and] factual background" of each provision demonstrates the different goals they serve. *See Womack*, 654 F.2d at 1037. The purpose of the FTCA, and of Section 5(b) in particular, was to create a dedicated expert commission to produce a more comprehensive and more consistent body of antitrust law through gradual adjudication of the concept of unfairness. *See* Averitt, *supra*, at 229–38 (describing the legislative history leading up to the creation of the FTC); *see also FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952) ("Congress placed the primary responsibility for fashioning [orders to address unfair conduct] upon the Commission, and Congress expected the Commission to exercise a special competence in formulating remedies to deal with problems in the general sphere of competitive practices.").

But by 1973, it was clear to Congress that the FTC's existing, "inadequate legal authority" had "restricted and hampered" the agency from carrying out its "law enforcement responsibilities." Pub. L. No. 93-153, 87 Stat. 576 § 408(A)(1) (1973). To address this, Congress added Section 13(b) to the FTCA. *Id.* § 408(f). The Senate Committee on

Commerce explained its purpose: "to permit the Commission to bring an *immediate* halt to unfair or deceptive acts or practices [through the courts] when to do so would be in the public interest." S. Rep. No. 93-151, at 30–31 (1973) (emphasis added). The new provision provided an expedited alternative to a full administrative trial, which takes a great deal of time, by authorizing interim relief where the Commission can show a likelihood of success on the merits rather than only after it proves its whole case. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

The FTCA thus contemplates distinct and specific rationales for the use of administrative adjudication or suit in article III courts. When the Commission "does not desire to further expand upon the prohibitions of the Federal Trade Commission Act through the issuance of a cease-and-desist order," either because it has already spoken on the issue or wishes to allow for further legal development before speaking, it may sue in federal court instead, conserving Commission resources while efficiently addressing unlawful conduct. S. Rep. No. 93-151, at 30–31. Thus, how the public interest is best served in a given case—through an administrative proceeding or a federal lawsuit—will depend on the facts

before the FTC. But that does not mean that the Commission exercises unfettered discretion in making that determination. Article III is tailored for speedy enforcement based on previously established law, whereas administrative adjudication serves as a forum for evaluation and explication of statutory standards. The Commission is simply using the different tools that Congress provided in keeping with their different purposes.

Thus, the strengths and weaknesses inherent to each tool also serve as a limit on the extent to which the Commission might wield them arbitrarily.[4] Put differently, Congress gave the Commission enforcement tools that work best when applied in their proper context and, knowing that, reasonably delegated to the Commission the task of ascertaining which approach to take in a given case. That is a permissible delegation for Congress to have made. *See Whitman v. Am. Trucking Ass'ns, Inc.*,

[4] For example, the Commission would only pursue a civil suit where it felt that it could meet the legal prerequisites for equitable relief, which require some showing that the maintenance of the status quo is justified. *See, e.g.*, *Winter*, 555 U.S. at 24 ("A preliminary injunction is an extraordinary remedy never awarded as of right. . . . In each case, courts 'must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.'") (citations omitted).

531 U.S. 457, 474–75 (2001) (observing that the Supreme Court "ha[s] 'almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.'" (quoting *Mistretta*, 488 U.S. at 416 (Scalia, J., dissenting))).

B. The FTCA's structure provides an intelligible principle.

Even if the public interest alone did not satisfy the intelligible principle standard, the statutory structure of the FTCA makes clear when the Commission should initiate enforcement under Section 5(b) and when it should act under Section 13(b). Statutory construction is a "holistic endeavor." *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988). It requires readers to "consider the entire text, in view of its structure and of the physical and logical relation of its many parts." *In re Lopez*, 897 F.3d 663, 670 n.5 (5th Cir. 2018) (citing Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012)). The differences between the text of the two provisions demonstrate their intended scope and provide further evidence of the principle by which Congress expected the FTC to act.

First, the two provisions differ temporally. Section 5(b) applies where an entity "*has been or is* using any unfair method of competition or unfair or deceptive act or practice." 15 U.S.C. § 45(b) (emphasis added). And it provides as its sole remedy a cease-and-desist letter, which can be issued only once a violation is proven. *Id.* But Section 13(b) applies where an entity "*is violating, or is about to violate*, any provision of law enforced by the Federal Trade Commission," and it permits the Commission to obtain preliminary relief, stopping the current or imminent violation in its tracks. *Id.* § 53(b) (emphasis added). Thus, although both provisions cover present conduct, the Commission can address completed conduct only through its administrative authority and may only act prophylactically to prevent imminent conduct by going to court.

The speed with which relief is needed may also dictate which authority the FTC acts under. For instance, even where an administrative proceeding is available, the FTC may choose to go to court "to streamline its procedures." S. Rep. 93-151, at 54. Congress enacted Section 13(b) after finding that cease-and-desist proceedings, on average, take "more than a year" and "frequently require from three to five." *Id.* The option to expedite enforcement and conserve administrative

resources by seeking an injunction in court was specifically intended to "make uniform the [] ragged pattern of the Commission's representational authority." *Id.* at 56. Thus, in clear cases that present no reason for the Commission to clarify the parameters of antitrust law, such as "the routine fraud case," the FTC may eschew its administrative authority and "merely seek a permanent injunction," reserving the Commission's resources for harder cases. *See id.* at 31.

