No. 26-1511

United States Court of Appeals for the First Circuit

VERAX BIOMEDICAL INC.,
Plaintiff-Appellant,

v.

AMERICAN NATIONAL RED CROSS,
Defendant-Appellee.

On Appeal from the
United States District Court for the District of Massachusetts
Hon. Patti B. Saris
No. 1:23-cv-10335

BRIEF FOR THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF APPELLANT

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INTEREST OF THE UNITED STATES

The United States enforces the federal antitrust laws, including the Sherman Act, 15 U.S.C. §§ 1-7, and has a strong interest in their correct application. The United States has a particularly strong interest in robust competition in healthcare markets, including the market for blood platelets. This case concerns one of the largest competitors in the market for blood platelets, the American National Red Cross (hereinafter, "Red Cross"). The Red Cross is a tax-exempt corporation that carries out charitable functions and operates a billion-plus dollar blood-related business through which it collects and sells blood and blood components throughout the United States.

In 2023, the United States filed a Statement of Interest in the district court explaining that the Red Cross qualifies as a "person" subject to the Sherman Act under the "form" and "function" standard laid out in *United States Postal Service v. Flamingo Industries (USA) Ltd.*, 540 U.S. 736 (2004). *See* Statement of Interest of the United States, *Verax Biomedical Inc. v. Am. Nat'l Red Cross*, 1:23-cv-10335 (D. Mass.), ECF No. 34 (Aug. 4, 2023). The district court said that "[t]he issue is close," but ultimately rejected that position. Op. 14.

The United States urges this Court to reverse and hold that the Red Cross is not categorically exempt from antitrust liability for its alleged anticompetitive conduct. The United States takes no position on any other aspect of this case.

ISSUE PRESENTED

The Sherman Act expressly applies to "[e]very person" that violates its terms, 15 U.S.C. §§ 1-2, and defines "person" to include "corporations," expressly including corporations "existing under or authorized by the laws of . . . the United States," *id.* § 7. The Red Cross is a federally chartered non-profit corporation with billions of dollars of commercial activity in its blood business that is neither owned nor controlled by the United States. The question presented by this case is whether the district court misapplied *Flamingo* in holding the Red Cross categorically exempt from Sherman Act liability.

STATEMENT OF FACTS

The Red Cross is a federally chartered, non-profit corporation. Op. 5 (citing 36 U.S.C. § 300101(a)).[1] It is neither owned nor controlled

[1] The facts in this Statement are taken from the opinion below, the factual allegations in the complaint (which are accepted as true on a motion to dismiss), or other publicly available materials.

by the United States. Op. 17. Instead, it is run by a board of governors, which is elected by the delegates of the local chapters at its annual meeting, except for the chairman. 36 U.S.C. §§ 300104(a)(1), 300104(a)(3)(A)-(B), 300107. The chairman is recommended by the board to the President of the United States. *Id.* § 300104(a)(3)(A)(i). The President may appoint or reject the recommended candidate, and may remove the chairman once appointed, but he may not select his own candidate for chairman. *Id.* § 300104(a)(3)(A)(i)-(ii). Nor can the President remove any other members of the board. *Id.* § 300104(c)(4).[2] In addition to its leadership, the Red Cross has a network of employees and volunteers who "are not employees of the United States." *Dep't of Emp. v. United States*, 385 U.S. 355, 360 (1966).

The Red Cross has a charitable mission and statutory obligations to "carry out a system of national and international relief in time of peace." 36 U.S.C. § 300102(4). It also has obligations to "perform all the duties devolved on a national society" under the Geneva Conventions, *id.*

[2] The Red Cross's current Board of Governors are the Red Cross's Chairman, its President, and ten other corporate executives. *See Board of Governers*, Red Cross, https://www.redcross.org/about-us/who-we-are/leadership/board-of-governors.html (last visited Aug. 21, 2026).

§ 300102(2), and to act "as a medium of communication" between "the International Committee of the Red Cross and the Government . . . of the United States," *id.* § 300102(3). To perform these treaty functions, it must be "auxiliary" to the United States government's humanitarian services, while maintaining its "autonomy" to preserve its "independen[ce]." *Statutes of the International Red Cross and Red Crescent Movement*, The Int'l Red Cross & Red Crescent Movement, Preamble & Art. 4, ¶¶ 3-4 (as amended in 2006), https://www.icrc.org/en/doc/assets/files/other/statutes-en-a5.pdf (last visited Aug. 21, 2026).

