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 *AMICUS CURIAE* AMERICANS FOR PROSPERITY FOUNDATION IN SUPPORT OF PETITIONER

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BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Under Supreme Court Rule 37.3, Americans for Prosperity Foundation ("AFPF") respectfully submits this *amicus curiae* brief in support of Petitioner.[1]

INTEREST OF *AMICUS CURIAE*

Amicus curiae AFPF is a 501(c)(3) nonprofit organization committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. As part of this mission, it appears as *amicus curiae* before federal and state courts. AFPF believes judicially created barriers to meaningful Article III review are inconsistent with the separation of powers. Those facing *ultra vires* or unconstitutional agency enforcement actions should not have to face years of potentially ruinous costs to have their day in court.

SUMMARY OF ARGUMENT

It should not be the law that an agency can do whatever it wants for as long as it wants to a business—no matter how *ultra vires*, abusive, or unconstitutional—without being subject to judicial review unless and until that abusive process ends. Were that the case, agency enforcement action would

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[1] All parties have consented to the filing of this brief. *Amicus curiae* states that no counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae* or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

supplant the jurisdiction of Article III courts even in cases of constitutional questions, presenting a clear violation of the separation of powers. That proposition is particularly true with respect to so-called "independent" agencies, where even the political branches cannot meaningfully intervene, leaving agencies wholly unaccountable until any opportunity for meaningful redress has been extinguished.

The panel majority recognized as much: "it seems odd to force a party to raise constitutional challenges before an agency that cannot decide them." App. 16. "[I]t 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." App. 18. Nonetheless, the divided panel mistakenly found it lacked jurisdiction, departing from the plain text of 15 U.S.C. § 45(c)–(d). Based on an all-too-common overreading of *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), and *Elgin v. Department of Treasury*, 567 U.S. 1 (2012), the majority mistakenly believed itself bound to eschew review. *See* App. 18.

This Court should correct this misreading of this Court's precedent and reaffirm that nothing in the FTC Act—or materially indistinguishable statutory schemes of other agencies—shutters the courthouse doors for those facing unconstitutional agency enforcement actions. Nothing in *Thunder Basin*, *Elgin*, or any of this Court's other precedent purports to bar review of Axon's claims. In fact, this Court's precedent in *Free Enterprise Fund v. Public Co. Accounting Oversight Board,* 561 U.S. 477 (2010), says the exact opposite.

Any handwringing about administrative or judicial efficiency, or purported administrative expertise, as justifying this abdication of the judicial role—particularly as to constitutional questions and statutory interpretation—must yield in the face of citizens' basic right to be free from extralegal administrative proceedings. Courts must retain jurisdiction, in the Article III sense, to act as a necessary safety valve for meritorious *ultra vires* and constitutional claims—particularly structural constitutional claims that go to the very legality of the process, as is the case here.

The district court had federal question jurisdiction over all of Axon's constitutional challenges to the FTC's structure, existence, and procedures. Nothing in the FTC Act purports to bar district court review of these claims. The FTC should not be allowed to duck judicial review of its actions and deny Axon its day in court simply by bringing in-house enforcement action.

If FTC wants to prosecute Axon for alleged antitrust violations, it should be required to prove up its case in federal court before an impartial Article III judge, subject to the protections of the Federal Rules of Civil Procedure and the Federal Rules of Evidence. The Constitution requires no less.

ARGUMENT

I. THE FTC ACT DOES NOT STRIP JURISDICTION OVER AXON'S CONSTITUTIONAL CLAIMS.

A. Recent Jurisdiction-Stripping Precedent Breaks With Historical Practice.

Until recently,[2] at least some Circuits recognized federal district courts had Article III jurisdiction to enjoin FTC administrative prosecutions under at least two circumstances: where agency action is (1) unconstitutional or egregiously *ultra vires*;[3] or (2) causing severe hardship. *See, e.g.*, *American Gen. Ins. Co. v. FTC,* 496 F.2d 197, 200 (5th Cir. 1974) (possible jurisdiction over "gross and egregious" errors); *Coca-Cola Co. v. FTC*, 475 F.2d 299, 303 (5th Cir. 1973) (possible jurisdiction over nonfrivolous constitutional claims); *Borden, Inc. v. FTC*, 495 F.2d 785 (7th Cir. 1974).[4] These decisions set a high bar but recognize courts do not abdicate their Article III role merely

