NO. 21-86

In the
Supreme Court of the United States

AXON ENTERPRISE, INC.,

Petitioner,

v.

FEDERAL TRADE COMMISSION, et al.,

Respondents.

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

BRIEF FOR PETITIONER

PAMELA B. PETERSEN
AXON ENTERPRISE, INC.
17800 N. 85th Street
Scottsdale, AZ 85255
(623) 326-6016

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
MATTHEW D. ROWEN
EVELYN BLACKLOCK
KIRKLAND & ELLIS LLP
1301 Pennsylvania Ave., NW
Washington, DC 20004
(202) 389-5000
paul.clement@kirkland.com

Counsel for Petitioner

May 9, 2022

QUESTION PRESENTED

After petitioner acquired an essentially insolvent competitor, it found itself subjected to the review of the Federal Trade Commission (FTC), rather than the Department of Justice (DOJ). While the DOJ route promises early access to judicial review, the FTC track is an altogether different matter. Petitioner faced a series of unreasonable demands from the FTC, and the prospect of "litigating" before administrative law judges insulated by unconstitutional double-for-cause removal restrictions and subject to review by an unaccountable Commission. Rather than resign itself to the ongoing unconstitutional injuries inflicted by the FTC's process, petitioner filed suit in district court seeking to enjoin the unconstitutional FTC proceedings. That lawsuit focused on constitutional issues collateral to the underlying antitrust issues, but the district court nonetheless dismissed it for want of jurisdiction based on implications drawn from a statutory grant of jurisdiction to review the FTC's cease-and-desist orders. A divided Ninth Circuit affirmed, with the majority acknowledging that dismissal "makes little sense," and the dissent contending that dismissal contradicted this Court's precedents.

The question presented is:

Whether Congress impliedly stripped federal 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 Commission's cease-and-desist orders.

PARTIES TO THE PROCEEDING

Petitioner, plaintiff-appellant below, is Axon Enterprise, Inc.

Respondents, defendants-appellees below, are the Federal Trade Commission, as well as Lina Khan, Rebecca Slaughter, Noah Phillips, and Christine Wilson, in their official capacities as Commissioners.

Former Commissioner Joseph J. Simons, in his official capacity as a Commissioner of the Federal Trade Commission, was also a defendant-appellee below, but his term expired on January 29, 2021. He is no longer a party to these proceedings.

Former Commissioner Rohit Chopra, in his official capacity as a Commissioner of the Federal Trade Commission, was also a defendant-appellee below, but he left the Commission on October 12, 2021. He is no longer a party to these proceedings.

CORPORATE DISCLOSURE STATEMENT

Axon Enterprise, Inc., has no parent corporation, and no shareholder owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

INTRODUCTION

Like most separation of powers disputes, this case is ultimately about accountability. Petitioner Axon Enterprise, Inc. (Axon) faces the unenviable prospect of years of proceedings before an unaccountable and unconstitutionally structured agency. Its primary adjudicator is an administrative law judge (ALJ) directly accountable to neither the Federal Trade Commission (FTC) nor the President. The FTC itself is not subject to direct presidential control and combines the functions of all three branches of government in a single self-proclaimed "independent" agency directly accountable to no one. Axon has been consigned to this unaccountable ALJ and agency, rather than given an early opportunity for judicial review, based on a black-box system that allocates some cases to the FTC's administrative process and others to the Department of Justice (DOJ) and federal court without even the felt need to articulate the sorting criteria.

The one bulwark against all this unaccountable "executive" action should be the federal district courts and their general federal-question jurisdiction under 28 U.S.C. §1331. But the decision below creates one more massive accountability problem. Despite Congress' express decision to authorize federal district courts to exercise jurisdiction and remedy ongoing constitutional violations by federal actors, the Ninth Circuit perceived an implicit repeal of that jurisdiction in the FTC Act. It did so even though the key provision on its face does not purport to *restrict* federal-court jurisdiction at all, but rather affirmatively *grants* appellate court review of certain agency orders. If

Congress had actually tried to insulate Executive Branch action from any meaningful judicial review, it would have needed to act with the clarity necessary to overcome the strong presumption against such preclusion (and would have been accountable to the electorate for that dubious decision). But the Ninth Circuit allowed Congress to achieve that result implicitly and without accountability, via a statute that looks to all the world like a grant of judicial review.

That decision should not be allowed to stand. It has no support in statutory text, context, or this Court's precedents. Indeed, it is impossible to square with *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 561 U.S. 477 (2010)—the one case that directly confronted an effort to deprive district courts of jurisdiction over a similar challenge to the structure, procedures, and very existence of a federal agency. As in *Free Enterprise Fund*, precluding judicial review here until *after* Axon has suffered for years before an unaccountable agency would not just defer judicial review; it would deny meaningful judicial review altogether. And it would make particularly little sense when the FTC has no expertise to bring to bear on constitutional challenges to its own structure and procedures, and the courts of appeals lack the power to remedy the constitutional violations. Under those circumstances, it is the express grant of jurisdiction in §1331, and not any implication from a grant of limited appellate review, that controls. That is the central lesson of *Free Enterprise Fund*, and it requires reversal of the decision below and a restoration of accountability.

OPINIONS BELOW

The opinion of the Ninth Circuit, 986 F.3d 1173, is reproduced at Pet.App.1-46. The opinion of the district court, 452 F.Supp.3d 882, is reproduced at Pet.App.49-89.

JURISDICTION

The Ninth Circuit issued its decision on January 28, 2021, Pet.App.1, and denied Axon's timely rehearing petition on April 15, 2021, Pet.App.47. Axon timely sought certiorari on July 20, 2021. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are included at Pet.App.90-107.

STATEMENT OF THE CASE

A. Legal Background

1. Our constitutional system starts with the premise that, absent the narrowest of possible exceptions, the federal government cannot subject its citizens to unconstitutional actions or consign them to unconstitutional procedures while denying them a remedy for constitutional violations. That principle, which this Court embraced in its earliest precedents, *see, e.g.*, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *United States v. Nourse*, 34 U.S. (9 Pet.) 8, 28-29 (1835), underlies numerous constitutional provisions, from the Due Process Clause to the Suspension Clause.

Congress has generally empowered federal district courts to address and redress unconstitutional actions by federal officials by vesting those courts with "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. §1331. This grant of jurisdiction empowers "federal courts to issue injunctions to protect rights safeguarded by the Constitution," *Bell v. Hood*, 327 U.S. 678, 684 (1946), including injunctions against federal officers and agencies, *see, e.g.*, *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015); *Von Hoffman v. City of Quincy*, 71 U.S. (4 Wall.) 535, 554 (1866). The federal government's sovereign immunity from damages actions makes the ability to obtain injunctive relief pursuant to §1331 particularly important. Thus, for example, a citizen suffering the irreparable injury of having First Amendment rights denied by federal officials has ready access to federal court under §1331 to enjoin that ongoing constitutional deprivation. *See, e.g.*, *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S.Ct. 63, 67 (2020).

To safeguard the availability of §1331 as a protection against unconstitutional Executive Branch action, this Court applies a strong presumption in favor of judicial review and construes statutes to avoid the constitutional issues implicated by a complete foreclosure of judicial review. *See, e.g.*, *Webster v. Doe*, 486 U.S. 592, 603-05 (1988); *Bowen v. Michigan Acad. of Fam. Physicians*, 476 U.S. 667, 672-77 & n.3 (1986); *Johnson v. Robison*, 415 U.S. 361, 366-73 & n.8 (1974). Moreover, §1331 always grants jurisdiction to consider whether congressional efforts to restrict judicial review are consistent with the Due Process

Clause. *See Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 219 n.* (1994) (Scalia, J., concurring in part and concurring in the judgment); *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479 (1991).

When Congress seeks only to delay or channel judicial review, rather than preclude it altogether, this Court has been more tolerant—but only where delaying judicial review does not amount to a denial of effective judicial review altogether, and post-deprivation remedies will ensure that constitutional violations do not go unremedied. *See, e.g.*, *Free Enter. Fund*, 561 U.S. at 489-91; *Thunder Basin*, 510 U.S. 200; *Elgin v. Dep't of Treasury*, 567 U.S. 1, 8 (2012). Such statutes typically, although not exclusively, channel review of the agency action to the *appellate* courts, presumably on the theory that the administrative record assembled before the agency substitutes for a district-court record. As a result, litigants must typically wait until the agency has taken final action and developed an administrative record before seeking review in the appellate courts. But given the Court's reluctance to preclude effective judicial review or "construe a statute to displace courts' traditional equitable authority absent the clearest command," *Holland v. Florida*, 560 U.S. 631, 646 (2010), §1331 jurisdiction remains available when necessary to remedy unconstitutional injury and when the agency will not illuminate the legal claims. *See, e.g.*, *Free Enter. Fund*, 561 U.S. at 489-91.

