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 United States Court of Appeals for the Ninth Circuit

REPLY BRIEF

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October 6, 2021

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

REPLY BRIEF

The government does not deny the importance of the questions presented. That is unsurprising; whether federal courts can hear constitutional challenges to the structure of federal agencies in time for private parties to avoid irreparable injury and get meaningful relief is as important as it gets, rivaled only by whether federal officers are systematically wielding executive power unconstitutionally. Indeed, the government all but admits that the questions presented are cert-worthy; it would just prefer this Court to grant the government's own petition after the en banc Fifth Circuit rejects its position (which may happen any day now). But there is no reason to wait, and there is every reason not to.

The panel majority itself acknowledged that the result it reached "makes little sense." Pet.App.18. That is an understatement. Under the decision below, Axon must endure "the very harms it seeks to avoid" for years before any court can hear its constitutional "challenges [to] the very existence of the Federal Trade Commission"—at which point no court will be able to provide a meaningful remedy for the constitutional injury Axon suffered along the way. Pet.App.28, 43 (Bumatay, J., dissenting in relevant part). Nothing in this Court's precedent compels that nonsensical result; in fact, the Court's decision in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 561 U.S. 477 (2010), precludes it. That multiple courts have failed to recognize as much just makes the need for this Court's intervention all the more acute.

The case for certiorari is even stronger given that Axon's "underlying constitutional challenge is not open to serious doubt." Chamber.Br.5. No additional percolation—which could take years and necessitate multiple trips to this Court if the government has its way—is needed to confirm what this Court's precedents already make plain: The dual-layer for-cause removal protections afforded FTC ALJs are flatly inconsistent with Article II. Indeed, the government conspicuously does not even try to explain how the Court could reach a different conclusion after *Free Enterprise Fund* and *Lucia v. SEC*, 138 S.Ct. 2044 (2018).

At a bare minimum, the Court should hold this petition until the en banc Fifth Circuit rules in *Cochran v. SEC*, No. 19-10396. The en banc court vacated a panel decision in the government's favor and heard oral argument more than nine months ago, so a decision is likely imminent, and the government all but promises to file its own petition if the en banc court does not reinstate the vacated decision. Should the Court prefer to await resolution of that case, holding this petition would make sense to maximize the chances that the Court can resolve these concededly critical issues this Term, rather than consign ever more private parties to unconstitutional proceedings just as the FTC is promising to ramp up its enforcement efforts. But the far better course is to grant certiorari now and put an end to the systematic denial of effective judicial review and this blatantly unconstitutional regime.

ARGUMENT

I. The Court Should Grant Certiorari To Decide Whether Congress Impliedly Stripped District Courts Of Jurisdiction Over Constitutional Challenges To The FTC's Structure, Procedures, And Existence.

1. The decision below cannot be reconciled with the jurisdictional holding of *Free Enterprise Fund*. There, this Court rejected the argument that a post-hoc review mechanism foreclosed all other judicial review when (as here) a party seeks to challenge the constitutionality of an agency's structure rather than the outcome of any particular agency proceeding. 561 U.S. at 489-91. Applying factors drawn from *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 212-16 (1994), the Court explained that district court jurisdiction was not foreclosed in such cases because: (1) after-the-fact review is not "meaningful" when it comes too late to remedy the "here-and-now" injuries of a party subjected to the actions of an unconstitutionally insulated officer wielding executive power; (2) constitutional objections to an agency's structure are "'collateral' to any [agency] orders or rules from which review might be sought" because they do not depend on the merits of any particular agency order; and (3) such structural constitutional claims lay well "outside the [agency's] competence and expertise." *Free Enter. Fund*, 561 U.S. at 489-91.

That holding compels reversal here. Just as in *Free Enterprise Fund*, Axon's "constitutional challenge against the agency's structure" goes to the FTC's very "existence." Pet.App.18; *see* BIO.11-12. Accordingly, just as in *Free Enterprise Fund*, (1) after-

the-fact review is not meaningful, as forcing Axon to endure unconstitutional FTC proceedings before it can get its day in court would cause irreparable injury that such review could not meaningfully remedy; (2) Axon's challenge to the FTC's constitutionality and structure is wholly collateral to any particular orders from which review might be sought; and (3) the FTC has zero expertise (and zero authority) to resolve constitutional challenges to its own structure.

