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 OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* SUPPORTING PETITIONER

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QUESTION PRESENTED

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

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INTRODUCTION AND INTERESTS OF *AMICI CURIAE*[*]

Litigation is not cheap. Whether it occurs before an arbiter, an agency, or a federal court, litigation comes with a high price tag. And antitrust litigation higher still. Unlike the Federal Government—which continues to print money—private companies have scarce resources to risk. The Ninth Circuit, however, supposed that Axon has an unlimited litigation budget to pursue its challenges to the Federal Trade Commission's unconstitutional administrative process.

This misunderstanding of litigation realities led the Ninth Circuit to affirm the District Court's dismissal of Axon's constitutional challenges for want of jurisdiction. Under the Ninth Circuit's decision, the FTC can exercise both executive and legislative power without meaningful review by a federal court. The lack of judicial review violates core separation-of-powers principles.

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It often appears as *amicus* opposing the accumulation of power in any one governmental branch contrary to the Constitution's careful separation of powers. *See, e.g.*, *Lucia v. SEC*,

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[*] No party's counsel authored any part of this brief. No person or entity, other than *amici* and their counsel, paid for the brief's preparation or submission. All parties filed blanket consents.

138 S. Ct. 2044 (2018); *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477 (2010).

Allied Educational Foundation is a nonprofit charitable and educational foundation based in Tenafly, New Jersey. Founded in 1964, AEF promotes education in diverse areas of study, including law and public policy. It has appeared as *amicus* often in this Court.

Although this case arises in the FTC context, many administrative agencies similarly exercise both executive and juridical power. The Securities and Exchange Commission and the Federal Deposit Insurance Corporation are just two examples. Courts, however, are abdicating their responsibility to decide important constitutional questions about these agencies' structures. Purporting to follow Congress's command, they leave the issues for later; later never comes. Yet neither Congress nor the President may transfer judicial power to Article II agencies. This Court should reverse the Ninth Circuit's decision and vindicate basic separation-of-powers principles by holding that federal courts have jurisdiction to hear these challenges.

STATEMENT

Axon makes body-worn cameras and digital evidence management systems for law enforcement. It acquired a failing competitor for around $13 million. Pet. App. 2a-3a, 49a, 51a. But no good deed goes unpunished. The FTC soon began investigating the deal. Axon has spent over $20 million defending that action.

Seeing its legal bills mount, Axon agreed to sell all assets it acquired from the competitor. It also offered to infuse the purchaser with $5 million. Yet this was not enough for the FTC, which wanted Axon to license its own pre-acquisition intellectual property to the buyer. Pet. App. 2a-3a, 51a. Axon demurred and then sued the FTC seeking a declaratory judgment.

The suit raised three constitutional challenges to the FTC's enforcement procedures. *See* Pet. App. 11a, 49a-50a, 67a-68a n.5. It also argued that Axon did not violate the antitrust laws by acquiring the competitor. *Id.* at 3a, 52a. Hours after Axon filed suit, the FTC began administrative proceedings against Axon. *Id.* at 3a n.1, 52a. Given that action, Axon agreed to dismiss its request for merits-based declaratory relief. *See id.* at 11a n.3. The only claims remaining in the case are Axon's constitutional claims challenging the FTC's structure and procedures.

The District Court, however, concluded that it lacked jurisdiction over the entire suit because Congress wanted companies like Axon to first pursue any constitutional claim before the FTC. *See* Pet. App. 61a-89a. A divided Ninth Circuit panel affirmed that dismissal. *See generally id.* at 1a-46a. While the certiorari petition was pending, the *en banc* Fifth Circuit split from ten other courts of appeals in deciding that district courts have jurisdiction over these constitutional challenges. *See generally Cochran v. SEC*, 20 F.4th 194 (5th Cir. 2021) (*en banc*). This Court then granted certiorari to resolve the circuit split.

SUMMARY OF ARGUMENT

I.A. Denial of judicial process was a motivating factor behind the American Colonies' declaring their independence from Britain. Responding to concerns raised at the state ratifying conventions, States soon ratified the Fifth Amendment's Due Process Clause. This guaranteed Americans judicial process.