The Court's cases make the nature of the party's claim and constitutional injury important. If a party simply seeks to avoid the imposition of fines, or to get a job restored, then delaying judicial review until after

the administrative proceedings have run their course will cause no material hardship. Those kinds of claims are precisely what Congress created the administrative scheme to address. But when the challenge goes to the very structure or existence of the agency, the agency's proceedings cannot provide an effective remedy. Not only is the agency ill-equipped to handle such claims, but forcing the challenger to undergo the agency's proceedings inflicts a "here-and-now" constitutional injury. *Seila Law LLC v. CFPB*, 140 S.Ct. 2183, 2196 (2020). Deferring judicial review until *after* a party has been subjected to the unconstitutional and unaccountable agency thus denies an effective judicial remedy.

Unsurprisingly, the one time this Court confronted head-on the issue of whether a statutory provision governing judicial review of agency action stripped the district courts of jurisdiction over a constitutional challenge to the agency itself, it concluded that the statute did not. *Free Enter. Fund*, 561 U.S. at 489-91. As the Court explained, such claims lay "outside" an agency's "competence and expertise" and "do not require technical considerations of [agency] policy." *Id.* at 491. Instead, they present "standard questions of administrative law, which the courts are at no disadvantage in answering." *Id.* The Court thus found little reason to believe that such claims "'are of the type Congress intended to be reviewed within [a] statutory structure'" designed for review of an agency's *actions* under its statutory mandate. *Id.* at 489 (quoting *Thunder Basin*, 510 U.S. at 212).

2. Congress "created and established" the FTC in 1914 via the Federal Trade Commission Act. Pub. L. No. 63-203, §1, 38 Stat. 717, 717-18 (1914) (codified at 15 U.S.C. §41). The FTC proclaims itself "an independent administrative agency." 16 C.F.R. §0.1. Under the terms of the FTC Act, the Commission "shall be composed of five Commissioners," "[n]ot more than three of [whom] shall be members of the same political party," all of "who[m] shall be appointed by the President, by and with the advice and consent of the Senate[,] … for terms of seven years." 15 U.S.C. §41. The Commissioners can be "removed by the President" only for "inefficiency, neglect of duty, or malfeasance," *id.*, terms this Court has construed to materially limit presidential control, *see, e.g.*, *Seila Law*, 140 S.Ct. at 2206.

The FTC wields enormous and barely adumbrated powers. In addition to constituting the Commission and "declar[ing] unlawful" all "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce," the FTC Act "empower[s] and direct[s]" the Commission "to prevent persons, partnerships, or corporations" from engaging in such methods, acts, and practices. 15 U.S.C. §45(a)(1)-(2); *see also* 16 C.F.R. §0.1. To that end, the statute confers upon the Commission a sweeping array of authorities, including the power "to investigate and report the facts relating to any alleged violations of the antitrust Acts," "to investigate and make recommendations for the readjustment of the business of any corporation alleged to be violating the antitrust Acts in order that the corporation may thereafter maintain its organization, management, and conduct of business in

accordance with law," and "to transmit" evidence it "obtains" "to the Attorney General" for use in "criminal proceedings under appropriate statutes." 15 U.S.C. §46(d), (e), (k)(1).

Moreover, the FTC does all this and more without the kind of accountability that comes with being an agency headed by a Cabinet Officer who is a direct report to the President. Thus, whereas an individual subjected to Cabinet-agency overreach can (at least in theory) appeal to the President (or others at the White House) to rein in his agent, a party subjected to overreach by a so-called independent agency is likely to be told the matter is beyond direct presidential control. At a minimum, a party subjected to Cabinet-agency overreach knows exactly whom to blame—the President—whereas someone subjected to overreach by a multi-member unelected commission insulated from direct presidential control is far less clear about where the buck stops or the blame lies. *See, e.g.*, *Free Enter. Fund*, 561 U.S. at 497-500.

When it comes to proposed or recently consummated mergers and acquisitions, the Commission may initiate enforcement proceedings to redress what it believes to be a prohibited act or practice. *See* 15 U.S.C. §45(b); 16 C.F.R. §3.11. Such actions can take one of two very different paths, seemingly at the FTC's whim. The FTC, in conjunction with DOJ, makes an initial decision whether to pursue the action itself on its home turf, or to have DOJ proceed in federal court. This "clearance" process has no statutory basis and is kept behind a veil of secrecy; for all the public knows, the decision could be made "by a coin flip." Dist.Ct.Dkt.15 at 12. The

outcome of this nowhere-codified, black-box clearance process makes a massive difference in terms of the process afforded to regulated parties. If a case is put on the "DOJ track," it proceeds in federal district court, where the defendant gets all the procedures and protections that come with an Article III tribunal—including, *e.g.*, an impartial fact-finder and the protections of the Federal Rules of Evidence and Civil Procedure.

Parties put on the administrative-enforcement "FTC track" are not so lucky. Rather than have their cases heard by an impartial, life-tenured judge, these parties face an ALJ "to whom the Commission, in accordance with law, delegates the initial performance of statutory fact-finding functions and initial rulings on conclusions of law." 16 C.F.R. §0.14; *see id.* §3.42(a).

These ALJs (of whom there is only one at present), like the agency itself, are insulated from accountability and clear lines of authority. Like other "independent"-agency ALJs, they operate with limited executive oversight. Under the Administrative Procedure Act, "[a]n action may be taken against" an ALJ "by the agency in which [the ALJ] is employed only for good cause established and determined by the Merit Systems Protection Board [MSPB] on the record after opportunity for hearing before the Board." 5 U.S.C. §7521(a). The President is thus not the one to decide whether to remove an FTC ALJ. Nor can the FTC directly remove its own ALJ. And while the President can remove a member of the FTC or the MSPB, the President may do so only for "inefficiency, neglect of duty, or malfeasance in office." *Id.* §1202(d);

15 U.S.C. §41. As a result of this statutory scheme, FTC ALJs enjoy two levels of insulation from direct presidential control, just like the ALJs in *Lucia v. SEC*, 138 S.Ct. 2044 (2018), and the members of the PCAOB in *Free Enterprise Fund*. Moreover, as a practical matter, a party subject to an abusive ALJ has nowhere to turn for redress. There are at least three possible audiences (the President, the FTC, and the MSPB) for such a complaint, yet none of them can act unilaterally to stop the abuse.

Despite their insulation from direct control, FTC ALJs exercise a wide array of important functions. They oversee discovery, conduct hearings, resolve motions, superintend settlement discussions, issue decisions on contested questions of fact and law, and, where appropriate, order a remedy. *See* 16 C.F.R. §§3.22-26, 3.41-46, 3.51, 3.56. They may also "suspend or bar from participation in a particular proceeding any attorney who shall refuse to comply with his directions, or who shall be guilty of disorderly, dilatory, obstructionist, or contumacious conduct, or contemptuous language in the course of such proceeding." *Id.* §3.42(d). ALJ decisions can be appealed to the full Commission, *see id.* §§3.54, 3.56, which may issue various remedial orders if it finds a violation of, *e.g.*, the FTC Act or the federal antitrust laws, *see* 15 U.S.C. §45(b).

As one might expect of a forum in which the investigator, prosecutor, and trial-level judge all work for the same agency—and in which the appellate-level judges are the same people who vote out the complaint in the first instance—the FTC fares outrageously well in its home-court proceedings: The agency has not lost

such a case in a quarter century. *See* Chamber.Br.15-16.

The FTC Act contains a provision for judicial review of its "cease and desist" orders. While the vast majority of proceedings before the agency "settle"—with a party agreeing to modify its practices or abandon a proposed transaction—when the proceedings run their course and culminate in a "cease and desist" order, the affected party "may obtain a review of such order in the court[s] of appeals of the United States," which have "exclusive" "jurisdiction" "to affirm, enforce, modify, or set aside [such] orders," but no other statutory powers. 15 U.S.C. §45(c)-(d); *see also id.* §45(g) (setting time limits). Unlike other administrative-review statutes, the FTC Act does not expressly provide for (let alone preclude) federal-court jurisdiction over any agency action *other than* a "cease and desist" order. *See, e.g.*, 5 U.S.C. §7703(d)(1) ("any final order or decision of the [Merit Systems Protection] Board"); 15 U.S.C. §78y(a)(1) ("a final order of the [Securities and Exchange] Commission"); 30 U.S.C. §816(a)(2) ("any order" of the Mine Safety and Health Review Commission).

Nor do the courts of appeals have exclusive jurisdiction over all manner of judicial disputes involving the FTC. The FTC can, and sometimes does, invoke the federal district court's authority to obtain preliminary relief before the agency proceedings have run their course. *See* 15 U.S.C. §53(b); *AMG Cap. Mgmt., LLC v. FTC*, 141 S.Ct. 1341, 1344 (2021). The FTC itself has complete discretion whether to invoke a district-court remedy (which provides the defendant an early opportunity to test the FTC's theory in a

neutral forum) or consign its counterparty to the agency process. Finally, the FTC Act says nothing whatsoever about judicial actions initiated by regulated parties to challenge the constitutionality of the structure, procedures, or existence of the Commission.