The government's contrary arguments are unpersuasive. The government insists that the fact that the FTC Act authorizes "review in a court of appeals" (if a party endures administrative proceedings and loses on the merits) is enough to satisfy the first *Thunder Basin* factor. BIO.9-10. But that argument cannot be squared with *Free Enterprise Fund*, as the SEC Act likewise allowed just such review. *See* 561 U.S. at 488-90. The government tries to distinguish *Free Enterprise Fund* on the ground that Axon "is already subject to a pending Commission proceeding." BIO.12. But that cannot make a difference when the proceeding itself is what inflicts the irreparable constitutional injury Axon seeks to challenge and avoid. The whole point of preenforcement challenges is to enable parties to contest government actions *before* they endure an impending injury. It would make little sense for a district court to lose jurisdiction over such a challenge just because the agency has eliminated any ripeness concern by actively inflicting the very "'here-and-now' injury" that the plaintiff seeks to prevent. *See Seila Law LLC v. CFPB*, 140 S.Ct. 2183, 2196 (2020) (quoting *Bowsher v. Synar*, 478 U.S. 714, 727 n.5 (1986)).

Moreover, the government's suggestion that jurisdiction turns on whether the FTC has initiated a formal adjudication would create perverse incentives, as this case well illustrates. To be sure, Axon may be embroiled in an FTC adjudication *now*. But Axon initiated this suit *before* the FTC initiated its proceeding, when Axon was in the same situation as the *Free Enterprise Fund* plaintiffs. *See* Pet.10-12. Nothing in the FTC Act evinces an intent to empower the Commission to divest district courts of jurisdiction over challenges to its very structure and existence through the simple expedient of bringing the threatened legal action as soon as the agency gets sued. And such a regime would be particularly inequitable given the realities of FTC adjudications, which produce appealable orders roughly once a decade. WLF.Br.11-12. If merely being mired in an FTC adjudication suffices to defeat district court jurisdiction over constitutional challenges to the agency itself, then such unconstitutional proceedings will persist and remain veritable black holes from which no party can hope to escape.

The government dismisses "the 'expense and annoyance of litigation'" as simply "'part of the social burden of living under government.'" BIO.13 (quoting *FTC v. Standard Oil Co.*, 449 U.S. 232, 244-45 (1980)). That is an argument only the government could love. It also misses the point. Axon is not complaining about the expense and annoyance of litigation; it is perfectly happy to shoulder the expense of litigating against the government in district court to vindicate its constitutional rights before the damage is done. Nor is Axon's complaint about the FTC proceedings that they are expensive and annoying (though they are

certainly both, *see* Cato/ALF.Br.20-22). It is that the FTC proceedings are unconstitutional (whereas *Standard Oil* involved only statutory claims). And as this Court recently explained, being subjected to proceedings before an agency that "violates the separation of powers … inflicts a 'here-and-now' injury" that exists without regard to the ultimate outcome of those proceedings. *Seila Law*, 140 S.Ct. at 2196 (quoting *Bowsher*, 478 U.S. at 727 n.5). Saying that Axon must "subject [itself] to … an officer it argues is unconstitutionally insulated from Executive control" just to have its day in court, Pet.App.43 (Bumatay, J.), is no different (or more acceptable) than saying that a party must "tak[e] the violative action" to prompt an enforcement action before "testing the validity of the law." *Free Enter. Fund*, 561 U.S. at 490-91.

In all events, the notion that Axon has merely been subjected to the everyday inconveniences of litigation blinks reality. Axon has already spent more than $20 million defending itself against the FTC's constitutionally infirm processes, which is almost twice what Axon paid for the underlying acquisition it offered to walk away from nearly two years ago. *See* Pet.10-11. And still the FTC adjudication has no end in sight. "If that is not betting the farm, what is?" WLF.Br.10.