B. The Constitution requires Article III courts to adjudicate cases and controversies. Judicial adjudication ensures that Congress, which passes the laws, and the President, who enforces the laws, do not have too much power. It also guards the citizen's right to judicial process—something the Founders gained at the cost of bloodshed. Neither Congress nor the President can assign this power to adjudicate cases and controversies to administrative agencies.

C. This Court requires lower courts to consider three factors when deciding whether Congress wanted agencies to decide a class of claims. As *Cochran* shows, courts can apply these three factors in a constitutional manner. But this Court needs to set firmer guidelines for courts' consideration of the three factors to protect the separation of powers and parties' due process rights.

D. The Court should not just explain how lower courts must apply the *Thunder Basin* factors and then remand for the Ninth Circuit to apply that ruling. Rather, the Court should properly apply the *Thunder Basin* factors after explaining the Ninth Circuit's errors.

II. The Court has long recognized that it should adopt procedural rules that encourage litigants to bring Appointments Clause challenges. But the Ninth Circuit's decision does just the opposite. As there is little chance of obtaining judicial review of claims or succeeding before the agency, parties will have no incentive to raise the issue unless the Court changes how lower courts apply the *Thunder Basin* factors.

ARGUMENT

The Constitution grants federal courts jurisdiction over nine types of cases or controversies. U.S. Const. art. III, § 2, cl. 1; *see* Erwin Chemerinsky, Federal Jurisdiction 260 (4th ed. 2003). To exercise federal jurisdiction, district courts must have both constitutional and statutory jurisdiction. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998). When both prerequisites are satisfied, "federal courts" have a "general duty to exercise the jurisdiction that is conferred upon them." *Hamdan v. Rumsfeld*, 548 U.S. 557, 589 (2006) (cleaned up).

No one disputes that the District Court could exercise constitutional jurisdiction over Axon's complaint. The question is whether Congress stripped the District Court of statutory jurisdiction to hear the case. To decide this question, the Ninth Circuit examined whether Congress's intent to deprive district courts of jurisdiction over certain claims is "fairly discernible in the statutory scheme." *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 351 (1984) (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 157 (1970)). Having determined that it was, the Ninth Circuit then decided whether

Axon's claims are the *type* that Congress wanted reviewed by the FTC.

Under this Court's precedent, courts must consider three factors when deciding this question. First, will a litigant "as a practical matter be able to obtain meaningful judicial review" of its claim? *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 213 (1994) (quoting *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991)). Second, can the agency use its expertise when deciding the issue? *See id.* at 212 (citation omitted). And third, are the claims "wholly collateral" to the case's merits? *Id.* (quoting *Heckler v. Ringer*, 466 U.S. 602, 618 (1984)).

District courts and courts of appeals must often apply the *Thunder Basin* factors when determining whether federal courts can decide a pre-enforcement challenge. Unfortunately, the Ninth Circuit and nine other courts of appeals apply *Thunder Basin* in a way that violates parties' due-process rights. The Court should therefore reverse and instruct lower courts how to apply *Thunder Basin* in a constitutional manner.

I. PROPERLY APPLYING THE *THUNDER BASIN* FACTORS SHOWS THAT THE DISTRICT COURT HAS JURISDICTION OVER AXON'S CONSTITUTIONAL CHALLENGES.

A. The Fifth Amendment's Original Meaning Protects The Right To Judicial Process.

The Constitution prohibits depriving any person of "due process of law." U.S. Const. amend. V.

"[A] mass of materials in the early years of the republic equated due process of law with judicial process." Gary Lawson, *Take the Fifth . . . Please!: The Original Insignificance of the Fifth Amendment's Due Process of Law Clause*, 2017 B.Y.U. L. Rev. 611, 630 (2017); *see* Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 Yale L.J. 408, 443 (2010) ("due process of law" commonly referred "to judicial process").

This reflected the understanding of pre-Revolutionary colonists. The colonists thought that "an act of Parliament that purports to abrogate the procedural protections of customary law violates due process." Nathan S. Chapman & Michael W. McConnell, *Due Process As Separation of Powers*, 121 Yale L.J. 1672, 1700 (2012).

