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 WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the

[1] The parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part and no counsel or party—other than *amicus*, its members, or its counsel—made a monetary contribution intended to fund the preparation or submission of this brief.

Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

Here, many businesses face the prospect of unconstitutionally structured proceedings before the Federal Trade Commission (FTC) or similarly structured independent agencies. Those costly proceedings can pose an existential threat to business operations. The Chamber has a significant stake in ensuring that those businesses can challenge unconstitutional proceedings in federal district courts before the constitutional injury occurs.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents fundamental questions about whether courts are available in the first instance to police the separation of powers and whether agency adjudicators can remain insulated from Executive Branch supervision. Those questions warrant the Court's immediate intervention because the answers are so clear and the harms of further delay are so obvious.

To start, absent this Court's intervention, private parties must endure lengthy, costly, and plainly unconstitutional agency enforcement proceedings before challenging the constitutionality of those proceedings in court. This Court's precedents make clear this state of affairs is untenable. In *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 561 U.S. 477 (2010), this Court authorized a pre-enforcement challenge in federal district court to the constitutionality of insulating the Public Company Accounting Oversight Board (PCAOB) from presidential supervision through multiple layers of tenure protection. The Court reasoned that delaying judicial review would unjustifiably force challengers to "bet

the farm" and suffer here-and-now injury without any guarantee of meaningful back-end review. Further, the Court explained, such structural constitutional challenges are collateral to any particular agency decision, because demanding a constitutionally accountable adjudicator does not guarantee any particular outcome on the merits. And agencies have no expertise regarding such pure constitutional questions. Other precedents in context after context likewise endorse pre-enforcement judicial review of constitutional challenges to agency procedures.

Free Enterprise Fund should make this an easy case. Like the challengers in *Free Enterprise Fund*, petitioner challenges the constitutionality of insulating Executive Branch officers (here, FTC administrative law judges (ALJs)) from presidential supervision through multiple layers of tenure protection. As in *Free Enterprise Fund*, back-end judicial review is no meaningful remedy. Forcing private parties to suffer years of business-threatening enforcement proceedings before unconstitutionally unaccountable adjudicators as a precondition to obtaining judicial review of the structure of FTC adjudications inflicts real and irreparable harm. Indeed, for many businesses, the promise of obtaining such review is illusory, given the overwhelming pressures to settle such enforcement proceedings. Yet the structural challenge to the FTC's ALJs has no bearing on the ultimate resolution of any given FTC enforcement proceeding. And delaying judicial review is particularly pointless because the FTC cannot entertain constitutional challenges to its own structure and has no expertise to bring to bear in any event.

Nevertheless, in a divided opinion, the Ninth Circuit shut the courthouse doors to such pre-enforcement challenges under the misapprehension that this Court's precedents bound its hands. Under the Ninth Circuit's

view, absent "exceptional circumstances," agency proceedings offer meaningful review whenever parties can obtain judicial review thereafter. And, under the Ninth Circuit's view, few challenges are collateral; if a party can make a constitutional challenge to the agency alongside challenging the merits of a particular agency action, courts must bar pre-enforcement review. And, under the Ninth Circuit's view, even an agency's lack of expertise and inability to entertain constitutional challenges are irrelevant.

The Ninth Circuit's approach would transform judicial review into a Sisyphean shell game. Parties like petitioner would endure years of unconstitutional proceedings before unaccountable agency adjudicators. And when those parties finally reach an Article III court that can hear these separation-of-powers challenges, courts must then decide whether to sever unconstitutional provisions and order a re-do of agency proceedings before constitutionally accountable adjudicators. This Court has long emphasized the importance of encouraging separation-of-powers challenges. But if the price of raising such challenges is to endure years of agency proceedings and the reward is years more of agency proceedings, the game will rarely be worth the candle.

The Ninth Circuit's jurisdiction-stripping approach warrants the Court's immediate intervention. The FTC is poised to unleash a torrent of new enforcement actions. Petitioner is the tip of the iceberg of private litigants facing the prospect of having to endure unconstitutional FTC adjudicatory proceedings now just to obtain judicial review later. Further, if left undisturbed, the decision below could rule out virtually all immediate judicial review of pre-enforcement challenges to the constitutionality of any agency's structure. This Court should intervene now and prevent its precedents from being twisted into artificial

barriers to judicial review across agency contexts.