Second, agency practice on merger actions, like the one here, illustrates that the Commission uses the provisions in different ways and is, in fact, constrained by the statutory distinctions. In merger cases, the Commission primarily relies on its administrative adjudication authority and typically only seeks preliminary injunctions in court to prevent mergers from closing to avoid the difficulty of unwinding. Thus, as explained above, how quickly the Commission needs to obtain relief to serve the public interest will govern. Where it has time to make a considered decision before the merger closes, there is no need to proceed under Section 13(b); where time is of the essence, and a merger will close before the Commission can complete its review, it must proceed to court. *See, e.g.*, *FTC v. Tronox Ltd.*, 332 F. Supp. 3d 187, 194 (D.D.C. 2018)

(explaining the Commission's decision to pursue an administrative hearing on a proposed merger and to refrain from seeking injunctive relief until it became clear that the merger might close before the ALJ could issue an opinion).

In rare cases, the Commission's approach to regulating mergers will be dictated by its determination that the public interest is best served by collaborating with parties that cannot join an administrative proceeding, like state governments or private corporations. In such cases, the agency must proceed in court under Section 13(b). *See, e.g.*, *Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775 (9th Cir. 2015) (suit by FTC, Idaho, and two local hospitals against two healthcare providers for an attempted horizontal merger); *FTC v. Lundbeck, Inc.*, 650 F.3d 1236 (8th Cir. 2011) (suit by FTC and Minnesota against a drug manufacturer for raising prices after acquiring a potential competitor).[5] Thus, the Commission's practice makes clear that it uses agency adjudication under Section 5(b) as its primary tool to regulate

[5] As far as *amici* are aware, these two cases represent the only scenario in which the Commission has brought a merger action under Section 13(b) without instituting an administrative proceeding under Section 5(b).

mergers and turns to Section 13(b) as a complementary power where exigency requires it to seek preliminary relief, or where it must collaborate with plaintiff parties that may not join an agency action.

Petitioners fail to acknowledge or meaningfully grapple with these textual and contextual limitations on the FTC's authority, asserting instead that the FTC's authorities here are equivalent to twin authorities provided to the Securities and Exchange Commission ("SEC"), which this Court held to violate the nondelegation doctrine in *Jarkesy v. SEC*, *see* 34 F.4th at 446. Pet. Br. at 17. To support this assertion, Petitioners stretch the import of *Axon Enter., Inc. v. FTC*, 143 S. Ct. 890 (2023) and claim that case "equat[ed]" SEC and FTC discretion to decide between bringing enforcement actions in administrative proceedings or federal court. *See* Pet. Br. at 17 (citing *Axon*, 143 S. Ct. at 897).

But *Axon* was about a completely different issue. That case concerned whether a challenge to the constitutionality of FTC and SEC administrative law judges could be brought in federal district court. *See Axon*, 143 S. Ct. at 897. While the Court mentioned in passing that both the SEC and FTC have the authority to choose between administrative hearings and judicial proceedings, it neither commented on the propriety

of that authority, nor compared it in a way that would be relevant to a nondelegation analysis. *See id.* Indeed, the Court did not cite Section 13(b) at all—it only compared Section 5(b) to another provision, Section 5(m). *See id.* (citing 15 U.S.C. §§ 45(b) and 45(m) but not § 53(b)). Accordingly, *Axon* does not affect this case. *See Gundy*, 139 S. Ct. at 2123 (Kagan, J., plurality op.) ("Only after a court has determined a challenged statute's meaning can it decide whether the law sufficiently guides executive discretion to accord with Article I.").

Moreover, Petitioners' attempted analogy is unavailing because, apart from the fact that both agencies have a mechanism for enforcing the law in an administrative proceeding or a federal court, the SEC's authorities are unlike the FTC's authorities in Sections 5(b) and 13(b) for at least two reasons. *Compare* 15 U.S.C. §§ 78u–78u-3 *with* 15 U.S.C. §§ 45(b), 53(b). In contrast to the FTCA, Congress did not require the SEC to consider whether there is a public interest in the value of its own deliberative process before commencing with an administrative proceeding, nor did it require the SEC to consider the public interest when seeking relief in court. *See id.* § 78u-2 (requiring SEC to assess the public interest in a penalty, but not a proceeding); *compare id.* § 78u-1(a)

(authorizing SEC to seek civil penalties in court without considering the public interest) *with id.* § 53(b) (requiring FTC to consider the public interest in an injunction before seeking one in court). The SEC need only consider the public interest when it decides whether to impose a civil penalty at the end of an administrative proceeding—not when it decides what proceeding to initiate in the first place. *Compare id.* § 78u-2 (requiring SEC to consider the public interest in a civil penalty) *with id.* § 45(b) (requiring FTC to consider the public interest in a proceeding by the Commission). Unlike the SEC's authority as construed in *Jarkesy*, then, this is not a case where an agency can determine the application of the law "as [it] sees fit, and to change [its] policy for any reason at any time." *Jarkesy*, 34 F.4th at 462–63 (quoting *Gundy*, 139 S. Ct. at 2123).

