No. 21-86

In the Supreme Court of the United States

AXON ENTERPRISE, INC., PETITIONER

v.

FEDERAL TRADE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a federal district court has jurisdiction to hear a suit in which a respondent in an ongoing Federal Trade Commission (FTC or Commission) administrative proceeding seeks to enjoin that proceeding based on an alleged constitutional defect in the statutory provisions that govern removal of the FTC's administrative law judge (ALJ).

2. Whether the removal protections accorded to the Commission's ALJ violate the separation of powers.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-46a) is reported at 986 F.3d 1173. The order of the district court (Pet. App. 49a-89a) is reported at 452 F. Supp. 3d 882.

JURISDICTION

The judgment of the court of appeals was entered on January 28, 2021. A petition for rehearing was denied on April 15, 2021 (Pet. App. 47a-48a). The petition for a writ of certiorari was filed on July 20, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress has created a comprehensive scheme for the commencement and review of civil enforcement proceedings by the Federal Trade Commission (FTC or Commission). The Federal Trade Commission Act

(FTC Act) forbids "[u]nfair methods of competition * * * and unfair or deceptive acts or practices" that affect commerce. 15 U.S.C. 45(a)(1). In addition, the Clayton Act prohibits acquisitions that may "substantially * * * lessen competition" or "tend to create a monopoly." 15 U.S.C. 18. If the Commission has "reason to believe" that a person has violated those provisions, it may initiate an administrative proceeding to determine whether the person has in fact done so. 15 U.S.C. 21(b), 45(b). If the FTC concludes that the respondent has committed a violation, the Commission "shall issue" an order requiring the respondent "to cease and desist" from the unlawful practice. 15 U.S.C. 45(b). That order can later be enforced in federal court. 15 U.S.C. 45(*l*).

The initial stages of an FTC administrative proceeding are typically assigned to an administrative law judge (ALJ). 16 C.F.R. 0.14. The ALJ conducts prehearing proceedings—including holding conferences, receiving legal briefs and motions, and overseeing discovery—and then conducts an evidentiary hearing. 16 C.F.R. 3.21-3.22, 3.31, 3.41. After the hearing, the ALJ issues an initial decision. 16 C.F.R. 3.51. Either party may appeal an adverse decision to the Commission, or the Commission may review it on its own initiative. 16 C.F.R. 3.52-3.53. If the ALJ's decision is not reviewed, it becomes the decision of the Commission. 16 C.F.R. 3.51(a). If it is reviewed, the Commission considers the case de novo and issues a final decision. 16 C.F.R. 3.54.

If the FTC enters a cease-and-desist order, the respondent "may obtain a review of such order in the court of appeals" where the alleged violation took place or where the respondent resides or carries on business. 15 U.S.C. 45(c). Once the Commission files the record with the court of appeals, "the jurisdiction of the court

of appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive." 15 U.S.C. 45(d).

On judicial review, the FTC's factual findings are "conclusive" if "supported by evidence." 15 U.S.C. 45(c). Either party may ask the court of appeals to remand the case to the Commission so that it can take additional evidence, if "there were reasonable grounds for the failure to adduce such evidence in the [initial] proceeding." *Ibid.* The court of appeals may stay the cease-and-desist order pending judicial review. 15 U.S.C. 45(g)(2). The FTC Act further specifies that certain cease-and-desist orders will not become final until after all judicial review in the courts of appeals and this Court has been completed. 15 U.S.C. 45(g)(4).

2. Petitioner Axon Enterprise, Inc., formerly known as TASER International, Inc., manufactures nonlethal policing equipment. Pet. App. 51. After petitioner acquired one of its competitors in 2018, the FTC began to investigate the acquisition. *Ibid.*

On January 3, 2020, petitioner filed suit in federal district court, seeking an injunction against any administrative proceeding that the FTC might initiate. Pet. App. 52. Petitioner alleged that any such administrative proceeding would violate the Fifth Amendment's Due Process Clause; that the statutory restrictions on the removal of the FTC Commissioners and its ALJ violated the separation of powers; and that petitioner was entitled to a declaratory judgment that its acquisition of a competitor did not violate the antitrust laws. *Id.* at 3-4.