This Court's review is especially warranted because petitioner's underlying constitutional challenge is not open to serious doubt. Under this Court's recent separation-of-powers cases, insulating FTC ALJs from presidential supervision in these enforcement proceedings through multiple layers of tenure protection is blatantly unconstitutional. Delaying the day of reckoning will force private parties to needlessly suffer constitutional violations, while jeopardizing the outcomes of agency adjudications in the many agencies that share this structural flaw. Only this Court's immediate intervention can break this cycle.

ARGUMENT

I. THIS COURT SHOULD RESOLVE WHETHER DISTRICT COURTS CAN HEAR CONSTITUTIONAL CHALLENGES TO THE FTC'S STRUCTURE IN THE FIRST INSTANCE

A. The Decision Below is Wrong

Congress granted federal district courts jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. Such civil actions encompass challenges to the constitutionality of the FTC's structure. And no statute repeals that jurisdiction. Certainly, 15 U.S.C. § 45(c) does not do so; that provision *authorizes* courts of appeals to review cease-and-desist orders after FTC Commissioners authorize those orders. Nor is this an exceptional case where the comprehensiveness of Congress' administrative-review scheme implies that Congress intended to channel Axon's challenges to the agency first and courts later. Quite the contrary, this Court has repeatedly allowed litigants to go straight to court to bring analogous, cross-cutting challenges to an agency's structure. The Ninth Circuit barred

immediate judicial review here by seriously misreading those precedents. Only this Court can correct course.

1. Administrative-review statutes "do not restrict judicial review unless the 'statutory scheme' displays a 'fairly discernible' intent to limit jurisdiction, and the claims at issue 'are of the type Congress intended to be reviewed within th[e] statutory structure.'" *Free Enter. Fund*, 561 U.S. at 490 (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207 (1994)). To determine whether Congress intended to funnel a particular type of claim into the administrative-review structure first, courts consider the so-called *Thunder Basin* factors, i.e., (1) whether "a finding of preclusion could foreclose all meaningful judicial review"; (2) whether the suit is "wholly collateral to a statute's review provisions"; and (3) whether the claims fall "outside the agency's expertise." *Id.* (quoting *Thunder Basin*, 510 U.S. at 212-13).

Applying this framework, the FTC's statutory structure does not channel constitutional challenges to the agency's structure to FTC administrative proceedings in the first instance. That conclusion flows inexorably from *Free Enterprise Fund*, where the Court allowed private parties to initiate a materially similar structural constitutional challenge in district court after interpreting a materially similar administrative-review scheme.

Free Enterprise Fund involved a challenge to the constitutionality of the PCAOB's multi-layer tenure protections. 561 U.S. at 480. Like petitioner here, the challengers sought to avoid having to submit to proceedings before an unconstitutionally structured body (there, the PCAOB; here, FTC ALJs), and instead immediately sought judicial relief so that any ensuing proceedings would occur before a constitutionally accountable body. And, like the statute here (15 U.S.C. § 45(c)), the statute

in *Free Enterprise Fund* (15 U.S.C. § 78y) expressly authorized appellate courts to review certain agency orders only after the conclusion of administrative proceedings.

Nonetheless, *Free Enterprise Fund* held that parties could challenge the constitutionality of the PCAOB's tenure protections in court without having to first undergo PCAOB proceedings. The Court explained that section 78y's text "does not expressly" take away the federal-question jurisdiction that district courts would otherwise have under 28 U.S.C. § 1331. *Id.* at 489. That observation is even more true of 15 U.S.C. § 45(c), which merely provides that once the FTC issues a final cease-and-desist order, those orders are ripe for judicial review.