B. Factual and Procedural Background

1. Axon makes body-worn cameras and digital evidence management systems for law enforcement. In May 2018, Axon acquired an essentially insolvent competitor, Vievu LLC, for approximately $13 million. "About a month later, the FTC sent Axon a letter stating that the Vievu acquisition raised antitrust concerns." Pet.App.3. The FTC subsequently subjected Axon and its executives to extensive and expensive investigatory proceedings.

Over the next year and a half, Axon cooperated with the FTC investigation, which itself cost $1.6 million in attorneys' fees and related expenses. But after 18 months, with the cost of complying with the FTC's investigative demands soaring and no end in sight, Axon offered to walk away from its acquisition. In fact, Axon offered not only to divest all Vievu assets, but to infuse a divestiture buyer with millions of dollars in working capital. The FTC, however—acting with the confidence that comes from believing itself to be truly "independent" from any Article II or Article III oversight—deemed that offer insufficient. Instead, "the FTC demanded that Axon turn Vievu into a 'clone' of Axon using Axon's intellectual property," and threatened Axon with "an administrative proceeding" if it refused to do so. Pet.App.3. The FTC literally referred to its demand

(with neither irony nor understatement) as a "blank check." CA9.ER.126 ¶3.

At that point, Axon filed a complaint in federal district court challenging the constitutionality of FTC ALJs and the FTC itself.[1] As Axon explained, under a straightforward application of *Lucia*, 138 S.Ct. 2044, FTC ALJs are principal officers subject to the Appointments Clause. And under an equally straightforward application of *Free Enterprise Fund*, the ALJs' dual-layer protections from removal violate the Constitution. Axon further argued that the combination "within a single agency" of "investigatory, prosecutorial, adjudicative, and appellate functions" offends the Due Process Clause and the separation of powers, and that the uncodified, black-box "clearance" process through which the FTC and DOJ assign merger investigations to either an administrative-enforcement track or a district-court-litigation track violates the Due Process and Equal Protection Clauses. Pet.App.11.[2]

Not even a day after Axon filed its lawsuit, the FTC initiated an administrative-enforcement proceeding challenging the Vievu acquisition. Pet.App.3 n.1. The administrative proceeding was assigned to the FTC's Chief (and, currently, only) ALJ.

---

[1] Axon also initially sought a declaratory judgment that its acquisition of Vievu was lawful under antitrust law, but it later voluntarily dismissed that claim. Only the constitutional claims remain.

[2] Axon expressly preserved a challenge to the FTC's basic structure and the removal protection of the Commissioners, arguing that *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), should be overruled. *See* CA9.Br.46 n.23; CA9.ER.150.

See Order Designating ALJ, *In re Axon Enter., Inc.*, No. 9389, 2020 WL 468939 (FTC Jan. 6, 2020).

Axon responded by asking the district court for a preliminary injunction to halt the administrative proceeding and the constitutional injury it inflicted, pending the district court's resolution of Axon's constitutional claims. Axon expressly excluded its antitrust claim from its motion and relied only on its constitutional claims. Dist.Ct.Dkt.15 at 5 n.4. The Commission opposed Axon's motion—not by contesting whether Axon was suffering ongoing irreparable injuries (constitutional and otherwise) or by defending its structure as constitutional on the merits—but solely on jurisdictional grounds. In particular, the agency argued that the FTC Act's express allowance of judicial review for cease-and-desist orders implicitly strips district courts of jurisdiction over all other challenges, including constitutional challenges to the structure, procedures, or existence of the FTC. Dist.Ct.Dkt.19 at 1, 14 n.12; *see* Pet.App.52. After holding oral argument limited to that jurisdictional issue, the district court dismissed Axon's complaint for lack of subject-matter jurisdiction and denied Axon's preliminary injunction motion as moot. Pet.App.89.

Axon filed a motion for expedited appeal, which the Ninth Circuit granted. The Ninth Circuit also stayed the FTC proceedings, which were by then on the eve of trial. CA9.Dkt.12, 40; *see also* Order, *In re Axon Enter., Inc.*, No. 9389, 2020 WL 6058257 (FTC Oct. 8, 2020). That stay remains in effect.

2. In a divided opinion, the Ninth Circuit affirmed the district court's jurisdictional dismissal. The

majority acknowledged that nothing in the FTC Act "expressly" divests federal district courts of their jurisdiction under §1331 to decide constitutional challenges to an agency's structure, procedures, or existence. Pet.App.4. But, in its view, that did not "rule out" the possibility that the Act "impliedly" stripped district courts of that jurisdiction. Pet.App.4. The majority thus proceeded with a "two-step inquiry," asking first whether Congress' "intent" to strip district courts of such jurisdiction is "fairly discernible" from the statutory scheme, and second whether Axon's claims are "of the type" Congress intended to channel into administrative proceedings rather than federal district court. Pet.App.5 (quoting *Bennett v. SEC*, 844 F.3d 174, 181 (4th Cir. 2016), and *Thunder Basin*, 510 U.S. at 207, 212).

The majority first concluded that the FTC Act's "detailed overview of how the FTC can issue complaints and carry out administrative proceedings" reflects a "fairly discernible intent to strip district court jurisdiction." Pet.App.10. The majority then examined Axon's claims through the lens of three factors it derived from this Court's cases: "(1) whether [Axon] can obtain meaningful judicial review in the statutory scheme, (2) whether the claim is 'wholly collateral' to the statutory scheme, and (3) whether the claim is outside the agency's expertise." Pet.App.11 (quoting *Elgin*, 567 U.S. at 15).

With respect to the availability of meaningful judicial review, the majority read this Court's cases as instructing that as long as agency proceedings are capable of culminating in "a final order that [can] be appealed to a court" with jurisdiction to hear all the

challenger's claims, "meaningful judicial review" exists—even if the challenger asserts that "the agency process itself would violate its constitutional rights." Pet.App.12, 18-19. Although the majority thought precedent bound it to reach that conclusion, it made clear that it "would agree with the dissent" (and Axon) if it "were writing on a clean slate." Pet.App.18; *see also* Pet.App.20 (seeking "clari[t]y" from this Court).

The majority next observed that courts "have offered two competing ways" to decide "whether a claim is 'wholly collateral' to the statutory review scheme." Pet.App.21. Some courts hold "that a claim is wholly collateral to the statutory enforcement scheme if it is not *substantively* intertwined with the merits dispute in the agency proceeding." Pet.App.21. On that understanding, this factor would favor Axon, because "Axon's constitutional challenges can be substantively separated from the underlying antitrust claim." Pet.App.21. But the majority noted that other courts "appl[y] this factor in the *procedural* sense," and hold that "if [a] claim is the procedural vehicle that the party is using to reverse the agency action," then "it is not 'wholly collateral' to the review scheme." Pet.App.21-22. Although the majority found it "a close call" and "far from clear," it agreed with the second set of courts. Pet.App.22, 25. That effectively ended its analysis of the collateral question.

As for whether Axon's constitutional claims are outside the FTC's expertise, the majority opined that the FTC "lacks agency expertise to resolve" such claims, yet still found the question "cloaked in ambiguity." Pet.App.22-23. It noted that some courts have suggested that an agency "can bring its expertise

to bear" simply by virtue of the fact that it "can moot the constitutional claims by resolving the merits issues before [it]." Pet.App.23. But the majority rejected that reasoning as irreconcilable with *Free Enterprise Fund*, instead adopting the more "straightforward" view that an issue lies outside agency expertise when it involves "standard questions of administrative law" rather than "technical considerations of [agency] policy." Pet.App.23 (quoting *Free Enter. Fund*, 561 U.S. at 491). Applying that understanding, the majority concluded that this "weigh[ed] against preclusion" of Axon's Article II claim and its claim challenging the FTC's unification of multiple functions. Pet.App.24. On the flip side, it concluded that this understanding weighed in favor of preclusion of the challenge to "the clearance process used to determine whether the FTC or DOJ will review a merger," Pet.App.11, because the "FTC might have valuable insight into how the clearance process works," Pet.App.28-29.

The Ninth Circuit thus found the final tally mixed, with the first factor "point[ing] to jurisdiction preclusion," the second "likely favor[ing] preclusion" but "far from clear," and the third "weigh[ing] against preclusion" for some, but not all, claims. Pet.App.25. Nevertheless, the majority ultimately discarded the second and third factors altogether, concluding that, under this Court's precedents, "the presence of meaningful judicial review is enough to find that Congress precluded district court jurisdiction over the type of claims that Axon brings." Pet.App.25. Thus, despite explicitly acknowledging Axon's "serious concerns" and "legitimate questions" about "how the FTC operates," the majority concluded that Axon "can

have its day in court" "only after it first completes the FTC administrative proceeding" to which Axon objects. Pet.App.25-26.