The Fifth Amendment's Due Process Clause therefore protects the right to judicial process. But the Ninth Circuit's application of *Thunder Basin* here eliminated this right. The decision allowed only administrative review of serious constitutional questions. Such a ruling deprived Axon of due process of law.

B. Congress Cannot Replace Judicial Process With Administrative Process.

The Founders recognized the importance of judicial process before the Fifth Amendment's ratification. *Cf.* 3 Elliot's Debates 451 (George Nicholas, Virginia Convention) (arguing that the Constitution allowed courts to apply due-process

principles). The text and structure of the Constitution confirms this pre-ratification interpretation.

"The judicial Power of the United States" is "vested in one supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." U.S. Const. art. III, § 1. This power "extend[s] to all Cases, in Law and Equity, arising under the Constitution [and] the Laws of the United States." *Id.* art. III, § 2, cl. 1. Although the Constitution does not define the term, the judicial power is "the power to bind parties and to authorize the deprivation of private rights." William Baude, *Adjudication Outside Article III*, 133 Harv. L. Rev. 1511, 1513-14 (2020).

The "Constitution assigns" "the responsibility for deciding" cases and controversies to "Article III judges in Article III courts." *Stern v. Marshall*, 564 U.S. 462, 484 (2011). This responsibility includes "the mundane as well as the glamorous, matters of common law and statute as well as constitutional law, issues of fact as well as issues of law." *Id.* (quoting *N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 86-87 n.12 (1982) (plurality)).

"The judicial Power of the United States" thus cannot "be shared" with another branch just as the President cannot "share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto." *United States v. Nixon*, 418 U.S. 683, 704 (1974) (cleaned up). So Congress "cannot vest any portion of the judicial power of the United States, except in courts [it] ordained and established." *Martin v. Hunter's Lessee*, 14 U.S. 304, 330 (1816). Thus, administrative

agencies cannot exercise the judicial power of the United States because they are not Article III courts. *See* Baude, 133 Harv. L. Rev. at 1539. But the Ninth Circuit's application of *Thunder Basin* allowed only administrative review of serious constitutional questions. Such a ruling deprived Axon of due process of law.

C. The Ninth Circuit Allowed Congress To Replace Judicial Process With Administrative Process.

The Ninth Circuit replaced judicial process with administrative process here. It applied all three *Thunder Basin* factors to avoid judicial review. This turned the proper analysis on its head.

1. Illusory judicial review is not meaningful judicial review.

Whether a defendant receives initial judicial review turns on the administrative agency's choice of forum. Many agencies can choose to enforce laws through administrative proceedings or suits in district court. *See, e.g.*, 15 U.S.C. §§ 45(b) and 53(b) (FTC); 78u(d) and 78u-2 (SEC). If the agency decides to proceed in district court, then the defendant gets immediate judicial review of its constitutional claims. But if the agency opens an administrative enforcement action, the Ninth Circuit held that the defendant may not access Article III courts until the administrative proceeding concludes. This rule extends not only to merits issues but also to challenges to the agency itself, including its administrative proceedings.

As the Seventh Circuit has acknowledged, this holding creates tension with *Free Enterprise Fund*. *See Bebo v. SEC*, 799 F.3d 765, 770-71 (7th Cir. 2015). The Eleventh Circuit tried to explain away this tension. *See Hill v. SEC*, 825 F.3d 1236, 1247-48 (11th Cir. 2016). That attempt is unpersuasive. The Eleventh Circuit said that, unlike in *Free Enterprise Fund*, Hill need not "bet the farm to test the constitutionality of the ALJs." *Id.* at 1248. But, to date, Axon has spent over $20 million fighting this battle. If that is not betting the farm, what is?