Then *Free Enterprise Fund* applied the three *Thunder Basin* factors, concluding that structural constitutional challenges to the PCAOB's tenure protections were not the type of claims that Congress intended to channel within section 78y. *Id.* at 489-91. First, the Court held that section 78y did not offer an avenue for plaintiffs to "meaningfully pursue their constitutional claims." *Id.* at 490. The Court explained that section 78y "provides only for judicial review of *Commission* action, and not every Board action is encapsulated in a final Commission order or rule." *Id.* Because the challengers instead objected to the *structure* of the PCAOB, not a defined final agency action, the only way to guarantee judicial review of that objection was to randomly challenge a PCAOB rule or to incur sanctions that could be reviewed. *Id.* The Court doubted that Congress would have countenanced such perverse procedures. *Id.* at 490-91.

So too here, section 45(c) provides for judicial review only of cease-and-desist orders that the FTC Commissioners finalize. 15 U.S.C. § 45(c). But not every ALJ action folds into such final orders, rendering some ALJ

actions unreviewable even if they cause real harm to the regulated party. For example, FTC ALJs could issue inappropriate subpoenas, only for the Commission to bypass that evidence in its final order. Many parties are pressured to settle, and settlement scuttles any right to judicial review. *See id.* (permitting only parties "required by an order of the Commission to cease and desist" a practice to seek review). Even parties that could obtain judicial review later must first suffer the irreparable harm of being subjected to proceedings before unconstitutionally unaccountable adjudicators. *See Free Enter. Fund*, 561 U.S. at 490. Judicial review is, by definition, not "meaningful" if it comes after the allegedly unconstitutional act "would have already taken place." *See Jennings v. Rodriguez*, 138 S. Ct. 830, 840 (2018).

As to the second *Thunder Basin* factor—whether the challenge is "collateral" to review of agency action—*Free Enterprise Fund* held that challenges to the PCAOB's tenure protections were plainly "collateral." 561 U.S. at 490. Structural constitutional challenges of this sort impugn "the Board's existence," not any particular individual action. *Id.* Petitioner here makes the exact same structural constitutional objection to FTC ALJs' multi-layer tenure protections. Again, that objection impugns all ALJ proceedings, not any particular action.

Finally, as to the third *Thunder Basin* factor—whether the agency has any expertise to bear—*Free Enterprise Fund* characterized the separation-of-powers challenge as a "standard question[] of administrative law, which the courts are at no disadvantage in answering." *Id.* at 491. The constitutionality of FTC ALJs' tenure protections presents the same administrative-law issue, and "agency adjudications are generally ill suited to address structural constitutional challenges." *Carr v. Saul*, 141 S.

Ct. 1352, 1361 (2021). Not only does the FTC lack relevant expertise; the agency does not even have jurisdiction to resolve such claims. *See*, *e.g.*, *Mathews v. Diaz*, 426 U.S. 67, 76 (1976).

In sum, *Free Enterprise Fund* set forth the rule that should have disposed of this case. If parties raise the same type of separation-of-powers challenge to an agency's structure, and the administrative-review scheme does not expressly bar initial judicial review, parties need not suffer through the unconstitutional proceeding as a prerequisite to judicial review.

Nor was *Free Enterprise Fund* an outlier. *Mathews v Eldridge*, 424 U.S. 319 (1976), reflects the same principle. The Social Security Act authorizes judicial review only "after any final decision of the [Commissioner of Social Security] made after a hearing." 42 U.S.C. § 405(g). The claimant in *Eldridge* never raised his "constitutional claim to a pretermination hearing" to the agency, nor did the claimant ever proceed to an agency hearing. 424 U.S. at 328-29. Yet the Court allowed the claimant to proceed directly to district court, reasoning that the claimant's "constitutional challenge is entirely collateral to his substantive claim of entitlement" and that the claimant should not have to suffer the harms of lengthy, potentially unconstitutional agency proceedings just to have his day in court. *Id.* at 330-31.