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[2] *Cf. LabMD, Inc. v. FTC*, No. 1:14-cv-00810-WSD, 2014 U.S. Dist. LEXIS 65090 (N.D. Ga. May 12, 2014) (not citing *Thunder Basin* or *Elgin*), *aff'd* 776 F.3d 1275 (11th Cir. 2015); *LabMD, Inc. v. FTC*, No. 13-15267, 2014 U.S. App. LEXIS 9802 (11th Cir. Feb. 18, 2014) (unpublished) (same).

[3] All of Axon's constitutional claims meet this test. *See, e.g.,* App. 50 (district court acknowledging "[t]he constitutional claims Axon seeks to raise in this case are significant and topical.").

[4] The Fifth Circuit, sitting *en banc*, recently concluded that the analogous SEC Act did not strip district court jurisdiction over certain constitutional claims, but did not address whether the FTC Act impliedly strips district court jurisdiction to adjudicate constitutional claims. *See Cochran v. SEC*, 20 F.4th 194, 211 (5th Cir. 2021) (*en banc*).

because a case is related to an administrative proceeding.

This approach makes sense by defending the courts' constitutional role while allowing for pretextual or frivolous claims to be dismissed. As Judge Jed Rakoff explained in finding jurisdiction over an equal-protection challenge to an SEC enforcement action, frivolous claims can be screened out at the motion to dismiss stage.[5] *See Gupta v. SEC*, 796 F. Supp. 2d 503, 514 (S.D.N.Y. 2011). And respondent-plaintiffs cannot derail ongoing administrative proceedings by obtaining an injunction unless they can show they are "likely to succeed on the merits" and "likely to suffer irreparable harm in the absence of preliminary relief," among other things. *See Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008). In any event, "when Congress vests a district court with jurisdiction, it's obliged to exercise it—efficiencies aside." *Cochran v. SEC*, 20 F.4th 194, 234 (5th Cir. 2021) (*en banc*) (Oldham, J., concurring). At the least, the district courts should look at the *merits* of constitutional or *ultra vires* claims before dismissing them out of hand.

Here, the motions panel unanimously recognized the possibility that Axon's claims are meritorious, and

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[5] The equal protection claim in *Gupta* resembles Axon's "clearance" process claim. *Compare Gupta*, 796 F. Supp. 2d at 506–08, 514 (discussing and finding jurisdiction over equal protection claim), *with* App. 35–41 (Bumatay, J., concurring in judgment in part and dissenting in part) (describing and explaining why district court had jurisdiction to adjudicate Axon's "clearance" process claim).

that it is facing irreparable harm, granting a stay. And the merits panel seemed to agree that at least some of Axon's claims presented serious constitutional questions. *See* App. 25–26. But it erred by holding the district court lacked jurisdiction to adjudicate these claims on the merits, *see Free Enterprise Fund*, 561 U.S. at 489–91, and enjoin the FTC's administrative prosecution, *see Bell v. Hood,* 327 U.S. 678, 684 (1946) ("[I]t is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution[.]"); *see also TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2210 (2021) ("[A] person exposed to a risk of future harm may pursue . . . injunctive relief to prevent the harm from occurring, at least so long as the risk of harm is sufficiently imminent and substantial.").

B. Courts Have Jurisdiction Over Constitutional and *Ultra Vires* Challenges to FTC Administrative Prosecutions.

Axon has brought substantial Article II and due process claims against the agency's structure, procedures, and existence arising under the U.S. Constitution. *See* App. 25–26, 28–29 (Bumatay, J., concurring in judgment in part, dissenting in part); App. 50. Section 1331 states that "district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331; *see also id.* § 1361 (mandamus). "Not some or most—but all." *Cochran*, 20 F.4th at 199. 5 U.S.C. § 702 waives FTC's sovereign immunity for all "agency actions," *see Trudeau v. FTC*, 456 F.3d 178, 187 (D.C. Cir. 2006), including administrative complaints, as the Supreme Court has held, *FTC v. Standard Oil Co. of California*, 449 U.S.

