No. 21-86

In The

Supreme Court of the United States

AXON ENTERPRISE, INC.,

Petitioner,

v.

FEDERAL TRADE COMMISSION, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether Congress impliedly stripped district courts of jurisdiction over constitutional challenges to the Federal Trade Commission's structure, procedures, and existence by granting the courts of appeals jurisdiction to "affirm, enforce, modify, or set aside" the FTC's cease-and-desist orders.

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE*[*]

Litigation is not cheap. Whether it occurs before an arbiter, an agency, or a federal court, litigation comes with a high price tag. And antitrust litigation higher still. Unlike the Federal Government—which continues to print money—private companies have scarce resources to risk. The Ninth Circuit, however, supposes that Axon has an unlimited litigation budget to pursue its meritorious constitutional challenges to the Federal Trade Commission's administrative process.

This led the Ninth Circuit to affirm the District Court's dismissal of Axon's constitutional challenges for want of jurisdiction. Now, the FTC can exercise both executive and legislative power without meaningful review by a federal court. This lack of judicial review violates core separation-of-powers principles.

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It often appears as *amicus* opposing the accumulation of power in any one governmental branch contrary to the Constitution's careful separation of powers. *See, e.g.*, *Lucia v. SEC*,

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[*] No party's counsel authored any part of this brief. No person or entity, other than WLF and its counsel, paid for the brief's preparation or submission. After timely notice, all parties consented to WLF's filing this brief.

138 S. Ct. 2044 (2018); *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477 (2010).

Although this case arises in the FTC context, many administrative agencies similarly exercise both executive and juridical power. The Securities and Exchange Commission and the Federal Deposit Insurance Corporation are just two examples. Courts around the country, however, are abdicating their responsibility to decide important constitutional questions about these agencies' structures. Purporting to follow Congress's command, they leave the issues for later; later never comes. Yet neither Congress nor the President may transfer judicial power to Article II agencies. This Court should grant certiorari to vindicate basic separation-of-powers principles supporting federal-court jurisdiction over cases and controversies.

STATEMENT

Axon makes body-worn cameras and digital evidence management systems for law enforcement. It acquired a failing competitor for around $13 million. Pet. App. 2a-3a, 49a, 51a. But no good deed goes unpunished. The FTC soon began investigating the deal. Axon has spent over $20 million defending that action.

Seeing its legal bills mount, Axon agreed to sell all assets it acquired from the competitor. It also offered to infuse the purchaser with $5 million. *Id.* Yet this was not enough for the FTC, which wanted Axon to license its own pre-acquisition intellectual property to the buyer. Pet. App. 2a-3a, 51a. Axon demurred

and then sued the FTC seeking a declaratory judgment.

The suit raised three constitutional challenges to the FTC's enforcement procedures. *See* Pet. App. 11a, 49a-50a, 67a-68a n.5. It also argued that Axon did not violate the antitrust laws by acquiring the competitor. *Id.* at 3a, 52a. Hours after Axon filed suit, the FTC began administrative proceedings against Axon. *Id.* at 3a n.1, 52a. Given that action, Axon agreed to dismiss its request for merits-based declaratory relief. *See id.* at 11a n.3. The only claims remaining in the case are Axon's constitutional claims challenging the agency's structure.

The District Court, however, concluded that it lacked jurisdiction over the entire suit because Congress wanted companies like Axon to first pursue any constitutional claim before the FTC. *See* Pet. App. 61a-89a. A divided Ninth Circuit panel affirmed that dismissal. *See generally id.* at 1a-46a. Axon now seeks certiorari after the Ninth Circuit declined to hear the case *en banc*. *See id.* at 47a-48a.

SUMMARY OF ARGUMENT

I.A. Denial of judicial process was a motivating factor behind the American Colonies' declaring their independence from Britain. Responding to concerns raised at the state ratifying conventions, States soon ratified the Fifth Amendment's Due Process Clause. This guaranteed Americans judicial process.

B. The Constitution requires that Article III courts adjudicate cases and controversies. Judicial adjudication ensures that Congress, which passes the

laws, and the President, who enforces the laws, do not have too much power. It also guards the right to judicial process—something the Founders gained at the cost of bloodshed. Neither Congress nor the President can assign this power to adjudicate cases and controversies to administrative agencies.