3. Judge Bumatay dissented in part. He read this Court's cases to set forth a clear rule that controls this case: "Absent legislative language to the contrary, challenges to an agency's *structure*, *procedures*, or *existence*, rather than to an agency's adjudication of the merits on an individual case, may be heard by a district court." Pet.App.33. To determine whether they possess jurisdiction over a case, Judge Bumatay explained, courts should "scrutinize each claim to determine whether it's merely an attack on a merits determination or something more existential to the agency." Pet.App.34. Thus, "to the extent [Axon's] claims target the [FTC's] existence, structure, or procedures under the Constitution, rather than its merits decisions," Judge Bumatay would have held that "the district court remains an appropriate forum for such action," as "pronouncing the constitutionality of a government function is precisely the business of Article III courts." Pet.App.34. Applying that rule, Judge Bumatay would have "reverse[d] the district court's dismissal of Axon's Article II claim" challenging FTC ALJs' two layers of for-cause removal protections, as well as Axon's challenge to the FTC's black-box, pre-enforcement "clearance process." Pet.App.44. He agreed with the majority, however, that Axon's due process challenge to "combining the role of investigator, prosecutor, and adjudicator within

one agency … is precluded from district court review." Pet.App.44-45.[3]

SUMMARY OF ARGUMENT

Congress has not consigned Axon to suffer through an administrative proceeding overseen by unconstitutional actors before it can have its day in court to challenge the unconstitutionality of the agency's structure, procedures, or existence. Instead, Congress vested federal district courts with jurisdiction to resolve such challenges and to enjoin unconstitutional actions before the damage is irreparably done. Congress plainly granted that authority in §1331, and it just as plainly never took it away. The FTC Act concededly does not expressly divest district courts of jurisdiction, so there is no need to confront the difficult question whether Congress could constitutionally strip someone of all means of halting proceedings that inflict irreparable constitutional harm. The only question is whether the Act takes that dubious step implicitly. That would be an extraordinary intent to impute to Congress. This Court has never construed *any* statute to implicitly strip district courts of their power to adjudicate those kinds of existential challenges to an agency, and nothing in the FTC Act would support making this

[3] A few months after the Ninth Circuit issued its decision, the en banc Fifth Circuit 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*, 20 F.4th 194, 198 (5th Cir. 2021) (en banc); *see* Pet'r's.Supp.Br.1-5. The en banc majority's analysis of the statutory-review scheme at issue there, which is materially identical to the statutory-review scheme of the FTC Act, substantially tracked the analysis in Judge Bumatay's dissent.

case the first. To the contrary, statutory text, context, and consequences all support district-court jurisdiction here.

Starting with the text, the FTC Act does not say anything about divesting federal district courts of jurisdiction over constitutional challenges like the ones Axon seeks to pursue here. The Act is instead focused exclusively on providing review for a specific type of agency action—namely, FTC cease-and-desist orders. A constitutional challenge to an agency's structure, procedures, or very existence is self-evidently not a challenge to a cease-and-desist order—or, for that matter, to *any* specific agency action. It is a challenge to the agency's very power to act at all.

That is manifestly not the kind of claim that would benefit from exhaustion before the FTC or development of an administrative record, as it has nothing to do with the merits of any antitrust investigation, and the Commission has neither the authority nor the expertise to resolve it. Nor is it the kind of claim that Congress would sensibly have channeled to the statute's judicial-review procedures, as the FTC Act does not even equip the agency with the injunctive and declaratory powers needed to provide relief from the kinds of structural problems Axon is pressing. Indeed, the agency itself needs to go to district court when it wants temporary injunctive relief. *See* 15 U.S.C. §53(b). That provision underscores both that there is nothing inherently incompatible between the FTC and district-court jurisdiction, and that the FTC itself is not equipped to prevent ongoing injury. Simply put, an existential challenge to the FTC's very structure and composition

is plainly not what Congress had in mind when it provided a mechanism for judicial review of FTC cease-and-desist orders.

That conclusion is reinforced by the untenable results that would follow from reading the FTC Act to implicitly strip district courts of jurisdiction over claims like Axon's. Not only are such claims collateral to FTC enforcement proceedings and outside the agency's expertise; there may be no way to bring them *at all* if the only path is through review of a cease-and-desist order. Just as in *Free Enterprise Fund*, there is no guarantee that the agency will ever issue such an order. Moreover, if Axon is forced to wait until the end of the FTC's enforcement proceedings to press its constitutional claims in court (and even then, only if it loses on the merits), then it will be too late to grant *meaningful* relief even if the FTC Act empowered a court to do so. After all, as this Court recently reiterated, parties forced to endure unconstitutional agency authority suffer a "here-and-now" injury that cannot be unsuffered.

Nothing in the FTC Act gives even the slightest indication that Congress intended to relegate parties in Axon's position to an unconstitutional limbo. Nor would such a reading of the statute make any sense given the heavy toll it would take on the separation of powers. Federal agencies already wield extraordinary power—in no small part because they employ structures and officers of dubious constitutionality. Insulating challenges to the very structure, procedures, and existence of such agencies and officials just exacerbates the problem. This is a case in point: Confident that lower courts were unlikely to

consider Axon's constitutional claims at all, the FTC would not even take yes for an answer when Axon capitulated and agreed to walk away from the merger the agency complained about. Those are the actions of an agency that believes itself so well insulated from Article II or even Article III oversight that it worries not a whit about steamrolling those stuck within its regulatory ambit.

ARGUMENT

I. District Courts May Hear Constitutional Challenges To An Agency's Structure, Procedures, Or Existence Absent Clear Statutory Language To The Contrary.

Congress has conferred on federal district courts jurisdiction to hear "all" civil actions arising under the Constitution and federal law. 28 U.S.C. §1331. The federal district courts therefore have the power—indeed, have a "virtually unflagging obligation"—to exercise that jurisdiction and adjudicate constitutional claims unless some more specific statute strips them of that jurisdiction. *See Mata v. Lynch*, 576 U.S. 143, 150 (2015) ("[W]hen a federal court has jurisdiction, it also has a 'virtually unflagging obligation … to exercise' that authority." (ellipsis in original) (quoting *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976))).

The grant of federal-question jurisdiction is a central mechanism for ensuring that the Constitution is, in practice not just promise, the supreme law of the land. Under long "established practice," the grant of jurisdiction in §1331 includes the power "to issue injunctions" against federal officers and agencies "to

protect rights safeguarded by the Constitution." *Bell*, 327 U.S. at 684; *see also Armstrong*, 575 U.S. at 327. That power applies to both ongoing and imminent constitutional violations. *See Seila Law*, 140 S.Ct. at 2196. And it applies to both efforts to vindicate enumerated rights and efforts to vindicate the Constitution's structural protections, which are "critical" to protecting individual rights and preventing "abuse of power." *Bowsher v. Synar*, 478 U.S. 714, 730 (1986); *see also Bond v. United States*, 564 U.S. 211, 222 (2011). No less than a deprivation of the right to speak or exercise one's religion, a violation of a structural constitutional protection inflicts a "'here-and-now' injury on affected third parties that can be remedied by a court." *Seila Law*, 140 S.Ct. at 2196.

Given §1331's express grant of jurisdiction, when a district court is confronted with an effort to enjoin unconstitutional government action, the "question" is "not whether" some statute "*confers* jurisdiction," but whether some more specific statute "*removes* the jurisdiction given to the federal courts" under §1331. *Whitman v. Dep't of Transp.*, 547 U.S. 512, 514 (2006) (per curiam) (emphases added); *see also Elgin*, 567 U.S. at 25 (Alito, J., dissenting). On relatively rare occasions, Congress has adopted language that could be read to eliminate judicial review of Executive Branch action altogether. This Court has greeted those efforts skeptically. In particular, this Court has demanded a clear statement before finding that Congress has taken the extraordinary step of insulating Executive Branch action from meaningful judicial review and forcing the courts to confront the constitutional questions implicated by such an effort.

See, e.g., *Webster*, 486 U.S. at 603-05; *Bowen*, 476 U.S. at 672-77 & n.3; *Johnson*, 415 U.S. at 366-73 & n.8. And the Court has *never* approved an *implicit* stripping of all meaningful judicial review of unconstitutional Executive Branch action.

Congress has sometimes acted not to eliminate judicial review altogether, but to defer or channel it. This often takes the form of channeling challenges to certain kinds of Executive Branch actions to the courts of appeals *after* the agency has taken the action and assembled an administrative record. Even then, Congress typically makes its intent to limit §1331 jurisdiction known "expressly." *Verizon Md. Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 644 (2002); *see, e.g.*, 12 U.S.C. §1818(i)(1) ("[N]o court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any [Board] notice or order under this section."); 42 U.S.C. §7607(b)(1) (requiring petitions for review of certain EPA air quality standards to be filed only in the D.C. Circuit).