232, 238 n.7 (1980). The Declaratory Judgment Act authorizes declaratory and injunctive relief.[6] *See* 28 U.S.C. §§ 2201, 2202. Thus, the district court had a duty to exercise federal-question jurisdiction over all of Axon's constitutional claims, and the power to grant Axon the relief it sought, absent a jurisdiction-stripping statute. There is no such statute.

To be sure, Congress may statutorily limit the subject-matter jurisdiction of lower federal courts. *See* U.S. Const. Art. III, § 2; 5 U.S.C. § 703; *see also Sheldon v. Sill,* 49 U.S. (8 How.) 441, 449 (1850). But "[i]n light of §1331, the question is not whether Congress has specifically conferred jurisdiction, but whether it has taken it away." *Elgin*, 567 U.S. at 25. If Congress wants to do that, it must clearly say so. *See Cameron v. EMW Women's Surgical Center, P.S.C.*, 142 S. Ct. 1002, 1009 (2022) ("We do not read a statute or rule to impose a jurisdictional requirement unless its language clearly does so." (citing *Henderson v. Shinseki*, 562 U.S. 428, 439 (2011)).

Here, Congress has not clearly stated an intent to shut the courthouse doors to *any* of Axon's

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[6] In addition, under the All Writs Act, courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a).

constitutional claims.[7] The FTC Act's judicial review provision creates only a limited exception to the general rule of district-court jurisdiction by providing jurisdiction in the Courts of Appeals to review "an order of the Commission to cease and desist from using any method of competition or act or practice." 15 U.S.C. § 45(c).[8] *See also* App. 30 (Bumatay, J., concurring in judgment and dissenting in part) (noting "the [FTC] Act is silent on . . . what role district courts play when a party—like Axon—asserts broad constitutional claims against the FTC itself"). "Upon the filing of the record," that jurisdiction "to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive." 15 U.S.C. § 45(d). *Cf. Cochran*, 20 F.4th at 201 ("§ 78y elsewhere uses mandatory terms—and they confirm our understanding that Congress did not strip district courts of § 1331 jurisdiction over structural constitutional claims. . . . [T]here would be no point in making jurisdiction 'exclusive' in the court of appeals if no other court ever had jurisdiction."). No other straight-to-the-Court-of-Appeals process is provided to transfer jurisdiction

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[7] Even if the question was close, any statutory ambiguities should be construed against the interests of its drafter: the government. *See also Wash. State Dep't of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000, 1016 (2019) (Gorsuch, J., concurring in judgment). The benefit of any doubt must go to Axon.

[8] *Cf. Cochran,* 20 F.4th at 200 ("The statute says nothing about people . . . who have not yet received a final order of the Commission. Nor does it say anything about people . . . who have claims that have nothing to do with any final order that the Commission might one day issue.").

away from the district court when the case presents itself in another posture.

No exception to ordinary jurisdiction of the federal courts can be inferred from the narrow exclusive jurisdiction provision in the FTC Act for appeals from cease and desist orders. *See* Antonin Scalia & Bryan Garner, *Reading Law* 107 (2012). As a federal district court explained:

> Section 45(d) does not grant to courts of appeals any jurisdiction exclusive or otherwise . . . until a cease and desist order has issued. Consequently, that section cannot be interpreted to deprive this Court of jurisdiction to review any orders issued or actions taken by the FTC when a cease and desist order has not yet been issued.

E. I. Du Pont de Nemours & Co. v. FTC, 488 F. Supp. 747, 750 (D. Del. 1980); *see Boise Cascade Corp. v. FTC*, 498 F. Supp. 772, 777 (D. Del. 1980) ("[N]othing in the [FTC] Act suggests that courts of appeals have exclusive jurisdiction over agency actions prior to the issuance of a cease and desist order.") (citation omitted). *Cf. La. Real Estate Appraisers Bd. v. FTC,* 917 F.3d 389, 391, 394 (5th Cir. 2019) (similar).