Read together, Sections 5(b) and 13(b) give the FTC an intelligible principle by which to exercise its authority. Congress provided the FTC with a mission, the tools with which to accomplish it, and guidelines by which to use them. That delegation presents no constitutional issue.

III. Petitioners' requested remedy is unavailable because the FTC's administrative authority predates its authority to bring claims in court.

As relief for their nondelegation claim, Petitioners ask the Court to vacate the Commission's decision. *See* Pet. Br. at 18. Petitioners lack standing to argue as much, because the constitutional infirmity that purportedly caused their injury arises out of a statute irrelevant to their claims. Petitioners argue that the supposed constitutional incompatibility between Section 5(b) and Section 13(b) renders the FTC unable to constitutionally enforce Section 5(b). *See id.* But, if Petitioners were correct that Congress's addition of Section 13(b) gave the Commission impermissible discretion to choose between administrative proceedings under Section 5(b) and judicial proceedings under Section 13(b), then the proper remedy would be to bar proceedings under Section 13(b)—not proceedings under Section 5(b). But Petitioners were not subject to a proceeding under Section 13(b).

This Court has warned that courts should "refrain from invalidating more of the statute than is necessary." *United States v. Bonilla-Romero*, 984 F.3d 414, 418 (5th Cir. 2020) (quoting *United States v. Booker*, 543 U.S. 220, 258 (2005)); *see Free Enter. Fund v. Pub. Co. Acct.*

Oversight Bd., 561 U.S. 477, 508 (2010). Accordingly, "[t]he Court has long applied severability principles in cases like this one, where Congress added an unconstitutional amendment to a prior law," and treated "the original, pre-amendment statute as the 'valid expression of the legislative intent.'" *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2353 (2020) (quoting *Frost v. Corporation Comm'n of Okla.*, 278 U.S. 515, 526–527 (1929)).

Therefore, just as in *Seila Law*, "'the unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted.'" *See Seila Law*, 140 S. Ct. at 2209 (quoting *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987)).[6] Determining whether the statute left after severance is legislation that Congress would have passed "can sometimes be 'elusive,'" *see Free Enter. Fund*, 561 U.S. at 509 (quoting *INS v. Chadha*, 462 U.S. 919, 932 (1983)), but there is no need for guesswork here: Congress did enact legislation authorizing administrative hearings without the authority to bring civil

[6] The fact that Section 13(b) was added by amendment presents an even easier question on the proper nondelegation remedy than in *Seila Law*, where the Supreme Court considered whether it should sever a single provision of a statute passed as a cohesive omnibus package. *See Seila Law*, 140 S. Ct. at 2192.

suits. Federal Trade Commission Act, ch. 13, 38 Stat. 717, 719 (1914) (codified as amended at 15 U.S.C. § 45).[7] Congress enacted Section 13(b) to provide *additional* enforcement options to the FTC, *see supra* pp. 12–14, and it would be absurd to suggest that it would prefer the FTC to have *no* enforcement options if that provision were invalidated. Accordingly, if the Court finds that Petitioners' nondelegation arguments are well taken, the proper remedy would be severance of Section 13(b) from the FTCA because "nothing [indicates] that Congress, faced with the limitations imposed by the Constitution, would have preferred no [enforcement authority] at all." *Free Enter. Fund*, 561 U.S. at 509.

But Petitioners claim injury from a statutory provision that was not used against them. The proceeding that Petitioners challenge was not taken under Section 13(b), and the order that resulted was not issued under Section 13(b). That presents a traceability and redressability issue

[7] Courts face an even trickier inquiry if they attempt to sever more than the minimum, especially when dealing with a later-amended statute, as here. "If courts had broad license to invalidate more than just the offending provision, a reviewing court would have to consider what other provisions to invalidate: the whole section, the chapter, the statute, the public law, or something else altogether . . . . That is the kind of free-wheeling policy question that the Court's presumption of severability avoids." *Barr*, 140 S. Ct. at 2351 n.7.

for Petitioners, which is fatal to their nondelegation claim. *See Seila L. LLC*, 140 S. Ct. at 2195 (noting that "standing must be met by persons seeking appellate review"); *see also Lujan*, 504 U.S. at 560 (requiring an injury that has been caused by the defendants and will be redressed by the relief requested). The sole remedy that would be appropriate would not redress any injury to Petitioners or affect any issue properly before this Court. Petitioners cannot use the supposed invalidity of a parallel statute not invoked to attack the FTC's administrative review authority under Section 5(b).

CONCLUSION

For the reasons stated above, *amici curiae* urge this Court to affirm the order of the Commission, and, in any event, to reject the arguments Petitioners make regarding the nondelegation doctrine.

Respectfully submitted,

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Date: August 2, 2023

CERTIFICATE OF SERVICE

I hereby certify that on August 2, 2023, a true and accurate copy of the foregoing motion was electronically filed with the Court using the CM/ECF system. Service on counsel for all parties will be accomplished through the Court's electronic filing system.

/s/ Orlando Economos

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Date: August 2, 2023