C. This Court requires lower courts to consider three factors when deciding whether Congress wanted agencies to decide a class of claims. Over the past twenty-seven years, however, lower courts have misapplied those factors. They have found that meaningful judicial review is always available—even when that review is illusory. And they have essentially ignored whether an agency can use subject-matter expertise when deciding an issue. Finally, lower courts have twisted claims to find them intertwined with the merits of an administrative case. Because the lower courts have misapplied all three factors, litigants cannot receive judicial process as guaranteed by the Fifth Amendment's Due Process Clause.

II. Further percolation in the courts of appeals would not help this Court's analysis. Over the past twenty-seven years, twelve courts of appeals have addressed the issue. Those decisions show that the lower courts need more guidance on deciding when a party may challenge an agency's structure. This case provides the ideal vehicle to resolve that uncertainty. Just last year, the Acting Solicitor General told the Court that this case would be a good vehicle to decide these important issues. This case is rare in that many arguments for why parties should be able to pursue pre-enforcement constitutional challenges to agencies' structures remain present.

ARGUMENT

The Constitution grants federal courts jurisdiction over nine types of cases or controversies. U.S. Const. art. III, § 2, cl. 1; *see* Erwin Chemerinsky, Federal Jurisdiction 260 (4th ed. 2003). To exercise federal jurisdiction, district courts must have both constitutional and statutory jurisdiction. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998). When both prerequisites are satisfied, "federal courts" have a "general duty to exercise the jurisdiction that is conferred upon them." *Hamdan v. Rumsfeld*, 548 U.S. 557, 589 (2006) (cleaned up).

No one disputes that the District Court could exercise constitutional jurisdiction over Axon's complaint. The real question is whether Congress stripped the District Court of statutory jurisdiction to hear this case. To decide this question, the Ninth Circuit examined whether Congress's intent to deprive district courts of jurisdiction over certain kinds of claims is "fairly discernible in the statutory scheme." *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 351 (1984) (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 157 (1970)). Having determined that it was, the Ninth Circuit then decided if Axon's claims are the *type* that Congress wanted reviewed by the FTC.

Under this Court's precedent, courts must consider three factors when deciding this question. First, will a litigant "as a practical matter be able to obtain meaningful judicial review" of its claim? *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 213 (1994) (quoting *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991)). Second, can the agency use

its expertise when deciding the issue? *See id.* at 212 (citation omitted). And third, are the claims "wholly collateral" to the case's merits? *Id.* (quoting *Heckler v. Ringer*, 466 U.S. 602, 618 (1984)).

District courts and courts of appeals must often apply the *Thunder Basin* factors when determining whether federal courts can decide a pre-enforcement challenge. Unfortunately, the Ninth Circuit's decision tracks a pattern of applying *Thunder Basin* in a manner that violates parties' due-process rights. The Court should therefore grant certiorari to correct this error and ensure that lower courts apply *Thunder Basin* in a constitutional manner.

I. REVIEW IS NEEDED TO CLARIFY HOW LOWER COURTS SHOULD APPLY THE *THUNDER BASIN* FACTORS.

A. The Fifth Amendment's Original Meaning Protects The Right To Judicial Process.

The Constitution prohibits depriving any person of "due process of law." U.S. Const. amend. V. "[A] mass of materials in the early years of the republic equated due process of law with judicial process." Gary Lawson, *Take the Fifth . . . Please!: The Original Insignificance of the Fifth Amendment's Due Process of Law Clause*, 2017 B.Y.U. L. Rev. 611, 630 (2017); *see* Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 Yale L.J. 408, 443 (2010) ("due process of law" commonly referred "to judicial process").

This reflected the understanding of pre-Revolutionary colonists. The colonists thought that "an act of Parliament that purports to abrogate the procedural protections of customary law violates due process." Nathan S. Chapman & Michael W. McConnell, *Due Process As Separation of Powers*, 121 Yale L.J. 1672, 1700 (2012).

The Fifth Amendment's Due Process Clause therefore protects the right to judicial process. But the lower courts' application of *Thunder Basin* has eliminated this right. Those decisions allow only administrative review of serious constitutional questions. Such rulings deprive citizens of due process of law.