Later that same day, the FTC initiated an administrative proceeding against petitioner, stating that the Commission had reason to believe that petitioner's

acquisition of its closest competitor violated the FTC Act and the Clayton Act because it severely limited competition for body-worn cameras. Pet. App. 52. In its answer to the administrative complaint, petitioner raised defensively the same claims it had raised in district court—that the complaint failed to allege a violation of the FTC Act or the Clayton Act, that the statutory restrictions on removal of the Commissioners and the ALJ violated the separation of powers, and that the administrative proceeding violated the Due Process Clause of the Fifth Amendment. Answer and Defenses at 20-22, *In re Axon* (FTC Jan. 21, 2020), https://go.usa.gov/xveWJ (First, Thirteenth, Sixteenth, and Seventeenth affirmative defenses); Amended Answer and Defenses at 20-23, *In re Axon* (FTC Mar. 2, 2020), https://go.usa.gov/xveZ8 (First, Fourteenth, Fifteenth, Seventeenth, and Eighteenth affirmative defenses).

3. In the district court, petitioner sought a preliminary injunction forbidding the FTC from conducting the administrative proceeding. Pet. App. 4. The court dismissed the complaint for lack of subject-matter jurisdiction. The court explained that, although district courts generally have jurisdiction over cases that arise under federal law, 28 U.S.C. 1331, Congress may implicitly preclude district-court jurisdiction over a particular category of suits by creating an alternative review scheme that bypasses the district courts and vests judicial review of agency action directly in the courts of appeals. Pet. App. 53-54.

The district court determined that Congress had created such an alternative review scheme here. Pet. App. 54-61, 89. It observed that the FTC Act "sets out a detailed scheme for preventing the use of unfair methods

of competition," with "enforcement provisions [that] create timelines and mechanisms for adjudicating alleged violations," and vests the courts of appeals with "exclusive jurisdiction" to review the agency's orders. *Id.* at 62. The court explained that this "detailed structure" for administrative adjudication and direct review in the courts of appeals demonstrates Congress's intent to preclude district courts from exercising jurisdiction over challenges like petitioner's. *Ibid.* (citation omitted).

The district court also observed that this Court had identified three factors as relevant to discerning whether Congress had channeled a particular claim to the court of appeals rather than to the district court: (1) whether the plaintiff can obtain meaningful judicial review, (2) whether the claim is "'wholly collateral'" to the statutory scheme, and (3) whether the claim lies "outside the agency's expertise." Pet. App. 66 (quoting *Elgin* v. *Department of the Treasury*, 567 U.S. 1, 15-16 (2012); *Free Enter. Fund* v. *Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 489-490 (2010)). The court determined that each of those three factors supported its conclusion that it lacked jurisdiction over petitioner's claims. *Id.* at 67-89.

First, the district court explained that petitioner could receive meaningful judicial review by presenting its claims in the administrative proceeding and, if aggrieved by a final agency decision, on judicial review in the court of appeals. Pet. App. 67-79. Second, the court determined that petitioner's claims were not "wholly collateral" to the administrative proceedings because petitioner retained the "ability to raise this challenge as part of the enforcement proceedings." *Id.* at 83. Third, the court concluded that the Commission could bring its

expertise to bear on petitioner's claims by addressing non-constitutional merits questions, which might "fully dispose of the case" and thus "avoid the need to reach [the] constitutional claims." *Id.* at 86 (citation omitted).

4. The court of appeals affirmed. Pet. App. 1-46.

The court of appeals "join[ed] every other circuit that has addressed a similar issue" in concluding that the district court lacked jurisdiction over petitioner's challenge to a pending administrative proceeding. Pet. App. 3. The court explained that the FTC Act's structure "reflect[ed] a fairly discernible intent to preclude district court jurisdiction." *Id.* at 10.

Examining the same three factors that the district court had considered (Pet. App. 11-26), the court of appeals first concluded that the FTC Act provides "meaningful judicial review of [petitioner's] claims" because those claims "can be meaningfully addressed in the Court of Appeals" after the administrative proceedings conclude. *Id.* at 12 (citation and emphasis omitted). Second, the court determined that, far from being "wholly collateral" to the enforcement proceedings, petitioner's claims were "'the vehicle by which'" it seeks to prevail in those very proceedings. *Id.* at 21-22 (citation omitted). Finally, although the court of appeals believed that "there [wa]s little room for the FTC to bring its expertise to bear," it concluded that the first two factors outweighed that consideration. *Id.* at 24; see *id.* at 24-26.

Judge Bumatay dissented. Pet. App. 29-46. He would have held that, although the district court lacked jurisdiction over petitioner's due-process challenge to the FTC's adjudicatory process, *id.* at 44-46, it had jurisdiction over (1) petitioner's due-process and equal-protection challenge to the process by which the Com-

mission decides whether to initiate administrative proceedings, *id.* at 35-41, and (2) petitioner's Article II challenge to the tenure protections afforded to the FTC's ALJ, *id.* at 42-44.

