Congress of the United States

Washington, DC 20515

December 2, 2022

The Honorable Gina Raimondo
Secretary
US Department of Commerce
1401 Constitution Avenue NW
Washington, DC 20230

Dear Secretary Raimondo,

We appreciate your leadership to strengthen US competitiveness in advanced technology innovation. We are writing to express our concern that the European Union's emerging use of competition regulation as an instrument of industrial policy will undermine US innovation, harm the vital US-EU trade relationship, and provide unfair advantages to China, Russia, and other foreign nations seeking to displace US competitiveness in critical advanced technologies. We therefore support continued advocacy to protect US businesses and workers against discriminatory European competition regulation that unfairly targets American companies.

We are concerned that European Competition Regulators have begun to use unprecedented new powers in the Digital Markets Act (DMA), in conjunction with recently adopted subjective jurisdictional criteria in Article 22 EUMR, to target US innovation with *ex ante* merger reviews. In February, bipartisan members of both houses of Congress wrote to President Biden proposing that US negotiators use the US-EU Joint Technology Competition Dialogue and the US-EU Trade and Technology Council to convey Congress's "great concern" that the DMA unfairly targets US workers by "deeming" US companies as "gatekeepers" based on discriminatory, subjective thresholds.[1]

Similar concerns had been expressed by federal officials for several months leading to the congressional letters, including your public expression of "serious concerns" that the DMA unfairly targets American firms.[2] The congressional letters urged that the EU slow down and incorporate revisions in the DMA that would allay the widely-held US concerns. Unfortunately, the EU Parliament did not accommodate US concerns prior to advancing the Digital Markets Act.

Now, the European Commission (EC) has chosen as its "test case" for its expanded Article 22 power a wholly US merger already under review by the Federal Trade Commission (FTC): the Illumina-Grail merger. On July 13, 2022, while the substantive merger review was still pending, the EU General Court rejected the parties' challenge to the EC's assertion of Article 22 jurisdiction and endorsed the EC's expansive interpretation of this extraterritorial tool. The General Court decision has been appealed to the European Court of Justice.

This merger could be of significant importance to the United States and illustrates the potential harm to US competitiveness posed by an expanded interpretation of the EC's Article 22 powers. In his Cancer Moonshot Initiative, President Biden established a whole-of-government program to accelerate public access to early cancer detection. According to Grail, its Multi-Cancer Early Detection (MCED) test, called Galleri, can identify

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[1] Bipartisan Letter from 30 House members to President Biden, February 23, 2022.
https://delbene.house.gov/uploadedfiles/eu_digital_markets_act_letter.pdf
Bipartisan letter from Senate Finance Committee Chair Ron Wyden and Ranking Member Mike Crapo, February 1, 2022.
https://www.finance.senate.gov/imo/media/doc/2022.02.01%20Wyden-Crapo%20Letter%20to%20POTUS%20on%20DMA%20DSA.pdf

[2] *Raimondo: US has 'serious concerns' about EU digital rules*, Samuel Stolton, PoliticoPro, December 8, 2021.
https://subscriber.politicopro.com/article/2021/12/raimondo-us-has-serious-concerns-about-eu-digital-rules-3992830
US pushes to change EU's digital gatekeeper rules, Samuel Stolton, PoliticoPro, January 31, 2022. https://www.politico.eu/article/us-government-in-bid-to-change-eu-digital-markets-act/

more than 50 cancers at early stages with a simple blood draw. It can detect the 12 deadliest cancers with about 76% accuracy, and false positives are less than 1%.[3] We've been told that Illumina's acquisition of Grail could accelerate access and affordability for this revolutionary cancer testing that will save both lives and dollars.

The EC's actions could force Illumina to divest from Grail, which may have the effect of maintaining existing barriers to accessing this critical diagnostic. This move demonstrates the potential for the EC to impede US innovation by imposing a judgment against a merger of companies, one of which does not operate in EU markets.

According to Grail, it has no products or customers in the EU. There currently is no European market for MCED testing. We understand that the EC initiated its own factual review after the FTC's Chief Administrative Law Judge (ALJ) had already begun an exhaustive review of this US-based transaction in Washington. The US review included a lengthy trial with extensive live testimony, cross-examination, voluminous document examination, and comprehensive oral arguments: all governed by rules of procedure and evidence. On September 1, the FTC's Chief Administrative Law Judge issued a lengthy decision rejecting the FTC's assertion that the merger would substantially lessen competition, and dismissed the FTC's complaint.

Now, with the EC actively wielding Article 22 to prevent a wholly-US merger, we hope you will consider advocating among your EU counterparts in favor of prudence, fairness, and timely accommodation of US concerns, recognizing events are trending in what we believe is a harmful direction. We also hope that you consider the possibility of US Government intervention in the European Court of Justice review of Article 22 jurisdictional interpretation.

CC: Lina Khan, Chair, Federal Trade Commission

Francis D'Souza, CEO, Illumina

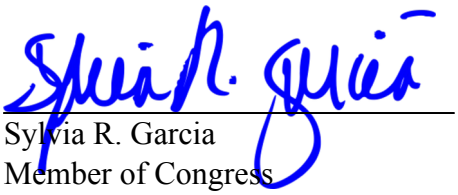
Bob Ragusa, CEO, Grail

Sincerely,

Scott H. Peters
Member of Congress

Brian Fitzpatrick
Member of Congress

[3] *Illumina and Antitrust's Unholy Grail,* Wall Street Journal Editorial Board, September 6, 2022. https://www.wsj.com/articles/antitrust-laws-unholy-grail-illumina-european-commission-margrethe-vestager-11662499674



Sylvia R. Garcia
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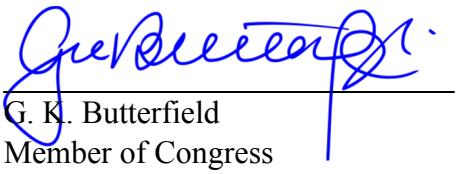

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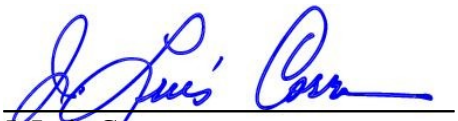

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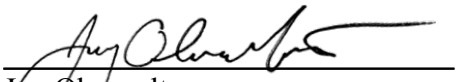

Jay Obernolte
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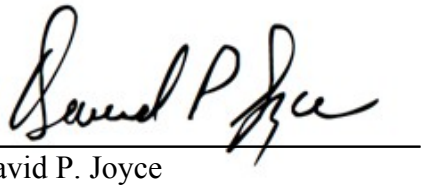

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