B. Congress Cannot Replace Judicial Process With Administrative Process.

The Founders recognized the importance of judicial process before the Fifth Amendment's ratification. *Cf.* 3 Elliot's Debates 451 (George Nicholas, Virginia Convention) (arguing that the Constitution allowed courts to apply due-process principles). The text and structure of the Constitution confirms this pre-ratification interpretation.

"The judicial Power of the United States" is "vested in one supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." U.S. Const. art. III, § 1. This power "extend[s] to all Cases, in Law and Equity, arising under the Constitution [and] the Laws of the United States." *Id.* art. III, § 2, cl. 1. Although the Constitution does not define the term, the judicial

power is "the power to bind parties and to authorize the deprivation of private rights." William Baude, *Adjudication Outside Article III*, 133 Harv. L. Rev. 1511, 1513-14 (2020).

The "Constitution assigns" "the responsibility for deciding" cases and controversies to "Article III judges in Article III courts." *Stern v. Marshall*, 564 U.S. 462, 484 (2011). This responsibility includes "the mundane as well as the glamorous, matters of common law and statute as well as constitutional law, issues of fact as well as issues of law." *Id.* (quoting *N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 86-87 n.12 (1982) (plurality)).

"The judicial Power of the United States" thus cannot "be shared" with another branch just as the President cannot "share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto." *United States v. Nixon*, 418 U.S. 683, 704 (1974) (cleaned up). So Congress "cannot vest any portion of the judicial power of the United States, except in courts [it] ordained and established." *Martin v. Hunter's Lessee*, 14 U.S. 304, 330 (1816). Thus, administrative agencies cannot exercise the judicial power of the United States because they are not Article III courts. *See* Baude, 133 Harv. L. Rev. at 1539. But the lower courts' application of *Thunder Basin* allows only administrative review of serious constitutional questions. Such rulings deprive defendants of due process of law.

C. Lower Courts Mistakenly Allow Congress To Replace Judicial Process With Administrative Process.

Lower courts, however, have replaced judicial process with administrative process. They have applied all three *Thunder Basin* factors to avoid judicial review. This turns the proper analysis on its head.

1. Illusory judicial review is not meaningful judicial review.

Whether a defendant receives initial judicial review turns on the administrative agency's choice of forum. Many agencies can choose to enforce laws through administrative proceedings or suits in district court. *See, e.g.*, 15 U.S.C. §§ 45(b) and 53(b) (FTC); 78u(d) and 78u-2 (SEC). If the agency decides to proceed in district court, then the defendant gets immediate judicial review of its constitutional claims. But if the agency opens an administrative enforcement action, the lower courts have held that the defendant may not access Article III courts until the administrative proceeding concludes. This rule extends not only to merits issues but also to challenges to the agency itself, or to administrative proceedings.

Circuit courts applying the meaningful-judicial-review factor have rubber-stamped the agency's choice of forum. For example, the Seventh Circuit held that the SEC's decision to pursue administrative proceedings foreclosed judicial review of constitutional claims. *See Bebo v. SEC*, 799 F.3d

765, 769-72 (7th Cir. 2015). But as the court acknowledged, this created tension with *Free Enterprise Fund*. *See id.* at 770-71.

The Eleventh Circuit tried to explain away this tension with *Free Enterprise Fund*. *Hill v. SEC*, 825 F.3d 1236, 1247-48 (11th Cir. 2016). That attempt is unpersuasive. The court said that, unlike in *Free Enterprise Fund*, Hill need not "bet the farm to test the constitutionality of the ALJs." *Id.* at 1248. But, to date, Axon has spent over $20 million fighting this battle. If that is not betting the farm, what is?

Other courts simply rubber-stamped the agency's choice of forum by paying lip service to the meaningful-judicial-review factor. *See, e.g.*, *Bennett v. SEC*, 844 F.3d 174, 184-86 (4th Cir. 2016). These decisions show that lower courts are ignoring the Fifth Amendment when considering *Thunder Basin*'s meaningful-judicial-review factor. *Cf.* Caleb Nelson, *Adjudication in the Political Branche*s, 107 Colum. L. Rev. 559, 590 (2007) (explaining how courts cannot provide meaningful judicial review in these cases).