In addition to those statutory functions, the Red Cross runs a billion-dollar commercial business collecting and selling blood platelets. Op. 1. It collects free donated platelets at its blood centers and sells them to hospitals at a profit. Compl. ¶¶ 29, 39. The Red Cross is the largest supplier of blood platelets in the United States. Op. 1. It accounts for approximately half of the blood platelets sold in the United States. Compl. ¶¶ 40-41. Many hospitals rely predominantly, and in some regions exclusively, on the Red Cross for their platelet supply. *Id.* ¶¶ 2, 42.

Before a hospital can use blood platelets, the platelets must be treated for bacterial contamination. Op. 1. There are several FDA-approved bacteria mitigation services on the market, including PGDprime, which is sold by Plaintiff Verax Biomedical, and INTERCEPT, which is sold by Verax's competitor Cerus Corporation. *Id.* at 4-5, 7. Before July 2020, the Red Cross sold both platelets treated with INTERCEPT and "untreated" platelets. *Id.* at 6-7. The untreated platelets could be treated with several bacteria mitigation services, including Verax's PGDprime. *Id.* Hospitals buying untreated platelets could choose which mitigation services to use and from whom to purchase them. *Id.* In July 2020, the Red Cross announced plans to stop selling untreated platelets. *Id.* The Red Cross allegedly entered into a contract with Cerus Corporation, under which it agreed to sell only platelets treated with Cerus' INTERCEPT technology. *Id.* at 7.

Verax sued, alleging that the Red Cross violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1-2, through illegal tying, Compl. ¶¶ 257-75, through exclusive dealing, *id.* ¶¶ 276-85, and through attempted monopolization, *id.* ¶¶ 286-305. The Red Cross moved to dismiss the antitrust claims on the basis that it is not a "person" liable to suit under the Sherman Act. Am. Nat'l Red Cross's Mem. of Law in Supp. of its Mot. to Dismiss the Compl. Pursuant to Fed. R. Civ. P. 12(B)(6), *Verax Biomedical Inc., v. Am. Nat'l Red Cross*, 1:23-cv-10335 (D. Mass.), ECF No. 19, at 9-11 ("Mot. to Dismiss").

The United States filed a Statement of Interest explaining that under the "form" and "function" standard laid out in *United States Postal Service v. Flamingo Industries (USA) Ltd.*, 540 U.S. 736 (2004), the Red Cross is separate from the United States and therefore a "person" under the Sherman Act.[3] Statement of Interest of the United States, *Verax Biomedical Inc., v. Am. Nat'l Red Cross*, 1:23-cv-10335 (D. Mass.), ECF No. 34 (Aug. 4, 2023). The Statement noted that the Red Cross has the form of a non-profit corporation, and while its organic statute also refers to it as an "instrumentality," that language was added for the narrow purpose of confirming the Red Cross's exemption from state

[3] In 2006, Congress passed the 2006 Postal Accountability and Enhancement Act ("PAEA"), which amended the Postal Reorganization Act, so that the United States Postal Service could be sued under antitrust law in certain situations. 39 U.S.C. § 409(d)(2), (e)(1). The PAEA "partially overruled *Flamingo*'s holding" with respect to the application of the antitrust laws to the Postal Service in particular, *Thompson v. United States*, 795 Fed. App'x 15, 18 n.4 (2d Cir. 2019) (unpublished), but did not otherwise supercede *Flamingo*'s "form" and "function" standard.

taxation. *Id.* at 14-16. The Red Cross also functions independently of the federal government, as required by treaty obligations under the Geneva Conventions. *Id.* at 10-12.

The district court noted that "[t]he issue is close" but ultimately held that the Red Cross is not subject to the Sherman Act. Op. 14. As the district court recognized, the Sherman Act "imposes liability on any 'person'" that violates its terms but does not apply to the United States itself. *Id.* at 12 (citing 15 U.S.C. § 7; and *Flamingo*, 540 U.S. at 744-45). Purporting to apply the "form and function" analysis from *Flamingo*, the court determined that the Red Cross should be treated under the antitrust laws as part of the United States. *Id.* at 12.