To be sure, this Court has sometimes found Congress' "intent to limit jurisdiction" under §1331 "'fairly discernible'" even in the absence of express language to that effect. *Free Enter. Fund*, 561 U.S. at 489 (quoting *Thunder Basin*, 510 U.S. at 207, 212). In particular, "when Congress creates procedures 'designed to permit agency expertise to be brought to bear on particular problems'" (which often produces an administrative record better suited to appellate review), those procedures have generally been understood to be exclusive, implicitly eliminating §1331 jurisdiction over the same matters. *Id.* (quoting *Whitney Nat'l Bank in Jefferson Parish v. Bank of New*

Orleans & Trust Co., 379 U.S. 411, 420 (1965)). But even in that context, the Court has been willing to find that Congress ousted district courts of §1331 jurisdiction only if, and only to the extent that, "the claims at issue 'are of the type Congress intended to be reviewed within th[e] statutory structure.'" *Id.* If a claim is "'wholly collateral to a statute's review provisions'" and "'outside the agency's expertise,'" then courts must "presume that Congress does *not* intend to limit [§1331] jurisdiction"—especially if to conclude otherwise "'could foreclose all meaningful judicial review.'" *Id.* (emphasis added) (quoting *Thunder Basin*, 510 U.S. at 212-13). Thus, when deferring judicial review would operate to deny meaningful judicial review altogether, this Court's insistence that Congress make its intent explicit applies with full force. While channeling meaningful judicial review is commonplace, foreclosing any mechanism to meaningfully remedy ongoing unconstitutional government conduct raises serious constitutional questions and is not an intent to be lightly attributed to Congress.

Applying those principles, this Court has recognized a critical distinction between challenges to agency *action* and challenges to an agency's very structure, existence, or power to act. When a party wants to challenge a particular agency action in court, such as imposing a fine or upholding a termination, an administrative-review scheme may require it to wait until the agency's action is final, which in turn may require the party to go through the agency's internal review process before seeking judicial review based on the record assembled before the agency. A party may have to do so even if it wants to argue that the fine or

removal violates the Constitution or another federal statute. *See, e.g.*, *Thunder Basin*, 510 U.S. at 204-05 (holding that statutory administrative-review procedures divested district court of jurisdiction over suit seeking to enjoin agency from taking action that allegedly would violate another statute); *Elgin*, 567 U.S. at 8 (holding that statutory administrative-review procedures divested district court of jurisdiction over suit seeking to attack adverse employment action as unconstitutional).

By contrast, when a party's complaint is not that a particular agency *action* is problematic, but that the agency *itself* is constitutionally problematic, and being subjected to agency activity at the hands of unaccountable officers is the problem, there is little reason to think Congress would have wanted to delay a party's day in court until the party has already suffered the constitutional injury. After all, while an agency can bring its substantive expertise to bear in deciding issues going to the legality of its bread-and-butter administrative action (whether it be imposing fines, approving discharges, or blocking acquisitions), an agency has no particular expertise in adjudicating constitutional challenges that go to its very power to act or exist, *e.g.*, whether the ALJ himself has been constitutionally appointed or the FTC's structure comports with the Constitution. Indeed, agencies typically lack the power to determine the constitutionality of *any* congressional enactments, let alone of those establishing their own existence. *See Thunder Basin*, 510 U.S. at 215.

Nor would it make any sense to channel such existential challenges to appellate courts. Since the

agency has no administrative expertise to bring to bear, the administrative record, which substitutes for a district-court record and justifies appellate review, would be entirely unhelpful. Moreover, the remedies typical of schemes channeling review to appellate courts—vacating a specific agency action and remanding for further proceedings—are ineffectual when a party assails the constitutionality of an agency's structure, procedures, or existence. What the party wants is an injunction against further unconstitutional agency proceedings inflicting irreparable harm, not to be sent back to the agency.

It is little surprise, then, that the sole time this Court has considered whether a statutory scheme for review of agency action implicitly stripped a district court of jurisdiction over a constitutional challenge to the agency itself, the Court unanimously concluded that the statute did not. *See Free Enter. Fund*, 561 U.S. at 489-91. There, the relevant statute empowered the Securities and Exchange Commission to review any rule or sanction issued by the Public Company Accounting Oversight Board. *Id.* at 489 (citing 15 U.S.C. §§7217(b)(2)-(4), (c)(2)). An aggrieved party could then challenge a final order or rule of the Commission in a court of appeals. *Id.* (citing 15 U.S.C. §78y). The government urged that the statute established "an exclusive route" to (eventual) judicial review, and thus implicitly stripped district courts of jurisdiction to hear even constitutional challenges to the Board's "existence." *Id.* at 489-90. In a section of the opinion with no noted dissent, this Court disagreed, explaining that the petitioners' structural constitutional claims were "outside" the agency's "competence and expertise" and did "not require

technical considerations of [agency] policy." *Id.* at 491 (citation omitted). Instead, those claims presented "standard questions of administrative law, which the courts are at no disadvantage in answering." *Id.*

The Court emphasized that reading the statute to implicitly strip district courts of jurisdiction would have left the petitioners with no way to "meaningfully pursue their constitutional claims." *Id.* at 490. While the government argued that the petitioners could eventually raise their claims in court by pursuing a challenge to a Board rule or standard in the administrative-review process, the Court rejected that suggestion as untenable. As the Court explained, reading the statute to implicitly force the petitioners to pursue those roundabout paths would make little sense when their "general challenge" to the Board's "existence" was entirely "collateral" to any challenge they might bring to a particular agency rule or order. *Id.* And the government's alternative suggestion that the petitioners incur a Board sanction to get into court would have essentially required them to "bet the farm" as the price of "testing the validity" of the Board. *Id.* (citations omitted). The Court was unwilling to attribute to the statute such a broad implicit stripping of jurisdiction as to leave no "'meaningful' avenue of relief" for the petitioners' constitutional claims. *Id.* at 490-91 (quoting *Thunder Basin*, 510 U.S. at 212).

Taken together, "the lesson of these cases is straightforward": Absent clear statutory language to the contrary, "challenges to an agency's *structure*, *procedures*, or *existence*, rather than to an agency's adjudication of the merits on an individual case, may be heard by a district court." Pet.App.33 (Bumatay,

J., dissenting). For those challenges, a judicial-channeling provision operates not to merely defer review, but as a highly disfavored effort to preclude all meaningful judicial review and to insulate Executive Branch action from judicial scrutiny that can prevent constitutional injuries. Thus, when presented with the question whether a statutory administrative-review scheme implicitly strips district courts of the jurisdiction they would otherwise possess under §1331, courts must "scrutinize each claim to determine whether it's merely an attack on a merits determination or something more existential to the agency." Pet.App.34. "The demarcation of jurisdiction along these lines most respects the separation of powers" by maintaining an appropriate division of labor between Article III courts and Article II agencies. *Id.* "After all, pronouncing the constitutionality of a government function is precisely the business of Article III courts." *Id.*

II. The FTC Act Does Not Strip The District Court Of Jurisdiction To Hear Axon's Constitutional Challenges To The FTC's Structure, Procedures, And Existence.

The FTC Act does not divest the district courts of jurisdiction over Axon's challenges to the structure, procedures, and very existence of the FTC. Axon alleges that FTC ALJs are principal officers who are unconstitutionally insulated by dual-layer removal protections. That is a structural separation-of-powers challenge that goes to the power of the FTC's ALJs to adjudicate *any* case. It produces a here-and-now injury of being subjected to the authority of an insufficiently accountable principal officer. Axon's

challenge to the FTC's combination under one roof of investigatory, prosecutorial, and adjudicative functions is much the same. It challenges the FTC's very "existence." *See Free Enter. Fund*, 561 U.S. at 490. Axon's challenge to the uncodified, non-public, black-box "clearance" process through which the FTC and DOJ decide which path a case will take likewise goes to the constitutionality of the agency's procedures and likewise challenges the FTC's power to initiate and pursue *any* merger investigation.

Nothing in the text of the FTC Act, which simply channels review of cease-and-desist orders to the courts of appeals, manifests any congressional intent to preclude district-court jurisdiction over those constitutional challenges or to deny meaningful judicial review altogether. To the contrary, appellate-court review of an administrative record is a poor fit for Axon's claims, while the district-court jurisdiction and associated remedies available under §1331 are a perfect fit to enjoin these ongoing violations of federal law. Structural constitutional claims are the bread and butter of Article III courts, not Article II agencies. Moreover, channeling those claims to administrative proceedings would deprive Axon of any meaningful judicial review by forcing it to suffer the very constitutional injury of which it complains: being forced to submit to the authority of an unconstitutionally structured agency. Nothing in the FTC Act gives even the slightest indication that its administrative-review provisions strip district courts of their traditional jurisdiction to remedy the injury a party suffers when it is subjected to the authority of an agency whose structure, procedures, and existence violate the Constitution.

A. Axon's Constitutional Claims Are a Misfit for the FTC Act's Administrative-Review Scheme.

1. The jurisdiction-stripping analysis begins where any statutory-interpretation analysis begins: with the text of the statute. The text of the FTC Act "does not expressly limit the jurisdiction that other statutes confer on district courts." *Free Enter. Fund*, 561 U.S. at 489. The FTC itself is authorized to invoke that jurisdiction in specified circumstances, *see* 15 U.S.C. §53(b), which underscores that there is nothing incompatible between FTC-related proceedings and district courts. Nor does anything in the statutory text even hint at the notion that it is designed to strip district courts of jurisdiction over challenges to the constitutionality of the agency itself, *i.e.*, to the FTC's very power to act. To the contrary, the text reflects a narrow focus on challenges to a specific form of agency action that is often, but not always, the source of the would-be challenger's injury: FTC cease-and-desist orders.