McNary v. Haitian Refugee Center, 498 U.S. 479 (1991), similarly demonstrates that parties need not shoulder substantial harm in agency proceedings just to bring systemic challenges to agency procedures or structures in court. There, the Court held an administrative review scheme that preconditioned judicial review on voluntary surrender for deportation did not "as a practical matter" afford "meaningful" judicial review. *Id.* at 496-

97. So too here, parties to unconstitutional FTC proceedings should not have to go through lengthy, expensive, and business-jeopardizing agency proceedings just to challenge the constitutionality of those proceedings in court. "[T]hat price is tantamount to a complete denial of judicial review." *Id.*

2. The Ninth Circuit instead interpreted this Court's precedents as foreclosing immediate judicial review. App-12 to -22. The Ninth Circuit correctly recognized that challenges to the constitutionality of an agency's structure fall "outside the agency's expertise." App-23. But the Ninth Circuit then misread this Court's precedents to suggest that judicial review is "meaningful" so long as review might eventually be available. App-12 to -20. Further, the Ninth Circuit suggested, a district-court action that challenges some aspect of an agency's enforcement action can never be "wholly collateral" to the review scheme. App-21 to -22. Left undisturbed, the Ninth Circuit's reasoning would transform this Court's *Thunder Basin* jurisprudence into a nearly insuperable barrier to immediate judicial review.

Under the Ninth Circuit's reading of *Thunder Basin*, so long as after-the-fact judicial review is hypothetically available, parties must point to "exceptional circumstances" to avoid initial agency proceedings, no matter what the nature of their challenge is. *See* App-12, App-15. But *Thunder Basin* imposed no such sweeping presumption against initial judicial review. *Thunder Basin* held only that the agency should evaluate petitioner's specific procedural due process claims first because the courts of appeals could meaningfully review that claim later; petitioner was not about to suffer any here-and-now injury in the meantime. 510 U.S. at 216-18.

Thunder Basin thus distinguished the petitioner's procedural due process claims there from the procedural

due process challenges in *Eldridge* and *McNary*, where having to go through constitutionally dubious agency proceedings inflicted immediate harms. *Id.* at 212-13. The Ninth Circuit portrayed *Eldridge* and *McNary* as exceptional cases, but *Thunder Basin* suggested the opposite, instead grounding those cases in a long line of precedents "uph[olding] district court jurisdiction" when confronted with wholly collateral claims that imposed immediate harms. *See id.*

Aggravating the error, the Ninth Circuit treated *Free Enterprise Fund* as "speak[ing] only to a situation of no guaranteed judicial review," and gave it no weight. App-19. But *Free Enterprise Fund* rejected the notion that Congress would precondition the availability of judicial review on voluntarily incurring some harm. *See supra* p. 7-8. And the Ninth Circuit's characterization of *Free Enterprise Fund* does not make it any less applicable: Here, too, parties may ultimately obtain judicial review of the FTC's structure after FTC enforcement proceedings end, but such review is not guaranteed. *Id.*

The Ninth Circuit also misinterpreted the second *Thunder Basin* factor—whether the challenge is "wholly collateral to the review scheme," 510 U.S. at 212. According to the Ninth Circuit, a "claim is not wholly collateral if it has been raised in response to, and so is procedurally intertwined with, an administrative proceeding—regardless of the claim's substantive connection to the initial merits dispute in the proceeding." App-21 (internal quotations omitted). In other words, a claim is not collateral if it was raised "in response to . . . an administrative proceeding," even if the agency has no power to address the claim and even if the claim has no bearing on the substantive issues within the agency proceeding.

But this Court has held the opposite: a claim is "collateral" if it merely challenges the agency's structure, not

the merits of a particular agency decision. As noted, *Free Enterprise Fund* considered the same structural constitutional challenge to an Executive Branch officer's tenure protections to be "collateral" to agency proceedings because that objection impugned the decision-making body's "existence," not any particular actions. 561 U.S. at 491. The Ninth Circuit is simply wrong that *Free Enterprise Fund* did "not address[] the nature of 'wholly collateral'" claims. App-22.

Likewise, in *Elgin v. Department of Treasury*, 561 U.S. 1 (2012), the Court held that petitioners' bill-of-attainder and equal-protection challenges to their removal from federal employment were not "wholly collateral" because those challenges (if successful) would have precluded the agency from removing them from federal employment. *Id.* at 21-22. But if petitioner prevails on its separation-of-powers challenge to FTC ALJs' tenure protections, petitioner could still be subject to the same agency enforcement actions. Those actions would just proceed before a constitutionally accountable adjudicator. Because structural constitutional challenges to ALJ tenure protections are divorced from the *substance* of agency decisions, those challenges are "wholly collateral."