As to the Red Cross's form, the court principally relied on a 2007 amendment to the Red Cross's statutory charter designating it an "instrumentality of the United States" with "the rights and obligations consistent with that status." 36 U.S.C. § 300101(a). The court followed *Sea-Land Service, Inc. v. Alaska Railroad*, 659 F.2d 243 (D.C. Cir. 1981), which it read as holding that "instrumentalities" of the United States are not subject to the Sherman Act. Op. 15-17. While recognizing that the Red Cross's charter also labels it a "corporation," the district court held that the "instrumentality" label controlled. *Id.* at 17. It also dismissed the government's arguments that the Red Cross is not part of the United States because the United States does not own or control it, stating that "governmental ownership and control are not dispositive of personhood under the Sherman Act." *Id.*

As to the Red Cross's function, the court reasoned that the "[Red Cross's] charter requires it to fulfill a variety of public functions, including effectuating treaty obligations and coordinating domestic and international aid[,]" so that "on balance, [the Red Cross's] public attributes outweigh its private ones for this analysis." *Id.* at 18. While the court acknowledged that the Red Cross must function independently of the federal government to fulfill treaty obligations, it stated that such independence did not situate the Red Cross outside of the government because in *Flamingo*, the Postal Service's "statutory status as an 'independent establishment of the executive branch' weighed in favor of treating it as one with the federal government, not against doing so." *Id.* at 19 (quoting 540 U.S. at 740 (emphasis omitted)).

This interlocutory appeal followed.

ARGUMENT

The district court erred in holding that the Red Cross is not a "person" under the Sherman Act. The Sherman Act applies to "[e]very person" who violates its terms. 15 U.S.C. §§ 1-2. And it defines the operative statutory term "person" broadly to "include corporations and associations existing under or authorized by the laws of . . . the United States." 15 U.S.C. § 7. The Act does not, however, apply to the United States itself, *Flamingo*, 540 U.S. at 745 (citing *United States v. Cooper Corp.*, 312 U.S. 600, 614 (1941)), which includes government agencies that are "part of" the United States, *id.* at 746-47.

Flamingo states that courts must analyze the "form" and "function" of an entity to determine if it is exempt from the Sherman Act as part of the United States. *Id.* at 747-48.[4] This is a highly context-specific inquiry that turns primarily on the statutes creating and organizing the Red Cross. Here, both the Red Cross's form and function reflect that it is a Sherman Act "person"—which is consistent with numerous other contexts in which federal courts have repeatedly concluded that, in

[4] The Red Cross's enabling statutes explicitly permit it to sue and be sued, thus the question is whether it is a "person" subject to the Sherman Act. Op. 11-12.

contrast to other federal corporations like the Federal Reserve Banks, the Red Cross is a corporate "person" separate from the United States itself. *See Hall v. Am. Nat'l Red Cross*, 86 F.3d 919, 922 (9th Cir. 1996) (the Red Cross "cannot be considered a government actor" for purposes of the Religious Freedom Restoration Act and First Amendment); *Marcella v. Brandywine Hosp.*, 47 F.3d 618, 624 (3d Cir. 1995) (the Red Cross is not "so deeply involved in the government" that it also enjoys immunity from trial by jury); *Irwin Mem'l Blood Bank of the S.F. Med. Soc'y v. Am. Nat'l Red Cross*, 640 F.2d 1051, 1052, 1057-58 (9th Cir. 1981) (affirming that the Red Cross "was not an 'agency' as defined by [the Freedom of Information Act]"); *Conn v. Am. Nat'l Red Cross*, 168 F. Supp. 3d 90, 97-98 (D.D.C. 2016) (the Red Cross was subjected by Congress to the private-employer, rather than federal-employer, provisions of the Age Discrimination in Employment Act and Americans with Disabilities Act and intended it to be treated like a private employer); *Rayzor v. United States*, 937 F. Supp. 115, 120 (D.P.R. 1996) (the Red Cross "is not a federal agency" for purposes of the Federal Tort Claims Act).

I. The Red Cross's Form Indicates Congress Treated It as a Person Under the Sherman Act

The Red Cross has a rare form among federal entities. The statutes that create and organize the Red Cross designate it both as a "corporation"[5] and as "a Federally chartered instrumentality of the United States."[6] This case presents a novel question of how *Flamingo* applies to a federal entity of this type. The weight of authority favors treating the Red Cross as a legally separate person instead of as part of the United States for Sherman Act purposes.

1. It is well-established that a corporation is a type of Sherman Act "person." The Sherman Act explicitly defines "person" to include "corporations," 15 U.S.C. § 7, so designating an entity a "corporation" generally indicates there is no "bar to the imposition of [Sherman Act] liability," *Flamingo*, 540 U.S. at 744. The Court in *Flamingo* relied heavily on the fact that the Postal Service is an "independent establishment of the executive branch of the Government of the United States," 39 U.S.C. § 201, *rather than* a corporation. 540 U.S. at 746. The

[5] 36 U.S.C. §§ 300101(a)-(b), 300102, 00103; *Rayzor*, 937 F. Supp. at 119 n.2 ("The Red Cross is a non-profit private corporation created by an Act of Congress in 1905."), *aff'd*, 121 F.3d 695 (1st Cir. 1997).
[6] 36 U.S.C. § 300101(a).