When the Commission believes that a party is violating antitrust law, the statute authorizes the agency to issue a "cease and desist" order. 15 U.S.C. §45(b). An affected party "may" then "obtain a review of such order in the court of appeals of the United States" by filing a petition for review of "such order" and asking the court of appeals to "set aside" the order. *Id.* §45(c). Consistent with the assignment of review to an *appellate* court, the statute contemplates the filing of the administrative record in the court of appeals. Only once the record has been filed does the court of appeals have "exclusive" "jurisdiction" to

"affirm, enforce, modify, or set aside [such] orders." *Id.* §45(d). Nothing in the Act even hints that these permissive procedures affirmatively preclude judicial review of challenges that are independent of cease-and-desist orders or strip district courts of expressly granted jurisdiction under §1331 or the ability to enjoin ongoing constitutional injuries.

That is not terribly surprising; the FTC Act presupposes a constitutionally structured agency, and hence focuses only on challenges to the final actions produced by that agency, not challenges to the agency's power to act in the first place. Moreover, the FTC Act envisions that the primary means through which the agency would inflict injury on regulated parties is via cease-and-desist orders. Thus, when a party's complaint is that it is being subjected to proceedings before an unconstitutional and unaccountable ALJ or before an unconstitutional and unaccountable agency in ways that inflict a here-and-now injury, whether or not they culminate in a cease-and-desist order, the FTC Act neither provides an obvious channel for judicial review nor precludes the exercise of jurisdiction under §1331. Indeed, in contrast to the statutory scheme the Court considered in *Free Enterprise Fund* and many other statutes, the Act does not broadly provide for appellate-court review of all agency action. The Act addresses only cease-and-desist orders; it does not supply (let alone preclude) federal-court jurisdiction over any agency action *other than* a cease-and-desist order. *Cf., e.g.*, 15 U.S.C. §78y(a)(1) ("a final order of the [Securities and Exchange] Commission"); 5 U.S.C. §7703(d)(1) ("any final order or decision of the [Merit Systems

Protection] Board"); 30 U.S.C. §816(a)(2) ("any order" of the Mine Safety and Health Review Commission).

Even as to cease-and-desist orders, moreover, the FTC Act presupposes the existence of an administrative record and narrowly circumscribes the relief that reviewing courts may grant, limiting courts of appeals to granting only a "decree affirming, modifying, or setting aside" such an order. 15 U.S.C. §45(c). The Act reflects no preference for appellate review of claims where the administrative record is useless to considering the claims. Nor does the Act even equip those appellate courts with the tools to address constitutional challenges to an agency's structure, procedures, and existence, as it gives courts no power to grant injunctive or declaratory relief. Even the agency itself must go to district court to get injunctive relief. In short, a straightforward reading of the statutory text renders it "fairly discernible," *Free Enter. Fund*, 561 U.S. at 489, that the FTC Act does *not* channel into its administrative-review procedures the kinds of structural constitutional challenges at issue here.

2. The nature of Axon's constitutional claims reinforces the conclusion that they are not "of the type Congress intended to be reviewed within th[e] statutory structure." *Thunder Basin*, 510 U.S. at 212.

First, Axon's "general challenge[s]" to the FTC's structure and procedures are "'collateral' to any Commission orders" "from which review might be sought." *Free Enter. Fund*, 561 U.S. at 490. Just as in *Free Enterprise Fund*, Axon objects "to the [agency's] existence, not to any of its" particular actions or orders. *Id.* Axon's complaint is being subjected to an

unconstitutional and unaccountable ALJ and agency wholly apart from whether the proceedings culminate in a cease-and-desist order. Axon's constitutional challenges are paradigmatic examples of claims that transcend any particular dispute or proceeding. *See id.* Axon challenges the FTC's constitutional grounding and power to act *at all*, regardless of what outcome its proceeding may ultimately reach. These claims assert that the ALJ and agency lack the constitutional prerequisites to take *any* action vis-à-vis Axon. The claims have nothing to do with the substance of the antitrust investigation the FTC was conducting into Axon's acquisition or the merits of the administrative-enforcement proceeding the FTC filed against Axon shortly after Axon filed its complaint in federal district court. Axon will not escape injury if the proceedings do not culminate in a cease-and-desist order. The injury Axon is suffering by being subjected to an unconstitutional proceeding will exist and persist regardless of the outcome that proceeding produces. *See* Pet.App.42-44 (Bumatay, J., dissenting).

Moreover, largely owing to their collateral nature, Axon's constitutional challenges to the FTC's structure, procedures, and existence do not implicate the FTC's substantive expertise in antitrust policy in the least. As this Court has "often observed," "agency adjudications are generally ill suited to address structural constitutional challenges, which usually fall outside the adjudicators' areas of technical expertise." *Carr v. Saul*, 141 S.Ct. 1352, 1360 (2021). That is precisely the case here: Like the petitioners in *Free Enterprise Fund*, Axon asserts an Article II claim against the double layer of removal protection enjoyed

by FTC ALJs. As in *Free Enterprise Fund*, that structural constitutional claim does "not require technical considerations of [agency] policy" or turn on any disputed questions of fact within the agency's competence to resolve. 561 U.S. at 491. It presents "standard questions of administrative law, which the courts are at no disadvantage in answering." *Id.* Put simply, "no amount of antitrust expertise can tell us whether ALJs must be directly removable by the President." Pet.App.44 (Bumatay, J., dissenting).

The same goes for Axon's challenge to the FTC's combined investigatory, prosecutorial, adjudicative, and appellate functions, its attack on the insulation of Commissioners from presidential removal, and its challenges to the FTC's black-box "clearance" process. Those claims do not implicate the FTC's antitrust expertise; to the contrary, they are the kinds of constitutional claims that could be asserted against *any* agency that is structured and operates like the FTC. It would make little sense to read the FTC Act as implicitly stripping district courts of jurisdiction over constitutional claims that are entirely "outside the Commission's competence and expertise." *Free Enter. Fund*, 561 U.S. at 491.

3. Reading the FTC Act to strip courts of jurisdiction over constitutional claims like Axon's would be particularly problematic because it "could foreclose all meaningful judicial review" of such claims. *Id.* at 489 (quoting *Thunder Basin*, 510 U.S. at 212-13). As this Court recently reiterated, structural constitutional violations inflict "a 'here-and-now' injury on affected third parties." *Seila Law*, 140 S.Ct. at 2196 (quoting *Bowsher*, 478 U.S. at 727

n.5). "In other words, a government agency inflicts injury on a person whenever it subjects that person to unconstitutional authority—regardless of whether a sanction is levied by the agency." Pet.App.43 (Bumatay, J., dissenting). Axon's lawsuit seeks to enjoin just such a constitutional injury—namely, Axon's subjection to an investigation and enforcement proceeding by an unaccountable ALJ and an unaccountable agency whose structure and procedures violate the Constitution. The only avenue for meaningful judicial review of those structural claims is in district court, *before* the agency inflicts further injury on Axon.

Telling Axon to wait until after FTC enforcement proceedings for the possibility of eventual judicial review if the proceedings culminate in a sanction is a non sequitur. Axon's beef is not that it must pay an invalid fine or should not lose a job on an unconstitutional basis. *Cf. Thunder Basin*, 510 U.S. 200; *Elgin*, 567 U.S. 1. In cases like that, there is no harm if the agency proceedings vindicate the challenger's arguments, and vacatur of a fine or reversal of a discharge on appeal can provide meaningful relief. Axon's beef is being subjected to unaccountable officers and an unconstitutional process. Just as the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury" and warrants immediate injunctive relief, *Roman Cath. Diocese of Brooklyn*, 141 S.Ct. at 67, subjection to unconstitutional agency authority and enforcement proceedings inflicts an injury that can be meaningfully remedied only by pre-enforcement injunctive relief.

Once Axon "'sustain[s] injury' from an executive act that allegedly exceeds the [agency's] authority," *Seila Law*, 140 S.Ct. at 2196, there is no way to unring the bell. If Axon somehow prevails after years of proceedings before an unaccountable ALJ and agency, its constitutional injuries will remain unremedied. And if Axon loses before the agency and eventually prevails on its constitutional claims in a judicial proceeding reviewing an ultimate FTC order, it would be a Pyrrhic victory, as no remedy could undo the injury to Axon of having been subjected to unconstitutional agency authority and procedures.

Again, *Free Enterprise Fund* is instructive. Here, as there, *see* 561 U.S. at 490, the relevant statute provides for judicial review of only certain agency actions. Here, as there, there is no guarantee that the agency will ever take the kind of action that the statute's administrative-review procedures cover. The FTC could drop the investigation or enforcement proceeding or coerce Axon into settling, or Axon could prevail on the merits in the enforcement proceeding. More troubling still, the FTC could just let those proceedings drag on precisely because of the lack of unaccountability that underlies Axon's complaint. In any of those scenarios, no cease-and-desist order would ever issue, so Axon would never receive judicial review of its constitutional challenges to the FTC's power to act in the first place. Yet Axon would still have suffered the "*independent* injury of being subject to an unconstitutional structure or procedure." Pet.App.37 n.3 (Bumatay, J., dissenting).