ARGUMENT

Petitioner contends (Pet. 19-28) that it may bypass the statutory scheme for judicial review of FTC cease-and-desist orders by filing an action in district court seeking to have the antecedent administrative proceedings enjoined on constitutional grounds. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or another court of appeals. This Court has previously denied petitions for writs of certiorari raising similar questions under virtually identical statutory schemes. See *Gibson* v. *SEC*, 141 S. Ct. 1125 (2021) (No. 20-276); *Tilton* v. *SEC*, 137 S. Ct. 2187 (2017) (No. 16-906); *Bebo* v. *SEC*, 577 U.S. 1236 (2016) (No. 15-997). The same course is warranted here.

On the merits, petitioner contends (Pet. 29-32) that the Commission's ALJ enjoys unconstitutional protections from removal. But the courts below never reached the merits, and there would be no sound reason for this Court to do so in the first instance, even if the Court concluded that the district court had jurisdiction over petitioner's suit.

1. a. This Court's decisions establish a framework "for determining whether a statutory scheme of administrative and judicial review provides the exclusive means of review for constitutional claims." *Elgin* v. *Department of the Treasury*, 567 U.S. 1, 8 (2012). Under that framework, the Court first asks whether "Congress' intent to preclude district court jurisdiction [i]s 'fairly discernible in the statutory scheme.'" *Id.* at 9

(citation omitted). As a general matter, a court may fairly discern from Congress's enactment of an elaborate and comprehensive scheme for reviewing agency action that Congress did not mean to allow litigants to challenge such action outside that scheme. In *Elgin*, for example, the Court held that the civil-service laws' "'elaborate' framework" for reviewing federal employees' challenges to employment decisions "demonstrates Congress' intent" to foreclose review of constitutional claims outside that framework. *Id.* at 11 (citation omitted). Similarly in *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200 (1994), the Court held that the enactment of a "comprehensive enforcement structure" for mine-safety laws "establishes a 'fairly discernible' intent to preclude district court review" of constitutional challenges to those laws. *Id.* at 216.

Even where exclusivity is fairly discernible from the statutory scheme, this Court has held that particular claims may proceed outside that scheme if they are not "of the type Congress intended to be reviewed within th[e] statutory structure." *Thunder Basin*, 510 U.S. at 212. The Court "presum[es] that Congress does not intend to limit * * * jurisdiction" if (1) "'a finding of preclusion could foreclose all meaningful judicial review,'" (2) the suit is "'wholly collateral to a statute's review provisions,'" and (3) the claims lie "'outside the agency's expertise.'" *Elgin*, 567 U.S. at 15 (citation omitted).

In this case, exclusivity is fairly discernible from the statutory scheme. Congress has allowed any individual, partnership, or corporation subject to an FTC cease-and-desist order to seek review in the circuit where the alleged violation took place or where he resides or carries on business. See 15 U.S.C. 45(c). It has prescribed the contents of the agency record in that review pro-

ceeding, the standard of review of the FTC's factual findings, the process for seeking a stay, the rules governing remands to the FTC for additional evidence, and the process by which the FTC's order becomes final. See pp. 2-3, *supra*. "Given the painstaking detail with which the [law] sets out the method for [respondents in FTC enforcement proceedings] to obtain review of adverse [decisions], it is fairly discernible that Congress intended to deny such [persons] an additional avenue of review in district court." *Elgin*, 567 U.S. at 11-12.*

In addition, there is no sound basis for concluding that petitioner's claims are "of the type Congress intended to be reviewed [outside] th[e] statutory structure." *Thunder Basin*, 510 U.S. at 212. First, "a finding of preclusion" of petitioner's current constitutional claims would not "foreclose all meaningful judicial review." *Elgin*, 567 U.S. at 15 (citation omitted). To the contrary, it would simply mean that, instead of filing suit in district court before the FTC proceedings conclude, petitioner must seek review in a court of appeals if the Commission determines in its final decision that a cease-and-desist order should be issued. At that point,

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* Petitioner suggests (Pet. 21) that the review scheme established by 15 U.S.C. 45 is "more narrow[]" than other statutory review schemes because it "specifically addresses only FTC 'cease and desist' orders" rather than all FTC orders. Pet. 21. That is incorrect. In an administrative proceeding under 15 U.S.C. 45, the Commission either finds the respondent not liable and issues an order terminating the proceeding, or finds the respondent liable and issues a cease-and-desist order. See 15 U.S.C. 45(b) (upon finding a violation, the FTC "shall issue and cause to be served on" the respondent an order "to cease and desist from using such method of competition or such act or practice"). Under the statute, there are no other orders that the FTC might issue that would lie beyond the review scheme.