Court noted that Congress debated but rejected proposals to make the Postal Service a corporation. *Id.* And "had the Congress chosen to create the Postal Service as a federal corporation, [the Court] would have to ask whether the Sherman Act's definition extends to the federal entity under this part of the definitional text." *Id.*

2. Congress's additional designation of the Red Cross as an "instrumentality" does not mean that it should be treated as part of the United States for Sherman Act purposes. The "instrumentality" designation in 2007 was added specifically to codify the Red Cross's exemption from state taxation. In 1966, the United States and the Red Cross challenged an attempt by the State of Colorado to impose state unemployment taxes on the wages of Red Cross employees. *Dep't of Emp.*, 385 U.S. at 356. The Supreme Court held "that the Red Cross is an instrumentality of the United States for purposes of immunity from state taxation levied on its operations." *Id.* at 358. The Red Cross's corporate form did not bear on the Court's analysis of its status as tax immune. And when Congress amended the Red Cross's organizing statutes in 2007, it expressly "confirm[ed] that status." Pub. L. No. 110-26, § 2(a)(7), 121 Stat. 103, 104-05.

In particular, Section 2 of The American National Red Cross Governance Modernization Act states: "The United States Supreme Court held The American National Red Cross to be an instrumentality of the United States, and it is in the national interest that the Congressional Charter confirm that status and that any changes to the Congressional Charter do not affect the rights and obligations of The American National Red Cross to carry out its purposes." *Id.* Congress thus did not intend to give the Red Cross new rights and privileges as an "instrumentality"; it merely codified *Department of Employment*'s holding that the Red Cross was an instrumentality for the purpose of a state tax exemption.

This is consistent with long-standing precedent that entities "may be governmental 'instrumentalities' in some sense" but still "not a part of the government." *Hall*, 86 F.3d at 921. After all, "[t]he question of whether a corporation is . . . shielded from state taxation . . . is a far different question from whether it is subject to" other federal laws and doctrines, *id.* at 922, such as the Sherman Act. Thus, "[a]n instrumentality of the United States can enjoy the benefits and immunities conferred by explicit statutes," but that attribute does not necessarily give rise to "the further inference that the instrumentality has all of the rights and privileges of the National Government." *Arkansas v. Farm Credit Servs. of Cent. Ark.*, 520 U.S. 821, 829 (1997).

The Red Cross itself has previously maintained that it is "an instrumentality of United States for the *limited purpose* of immunity from state taxation." Defs.' Corrected Mem. of Law in Supp. of Their Mot. to Dismiss, *Mosseri v. Am. Red Cross*, No. 06-60192-CIV, 2006 WL 1863313, at *5 (S.D. Fla. May 23, 2006) (emphasis in original). The Red Cross also has argued that the "instrumentality" label does not make it a "state actor" in the context of free speech, free exercise, equal protection, and procedural due process claims. *See* Resp. Br. of Appellees Am. Red Cross & Mary McCord, *Marie v. Am. Red Cross*, No. 13-4052, 2014 WL 671671, at *12, *37-45 (6th Cir. Feb. 11, 2014). In other words, when being part of the government is inconvenient, the Red Cross disclaims that status.

Here, however, the Red Cross argued that it is an instrumentality for broader purposes and that the label does make it part of the government in the antitrust context. The district court agreed. According to the Red Cross and the district court, *Sea-Land* is controlling and requires the result that any and all "instrumentalities" of the United States are not subject to the Sherman Act. Mot. to Dismiss at 9-10 (citing 659 F.2d at 244-47); Op. 15, 17. Indeed, according to the Red Cross, an instrumentality can only be subject to the Sherman Act if there is an express statement from Congress so permitting. Am. Nat'l Red Cross's Reply in Supp. of its Mot. to Dismiss the Compl. Pursuant to Fed. R. Civ. P. 12(B)(6), *Verax Biomedical Inc., v. Am. Nat'l Red Cross*, 1:23-cv-10335 (D. Mass), ECF No. 27 at 3-4.

But that blunderbuss rule flouts the logic of *Flamingo*. Where a statute makes "no mention of the Sherman Act," that "silence leads to no helpful inference one way or the other." 540 U.S. at 746-47. And *Flamingo* never even used the term "instrumentality," much less treated the Postal Service's status as a federal agency or instrumentality as itself dispositive. Rather, the Court looked to "other considerations"—namely, the Postal Service's status as part *of the Executive Branch*, as well as facts about how the Postal Service actually functions. *Id.* Thus, while those "other considerations" gave rise to a need for "an express statement from Congress that the Postal Service can be sued for antitrust violations," *id.*, there is no such express-statement requirement for the

Red Cross because those "other considerations" are not present for the Red Cross (which, unlike the Postal Service, is a corporation). As explained below, the Red Cross is not part of the Executive Branch and does not function as part of the United States.