As the Fifth Circuit explained, the Seventh and Eleventh Circuits were wrong. "*Free Enterprise Fund* is squarely on point, foreclosing any possibility that" district courts lack jurisdiction to consider challenges to agencies' structures. *Cochran*, 20 F.4th at 201. The Fifth Circuit relied on this "Court['s] determin[ation] that the Government's theory would foreclose all meaningful judicial review because [15 U.S.C. §] 78y provides only for judicial review of SEC action, and not every [Public Company Accounting Oversight Board] action is encapsulated in a final SEC order or rule." *Id.* at 202 (cleaned up).

The same is true of FTC ALJs' orders. Not every FTC ALJ decision leads to a final FTC order that can be challenged in a court of appeals. So there is no way to distinguish this case from *Free Enterprise Fund* on the first *Thunder Basin* factor.

Yet the Ninth Circuit's decision rubber-stamped the agency's choice of forum. This ignored the Fifth Amendment when considering *Thunder Basin*'s meaningful-judicial-review factor. *Cf.* Caleb Nelson, *Adjudication in the Political Branches*, 107

Colum. L. Rev. 559, 590 (2007) (explaining how courts cannot provide meaningful judicial review in these cases).

There is another way that the Ninth Circuit's decision exacerbated this misapplication of the first *Thunder Basin* factor. It held that Axon could receive meaningful judicial review of the FTC's decision. But there is a substantial difference between having meaningful review and having illusory review. *See TXO Prod. Corp. v. All. Res. Corp.*, 509 U.S. 443, 500 (1993) (Kennedy, J., concurring). Here, the judicial review cited by the Ninth Circuit is illusory.

Over the past twenty-five years, only two companies have managed to obtain judicial review of an FTC merger decision. *See* Brief for Appellant at 42 n.10, *Axon Enter., Inc. v. FTC*, 986 F.3d 1173 (9th Cir. 2021) (No. 20-15662), 2020 WL 2310605. Once-a-decade review is anything but "meaningful." Rather, it is merely illusory—theoretically possible but overwhelmingly improbable. *Thunder Basin* requires more. It mandates that courts consider pre-enforcement challenges when no opportunity exists for meaningful judicial review. And no review is meaningful if it is unlikely even to occur.

An example proves the point. Aleksei Navalny was convicted of stealing money from two Russian firms. *See* RadioFreeEurope, *Russian Supreme Court Upholds Conviction Of Navalny Brothers In 'Yves Rocher Case'* (Apr. 25, 2018), https://bit.ly/38x7yEx. Navalny could appeal to the Russian Supreme Court. But was this review meaningful? No, it was merely illusory. Russia's singular goal was to show the international community that it was not

incarcerating Navalny for opposing President Vladimir Putin.

The Ninth Circuit relied on similarly illusory review when applying the *Thunder Basin* factors. In the past quarter century, only two companies have obtained judicial review of an FTC merger decision—both lost. *See generally Polypore Int'l, Inc. v. FTC*, 686 F.3d 1208 (11th Cir. 2012); *Chi. Bridge & Iron C. N.V. v. FTC*, 534 F.3d 410 (5th Cir. 2008). Axon could therefore in theory obtain judicial review of an adverse FTC decision. Yet theoretical review falls well short of what the Due Process Clause requires under *Thunder Basin*.

There is a second reason why Axon cannot receive meaningful judicial review of the FTC's decision here. Axon challenges the FTC's administrative procedures. These constitutionally flawed procedures harm Axon here and now. Even if the FTC—for the first time in twenty-five years—were to rule in Axon's favor, that would not remedy the harm. Similarly, even if Axon became the first company in the past three decades to obtain judicial review *and* succeed before a court, that would not remedy Axon's injury.

If this Court affirms, Axon must again respond to the FTC's discovery demands. If a hearing before the ALJ starts, Axon must spend an exorbitant amount on attorneys' fees and litigation costs. Then if it loses before the ALJ, Axon must spend money to litigate before the full commission. All this before it can even ask an Article III court to decide whether the administrative proceedings are constitutional.

If Axon were to become the first company in twenty-five years to prevail after finally getting judicial review, it would still lose. It could not recover the tens of millions of dollars expended before the FTC. The hearing before the ALJ would have also proceeded despite the unconstitutional appointment. It is impossible to unring that bell.