Even if Axon is ultimately subjected to a cease-and-desist order and prevails on its structural claims,

it still could not obtain any meaningful *relief* since the FTC Act does not give courts of appeals the power to grant injunctive relief. *See* 15 U.S.C. §45(c). Unlike a petitioner who wants his job back or a fine vacated and can obtain meaningful relief, Axon's sole prize for proving that it was subjected to unconstitutional proceedings before an agency will be more proceedings before that agency. That would be more like a cruel hoax than a real remedy, and it reinforces the conclusion that Axon's constitutional claims are not of the type covered by the Act's administrative-review scheme, as "[i]t makes little sense to require litigants to present claims to adjudicators who are powerless to grant the relief requested." *Carr*, 141 S.Ct. at 1361; *cf. Elgin*, 567 U.S. at 22 (CSRA administrative-review provision provided "precisely the kinds of relief" petitioners sought from district court). Nor, as noted, will the administrative record shed any light on the controversy, even though that is the *raison d'être* of appellate jurisdiction over a different set of claims. Statutes should not lightly be read to disregard the relative competencies of trial and appellate courts or to force parties to engage in a "vain exercise," *Carr*, 141 S.Ct. at 1361, that provides no "'meaningful' avenue of relief." *Free Enter. Fund*, 561 U.S. at 491 (quoting *Thunder Basin*, 510 U.S. at 212).

In short, statutory text, context, and practical consequences all reinforce the same conclusion: The FTC Act does not strip district courts of jurisdiction to adjudicate collateral constitutional challenges to the FTC's structure, procedures, and existence.

B. The Ninth Circuit's Contrary Conclusion Cannot Be Reconciled With the Statute's Text or This Court's Cases.

The Ninth Circuit reached a contrary conclusion only by treating the statutory text as afterthought, narrowly confining *Free Enterprise Fund* to its facts, and embracing an implausibly broad reading of *Elgin*. In reality, this Court's cases foreclose the conclusion that Congress implicitly channeled to the FTC and appellate courts collateral constitutional claims that the Commission has neither the power nor the competence to resolve and that the appellate courts cannot properly remedy.

1. At the outset, the Ninth Circuit began on the wrong foot by giving short shrift to the statutory text. The court devoted all of four sentences to analyzing the text of the FTC Act. *See* Pet.App.10. In its view, it was enough to observe that the Act contains a "detailed overview" of the cease-and-desist order process, which "impliedly precludes jurisdiction for at least some claims." *Id.* That cursory analysis overlooks that the existence of a provision channeling review of some matters to the court of appeals is only the beginning, not the end, of the textual analysis. The statutory text determines not just the *existence* of any jurisdictional preclusion, but also its *scope*. After all, when the ultimate question is whether a claim is "of the type Congress intended to be reviewed within th[e] statutory structure," *Thunder Basin*, 510 U.S. at 212, a court can hardly answer that question by observing that *some* claims are channeled to the appellate courts. It must instead determine what kinds of claims the statute covers. Here, the text

shows that the FTC Act creates (at most) a carve-out from §1331 jurisdiction for efforts to affirm, modify, or set aside an FTC cease-and-desist order; it does not immunize the FTC from district-court proceedings or channel every challenge that might implicate an administrative-enforcement proceeding into the appellate courts.

2. The Ninth Circuit next mistakenly posited that this lawsuit effectively *is* a challenge to a cease-and-desist order, even though the claims Axon seeks to press do not turn even on the existence, let alone the merits, of any cease-and-desist order. The majority acknowledged that Axon's constitutional claims are "substantively" collateral, as they are "not *substantively* intertwined with the merits dispute in th[e] agency proceeding." Pet.App.21-22. But, relying on language from this Court's decision in *Elgin* about the lawsuit there being "the vehicle by which" the parties "s[ought] to reverse" a specific agency action, 567 U.S. at 22, the court posited that the relevant question is whether a claim is collateral "in the *procedural* sense"—*i.e.*, whether it "is the procedural vehicle that the party is using to reverse the agency action." Pet.App.21-22. The court then concluded that Axon's claims fail this "procedurally collateral" test even though Axon has not asked the district court to reverse any agency action, simply because enjoining the agency from acting *as currently structured* would have the incidental effect of eliminating any prospect of a cease-and-desist order.

That test would render virtually any structural challenge—no matter how divorced from the merits of any specific proceeding—non-collateral. That absurd

result cannot be reconciled with this Court's precedents. Indeed, while the Ninth Circuit made the puzzling claim that "[n]either *Thunder Basin* nor *Free Enterprise Fund* shed any light on whether 'wholly collateral' should be construed procedurally or substantively," Pet.App.22, both in fact squarely foreclose its "procedural" test. In *Free Enterprise Fund*, the Court considered it self-evident that the petitioners' "general challenge" to the PCAOB's very "existence" was "collateral" to any objection they might raise to one of the agency's auditing standards or rules—even though that challenge, if successful, could have precluded the agency from issuing *any* standards or rules. 561 U.S. at 490. The Ninth Circuit did not and could not explain how the same type of Article II claim that was archetypally collateral in the PCAOB context is hopelessly intertwined with the merits in the FTC context.

As for *Thunder Basin*, the Court there identified two examples of cases involving "wholly collateral" claims—*Mathews v. Eldridge*, 424 U.S. 319 (1976), and *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991)—neither of which fits the Ninth Circuit's "procedural" bill. *See Thunder Basin*, 510 U.S. at 212-13. In *Mathews*, the petitioner brought a due process challenge to administrative procedures established for assessing the existence of a "continuing disability" before terminating disability benefits. 424 U.S. at 324-25. Although that challenge would have had the ultimate effect of precluding those procedures from being used to issue final agency action against the petitioner, the Court nonetheless deemed it collateral because it was "entirely collateral to his substantive claim of entitlement" to benefits. *Id.* at 330. In

McNary, the petitioner brought a due process challenge to amnesty determination procedures "despite an Immigration and Nationality Act provision expressly limiting judicial review of individual amnesty determinations to deportation or exclusion proceedings." *Thunder Basin*, 510 U.S. at 213. While that challenge likewise would have precluded those procedures from being used to take action against the petitioner, the Court nonetheless deemed it "collateral" because it was distinct from "individual denials" of amnesty. *McNary*, 498 U.S. at 492.

Instead of focusing on this Court's squarely on-point decision in *Free Enterprise Fund*, the Ninth Circuit fixated on language in *Elgin* describing the constitutional claims there as "the vehicle by which [the petitioners] seek to reverse" particular agency action. 567 U.S. at 22. But *Elgin* was not announcing some sweeping new test, let alone one that would overrule *Free Enterprise Fund*. It was simply accurately describing the claims at hand, which challenged specific agency actions. While the petitioners challenged the validity of a federal statute, what they wanted was their jobs back. That is the precise relief the Civil Service Reform Act channels to the MSPB and the appellate courts. But while the Reform Act provided "the exclusive avenue to judicial review" for an employee who "challenges an adverse employment action," *id.* at 5, the petitioners instead brought suit in federal district court. The fact that the petitioners challenged their discharges on the ground that the Selective Service statutes were unconstitutional did not make their challenges "collateral" to the discharge orders. *Id.* at 7-8.

Instead, their claims fell in the heartland of the Reform Act's channeling provision.

The relevant question under this Court's cases thus remains whether a constitutional claim is separable from, and therefore collateral to, *the merits*—not whether it would have the ultimate effect of precluding the agency from taking actions covered by the administrative-review scheme. Here, Axon's constitutional claims concern the FTC's very power to act, independent of any particular action the FTC may take against Axon. Resolution of those claims in Axon's favor would disable the FTC from taking any action against Axon unless and until the FTC's structure conformed to the Constitution. Conversely, resolution of the constitutional claims in the FTC's favor would allow the FTC to pursue enforcement proceedings against Axon, but it would not render any cease-and-desist order immune from challenge on the merits. Simply put, Axon's challenges to the FTC's structures, procedures, and very existence are entirely collateral to the merits of any dispute over the Vievu acquisition and indistinguishable from the challenges deemed collateral and subject to §1331 jurisdiction in *Free Enterprise Fund*.

3. The Ninth Circuit's remaining reasons for failing to follow *Free Enterprise Fund* fare no better. The court agreed that, for the most part, Axon's constitutional claims do not implicate the FTC's substantive expertise. Pet.App.24. But it questioned whether that was the case for Axon's constitutional challenge to the FTC's black-box "clearance" process. Pet.App.28. In the majority's view, the FTC "might have valuable insight into how the clearance process

works and demonstrate that the process does in fact comport with due process." Pet.App.28-29. Of course, since the clearance process itself is secret, it is anyone's guess whether the FTC in fact possesses any relevant "insight." But that aside, whatever "insight" the FTC might possess regarding the history of the clearance process, "its origins, and its justifications," the FTC still "can't shed particular light on whether the process satisfies due process and equal protection guarantees." Pet.App.40 (Bumatay, J., dissenting). Axon does not claim that *its* case should have gone to the DOJ/federal-court track under a "correct" clearance process. Rather, as with its Article II claim and its challenge to the amalgamation of functions in a single-agency body, Axon's challenge to the clearance process goes to the very existence of the process and raises "standard questions" of constitutional law that "do not require technical considerations" of antitrust policy and that "courts are at no disadvantage in answering." *Free Enter. Fund*, 561 U.S. at 491.