In sum, the Ninth Circuit misinterpreted the Court's precedents at every turn. The Ninth Circuit transformed precedents that favor immediate judicial review into obstacles and radically curtailed the circumstances when parties can go to court first before suffering irreparable harms from agency procedures. The Ninth Circuit's reasoning is so seriously at odds with the Court's precedents as to warrant review on this basis alone.

B. The Jurisdictional Question Is Exceptionally Important and Squarely Presented

1. If left undisturbed, the Ninth Circuit's disastrously expansive reading of *Thunder Basin* risks

stymying all manner of structural challenges to all sorts of administrative agencies. By functionally equating eventual review with meaningful review, the first *Thunder Basin* factor would virtually always delay judicial review and shunt challenges to agency proceedings first. App-12 to -16. And the Ninth Circuit leached the concept of "wholly collateral" claims of any real meaning as well. App-22. If the Ninth Circuit's approach remains in place, *Free Enterprise Fund* will become a dead letter. It is hard to fathom what constitutional challenges to an agency's structure—let alone what other claims—a party could ever bring in court without first running the gauntlet of lengthy agency proceedings.

The Ninth Circuit's hostility to initial judicial review also heightens concerns with agency adjudication of private rights. As the "stuff of . . . Westminster in 1789," the FTC's antitrust and unfair competition actions seek to enforce rights with a "private" flavor. *N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 90-91 (1982) (Rehnquist, J., concurring); *see also United States v. Trans-Mo. Freight Ass'n*, 166 U.S. 290, 327 (1897) (describing the common law roots of antitrust). Such rights are meaningfully different from the Mine Act's safety regulations at issue in *Thunder Basin*, 510 U.S. at 202-04, or the public employment protections at issue in *Elgin*, 567 U.S. at 5. "Private rights . . . are normally within the purview of the judiciary." *CFTC v. Schor*, 478 U.S. 833, 854 (1986). Relegating private rights "as an initial matter to administrative adjudication" thus threatens to "encroach[] on the judicial powers" right off the bat. *Id.* at 853-54 (internal quotations omitted). Those concerns are all the more reason why private parties should be able to bring structural separation-of-powers challenges in district courts in the first instance.

2. The costs of the decision below are untenable. If

left undisturbed, the decision below will pointlessly consign businesses to years of costly yet unconstitutional administrative proceedings. Various features of FTC proceedings make it even more unfair to force private parties to expend millions of dollars in litigation fees just to tee up constitutional challenges for far-off judicial review.

The FTC's jurisdiction is extraordinarily broad: the agency administers more than 70 federal statutes. *See* FTC, *Statutes Enforced or Administered by the Commission*, https://www.ftc.gov/enforcement/statutes. Those statutes endow the FTC with sweeping powers over the economy, including the authority to regulate nebulous concepts like "unfair methods of competition" and "unfair or deceptive acts" in commerce, 15 U.S.C. § 45(a)(1). Through enforcement proceedings, the FTC can issue cease-and-desist orders upending existing business practices. *Id.* § 45(b). Not only that, the FTC can refer companies to the Attorney General for criminal prosecution and, upon request, "make recommendations for the readjustment of the business" to ensure compliance with antitrust laws. *Id.* § 46(a), (e), (k).

Yet the FTC brings the full weight of the government's coercive powers to bear upon businesses' operational decisions with few checks on its discretion. The FTC only needs "reason to believe" that companies or individuals have engaged in unfair methods of competition to launch enforcement proceedings. *Id.* § 45(b). And the FTC can pick its preferred forum: the FTC decides whether to ask the Department of Justice to initiate suit in federal court, or to instead subject companies to its own enforcement proceedings. App-27.