Indeed, the district court appears to have misinterpreted *Sea-Land* by taking certain language out of context. Although *Sea-Land* stated that "Congress did not place the United States or its instrumentalities under the governance of the Sherman Act," 659 F.2d at 244, the D.C. Circuit did not state or imply that an entity's statutory label as an instrumentality ends the analysis. To the contrary, the first sentence of the opinion makes clear that the court's analysis hinged on the relevant entity's form and function as "wholly owned and operated by the United States." *Id.* So read, *Sea-Land* is consistent with *Flamingo*, which made clear the analysis looks to both an entity's form and function. *Flamingo*, 540 U.S. at 747-48. And because the Red Cross is not owned or operated by the United States, *Sea-Land* does not help the Red Cross here.

3. In a different but instructive context, the Supreme Court recently addressed the proper legal treatment of the New Jersey Transit Corporation, whose organic statute labelled it both a "body corporate"

(i.e., corporation) and an "instrumentality of the State." *Galette v. New Jersey Transit Corp.*, 607 U.S. 509, 528-529 (2026). While the Court's analysis was directed at the specific question of whether the New Jersey Transit Corporation should be considered an "arm of the State" for purposes of State Sovereign immunity, *id.*, some of the Court's reasoning is relevant here as well.[7]

In particular, the Court discussed how, at common law, "[o]ne key marker of separate legal personhood was the corporate form," and "it has 'long [been] settled as a matter of American corporate law that separately incorporated organizations are separate legal units with distinct legal rights and obligations." *Id.* at 520, 524 (quoting *Agency for Int'l Development v. Alliance for Open Society Int'l, Inc.*, 591 U.S. 430, 435 (2020)). The Court further explained "[t]he term 'instrumentality,' . . . lacks the historical weight the corporate form carries," *id.* at 529, and that "[t]here is no good reason to believe that the State intended for NJ Transit to be part of the State itself by using the word 'instrumentality,' when it simultaneously used the word 'body

[7] *Galette* was decided after the district court granted the motion to dismiss, and so the district court did not have the benefit of *Galette* to guide its decisionmaking.

corporate,' a term traditionally understood to create a '[s]eparate legal personality,'" *id.* at 535-36 (quoting *First Nat. City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 625 (1983)).

In addition, the Court highlighted the Red Cross as a specific example of an entity that would *not* share in any State Sovereign immunity, explaining that a "charitable organization may undertake rescue or other good work which, in its absence, we would expect the State to shoulder, [b]ut none would conclude . . . that in times of flood or famine the American Red Cross, to the extent it works for the public, acquires the States' . . . immunity' as a result." *Id.* at 532 (quoting *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 51 (1994)). Thus, to the extent *Galette* is applicable here, it suggests that the Red Cross's form supports treating it as a separate legal person.

Of course, "form" is only part of the analysis under *Flamingo* and therefore not dispositive by itself. There can be a federal corporation whose corporate form weighs in favor of treating the entity as a separate legal person under the Sherman Act, but whose *function* supports treating the entity as part of the United States. For example, the Federal Reserve Banks are corporations, but the Sixth Circuit has previously held that "[i]t is the role of the Federal Reserve System as manager of the fiscal affairs of the federal government and the money supply of the nation which places the Reserve Banks outside the Sherman Act definition of persons." *Jet Courier Servs., Inc. v. Fed. Rsrv. Bank of Atlanta*, 713 F.2d 1221, 1228 (6th Cir. 1983).[8] But as explained below, that is not the case for the Red Cross: in addition to being a corporation, which Congress expressly included as a type of Sherman Act person, *supra*, the Red Cross *does not* function as part of the United States. Thus, *both form and function* support treating the Red Cross as a "person" for Sherman Act purposes.

