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

SUPPLEMENTAL BRIEF FOR PETITIONER

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The FTC previously acknowledged that "[i]f a circuit conflict emerges as a result of the [en banc] Fifth Circuit's decision" "[i]n *Cochran v. SEC*," then "this Court's review may be warranted at that time." BIO.14. It is that time. On December 13, 2021, the en banc Fifth Circuit issued its opinion in *Cochran*—and, as predicted, it squarely conflicts with the decision below (and decisions from other circuits) on the critically important question of whether district courts may hear constitutional challenges to an agency's structure or existence. This clear circuit split removes the only possible objection to this Court's review of an issue that all concede is of enormous importance, and the petition in this case provides this Court the opportunity to resolve the circuit split this Term.

Expeditious resolution of the circuit split is critical, because as matters stand, private parties in most of the country must endure unconstitutional federal agency actions—and suffer the very constitutional harms they seek to avoid—before they can get their day in court. That untenable situation should not persist another year while the petition in *Cochran* is filed and briefed. That is particularly true because enforcement actions by agencies with patently unconstitutional structures, like the Federal Trade Commission, are ratcheting up, not down. In short, this petition provides a timely opportunity to resolve a critical question as to which the answer should be clear and the same in Texas and Arizona. The Court should grant the petition.

REASONS TO GRANT THE PETITION

By a 9-to-7 vote, the en banc Fifth Circuit in *Cochran* held that the Securities Exchange Act of 1934 does not "implicitly strip[] federal district courts of subject-matter jurisdiction to hear structural constitutional claims." *Cochran v. SEC*, No. 19-10396, slip op.2 (5th Cir. Dec. 13, 2021) (en banc) ("*Cochran* Op."). Judge Willett concurred in the judgment on the ground that "th[e] case is controlled by *Free Enterprise Fund*…." *Id.* at 1 n.2. Judge Oldham, joined by Judges Smith, Willett, Duncan, Engelhardt, and Wilson, concurred separately to underscore that text and precedent erase "any conceivable dispute" about the soundness of the majority's conclusion. *Id.* at 30; *see id.* at 30-69. Judge Costa, joined by Chief Judge Owen and Judges Stewart, Dennis, Southwick, Graves, and Higginson, dissented. *Id.* at 70-95.

The decision in *Cochran* creates an undeniable circuit split and confirms the need for this Court's review. Like Axon, Cochran is a defendant in an administrative "enforcement action." *Cochran* Op.2; *see* Pet.10-13. Like Axon, Cochran separately "filed suit in federal district court to enjoin the … enforcement proceedings against her." *Cochran* Op.3; *see* Pet.11. Like Axon, Cochran argues that the administrative tribunal before which she has been haled is plagued by "a removability problem" because the agency "ALJs enjoy multiple layers of 'for-cause' removal protection." *Cochran* Op.3; *see* Pet.11-12. Like Axon, Cochran's alleged "injury has absolutely nothing whatsoever to do with a final order," because, like Axon, she seeks to litigate a "removal power claim challeng[ing] the *constitution* of the tribunal, not the

legality or illegality of [any] final order." *Cochran* Op.7-8; *see* Pet.13-14, 16. And, like Axon, a "district court dismissed Cochran's case for lack of subject-matter jurisdiction" based on a misreading of this Court's decisions. *Cochran* Op.3-4; Pet.12.

There are only two material differences between the two cases. First, and most obvious, is the result. While the court in this case concluded that "Congress impliedly precluded district court jurisdiction over claims of the type brought by Axon," App.5, and consigned Axon to years of proceedings before an unconstitutional agency, the court in *Cochran* held that Congress *did not* "implicitly strip[] district courts of jurisdiction to hear structural constitutional claims," *Cochran* Op.5, and allowed Cochran's district-court challenge to proceed. Second, and equally important, this case allows the Court to resolve the circuit split this Term, not next, and promises to free countless parties from unconstitutional agency action in the interim.

To be sure, *Cochran* involves the SEC Act, whereas this case involves the FTC Act. But for purposes of determining whether Congress impliedly stripped district courts of jurisdiction over structural constitutional challenges, that is a distinction without a difference, as there are no material differences between the language and structure of the relevant provisions of the two statutes. Indeed, the United States not long ago acknowledged that the "statutory review scheme" under the FTC Act (15 U.S.C. §45) "is materially identical to the statutory review scheme" under the SEC Act (15 U.S.C. §78y). Resp.Br.12, *Gibson v. SEC*, No. 20-276 (U.S. Dec. 4, 2020); *see also*

App.14-15. And it did so again when it noted that the *Cochran* case may well generate "a circuit conflict" with the decision below here. BIO.14.

Thus, as things stand now, the courthouse doors are open in Texas, Mississippi, and Louisiana, but closed almost everywhere else. In the Fifth Circuit, parties against whom the FTC, SEC, or a comparable alphabet-soup agency has initiated an enforcement action can go to a federal district court and secure a decision on constitutional challenges to the agency's structure or existence without first having to endure the full complement of administrative proceedings that they claim are unconstitutional. In the Ninth Circuit (and the Second, Fourth, Seventh, Eleventh, and D.C. Circuits), by contrast, those same agencies can instigate unconstitutional proceedings via unconstitutional structures and escape judicial review for years—and even then, it may be impossible to fashion a meaningful remedy. That is not a state of affairs this Court should allow to linger for another year—especially when federal agencies are not promising the regulated community a year-long respite, and Axon's "underlying constitutional challenge is not open to serious doubt." Chamber.Br.5.

CONCLUSION

The Court should grant the petition, and set this case for argument and decision this Term.

Respectfully submitted,

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