The FTC does not disclose why or how it chooses between those diametrically different options of forum, yet that choice dictates whether private parties enjoy the full

panoply of rights that come from litigating before an Article III court, or instead face an administrative process lacking in key procedural protections. In federal-court proceedings, the Federal Rules of Evidence and Civil Procedure apply; private parties enjoy full cross-examination rights; Article III judges develop the record; and courts of appeals review district-court factfinding for clear error. But if the FTC instead opts for agency enforcement proceedings, FTC ALJs preside over hearings, which need not comply with the Federal Rules of Evidence, *see* 16 C.F.R. § 3.43. Those ALJs, not courts, make initial factual and legal findings, *id.* § 3.51. FTC Commissioners in turn review ALJ findings without taking new evidence, *id.* § 3.54. Federal courts of appeals then review the FTC's final decision—but courts of appeals apply the deferential standards of the Administrative Procedure Act. *E.g.*, *ECM v. BioFilms, Inc. v. FTC*, 851 F.3d 599, 609, 612 (6th Cir. 2017). Thus, by picking its home turf, the FTC guarantees that Article III judges review the agency's work only through a highly deferential lens.

Further, when the FTC subjects parties to agency enforcement proceedings, the Commission serves as both prosecutor and judge. Like a prosecutor, the Commission initiates enforcement proceedings by filing a complaint. 15 U.S.C. § 45(b). The ALJ then adjudicates the complaint. But the Commission then circles back and acts as the final judge of whether the party has violated any laws. *See* 16 C.F.R. §§ 3.51(b), 3.52. The upshot of the Commission's dual-hatted role is that in the past 25 years, "in 100 percent of the cases where the administrative law judge" rules in the FTC's favor, "the Commission affirm[s] liability; and in 100 percent of the cases in which the administrative law judge" finds "no liability, the Commission reverse[s]." Joshua D. Wright, *Section 5 Revisited: Time for the FTC to Define the Scope of Its Unfair Methods of Competition Authority* at 6 (Feb. 26, 2015),

https://www.ftc.gov/system/files/documents/public_statements/626811/150226bh_section_5_symposium.pdf. As the Ninth Circuit observed, "[e]ven the 1972 Miami Dolphins would envy that type of record." App-26.

Faced with the FTC's unblemished record of success in its self-initiated and self-managed proceedings, parties very frequently succumb to intense settlement pressures rather than bearing the expense of administrative proceedings where they are virtually certain to lose. As a former FTC Commissioner explained, the FTC elicits "cheap settlements" due to "the perception that administrative litigation at the FTC is biased strongly in favor of the Commission and that the definition of what constitutes an unfair method of competition is so hopelessly vague that it can be manipulated to fit nearly any set of facts." Jan M. Rybnicek & Joshua D. Wright, *Defining Section 5 of the FTC Act: The Failure of the Common Law Method and the Case for Formal Agency Guidelines*, 21 Geo. Mason L. Rev. 1287, 1307 (2014).

These dynamics illustrate that, for most parties subjected to FTC enforcement proceedings, justice delayed is justice denied when it comes to challenging the constitutionality of those proceedings. Few parties are willing or able to shoulder the burdens of these proceedings in the hopes that their constitutional challenges will eventually see the light of a courthouse years later. For many parties, then, the lack of pre-enforcement review forecloses judicial review altogether. And the number of affected parties is likely to grow rapidly given the FTC's interest in further ramping up its antitrust enforcement efforts. *See, e.g.,* John D. McKinnon, *FTC Vote to Broaden Agency's Mandate Seen as Targeting Tech Industry*, Wall St. J. (Jul. 1, 2021).

3. This case is an ideal vehicle to resolve this jurisdictional question, and there is no time to lose. The Court

has denied certiorari on this question in the SEC context, most recently in *Gibson v. SEC*, 141 S. Ct. 1125 (2021) (Mem.). But, as the government observed in *Gibson*, *Axon* "present[s] [a] better vehicle[]" than *Gibson* "for resolving" this question because the Ninth Circuit has stayed FTC proceedings. U.S. Cert. Resp. Br. at 13, *Gibson v. SEC*, 141 S. Ct. 1125 (2021). Further, judges on numerous courts of appeals have parted ways, and the en banc Fifth Circuit is considering the jurisdictional question in the materially identical SEC context.[2] No further percolation is needed.