II. The Red Cross Does Not Function as Part of the United States

The function prong of *Flamingo*'s analysis also indicates that the Red Cross is not part of the United States government. To begin, the United States does not own, control, or supervise the Red Cross. In holding that the Postal Service was part of the United States government, *Flamingo* noted that nine of the eleven total members of its

[8] The Sixth Circuit has otherwise acknowledged that absent such circumstances, "federal corporation" status "supports the conclusion that the [entity] is not immune from antitrust liability." *McCarthy v. Middle Tenn. Elec. Membership Corp.*, 466 F.3d 399, 414 (6th Cir. 2006).

board of governors are appointed by the President with advice and consent of the Senate. 540 U.S. at 740. Those members of the board of governors are "officer[s] of the Government of the United States." 39 U.S.C. § 205(d). And they are "removable" by the President. *Flamingo*, 540 U.S. at 740 (citing 39 U.S.C. § 202).

By contrast, the Red Cross's board of governors is neither controlled nor supervised by the United States. 36 U.S.C. § 300104(a)(1). The President does not enjoy the power to appoint members of the Red Cross's board of governors in the manner that the President is empowered to appoint the overwhelming majority of the members of the board of the Postal Service. Except for the chairman, the President cannot appoint or remove any board member. 36 U.S.C. § 300104(a)(3)(B). As for the chairman, "[t]he board of governors, in accordance with procedures provided in the [Red Cross's] bylaws, shall recommend to the President an individual to serve as chairman of the board of governors." 36 U.S.C. § 300104(a)(3)(A). The President may approve or disapprove of the recommended candidate, or remove the chairman once appointed, but has no authority to select his own candidate. *Id.* Before 2007, the President was authorized to appoint eight members of the Red Cross's board, seven of whom were required to be "officials of departments and agencies of the United States Government," 36 U.S.C. § 300104(a)(1)(A) (2006), but Congress eliminated that requirement in 2007. *See* Am. Nat'l Red Cross Governance Modernization Act of 2007, Pub. L. No. 110-26, 121 Stat. 103, 104-05 (2007). Today, no United States government officials serve on the Red Cross's board.[9]

The United States also does not supervise the Red Cross's operations. In 2007 Congress "explicitly delegate[d] to Red Cross management the responsibilities for day-to-day operations." H.R. Rep. No. 110-87, at 7 (2007). Congress made clear that the Red Cross's "board of governors is the governing body of the corporation with all powers of governing and directing, and of overseeing the management of the business and affairs of, the corporation." 36 U.S.C. § 300104(a)(1). And federal courts, including the Supreme Court, have long recognized that "government officials do not direct [the Red Cross's] everyday affairs." *Dep't of Emp.*, 385 U.S. at 360; *see also Hall*, 86 F.3d at 922 ("The daily

[9] The district court did not have the benefit of *Trump v. Slaughter*, 609 U.S.—, 146 S. Ct. 2283 (2026), to consider whether constitutional issues would arise from its conclusion that the Red Cross is part of the U.S. government, while only the Chairman is subject to removal by the President.

affairs of the Red Cross are not controlled by government officials."); *Marcella*, 47 F.3d at 622 (finding that the Red Cross's "day-to-day activities are directed by the organization itself, not the government."); *Irwin*, 640 F.2d at 1057 (holding that the Red Cross's "operations are not subject to substantial federal control or supervision"); *id.* at 1056 ("It is settled that government officials do not direct the everyday affairs of the Red Cross."); *Rayzor*, 937 F. Supp. at 119 ("[T]he daily affairs of the Red Cross are not controlled by the Government.").

Federal courts, including the Supreme Court, also have long recognized that the Red Cross's "employees are not employees of the United States." *Dep't of Emp.*, 385 U.S. at 360; *see also Hall*, 86 F.3d at 923 (same); *Marcella*, 47 F.3d at 622 (same); *Irwin*, 640 F.2d at 1056 (same); *Rayzor*, 937 F. Supp. at 118 (same). And while "[w]henever the President finds it necessary, he may accept the cooperation and assistance of the American National Red Cross," Congress made clear that when the President does so, "employees of the American National Red Cross may *not* be considered as employees of the United States." 10 U.S.C §§ 2602(a), (e) (emphasis added). Unlike employees of the United States, no Red Cross employee is required to take an oath of office or subject to limitations on political activity or other regulations applicable to Executive Branch employees. *See, e.g.*, 5 U.S.C. § 3331; 5 U.S.C. § 7324.

The district court dismissed these features of how the Red Cross operates, reasoning that "governmental ownership and control are not dispositive of personhood under the Sherman Act." Op. 17-18. It stated that "the sole antitrust case the United States cites in support treated governmental ownership as 'immaterial' to personhood analysis." *Id.* (quoting *Jet Courier*, 713 F.2d at 1228).

But this reasoning is unavailing for two reasons. First, *Flamingo* is controlling precedent, and it suggests that government control is material. For example, the Court emphasized the Postal Rate Commission's oversight of the Postal Service in its postal lines of business—"[t]he great majority of the organization's business." 540 U.S. at 747-48.