Rather, the FTC Act quite sensibly places exclusive jurisdiction in the Courts of Appeals when a suit involves a challenge to an FTC cease or desist order—the role of the court in such circumstances is more akin to that of an appellate court and, given the administrative proceedings that have already occurred, going straight to the court of appeals allows

for more prompt completion of judicial review. But this path for exclusive review of a particular type of agency order indicates nothing about the availability of judicial review for other claims involving the agency. *Cf. Sackett v. EPA*, 566 U.S. 120, 129 (2012) ("[I]f the express provision of judicial review in one section of a long and complicated statute were alone enough to overcome the APA's presumption of reviewability for all final agency action, it would not be much of a presumption at all.").

This Court has explained how a textually similar judicial review provision works *with* other statutes, not against them: "[T]he text does not expressly limit the jurisdiction that other statutes confer on district courts. Nor does it do so implicitly." *Free Enter. Fund*, 561 U.S. at 489 (citing 28 U.S.C. §§ 1331, 2201); *see also Cochran*, 20 F.4th at 209 ("To put it plainly: *Free Enterprise Fund* held that § 78y does not provide an adequate possibility of meaningful judicial review for challenges to the structure of the Exchange Act's statutory-review scheme."). So too here.[9] *See also Cochran*, 20 F.4th at 214 (Oldham, J., concurring) ("Here, the text is as unambiguous as can be. Section 1331 creates jurisdiction, and § 78y strips only part of it."); *Tilton v. SEC*, 824 F.3d 276, 299 n.6 (2d Cir. 2016) (Droney, J., dissenting).

The FTC Act provides for jurisdiction channeling to the Courts of Appeals of claims challenging an FTC cease and desist order; it otherwise leaves in place

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[9] According to the panel majority, "[t]his provision [15 U.S.C. § 45] is almost identical to the statutory review provision in the SEC Act[.]" App. 10.

district courts' general federal-question jurisdiction. District courts have a "virtually unflagging" obligation to decide cases within their jurisdiction. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014); *see also Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996) ("We have often acknowledged that federal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress."). And as Chief Justice Marshall has explained, courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. . . . Questions may occur which . . . [courts] would gladly avoid; but . . . [courts] cannot avoid them." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821). That observation resonates here. For "'[w]hen a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction. . . . The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied.'" *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 358–59 (1989) (Scalia, J.) (quoting *Willcox v. Consolidated Gas Co.*, 212 U.S. 19, 40 (1909)).

If the FTC scheme is unconstitutional, that is for the courts to decide—let the chips fall where they may. *Cf. Collins v. Yellen*, 141 S. Ct. 1761, 1780 (2021) ("[W]henever a separation-of-powers violation occurs, any aggrieved party with standing may file a constitutional challenge."). It is no answer to "allow the agency to duck and weave its way out of meaningful judicial review" of that question. *See Fleming v. USDA*, 987 F.3d 1093, 1111 (D.C. Cir. 2021) (Rao, J., concurring in part, dissenting in part).

C. Case Law Does Not Bar the Courthouse Doors to Axon's Constitutional Claims.

The panel decision is rooted in a misinterpretation and expansion of *Thunder Basin*, 510 U.S. 200, and *Elgin*, 567 U.S. 1.[10] *Thunder Basin* and *Elgin* were both rooted in implied congressional intent. The principles they announce cannot be transplanted from old soil to new without an assessment of the congressional intent embodied there. And that assessment of the FTC Act confirms Congress did not intend to preclude Axon from raising its claims in federal district court. Nothing in *Thunder Basin* or *Elgin* compels otherwise. *See also Cochran*, 20 F.4th at 234 (Oldham, J., concurring) ("*Elgin* did not purport to transform the *Thunder Basin* test from a claim-focused inquiry to a case-focused inquiry.").

The FTC Act's history and structure is significantly different from that of the statutes at issue in *Thunder Basin* and *Elgin*. In *Thunder Basin*, for example, the Mine Act's history shows Congress specifically intended to *narrow* the scope of district court review. *See* 510 U.S. at 209–11 & n.15 (noting Congress amended the Act to eliminate district court review and finding "the legislative history and these amendments to be persuasive evidence that Congress intended to" preclude judicial review). Similarly, Congress intentionally *narrowed* the scope of district court jurisdiction when it enacted the Civil Service

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[10] This is not the first time this Court's precedent has been weaponized by FTC as part of a project to reimagine a statute to FTC's advantage. *See generally AMG Capital Mgmt., LLC v. FTC,* 141 S. Ct. 1341 (2021).