The government next asserts that Axon's claims are not "collateral" because "they arise from actions the [FTC] took in the course of th[e statutory] scheme." BIO.10. But an agency does not have to be acting without statutory authority for a challenge to be collateral. What matters is whether Axon's "challenge

to the [FTC] is 'collateral' *to any Commission orders or rules from which review might be sought*." *Free Enter. Fund*, 561 U.S. at 490 (emphasis added). That factor is satisfied here for the same reason it was satisfied in *Free Enterprise Fund*: Axon "object[s] to the [FTC's] existence," not to how it is exercising its statutory powers. *Id.* Nothing that happens in the FTC proceedings will have any bearing on the merits of Axon's structural constitutional claims, and nothing that happens in the adjudication of those claims (assuming Axon can ever get to court) will have any bearing on the merits of the FTC's antitrust claims.

The government falls even further short of the mark in arguing that Axon's "constitutional challenges go to the FTC's conduct of that very proceeding." BIO.12. Axon claims that "the FTC's structure violates Article II by providing improper insulation from the president." Pet.App.3. That challenge has nothing to do with "the FTC's conduct[]" or the merits of the merger proceedings. Indeed, it is identical to the removal claim in *Free Enterprise Fund*, save for swapping FTC ALJs for the PCAOB. Here as in *Free Enterprise Fund*, Axon's structural constitutional claims "transcend[] any particular proceeding." *See Cochran v. SEC*, 969 F.3d 507, 520 (5th Cir.) (Haynes, J., dissenting).

Finally, any suggestion that Axon's constitutional "claims do not lie 'outside the agency's expertise,'" BIO.10, fails the straight-face test, as all members of the panel agreed. *See* Pet.App.22 ("The FTC lacks agency expertise to resolve [Axon's] constitutional claims."). Axon challenges the "constitutional grounding of the agency overseeing the proceedings."

See Cochran, 969 F.3d at 519 (Haynes, J., dissenting). That "the FTC could bring its expertise to bear on issues concerning petitioner's compliance or non-compliance with the antitrust laws," BIO.10, is therefore of no moment. Just as in *Free Enterprise Fund*, the kinds of structural "constitutional claims" Axon presses here are decidedly "outside" agencies' "competence and expertise." 561 U.S. at 491.

2. The government emphasizes the absence of a circuit split and asks this Court to wait until one "emerges," at which point it acknowledges that "this Court's review may be warranted." BIO.13-14. But there is no need to wait for a circuit split, as there is already a conflict to resolve: the conflict between the decision below and this Court's decision in *Free Enterprise Fund*. That multiple circuits have misread *Free Enterprise Fund* only underscores the need for this Court to step in and set the lower courts straight. The alternative is to force private parties to continue to "endure lengthy, costly, and plainly unconstitutional agency enforcement proceedings before challenging the constitutionality of those proceedings in court." Chamber.Br.2. When the status quo is private parties continuing to suffer here-and-now constitutional (and financial) injuries with no court open to remedy them, the time for plenary review is now.

At a minimum, the Court should hold this petition until the en banc Fifth Circuit issues its opinion in *Cochran*. There, the en banc court has already vacated a pro-government ruling on what the government concedes is essentially the same question in the SEC context. BIO.14. The en banc court heard

oral argument more than nine months ago, so a decision is likely imminent, and the government all but promises to file its own petition for certiorari should the en banc court not reinstate the vacated ruling. There is no particular reason to allow the government to choose its favored vehicle or to give the government two briefs and the final word in the merits briefing, and there is a very good reason to hold this petition and grant it when the en banc court issues its decision in *Cochran*. That will maximize the chances that this Court can resolve this critical question this Term, rather than wait another calendar year during which private parties will be denied judicial review just as agency enforcement efforts escalate.

Indeed, the only party that stands to benefit from delay is the government. Every day that private parties like Axon are stuck in front of unaccountable officials wielding immense power increases the chances that those parties will be strong-armed into throwing in the towel rather than running up massive legal bills and enduring existential threats at the hands of unconstitutional and unaccountable agencies. *See* Cato/ALF.Br.16-18. That is manifestly not a valid reason to delay—let alone deny—review. After all, the whole point of judicial review is to ensure that government officials cannot violate private parties' rights with impunity. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (describing right to judicial review of unlawful government action as "[t]he very essence of civil liberty" and necessary to retaining the "high appellation" of "a government of laws, and not of men"). Accordingly, while the first question presented readily merits plenary review based on the already-extant conflict with *Free*

Enterprise Fund, should the Court wish to await the Fifth Circuit's decision, it should hold this petition until it issues, rather than relegate Axon to who knows how many more years of regulatory limbo before it can finally get its day in court.