The Ninth Circuit's decision therefore barred meaningful judicial review of Axon's meritorious constitutional claims. It allowed a non-Article III tribunal—the FTC—to decide this issue. That violated Article III's clear command.

2. Agencies lack expertise in constitutional law.

The justification for allowing administrative agencies to decide issues is "their expertise." *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 196 (1997) (citing *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 812 (1978)). Under *Thunder Basin*, courts must therefore consider whether the issues presented in the pre-enforcement challenge fall within an agency's area of expertise.

But the Ninth Circuit's decision gave agencies the final say on where a defendant must litigate its constitutional claims. Any case the FTC brings must include issues and claims within its expertise. Otherwise, it would lack statutory authority to hold the administrative hearing. The same is true for the SEC, FDIC, and other agencies.

It does not follow that collateral issues—like the constitutionality of the agency's structure—are

within the agency's expertise. Decisions like the one below, however, mean that every pre-enforcement challenge that a defendant brings in federal court is within the agency's expertise. Not only does this violate *Thunder Basin*'s plain language, it also violates defendants' due-process rights.

As the Fifth Circuit explained, agencies like the SEC and FTC lack expertise in adjudicating constitutional challenges to their structures. *Cochran*, 20 F.4th at 208 (citing *Carr v. Saul*, 141 S. Ct. 1352, 1360 (2021)). The Ninth Circuit correctly recognized this fact. Pet. App. 23a. Federal courts—not the FTC—are constitutional law experts. This lack of expertise is even truer today given a non-lawyer as FTC commissioner.

Yet the Ninth Circuit still affirmed. In the Ninth Circuit's view, two of the three *Thunder Basin* factors are mere surplusage. *See* Pet. App. 25a ("the presence of meaningful judicial review [alone] is enough to find that Congress precluded district court jurisdiction over the type of claims that Axon brings" (citation omitted)). Allowing non-attorneys to go outside their expertise and decide important constitutional questions is a quintessential Article III violation.

3. Challenges to agency structures and procedures are wholly collateral to the merits of an agency enforcement action.

The Fifth Circuit correctly held that "whether a claim is collateral to the relevant statutory-review

scheme depends on whether that scheme is intended to provide the sort of relief sought by the plaintiff." *Cochran*, 20 F.4th at 207 (citing *Elgin v. Dep't of Treasury*, 567 U.S. 1, 22 (2012)). The FTC's review provisions do not cover the type of relief Axon seeks. Those provisions are meant to allow judicial review of decisions finding anti-competitive conduct. They are not meant to review decisions about the constitutionality of the FTC's structure.

That is not the only reason that Axon's claims are collateral to the merits. A federal court could decide Axon's constitutional challenges without even knowing the merits question. Whether the FTC's and Department of Justice's process for determining which agency pursues certain antitrust claims violates equal protection does not depend on Axon's acquisition of a failing competitor. Rather, it is a mixed question of law and fact independent of the acquisition. The only facts a court needs to decide the issue are the agency's procedures for dividing cases—procedures the FTC will not disclose. In other words, nothing about the challenged transaction is relevant.

Axon's challenge to the dual-layer for-cause removal protection afforded FTC ALJs is also wholly collateral to the merits. This question is a pure question of law that requires no factfinding. A federal court could decide this issue solely based on the relevant statutes and regulations, without looking at what the FTC alleges in the administrative proceeding.

It is hard to imagine how claims could be more collateral to the merits than Axon's. The Ninth Circuit should have looked to *Free Enterprise Fund*

and to the Constitution. They show that allowing a federal administrative agency to decide these constitutional claims while precluding immediate judicial review violates Axon's due-process rights.

D. Vacatur Is An Insufficient Remedy.

The Court should not just vacate the Ninth Circuit's decision and remand for further proceedings. Rather, it should go through the three *Thunder Basin* factors as district courts should when considering these challenges. This accomplishes three important goals.