Reform Act ("CSRA"), the statute at issue in *Elgin*. *See* 567 U.S. at 11–12. The FTC Act's history includes no similar history. The Mine Act also allowed aggrieved mine operators, not the Secretary, to initiate actions before the Commission. *Thunder Basin*, 510 U.S. at 209. And the CSRA set forth in "painstaking detail . . . the method for covered employees to obtain review of adverse employment actions[.]" *Elgin*, 567 U.S. at 11–12.

By contrast, entities like Axon have no ability to obtain review of their constitutional challenges to the FTC's authority through the FTC Act scheme unless and until the FTC issues a cease-and-desist order against them. Moreover, the Mine Act involved administrative proceedings before an independent commission (rather than the agency enforcing the Mine Act), *see Thunder Basin*, 510 U.S. at 204; *Sec'y of Labor v. Knight Hawk Coal, LLC,* 991 F.3d 1297, 1300 (D.C. Cir. 2021), and the CSRA involved actions by the government as an employer, rather than a regulator*, see United States v. Fausto*, 484 U.S. 439, 443–47 (1988); *Nyunt v. Chairman, Broad. Bd. of Governors*, 589 F.3d 445, 448 (D.C. Cir. 2009) (Kavanaugh, J.) ("The CSRA is also exclusive: It constitutes *the* remedial regime for federal employment and personnel complaints."). Those are different animals from inhouse enforcement proceedings brought by administrative agencies, particularly when, as here, those enforcement proceedings are interfering with private rights.

Thunder Basin itself confirms the panel's decision here was erroneous. There, the Court emphasized that preclusion does not apply to claims that are "wholly collateral to a statute's review provisions and

outside the agency's expertise, particularly where a finding of preclusion could foreclose all meaningful judicial review." *Thunder Basin*, 510 U.S. at 213 (cleaned up). Nor does it preclude all constitutional claims. *See id.* at 216–18; *Ironridge Global IV, Ltd. v. SEC*, 146 F. Supp. 3d 1294, 1303 n.5 (N.D. Ga. 2015) ("[S]ince *Thunder Basin*, other courts have held that the Mine Act does not preclude all constitutional claims from district court jurisdiction.") (citation omitted)); *see also* Luis Inaraja Vera, *Delayed Judicial Review of Agency Action*, 56 Harv. J. on Legis. 199, 228 (2019) (*Thunder Basin* "was not a facial challenge to the constitutional validity of the enforcement and judicial review provisions of the Mine Safety Act." (citing *Thunder Basin*, 510 U.S. at 218 n.22)). Yet here, the panel found Axon's constitutional claims precluded even though they are collateral to the enforcement proceeding, rely on superior law, and the FTC lacks expertise or authority to address these claims. *Cf. Free Enter. Fund*, 561 U.S. at 491 & n.2 (noting "Petitioners' constitutional claims are . . . outside the Commission's competence and expertise").

The panel opinion essentially read *Thunder Basin* as setting forth a one-factor test, not a three-factor test. In doing so, it emphasized the one factor that is *least* relevant to the implied preclusion question that the factors are meant to address: Did Congress intend, by enacting this statute, to foreclose ordinary routes of judicial review? The fact that Congress provided an opportunity for eventual judicial review through an administrative proceeding sheds little light on that question, given that Congress routinely creates duplicative routes to judicial review. The relationship between the claims, the statutory scheme, and the

agency's expertise are a far better guide to congressional intent in this context. There is very little reason to believe Congress would have intended regulated parties to be deprived of all opportunity to present constitutional claims that are collateral to a statutory scheme and do not require any agency expertise merely because those parties are regulated by an agency. The panel's overreading of *Elgin* seems to have led them astray from this basic point.