II. THE COURT SHOULD ALSO RESOLVE THE CONSTITUTIONALITY OF MULTI-LAYER ALJ TENURE PROTECTIONS

If the Court grants review of the first question presented, the Court should also address the constitutionality of insulating FTC ALJs from presidential supervision through multiple layers of tenure protection. The Court's precedents so clearly foreclose that structure that this Court should not allow that blatant constitutional violation to persist any longer.

1. By vesting the President alone with "the executive Power," U.S. Const. art. II, § 1, cl. 1, the Constitution requires that the President have a means of directing subordinates within the Executive Branch as to the execution of the law. *Free Enter. Fund*, 561 U.S. at 492-93. Because "removal at will" is the "most direct method of

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[2] *Cochran v. SEC*, 969 F.3d 507, 510 (5th Cir. 2020); *id.* at 519 (Haynes, J., dissenting in part); *Cochran v. SEC*, 978 F.3d 975, 975-76 (5th Cir. 2020) (granting rehearing en banc); *Gibson v. SEC*, 795 F. App'x 753, 754 (11th Cir. 2019); *Tilton v. SEC*, 824 F.3d 276, 291 (2d Cir. 2016), *cert. denied*, 137 S. Ct. 2187 (2017); *id.* at 292 (Droney, J., dissenting); *Bennett v. SEC*, 844 F.3d 174, 188 (4th Cir. 2016); *Bebo v. SEC*, 799 F.3d 765, 767 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1500 (2016).

presidential control," *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2204 (2020), "the Constitution gives the President 'the authority to remove those who assist him in carrying out his duties,'" *id.* at 2191 (quoting *Free Enter. Fund*, 561 U.S. at 513-14).

This Court's precedents leave no doubt that the multiple layers of tenure protection separating FTC ALJs from presidential accountability are unconstitutional. Over a decade ago, in *Free Enterprise Fund*, this Court held that insulating Executive Branch officers from presidential supervision through multiple layers of tenure protection violates the separation of powers. 561 U.S. at 492. There, members of the PCAOB were removable only for cause, and they could in turn be removed by SEC Commissioners who themselves were removable only for cause. *Id.* at 487. That structure was unconstitutional, the Court explained, because "[n]either the President, nor anyone directly responsible to him, nor even an officer whose conduct he may review only for good cause, has full control over the Board." *Id.* at 496.

This prohibition on multi-layer tenure protections extends to Executive Branch ALJs. Three years ago, in *Lucia v. SEC*, 138 S. Ct. 2044, 2053-54 (2018), the Court held that SEC ALJs—who perform similar functions as FTC ALJs—are Executive Branch officers, not mere employees. Just last Term, in *United States v. Arthrex*, 141 S. Ct. 1970, 1982 (2021), the Court reiterated that Executive Branch adjudicators must be just as accountable to the President as any other officer. Those adjudicators "exercise executive power and must remain 'dependent on the President'" even though their duties "'partake of a Judicial quality as well as executive." *Id.* at 1982 (quoting 1 Annals of Cong., at 611-12 (J. Madison)).

Today, FTC ALJs' multi-layer tenure protections thus appear constitutionally indefensible. FTC ALJs are

plainly Executive Branch officers. Yet, to remove an FTC ALJ, the FTC itself must initiate removal proceedings and a separate agency, the Merit Systems Protection Board (MSPB), must then find "good cause" for the ALJ's removal. 5 U.S.C. § 7521(a). But the President may only remove FTC Commissioners for "inefficiency, neglect of duty, or malfeasance in office." 15 U.S.C. § 41. And the President is equally constrained by for-cause tenure protections in removing members of the MPSB. *See* 5 U.S.C. § 1202(d). Thus, just as in *Free Enterprise Fund*, at least two layers of tenure protection hamstring the President's ability to oversee FTC ALJs, through removal if necessary. 561 U.S. at 496. That structure is unconstitutional, as "the President can neither oversee [those officers] himself nor attribute [their] failings to those whom he can oversee." *Arthrex*, 141 S. Ct. at 1982 (internal quotations omitted).