II. The Court Should Grant Certiorari To Decide Whether FTC Adjudicators Are Unconstitutionally Insulated From Presidential Control.

The case for certiorari is doubly clear given that Axon's constitutional objections to the structure of the FTC are so plainly meritorious. *See* Pet.29-32. This Court held in *Free Enterprise Fund* that Article II officers wield executive power unconstitutionally when, as here, they are insulated from Presidential control by multiple levels of tenure protection. 561 U.S. at 483-84. And while *Free Enterprise Fund* did not resolve whether its holding applied to ALJs, that was because it was unsettled at the time whether ALJs are "Officers of the United States." *Id.* at 507 n.10. This Court has since settled that issue and concluded that SEC ALJs, who are materially indistinguishable from FTC ALJs, are Officers of the United States. *See Lucia*, 138 S.Ct. at 2053; Pet.30-31. Thus, under a straightforward application of this Court's cases, the removal procedures governing FTC ALJs are "contrary to Article II's vesting of the executive power in the President." *Free Enter. Fund*, 561 U.S. at 496.

The government does not try to argue otherwise; it simply asserts "that this Court's review would be premature" because the lower courts did not reach that question. BIO.15. But "[t]he Court's precedents

so clearly foreclose that structure that this Court should not allow that blatant constitutional violation to persist any longer." Chamber.Br.17. Moreover, kicking the can down the road would only exacerbate the inevitable practical complications of this Court's ruling. The FTC currently employs only one ALJ. If the constitutional deficiency in the FTC's structure ends up demanding multiple do-overs, "the FTC's adjudicatory work could grind to a halt." Chamber.Br.20. By contrast, resolving the issue now would save lower courts the trouble of grappling with difficult questions about how to remedy the constitutional deficiencies that are plain as day after *Free Enterprise Fund* and *Lucia*. In short, resolving this constitutional question now would "offer an ounce of prevention to save the courts a pound of cure." Chamber.Br.21.

III. The Questions Presented Are Recurring And Exceptionally Important, And This Is An Excellent Vehicle To Address Them.

The government does not deny the importance of the questions presented. Nor could it, as their "far-reaching significance" is obvious, particularly given that "the FTC, along with the SEC, are widely regarded as the two most aggressive independent regulatory agencies in the federal government." Cato/ALF.Br.5-6. Recent developments have only exacerbated matters, as the FTC has announced that it plans to ramp up its enforcement efforts even further. *See, e.g.*, Bryan Koenig, *FTC's New Chair Wants To Be More Proactive, Preemptive*, Law360 (Sept. 23, 2021), https://bit.ly/3kGgVrZ; Jeff Stein, *Biden administration ramps up antitrust efforts amid*

worries about high prices, The Washington Post (Aug. 30, 2021), https://wapo.st/2XLwKVh; Dissenting Statement of Comm'r Christine S. Wilson, at 9 (July 1, 2021) (lamenting that the Commission's "response to [this Court's] decision" in *AMP Capital Management, LLC v. FTC*, 141 S.Ct. 1341 (2021), has been "a new concerted effort … to exceed the FTC's authority regarding the use of Section 5 of the FTC Act"), https://bit.ly/3zHqivH.

The government likewise does not deny that this case cleanly presents the jurisdictional question. And the merits question is purely legal and effectively answered by the combined force of *Free Enterprise Fund* and *Lucia*. Moreover, "[u]nlike petitions raising related issues *after* the petitioner already suffered the constitutional violations, this case," in which the agency proceedings have been stayed pending certiorari, "does not require the Court to grapple with retrospective remedial doctrines." AFP.Br.3; *see* Pet.33-34. The Court should take the opportunity to resolve these two critically important questions.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari. At the very least, the Court should hold this petition pending the en banc Fifth Circuit's resolution of *Cochran v. SEC*.

Respectfully submitted,

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