Second, *Jet Courier* did not hold that lack of government ownership is immaterial to personhood under the Sherman Act. Rather, it held that where an "agency of the federal government," in that case the Federal Reserve System, "perform[s] a vital government[al] role," the fact that the government was "not the sole owner," did not put the agency outside the federal government. 713 F.2d at 1228.[10] The United States still exercises significant control over the Federal Reserve System, which is controlled by a board of governors all of whom are appointed by the President and confirmed by the Senate. 12 U.S.C. § 241. And "the Federal Reserve's unique historical status and role" has supported special treatment in a variety of contexts. *Trump v. Cook*, 146 S. Ct. 2234, 2249 (2026). By contrast, the United States does not own the Red Cross, the President does not appoint any members of its board other than the chairman, and the Red Cross does not have an anomalous historical pedigree. *See supra* pp. 2-3, 19-23.

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[10] The court stated that the distinction between *Sea-Land*—where "the government was the sole owner of the railroad"—and that case—where the government was not "the sole owner" of the Federal Reserve Banks—was "immaterial" to the ultimate conclusion that the Federal Reserve Banks were part of the United States government. *Jet Courier*, 713 F.2d at 1228. However, as the court immediately explained afterwards, that was because "[i]t is the role of the Federal Reserve System as manager of the fiscal affairs of the federal government and the money supply of the nation which places the Reserve Banks outside the Sherman Act definition of persons." *Id.* Thus, *Jet Courier* never said government ownership was immaterial to the analysis—just that it did not trigger personhood for the Federal Reserve Banks given their vital governmental role.

Moreover, unlike the Federal Reserve System, which plays a key role "as manager of the fiscal affairs of the federal government," *Jet Courier*, 713 F.2d at 1228, the Red Cross does *not* perform a vital government role. To the contrary, "[i]n order to fulfill its role under the Geneva Convention, the Red Cross must be *independent* of the United States government." *Hall*, 86 F.3d at 923 (emphasis added). In particular, Congress designated the Red Cross to serve as a "national society" that must "perform all the duties devolved on a national society" under the Geneva Conventions. 36 U.S.C. §§ 300102(1)-(2). This role requires it to "[b]e . . . auxiliary to the public authorities of the United States," *Statutes of the International Red Cross and Red Crescent Movement*, The International Red Cross & Red Crescent Movement, Art. 4, ¶ 3 (as amended in 2006), available at https://www.icrc.org/en/doc/assets/files/other/statutes-en-a5.pdf (last visited Aug. 21, 2026), to preserve its "independen[ce]," *id.* Preamble; *see also Marcella*, 47 F.3d at 624 ("[T]o properly fulfill its role as one of the participants in international Red Cross activities and to enforce the provisions of the Geneva Convention, the Red Cross must be independent of the United States government.").

Consistent with this requirement, in 2007 Congress reaffirmed that the Red Cross is a "volunteer organization" and "American charity" and that the changes it made to the text of the Red Cross's statute were designed to ensure the Red Cross's independence from the federal government. H.R. Rep. No. 110-87, at 7-8 (2007). In particular, Congress reaffirmed that the 2007 legislation ensures that the Red Cross's role is "consistent with the relationship that national societies in other countries have to their governments as autonomous auxiliaries to public authorities in each such country." *Id.* at 13. It is difficult for the Red Cross to dispute this. It has already argued without qualification in federal court that "Red Cross is not a federal agency," that it "differs from the usual government agency," and that "its employees are not federal employees." Defs.' Corrected Mem. of Law in Support of Their Mot. to Dismiss, *Mosseri v. Am. Red Cross*, No. 06-60192-CIV, 2006 WL 1863313, at *5 (S.D. Fla. May 23, 2006).

The district court improperly disregarded the statutory independence requirement, stating that, "[i]n *Flamingo*, [the Postal Service's] status as an '*independent establishment* of the executive branch' weighed in *favor* of treating it as one with the federal government, not *against* doing so." Op. 19 (emphasis in original). But this patently misreads *Flamingo*.

The *Flamingo* Court relied on the Postal Service's role as an "independent establishment" of "the executive branch," not that it was an "independent establishment" more generally. The *Flamingo* Court explained that "[t]he statutory designation of the Postal Service as an 'independent establishment *of the executive branch* of the Government of the United States' is not consistent with the idea that it is an entity existing outside the Government." 540 U.S. at 746 (emphasis added). The Court then reiterated that "[t]he statutory instruction that the Postal Service is an establishment 'of the executive branch of the Government of the United States' indicates just the contrary," *id.*, dropping the word "independent" altogether. The Postal Service was part of the Government *despite* its high degree of independence, not because of it. *Id.* ("The [Postal Reorganization Act] gives the Postal Service a high degree of independence from other offices of the Government, but it remains part of the Government."). It makes no sense to rely on the Red Cross's independence as a basis to conclude that it is part of the United

States government and exempt from the antitrust laws, especially when that very independence enables it to act as a private market participant.