2. This constitutional defect is widely acknowledged. The United States expressed concern as early as 2017 that ALJs' multi-layered tenure protections raise severe constitutional concerns. Gov't Cert. Resp. 20-21, *Lucia*, 138 S. Ct. 2044 (2018) (No. 17-130); Gov't Br. 47-48, *Lucia*, 138 S. Ct. 2044 (2018) (No. 17-130). Indeed, the United States urged the Court to address the ALJ tenure-protection question in *Lucia*, explaining that "[i]t is critically important that the Court . . . address whether the restrictions imposed by statute on [SEC ALJs'] removal are consistent with the constitutionally prescribed separation of powers." Gov't Cert. Resp. 21, *Lucia*, 138 S. Ct. 2044 (No. 17-130).

Yet, despite the obviousness of the constitutional defect, the Ninth Circuit just recently upheld Department of Labor ALJs' multi-layered tenure protections based on a cramped reading of this Court's precedents. *Decker Coal Co. v. Pehringer*, No. 20-71449, 2021 WL 3612787, at

*10 (9th Cir. Aug. 16, 2021). That the Ninth Circuit has now set a course inconsistent with the Court's separation-of-powers precedents is all the more reason to grant both questions presented. Failing to address the tenure-protection issue will only "needlessly prolong[] the period of uncertainty and turmoil caused by litigation of these issues." Gov't Cert. Resp. 21, *Lucia*, 138 S. Ct. 2044 (No. 17-130).

Resolving this issue is even more imperative now. The FTC currently employs a single ALJ who hears dozens of cases each year. *See* Office of Personnel Management, *Administrative Law Judges: ALJs by Agency*, https://www.opm.gov/services-for-agencies/administrative-law-judges/#url=ALJs-by-Agency. If the multi-layer tenure problem calls all of those decisions into question and demands do-overs, the FTC's adjudicatory work could grind to a halt. That result is particularly concerning given that adjudications are at the core of the FTC's authority, whereas broad unfair methods of competition rulemaking by the FTC raises significant statutory and constitutional concerns. *See* Maureen K. Ohlhausen & James Rill, *Pushing the Limits? A Primer on FTC Competition Rulemaking*, U.S. Chamber of Commerce (Aug. 12, 2021), https://www.uschamber.com/sites/default/files/ftc_rulemaking_white_paper_aug12.pdf. So miring adjudications in constitutional debate threatens to undermine the FTC's work writ large. The longer this issue festers, the more destabilizing its resolution could be. And this case presents a particularly attractive posture, since the petitioner has sought initial judicial review and thus has no need to unwind defective agency proceedings.

Further, many other agencies' ALJs enjoy similar tenure protections. The federal government relies on over a thousand ALJs to adjudicate administrative matters in over 25 agencies. *See* Office of Personnel

Management, *Administrative Law Judges: ALJs by Agency*. Each of those ALJs enjoys at least two layers of tenure protection, because each is removable only upon a finding a "good cause" by the MSPB, whose members are themselves removable only for cause. *See* 5 U.S.C.§ 7521(a).

Compounding the problem, many of the agencies that use ALJs, including the FTC, SEC, Federal Depository Insurance Corporation, National Labor Relations Board, and International Trade Commission, are headed by individuals whom the President cannot remove at will. *See id.* (listing agencies using ALJs); 29 U.S.C. § 153(a) (NLRB); 19 U.S.C. § 1330 (ITC); 15 U.S.C. § 78d (SEC); 12 U.S.C. § 1812(a)(1) (FDIC). So the President faces further obstacles in his ability to direct these agencies to initiate removal proceedings.

Without this Court's guidance, agencies will have no choice but to continue conducting unconstitutional enforcement proceedings; agencies cannot invalidate their own statutes. *See*, *e.g.*, *Diaz*, 426 U.S. at 76. Being hauled before an unconstitutionally unaccountable adjudicator "inflict[s] . . . harm[s]" that may require invalidating the whole proceeding. *See Collins v. Yellen*, 141 S. Ct. 1761, 1789 (2021). Delaying resolution of this issue will only magnify the remedial consequences, as more and more unconstitutional adjudications take place each year. By resolving this question now, in a pre-enforcement posture, the Court can offer an ounce of prevention to save the courts a pound of cure going forward.

CONCLUSION

For the foregoing reasons, the Court should grant the petition.

Respectfully submitted,

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