



FOR IMMEDIATE RELEASE

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## WLF Urges Fifth Circuit To Find FTC's Structure Unconstitutional

*(Illumina v. FTC)*

**“The current FTC does not resemble the agency whose structure the Supreme Court approved almost 90 years ago.”**

—John Masslon, WLF Senior Litigation Counsel

WASHINGTON, DC—Washington Legal Foundation (WLF) today urged the U.S. Court of Appeals for the Fifth Circuit to reverse the Federal Trade Commission in an important separation-of-powers case. In its amicus brief, WLF argues that the FTC's structure is unconstitutional and that its administrative procedures violate parties' due-process rights.

The case arises from Illumina's merger with GRAIL. After Illumina originally spun it off, GRAIL invented a blood test that can detect 50 cancers at an early stage. Eventually, the two companies realized that merging was the best way to reduce the cost of the test. The FTC, however, challenged the merger. An FTC ALJ held that the merger was legal. Yet the Commission reversed that decision and held that the merger violated antitrust laws. Illumina and Grail now challenge that ruling in the Fifth Circuit.

In its brief supporting Illumina and GRAIL, WLF argues that the FTC's structure violates the Constitution. In *Humphrey's Executor*, the Supreme Court said that principal officers may enjoy for-cause removal protection only if three requirements are satisfied: (1) the independent agency is balanced along partisan lines; (2) the agency's members are experts; and (3) the agency exercises no executive power. The FTC, however, (1) has three members, all from the same political party; (2) has at least one non-expert commissioner; and (3) exercises executive power. So under *Seila Law*, which clarified *Humphrey's Executor*, the FTC's structure is unconstitutional.

WLF's brief also describes the due-process problems with the FTC's adjudicatory process. Recently, the Supreme Court has reaffirmed that only Article III courts may adjudicate private rights. Administrative agencies can adjudicate only public rights. As the rights at issue here are private rights, the Constitution bars administrative adjudication. The Due Process Clause also bars individuals from serving as both prosecutor and judge in a single case. But that is what happened here. The FTC commissioners decided to bring the case and then served as the adjudicatory body. That makes a mockery of due process.

*Celebrating its 46th year, WLF is America's premier public-interest law firm and policy center advocating for free-market principles, limited government, individual liberty, and the rule of law.*

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