First, it would prevent the Ninth Circuit and the District Court from ignoring this Court's decision. Although this wouldn't be a concern with many courts of appeals, it is a serious concern when deciding how to dispose of a case from the Ninth Circuit. For example, after this Court's decision in *Hernandez v. Mesa*, 137 S. Ct. 2003 (2017), the Ninth Circuit refused to faithfully apply that decision in *Rodriguez v. Swartz*, 899 F.3d 719 (9th Cir. 2018) . It wasn't until after this Court issued *Hernandez v. Mesa*, 140 S. Ct. 735 (2020) that the Ninth Circuit relented and properly applied the Court's precedent.

Second, it would give practical guidance to lower courts who will have to apply *Thunder Basin* moving forward. Rather than having to interpret the Court's decision, the lower courts could simply follow the blueprint in the Court's opinion.

Finally, "[t]he doctrine of the separation of powers was adopted by the convention of 1787 not to promote efficiency but to preclude the exercise of

arbitrary power." *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting). But here preserving the separation of powers would actually increase efficiency. Although this is "a court of review, not of first view," *Brownback v. King*, 141 S. Ct. 740, 747, n.4 (2021), both the District Court and the Ninth Circuit applied the *Thunder Basin* factors. It is thus appropriate for the Court to review that decision by properly applying the factors. This would also promote judicial economy by bypassing the remand and the inevitable certiorari petition that would follow. Thus, undertaking the analysis would save the parties' resources, the Ninth Circuit's resources, and this Court's resources.

* * *

The Ninth Circuit ignored the FTC's exercise of arbitrary power. This it may not do. The Court should properly apply the *Thunder Basin* factors here. Considering the factors in line with the Constitution shows that the District Court has jurisdiction over Axon's constitutional challenges.

II. CURRENT APPLICATION OF THE *THUNDER BASIN* FACTORS DISCOURAGES PARTIES FROM CHALLENGING UNCONSTITUTIONAL AGENCY STRUCTURES.

This Court encourages litigants to raise Appointments Clause defects. *Lucia*, 138 S. Ct. at 2055 n.5 (citing *Ryder v. United States*, 515 U.S. 177, 183 (1995)). So one of the factors that the Court considers when crafting appropriate remedies for Appointments Clause violations is whether it will encourage similar challenges moving forward. *See id.*

The Court should do the same when considering when district courts have subject-matter jurisdiction over constitutional challenges to federal agencies' structures. If anything, the ability to challenge the agencies' structure is more important than the type of relief you can receive if successful. The type of relief a party may receive if successful in raising an Appointments Clause challenge is moot if the district court lacks subject-matter jurisdiction to consider the challenge. The district court, and court of appeals, will never consider what is the appropriate remedy if it must dismiss the case for want of jurisdiction.

If the Court requires lower courts apply *Thunder Basin* to protect the separation of powers and parties' due process rights, parties will be able to challenge the constitutional structure of federal agencies in court. This would allow district courts to reach the merits of the claims and decide whether the agency's structure is constitutional. Because parties will know that the district courts can reach the merits of their constitutional challenges, they will be more likely to bring their challenges. They can rest assured that they are not throwing money away by filing suits that are inevitably going to be dismissed for lack of jurisdiction.

And given the nature of the challenges that Axon raises, reversing the Ninth Circuit would cause parties to worry less about remedies for an Appointments Clause violation. If the District Court declares the FTC's structure unconstitutional, any conceivable remedy would fix the harm that Axon faces.

Axon would not have to proceed with a hearing before an unconstitutional ALJ and waste those resources. So a ruling that instructs lower courts to properly apply the *Thunder Basin* factors would solve all the problems with parties being discouraged from raising Appointments Clause violations in pre-enforcement actions like this one. This incentive is another reason for the Court to reverse the Ninth Circuit's decision and properly apply the *Thunder Basin* factors to allow Axon's suit to proceed.

* * *

The issues at stake here are important; they implicate foundational separation-of-powers issues. If the Court affirms the Ninth Circuit's holding, it will erode the separation of powers. It will also deprive parties of their right to due process of law. The Court should right the ship by reversing the Ninth Circuit's decision and instructing lower courts that they must hear most constitutional challenges to agencies' structures.

CONCLUSION

This Court should reverse.

Respectfully submitted,

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