Finally, the Ninth Circuit tried to distinguish *Free Enterprise Fund*'s discussion of the absence of meaningful judicial review on the theory that *Free Enterprise Fund* "speaks only to a situation of no guaranteed judicial review" at all. Pet.App.19. But, as Judge Bumatay explained, that is precisely the case here. Axon's complaint is not that it will suffer injury *if, but only if*, the FTC ultimately issues a cease-and-desist order. Its complaint is that the very act of "subject[ing] the company to the FTC's jurisdiction" and the whims of unaccountable officials "is the harm in and of itself," regardless of whether a cease-and-desist order ever issues. Pet.App.36 (Bumatay, J.,

dissenting). Seeking an injunction and declaratory relief in the district court can meaningfully remedy that injury, and is the only path to judicial review of, and relief from, that harm. If no cease-and-desist order ever issues, Axon will still be injured, and those injuries will remain unremedied and irremediable. And if a cease-and-desist order issues and Axon prevails on its claims, the remedy will come too late (and a remand for further proceedings will remedy nothing).

In all events, the ultimate question is not whether some judicial review is available for a structural claim if everything breaks right. The question is whether—given the baseline of general availability and expressly granted district-court jurisdiction under §1331—a claim is "of the type Congress intended to be reviewed [exclusively] within th[e] statutory structure." *Free Enter. Fund*, 561 U.S. at 489. When a challenge assails the very structure of the agency, relegating the challenger to the agency is a non sequitur. The agency cannot objectively address the claim or build an administrative record to facilitate appellate review. All the agency can do is inflict the very constitutional injuries the challenger seeks to remedy. Under those circumstances, to deny the challenger access to a district court that could remedy its constitutional injuries is inconsistent with any plausible congressional intent.

III. Timely Judicial Resolution Of Claims Like Axon's Is Critical To Preserving The Separation Of Powers And Preventing Agency Overreach.

Ensuring that district courts remain free to exercise the jurisdiction Congress gave them to adjudicate structural constitutional claims like Axon's is critical to preserving the separation of powers and preventing the worst forms of agency overreach. Indeed, the timing of judicial review in this context is every bit as critical as the underlying constitutional protections themselves.

As even the Ninth Circuit recognized, "it makes little sense to force a party to undergo a burdensome administrative proceeding to raise a constitutional challenge against the agency's structure before it can seek review from the court of appeals." Pet.App.18. When a party asserts that it is being subjected to agency action that violates the separation of powers and is not authorized by the Constitution, it is completely incoherent to tell the party to call back later after the unconstitutional process has run its course. By that time, the "here-and-now" injury will have already occurred, and no meaningful remedy will be available.

Courts recognize this instinctively when traditional individual rights, like free speech and free exercise, are at issue, even going so far as to recognize the deprivation of constitutional rights as irreparable injury per se. There is no reason to treat structural constitutional claims differently and force parties to let the constitutional harm run its course before seeking an ineffectual cure. The structural provisions

of the Constitution "protect the individual," *Bond*, 564 U.S. at 222, and are at least as important as the First Amendment in safeguarding individual rights, *see Bowsher*, 478 U.S. at 730. There is no reason to relegate their enforcement to second-class status when it comes to district-court jurisdiction and effective remedies. The structural protections of the Constitution are simply too important to leave their enforcement to gadflies. Parties that vindicate the most fundamental guarantees of the government by prevailing in a constitutional case deserve effective relief.

If parties cannot bring claims like Axon's in district court, then eventual judicial review of such claims will depend on a host of contingent circumstances, including whether regulated parties can withstand the expense—here more than $20 million in legal fees for a $13 million acquisition—and negative publicity of litigating in the agency's own tribunal long enough to (eventually) make it to court. Powerful federal agencies are well aware of that dynamic, and they act as one would expect potent, insulated, and non-accountable institutions to act—bringing immense settlement pressure to bear in hopes that structural constitutional claims will never reach an Article III court.

The FTC is a case in point. Insulated from direct presidential oversight, the agency has not lost a fight on its home turf in 25 years. Emboldened by a win streak born of unaccountable power, and relying on the barriers between Axon and the (at best) remote possibility of eventual judicial review, the FTC has tried to extract from Axon everything it can think of,

while resisting mightily any Article III examination of the authority the agency wields. Not satisfied with Axon's offer to walk away from its acquisition and infuse a divestiture buyer with millions of dollars in working capital, the FTC instead seeks to force Axon to hand over its own independently developed intellectual property to a rival and create a virtual "clone" of itself. It has used a black-box "clearance" process to deny Axon any prospect of meaningful judicial review (without any felt need to explain that decision or even articulate the standards by which it was made) and to relegate Axon to an administrative forum where the agency always wins.

Far from being in a position to fairly or impartially judge the constitutionality of its own structure, the FTC has even suggested that its ALJs need not be subject to *any* presidential control whatsoever. *See* Order Denying Respondent's Motion to Disqualify the ALJ, *In re Axon Enter., Inc.*, No. 9389, 2020 WL 5406806, at *6 (FTC Sept. 3, 2020) (opining that "the President wields a constitutionally adequate degree of control over ALJs, *to the extent Presidential oversight over persons with adjudicative functions is necessary*" (emphasis added)). Those are the actions of an agency that either does not read this Court's cases, *cf. Lucia*, 138 S.Ct. 2044, or believes itself so well insulated from Article III or even Article II oversight that it worries not a whit about abiding by them.

Making matters worse, deferring judicial review for the rare target of agency overreach who is willing to fight to the bitter end creates remedial deficiencies that often leave even successful litigants without

meaningful relief. Take, for instance, the case of Raymond J. Lucia. The administrative proceedings against him began in September 2012. After a hearing before an unconstitutionally appointed SEC ALJ and an appeal to a Commission that is itself insulated from presidential control, Lucia was found to have violated the Advisers Act, directed to pay a penalty, and barred from ever again working in the securities business (which he had done, without incident, for more than two decades). In 2018, this Court ruled in his favor on his Appointments Clause claim. *See Lucia*, 138 S.Ct. 2044. But that just led to another administrative proceeding in which the new ALJ unsurprisingly declined to break from a determination that had already been approved by the Commission. *See In re Raymond J. Lucia Cos.*, Admin. Proc. File No. 3-15006 (SEC June 16, 2020).

Lucia's experience underscores that it is virtually impossible to unring the bell after someone has been forced to endure an unconstitutional process. In other cases, deferring judicial review has forced the Court to confront challenging severability questions or embrace dubious remedial doctrines, like the *de facto* officer doctrine. *See, e.g.*, *Collins v. Yellen*, 141 S.Ct. 1761, 1795-99 (2021) (Gorsuch, J., concurring in part); *United States v. Arthrex, Inc.*, 141 S.Ct. 1970, 1988-94 (2021) (Gorsuch, J., concurring in part and dissenting in part). Recognizing that Congress has not stripped district courts of their traditional jurisdiction to resolve constitutional challenges to an agency's very existence would eliminate the prospect of leaving a successful constitutional litigant with no meaningful relief and the need to invent atextual doctrines to ameliorate the consequences of belatedly recognizing

that an agency has operated unconstitutionally for years after one hearty litigant finally runs the gauntlet necessary to secure a judicial determination. The far better route is to allow agency procedures and structures to be tested early, while a successful litigant can still obtain a meaningful remedy before the unconstitutional applications pile up.

Put simply, unless parties in Axon's position can obtain timely judicial review of an agency's very authority to act, many or most separation-of-powers challenges will likely never make it beyond the agency's own tribunal to an Article III court. And even those that do will make it to court too late to provide any meaningful relief to all the parties that have already been forced to endure the whims of an unconstitutional and unaccountable agency. The predictable result will be ever more aggressive agency action asserted against private parties. That is an unacceptable result for a system that relies on courts to enforce the separation of powers precisely because they are critical to the protection of individual rights.

The decision below imposes all those untoward consequences without even requiring Congress to be accountable for them by passing a statute expressly restricting judicial review. That misguided decision misreads this Court's precedents and cannot be allowed to stand.

CONCLUSION

For the foregoing reasons, this Court should reverse.

Respectfully submitted,

PAMELA B. PETERSEN
AXON ENTERPRISE, INC.
17800 N. 85th Street
Scottsdale, AZ 85255
(623) 326-6016

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
MATTHEW D. ROWEN
EVELYN BLACKLOCK
KIRKLAND & ELLIS LLP
1301 Pennsylvania Ave., NW
Washington, DC 20004
(202) 389-5000
paul.clement@kirkland.com

Counsel for Petitioner

May 9, 2022