D. District Courts Have Jurisdiction Over At Least Some *Ultra Vires* Claims.

While not directly at issue here, this Court should also make clear nothing in the FTC Act purports to strip jurisdiction over *ultra vires* claims, particularly in extreme cases of FTC overreach causing severe hardship.[11] After all, "[t]he acts of all [government] . . . officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief." *Am. Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 108 (1902); *see, e.g., Leedom v. Kyne,* 358 U.S. 184 (1958); *Stark v. Wickard,* 321 U.S. 288 (1944). *See generally Chamber of Commerce of the United States v. Reich*, 74 F.3d 1322, 1327–29 (D.C. Cir. 1996). And

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[11] Nor does *Standard Oil* bar review of *ultra vires* claims against FTC. *See Athlone Indus., Inc. v. Consumer Prod. Safety Com.,* 707 F.2d 1485, 1489 n.30 (D.C. Cir. 1983) (distinguishing *Standard Oil*); *see also Cochran*, 20 F.4th at 210 ("*Standard Oil* did not concern implied jurisdiction stripping; rather, the issue before the Court was whether the FTC had taken a 'final agency action' within the meaning of the Administrative Procedure Act[.]" (citations omitted)).

as Judge Silberman has observed: "If a plaintiff is unable to bring his case predicated on either a specific or a general statutory review provision, he may still be able to institute a non-statutory review action."[12] *Chamber of Commerce*, 74 F.3d at 1327 (citing Byse and Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action*, 81 Harv. L. Rev. 308, 321 (1967)); *see* 28 U.S.C. § 1361. These types of claims would fall outside the FTC Act's review scheme, as FTC would not have any lawful authority even to bring the inhouse enforcement action.

II. EXHAUSTION BEFORE THE FTC IS FUTILE FOR AXON.

As the panel majority observed, "Axon raises legitimate questions about whether the FTC has stacked the deck in its favor in its administrative proceedings. . . . Axon essentially argues that the FTC administrative proceeding amounts to a legal version of the Thunderdome in which the FTC has rigged the rules to emerge as the victor every time." App. 26. Axon is correct. Allowing the administrative proceeding to continue without resolving Axon's

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[12] Subject-matter jurisdiction to adjudicate these types of *ultra vires* claims seeking negative injunctions does not hinge on the presence or absence of "final agency action," as these are not APA claims. In any event, experience has shown that FTC's filing of an administrative complaint is a "final" FTC decision on liability. *See* Section II, *infra.*

constitutional claims serves no legitimate purpose.[13] *See also Carr v. Saul,* 141 S. Ct. 1352, 1361 (2021) ("[T]his Court has consistently recognized a futility exception to exhaustion requirements.").

With respect to Axon's Article II claims, the Commission lacks relevant expertise and has already decided the issue against Axon. *See* Order, *In re Axon Enterprise*, F.T.C. No. 9389 (Sept. 3, 2020); *see also Free Enter.*, 561 U.S. at 491 ("Petitioners' constitutional claims are also outside the Commission's competence and expertise."). So, too, with respect to Axon's due process challenge to the FTC Act's blending of prosecutorial and judicial functions. "[A] challenge to the validity of the administrative procedure itself . . . also presents an issue beyond the competence of the . . . [agency] to hear and determine." *Oestereich v. Selective Serv. Sys. Local Bd.*, 393 U.S. 233, 242 (1968) (Harlan, J., concurring); *see id.* (Harlan, J., concurring) ("Adjudication of the constitutionality of congressional enactments has generally been thought

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[13] As Judge Oldham observed in *Cochran*: "The SEC's litigation position is a combination of 'trust us, we're the experts' and 'there will be time for judicial review when we're good and ready, thank you.'" *Cochran*, 20 F.4th at 225 (Oldham, J., concurring). That well describes the FTC's litigating position in this case and other challenges to the constitutionality of its in-house enforcement process. *See also* Order Denying Respondent LabMD's Motions for Stay, *In the Matter of LabMD, Inc.*, FTC No. 9357, at 4 (FTC Dec. 13, 2013) (asserting that "neither the District Court nor the Court of Appeals has jurisdiction to entertain LabMD's premature challenge to this adjudicatory proceeding").

beyond the jurisdiction of administrative agencies.").[14]

Further administrative consideration of Axon's equal protection and due process claims would likewise serve no purpose. As Judge Rakoff observed in the course of finding jurisdiction over an equal-protection claim in the SEC context similar to Axon's:

> [T]he SEC's administrative machinery does not provide a reasonable mechanism for raising or pursuing such a claim. The SEC's Rules of Practice do not permit counterclaims against the SEC, nor do they allow the kind of discovery of SEC personnel that would be necessary to elicit admissible evidence corroborative of such a claim. The Commission, having approved the OIP . . . would be inherently conflicted in assessing such a claim[.]