The district court also relied on the Red Cross's non-profit mission to conclude that "on balance, [the Red Cross's] public attributes outweigh its private ones for this analysis." Op. 18. This overreads *Flamingo*'s statement that when an organization "does not seek profits, but only to break even," this "is consistent with [a] public character." 540 U.S. at 747. Indeed, "it is beyond debate that nonprofit organizations can be held liable under the antitrust laws." *Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 576 (1982); *accord NCAA v. Alston*, 141 S. Ct. 2141, 2159 (2021) ("the Sherman Act had already been applied to other nonprofit organizations"); *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 100 n.22 (1984) ("[t]here is no doubt that the sweeping language of § 1 applies to nonprofit entities").

Moreover, Verax's complaint contains numerous allegations suggesting that, as regards the challenged conduct in this case, the Red Cross functions like a private market participant rather than as a governmental entity in its blood business:

- "ARC is by far the largest supplier of platelets in the United States. ARC collects free donated platelets at its blood centers and then sells doses of platelets to hospitals *at a profit*." Compl. ¶ 39 (emphasis added).

- "Verax's PGD*prime* competes against ARC's pathogen reduction treatment in the U.S. platelet bacteria mitigation services market." *Id.* ¶ 17.

- "Prior to July 2020, ARC sold platelets that were compatible with multiple different bacteria mitigations services. . . . In July 2020, ARC publicly announced that it was implementing a policy of performing the PRT platelet mitigation service on all of the platelets it sold and would stop selling traditional platelets entirely." *Id.* ¶¶ 93-94, 97.

- "ARC executed an exclusive dealing contract with Cerus Corporation in which ARC agreed to buy exclusively Cerus's INTERCEPT treatment technology and provide exclusively INTERCEPT-treated PRT platelets to hospitals." *Id.* ¶ 114.

These allegations distinguish the Red Cross from the Postal Service in *Flamingo*. There, the Supreme Court found significant that the Postal Service "has many powers more characteristics of Government than of private enterprise, including its state-conferred monopoly on mail delivery, the power of eminent domain and the power to conclude international postal agreements." 540 U.S. at 747. The Red Cross lacks these and any similar powers. Op. 18.

Flamingo also found significant that the Postal Service "lacks the prototypical means of engaging in anti-competitive behavior: the power to set prices." 540 U.S. at 747. The Postal Services has the power to set prices only on its nonpostal lines of business—not for "[t]he great majority" of its business that "consists of postal services." *Id.* at 747-48. By contrast, the Red Cross allegedly has the power to set prices for blood platelets. Compl. ¶ 220 ("Because of its market dominance, ARC can and does set the price of its platelets above the competitive level."). And where the Postal Service's non-postal lines of business comprised only a small part of its revenues, *Flamingo*, 540 U.S. at 748, the Red Cross allegedly funds a substantial part of its operations through the profits generated on its blood business side. *See, e.g.*, The Am. Nat'l Red Cross, Consolidated Financial Statements at 4 (June 30, 2021), https://www.redcross.org/content/dam/redcross/about-us/publications/2022-publications/FY21-RedCross-Audited-Financial-Statement.pdf (listing approximately $50 million in operating revenues above expenses for biomedical services division in fiscal year 2021).

Thus, unlike the Postal Service, the Red Cross lacks powers characteristic of the government and has powers characteristic of a market participant. It therefore "should be treated under the antitrust laws" as "a market participant separate from [the United States]," rather than "as part of the Government." *Flamingo*, 540 U.S. at 747.

CONCLUSION

This Court should reverse the district court's holding that the Red Cross is not a "person" under the Sherman Act.

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limit of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because, excluding the parts exempted by Fed. R. App. P. 32(f), the brief contains 6,345 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(b) because the brief has been prepared in Microsoft Word 2010, using 14-point Century Schoolbook font, a proportionally spaced typeface.

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CERTIFICATE OF SERVICE

I certify that on August 21, 2026, I caused the foregoing to be filed through this Court's CM/ECF system, which will serve a notice of electronic filing on all registered users, including counsel for Verax Biomedical Inc. and the American National Red Cross.

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