the court of appeals can consider petitioner's claims and, if appropriate, can vacate the FTC's order and award other suitable relief. In *Lucia* v. *SEC*, 138 S. Ct. 2044 (2018), for example, the Court considered an Appointments Clause challenge similar to petitioner's in the course of reviewing a final agency order issued after administrative proceedings had concluded. *Id.* at 2055. The Court held that the ALJ who had ruled in Lucia's case had been unconstitutionally appointed, and it ordered a new hearing before a different, properly appointed ALJ. *Ibid.*

Second, petitioner's claims are not "wholly collateral to [the] statute's review provisions." *Elgin*, 567 U.S. at 15 (citation omitted). Quite the contrary, petitioner's claims are "the vehicle by which [petitioner] seeks to prevail" in those very proceedings. Pet. App. 22 (internal quotation marks omitted). Put another way, petitioner's claims "do not arise 'outside' the [FTC] administrative enforcement scheme"; rather, "they arise from actions the [FTC] took in the course of that scheme." *Jarkesy* v. *SEC*, 803 F.3d 9, 23 (D.C. Cir. 2015).

Third, petitioner's claims do not lie "'outside the agency's expertise.'" *Elgin*, 567 U.S. at 15 (citation omitted). Although an agency may lack expertise on matters of constitutional interpretation, it can still "apply its expertise" to the "many threshold questions that may accompany a constitutional claim," potentially "obviat[ing] the need to address the constitutional challenge." *Id.* at 22-23. Here, for example, the FTC could bring its expertise to bear on issues concerning petitioner's compliance or non-compliance with the antitrust laws, potentially obviating the need for judicial review if the FTC concludes that no violation has occurred. See Pet. App. 88 ("Axon maintains it has done

nothing wrong. The FTC, in applying its expertise, may agree."). In such circumstances, there is "no reason to conclude that Congress * * * exempt[ed] such claims from exclusive review" through the channels specified in the statute. *Elgin*, 567 U.S. at 23.

b. Petitioner's contrary arguments lack merit. Petitioner characterizes (Pet. 20-21) the court of appeals' decision as a "jurisdiction-stripping" rule and argues that Congress may adopt such a rule only through "clear textual language." In *Elgin*, however, this Court distinguished between (1) "a statute that purports to 'deny any judicial forum for a colorable constitutional claim'" and (2) a statute that "simply channels judicial review of a constitutional claim to a particular court." 567 U.S. at 9 (citation omitted). The Court explained that its precedents require a clear statement to "foreclose all judicial review" of a constitutional claim, but that no such clear statement is needed when Congress "merely directs that judicial review shall occur in [a specified court]." *Id.* at 10.

Here, Congress has not deprived petitioner of all judicial review of its constitutional claims. Rather, it has simply required that review to take place in the court of appeals, if and when the Commission issues a cease-and-desist order, rather than in the district court. No clear-statement requirement applies in order for that review scheme to be deemed exclusive.

Petitioner also argues (Pet. 22-23, 25-26) that the decision below conflicts with this Court's decision in *Free Enterprise Fund* v. *Public Co. Accounting Oversight Board*, 561 U.S. 477 (2010). That is incorrect. In *Free Enterprise Fund*, an accounting firm argued that the "existence" of the Public Company Accounting Oversight Board violated the Appointments Clause and the

separation of powers. *Id.* at 490. The Court explained that such a "general challenge to the Board" was collateral to "any [particular] orders or rules from which review might be sought," and that "[r]equiring [the firm] to select and challenge a Board rule at random" would have been "an odd procedure for Congress to choose." *Ibid.* The Court rejected the suggestion that the firm could secure judicial review by refusing to comply with a Board request for documents or testimony and then "rais[ing] [its] claims by appealing a Board sanction." *Ibid.* The Court refused to "require plaintiffs to bet the farm by taking the violative action before testing the validity of the law." *Ibid.* (citation, ellipsis, and internal quotation marks omitted).

In contrast to the accounting firm in *Free Enterprise Fund*, petitioner does not need to "select and challenge a [Commission action] at random." 561 U.S. at 490. Nor is it required to "bet the farm by taking the violative action before testing the validity of the law." *Ibid.* (citation, ellipsis, and internal quotation marks omitted). Petitioner is already subject to a pending Commission proceeding arising out of its past actions; its constitutional challenges go to the FTC's conduct of that very proceeding; and it has presented those same challenges as defenses to the FTC's administrative enforcement action. It is not "odd," but rather entirely natural, for Congress to have insisted that petitioner pursue those constitutional challenges through the scheme Congress established for reviewing the outcome of the administrative proceeding. *Ibid.*