The Ninth Circuit's decision exacerbates this misapplication of the first *Thunder Basin* factor by holding that Axon could receive meaningful judicial review of the FTC's decision. Yet there is a substantial difference between having meaningful review and having illusory review. *See TXO Prod. Corp. v. All. Res. Corp.*, 509 U.S. 443, 500 (1993) (Kennedy, J., concurring). Here, the judicial review cited by the Ninth Circuit is merely illusory.

Over the past twenty-five years, only two companies have managed to obtain judicial review of

an FTC merger decision. *See* Brief for Appellant at 42 n.10, *Axon Enter., Inc. v. FTC*, 986 F.3d 1173 (9th Cir. 2021) (No. 20-15662), 2020 WL 2310605. Once-a-decade review is anything but "meaningful." Rather, it is merely illusory; theoretically possible but overwhelmingly improbable. *Thunder Basin* requires more. It mandates that lower courts consider pre-enforcement challenges when no opportunity exists for meaningful judicial review. And no review is meaningful if it is unlikely even to occur.

An example proves the point. Aleksei Navalny was convicted of stealing money from two Russian firms. *See* RadioFreeEurope, *Russian Supreme Court Upholds Conviction Of Navalny Brothers In 'Yves Rocher Case'* (Apr. 25, 2018), https://bit.ly/38x7yEx. Navalny could appeal to the Russian Supreme Court. But was this review meaningful? No, it was merely illusory. Russia's singular goal was to show the international community that it was not incarcerating Navalny for opposing President Vladimir Putin.

The Ninth Circuit relied on similarly illusory review when applying the *Thunder Basin* factors. In the past quarter century only two companies have obtained judicial review of an FTC merger decision—both lost. *See generally Polypore Int'l, Inc. v. FTC*, 686 F.3d 1208 (11th Cir. 2012); *Chi. Bridge & Iron C. N.V. v. FTC*, 534 F.3d 410 (5th Cir. 2008). Axon could therefore theoretically obtain judicial review of an adverse FTC decision. Yet once-a-decade review falls well short of what the Due Process Clause requires under *Thunder Basin*.

There is a second reason why Axon cannot receive meaningful judicial review of the FTC's decision here. Axon challenges the FTC's administrative procedures. These constitutionally flawed procedures harm Axon here and now. Even if the FTC—for the first time in twenty-five years—were to rule in Axon's favor, that would not remedy the harm. Similarly, even if Axon became the third company in the past three decades to obtain judicial review and succeeded before a court—unlike the two prior companies—that would not remedy Axon's injury.

The same is true of the cases from other circuits discussed above. The parties in those cases could not obtain meaningful judicial review of challenges to agency structure or procedures. They were relegated to losing in the agency and then praying that they got ever-so-rare judicial review.

If this Court denies review, once the stay expires Axon must again respond to the FTC's discovery demands. If a hearing before the ALJ starts, Axon must spend an exorbitant amount on attorneys' fees and litigation costs. Then if it loses before the ALJ, Axon must spend money to litigate before the full commission. All this before it can ask an Article III court to decide whether the administrative proceedings are constitutional.

If Axon were to become the first company in twenty-five years to prevail after finally getting judicial review, it would still lose. It could not recover the tens of millions of dollars expended before the FTC. The hearing before the ALJ would have also

proceeded despite the unconstitutional appointment. It is impossible to unring that bell.

The Ninth Circuit's decision therefore bars meaningful judicial review of Axon's meritorious constitutional claims. It allows a non-Article III tribunal—the FTC—to decide this issue. That violates Article III's clear command.

2. Agencies lack expertise in constitutional law.

The justification for allowing administrative agencies to decide issues is "their expertise." *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 196 (1997) (citing *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 812 (1978)). Under *Thunder Basin*, courts must therefore consider whether the issues presented in the pre-enforcement challenge fall within an agency's area of expertise. But again, the lower courts have misapplied this factor.

The Fifth Circuit, for example, held that agency expertise is "assessed by looking at the overall case." *Cochran v. SEC*, 969 F.3d 507, 516 (5th Cir. 2020), *reh'g granted*, 978 F.3d 975 (5th Cir. 2020) (*en banc*). This analysis again gives agencies the final say on where a defendant must litigate its constitutional claims. Any case the FTC brings must include issues and claims within its expertise. Otherwise, it would lack statutory authority to hold the administrative hearing. The same is true for the SEC, FDIC, and other agencies.