Petitioner asserts (Pet. 19-20) that it will suffer irremediable harm simply from "endur[ing] [an] unconstitutional process" before the FTC. In *FTC* v. *Standard Oil Co.*, 449 U.S. 232 (1980), however, this Court rejec-

ted a similar effort to enjoin an ongoing FTC enforcement proceeding that had allegedly been commenced unlawfully. The Court held that the Commission's issuance of an administrative complaint was neither "final agency action" nor otherwise "directly reviewable" under Section 10(c) of the Administrative Procedure Act, 5 U.S.C. 704. 449 U.S. at 238; see *id.* at 239-246. The Court explained that "the Commission's issuance of a complaint averring reason to believe that [the plaintiff] was violating the [FTC] Act is not a definitive ruling or regulation," and that "immediate judicial review would serve neither efficiency nor enforcement of the Act." *Id.* at 243. The Court further explained that a court could consider the lawfulness of the proceeding after it ended and that, in the meantime, the "expense and annoyance of litigation is part of the social burden of living under government." *Id.* at 244-245 (citation and internal quotation marks omitted).

Standard Oil involved a statutory rather than a constitutional challenge, but nothing in the Court's reasoning turned on that point. As applied to petitioner's suit and others like it, the effect of the comprehensive statutory scheme that governs judicial review of FTC cease-and-desist orders thus is simply to preclude immediate review of FTC administrative complaints that have traditionally been unreviewable under background administrative-law principles.

c. As petitioner acknowledges (Pet. 27), the decision below does not conflict with any decision of another court of appeals. Every court of appeals to consider the issue has agreed that parties in petitioner's position may not bypass the statutory review scheme for challenging the final decision in an agency adjudication by suing in district court to enjoin an ongoing adminis-

trative proceeding. See *Tilton* v. *SEC*, 824 F.3d 276 (2d Cir. 2016), cert. denied, 137 S. Ct. 2187 (2017); *Bennett* v. *SEC*, 844 F.3d 174 (4th Cir. 2016); *Bebo* v. *SEC*, 799 F.3d 765 (7th Cir. 2015), cert. denied, 577 U.S. 1236 (2016); *Hill* v. *SEC*, 825 F.3d 1236 (11th Cir. 2016); *Jarkesy*, 803 F.3d 9 (D.C. Cir.).

One court of appeals, however, is still considering a close variant of the question presented here. In *Cochran* v. *SEC*, No. 19-10396, the Fifth Circuit has granted rehearing en banc to determine whether a party to an enforcement proceeding before the Securities and Exchange Commission—whose statutory review scheme is materially identical to the statutory review scheme at issue in this case, see Pet. 27 & n.3—may challenge the statutory restrictions on removal of ALJs by filing suit in district court. See *Cochran* v. *SEC*, 978 F.3d 975 (5th Cir. 2020, argued Jan. 20, 2021). If a circuit conflict emerges as a result of the Fifth Circuit's decision, this Court's review may be warranted at that time. For now, however, the uniformity of the courts of appeals' decisions makes this Court's intervention unnecessary.

2. On the merits, petitioner argues (Pet. 29-32) that the FTC's ALJ is unconstitutionally insulated from presidential control. This Court could not decide the merits of petitioner's constitutional challenge unless it first determined that petitioner's suit fell within the jurisdiction of the district court. And even if the Court reached that conclusion, it would be contrary to the Court's usual practice for it to resolve the separation-of-powers issue in the first instance. Because both of the courts below concluded that the district court lacked jurisdiction over petitioner's challenge, they never reached the merits. This Court is "a court of review, not of first view," *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7

(2005), and it does "not normally strain to address issues * * * that the district and appellate courts have had no opportunity to consider," *Comcast Corp.* v. *National Ass'n of African American-Owned Media*, 140 S. Ct. 1009, 1018 n.* (2020). In *Free Enterprise Fund*, by contrast, the lower courts had exercised jurisdiction and had resolved the merits of the plaintiffs' constitutional challenge. See 561 U.S. at 488.

Various courts of appeals are currently considering similar constitutional challenges in the course of reviewing final agency orders issued after the completion of administrative proceedings, where the jurisdictional obstacles present in this case are not implicated. One court of appeals recently rejected such a constitutional challenge, see *Decker Coal Co.* v. *Pehringer*, 8 F.4th 1123 (9th Cir. 2021), while two others are still considering the question, see *Jarkesy* v. *SEC*, No. 20-61007 (5th Cir. 2020); *K&R Contractors* v. *Keene*, No. 20-2021 (4th Cir. 2020). That, too, shows that this Court's review would be premature.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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