It does not follow that collateral issues—like the constitutionality of the agency's structure—are

within the agency's expertise. Decisions like *Cochran*, however, mean that every pre-enforcement challenge that a defendant brings in federal court is within the agency's expertise. Not only does this violate *Thunder Basin*'s plain language, it also violates defendants' due-process rights.

The Ninth Circuit correctly recognized that "[t]he FTC lacks agency expertise to resolve [Axon's] constitutional claims." Pet. App. 23a. Federal courts—not the FTC—are constitutional law experts. This lack of expertise is even truer today given a non-lawyer as FTC commissioner.

Yet the Ninth Circuit still affirmed. In the Ninth Circuit's view, two of the three *Thunder Basin* factors are mere surplusage. *See* Pet. App. 25a ("the presence of meaningful judicial review [alone] is enough to find that Congress precluded district court jurisdiction over the type of claims that Axon brings" (citation omitted)). This tracks the analysis that the Federal Circuit employs. *See Sec. People, Inc. v. Iancu*, 971 F.3d 1355, 1360 & n.1 (Fed. Cir. 2020). Allowing non-attorneys to go outside their expertise and decide important constitutional questions is a quintessential Article III violation.

At least the Fifth, Ninth, and Federal Circuits considered this factor. When applying *Thunder Basin*, other courts ignore whether the agency has expertise to consider an issue. *See generally Harkness v. United States*, 727 F.3d 465 (6th Cir. 2013); *Great Plains Coop v. Commodity Futures Trading Comm'n*, 205 F.3d 353 (8th Cir. 2000). This shows that the lower courts have veered from the course this Court charted in *Thunder Basin*.

Lower courts have misunderstood the second *Thunder Basin* factor. Some courts hold that agencies always have expertise that weighs against immediate judicial review. And those that recognize that agencies lack expertise in constitutional law just decline to place any weight on this factor. This Court's review is therefore necessary to correct these misunderstandings of the second *Thunder Basin* factor.

3. Challenges to agency structures and procedures are wholly collateral to the merits of an agency enforcement action.

Finally, lower courts have applied the "wholly collateral" factor to deny citizens due process of law. Lower courts have applied the factor in a way that always supports punting to administrative agencies. But as explained above, Article III prohibits such delegation of the judicial power.

The Fourth Circuit's *Bennett* decision provides a good example. There, Bennett argued that her constitutional claim was collateral to the agency proceeding "because it challenge[d] the legality of the forum itself and [did] not seek to affect the merits." *Bennett*, 844 F.3d at 187 (quotation omitted). "[T]his makes conceptual sense" because "[e]ven if she [wa]s successful in" her constitutional challenges, the agency "could still bring a civil enforcement action in district court on the same substantive charges." *Id.*

But the Fourth Circuit ultimately held that this factor weighed against immediate judicial

review. It held that "claims are not wholly collateral when they are the vehicle by which [defendants] seek to reverse" agency action. *Bennett*, 844 F.3d at 186 (cleaned up). In other words, a claim is never collateral.

The Fourth Circuit is not alone in this misapplication of *Thunder Basin*'s wholly collateral factor. The First, Second, and D.C. Circuits have also erroneously held that—as a practical matter—claims are never collateral. *See Tilton v. SEC*, 824 F.3d 276, 287-88 (2d Cir. 2016); *Jarkesy v. SEC*, 803 F.3d 9, 22-28 (D.C. Cir. 2015); *Aguilar v. U.S. Immigr. & Customs Enf't Div. of Dep't of Homeland Sec.*, 510 F.3d 1, 13 (1st Cir. 2007).

At least in these cases parties could raise these collateral arguments in the administrative proceeding. But even when parties cannot raise an issue in an administrative proceeding, lower courts have held that claims a party may raise only before an Article III court are not wholly collateral to the administrative proceeding. *See Massieu v. Reno*, 91 F.3d 416, 424 (3d Cir. 1996). This violates citizens' due-process rights.

Here, a federal court could decide Axon's constitutional challenges without even knowing the merits question. Whether the FTC's and Department of Justice's process for determining which agency pursues certain antitrust claims violates equal-protection guarantees does not depend on Axon's acquisition of a failing competitor. Rather, it is a mixed question of fact and law independent of the acquisition. The only facts that a court needs to decide the issue are the agencies' procedures for dividing

cases—procedures the FTC will not disclose. In other words, nothing about the transaction the FTC challenges is relevant.

Axon's challenge to the dual-layer for-cause removal protection afforded FTC ALJs is also wholly collateral to the merits. This question is a pure question of law that requires no factual inquiries. A federal court could decide this issue solely based on the relevant statutes and regulations, without looking at what the FTC is alleging in the administrative proceeding.

It is hard to imagine how claims could be more collateral to the merits than Axon's. The Ninth Circuit should have looked to *Free Enterprise Fund* and to the Constitution. They show that allowing a federal administrative agency to decide these constitutional claims while precluding immediate judicial review violates Axon's due-process rights.

* * *

When parties must litigate two adjudications before reaching an Article III court, they are denied their right to due process of law. Even if lower courts' application of *Thunder Basin* were more efficient—which it is not—that would be irrelevant. "The doctrine of the separation of powers was adopted by the convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power." *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

Yet lower courts consistently prioritize alleged efficiency over preventing the exercise of arbitrary

power. This they may not do. The Court should hear this case to provide much-needed guidance for lower courts applying *Thunder Basin*.

II. FURTHER PERCOLATION IN THE LOWER COURTS IS UNNECESSARY.

This Court need not wait for more lower-court decisions applying the *Thunder Basin* factors before deciding the question presented. Section I, *supra*, discusses cases applying *Thunder Basin* from twelve courts of appeals. And these cases are not clustered in recent years or after *Thunder Basin* in 1994. Rather, the decisions span a broad swath of time from the mid-1990s to the present.

This shows that the issue has fully percolated in the lower federal courts. Twenty-seven years after this Court's *Thunder Basin* decision, the lower courts routinely err when applying the relevant factors. The errors they make differ slightly, but they have unanimously erred when analyzing at least one factor. Further percolation would just allow the number of erroneous decisions to multiply without providing clarity that would assist in this Court's consideration of the issue.

Last year, the Acting Solicitor General recognized that no further percolation was necessary. *See generally* Brief for Respondent, *Gibson v. SEC*, 141 S. Ct. 1125 (2021) (*per curiam*) (No. 20-276), 2020 WL 7249058. He argued that this Court should only consider granting review if a circuit split develops. *See id.* at 12. In other words, he acknowledged that the circuit courts have convalesced around one

outcome—federal courts lack jurisdiction to consider challenges like Axon's.

But just because the courts of appeals have reached the same conclusion does not mean that they have reached the right conclusion. "All 12 Courts of Appeals with criminal jurisdiction agreed that a defendant need not know he is a felon to be guilty of being a felon in possession of a firearm" until "[t]his Court came to the opposite conclusion in *Rehaif v. United States*," 139 S. Ct. 2191 (2019). *Greer v. United States*, 141 S. Ct. 2090, 2101 (2021) (Sotomayor, J., concurring and dissenting). Sometimes courts of appeals engage in groupthink where they all apply flawed reasoning that this Court eventually rejects. This is one such area where all the courts of appeals have gone astray.

The Acting Solicitor General's brief in *Gibson* recognized, however, that this case would present a good vehicle to decide the issue if the circuits were to diverge. *See supra*, at 13. This is because Axon obtained a stay of the FTC proceedings pending disposition of this certiorari petition.

As described above, there is no reason to wait for further lower-court developments to decide the question presented. And, if the Court denies review here, it may be another decade before there is another clean vehicle to answer the question. Because this case presents an ideal vehicle to decide the issue, the Court should grant certiorari now.

* * *

The issues at stake here are important; they implicate foundational separation-of-powers issues. They do not involve questions of statutory interpretation that Congress could overrule. Our government's adherence to the Constitution's structural requirements should not depend on whether circuit courts split on an issue. This Court should thus grant the petition now and clarify that lower courts must apply *Thunder Basin* so that litigants receive adequate judicial process.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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