Gupta, 796 F. Supp. 2d at 513–14 (cleaned up).

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[14] As Judge Green observed in a fractured D.C. Circuit panel decision declining to review a facial constitutional challenge to the FTC Act brought by a company enmeshed in an FTC administrative prosecution: "Here, however, no amount of litigation expense or effort before the FTC could convince the agency that its prosecutorial powers are unconstitutional, nor has Congress directed persons . . . to litigate such constitutional issues before the agency. Viewed pragmatically then, the FTC's assertion of its prosecutorial powers must be deemed final action." *Ticor Title Ins. Co. v. FTC*, 814 F.2d 731, 757 (D.C. Cir. 1987) (opinion of Green, J.). That observation resonates here.

So too here. FTC inhouse precedent bars inquiry into the circumstances of the pre-complaint investigation and reasons why a complaint is issued, stating these matters "will not be reviewed by the courts." *See In re Exxon Corp*., 83 F.T.C. 1759, 1974 FTC LEXIS 226, at *2–3 (June 4, 1974). This limitation on the scope of discovery, *see also* 16 C.F.R. § 3.31(c)(1)–(2), prevents respondents like Axon from obtaining evidence necessary to substantiate potentially meritorious constitutional defenses. *See* Order, *In re Axon Enter*., F.T.C. No. 9389, 2020 FTC LEXIS 124, at *4 (July 21, 2020) (denying "discovery into the decision-making process that culminated in the FTC, rather than the DOJ, taking enforcement action against Axon"); Order, *In re Axon Enter*., F.T.C. No. 9389, 2020 FTC LEXIS 127 (July 21, 2020) (denying discovery as to clearance process); *see also* Order, *In re LabMD*, F.T.C. No. 9357, 2014 FTC LEXIS 35, at *9 n.3 (Feb. 21, 2014) ("[A]pplicable precedent holds that the Commission's decision making in issuing a complaint is outside the scope of discovery in . . . administrative litigation[.]"). Thus, Axon cannot possibly obtain the information it needs to show an equal protection or due process violation until the conclusion of the administrative process.

Nor do FTC's Rules even obligate complaint counsel to provide exculpatory evidence to Axon. This is because FTC, unlike other agencies, has resisted incorporating the *Brady* rule into its administrative

adjudication scheme.[15] *See, e.g., Amrep Corp.*, 102 F.T.C. 1362, 1371 (1983); *see also* Justin Goetz, Note, *Hold Fast the Keys to the Kingdom: Federal Administrative Agencies and the Need for* Brady *Disclosure*, 95 Minn. L. Rev. 1424, 1433 & n.63 (2011).

Unsurprisingly, then, as the panel majority recognized: "Axon claims—and FTC does not appear to dispute—that FTC has not lost a single case in the past quarter-century. Even the 1972 Miami Dolphins would envy that type of record." App. 26. As a former FTC Commissioner has explained:

> The FTC has voted out a number of complaints in administrative adjudication that have been tried by administrative law judges in the past nearly twenty years. In each of those cases, after the administrative decision is appealed to the Commission, the Commission has ruled in favor of FTC staff and found liability. In other words, in 100 percent of cases where the administrative law judge ruled in favor of the FTC staff, the Commission

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[15] In 2009, FTC amended its Rules of Practice to grab powers that had been previously exercised by the ALJ. 74 Fed. Reg. 1,804, 1,808–11 (Jan. 13, 2009). Under these changes, the same Commission that votes out the Complaint (not the ALJ) decides dispositive motions, *see* 16 C.F.R. § 3.22(a), and has greater case-management authority. *See* Initial Decision, *In re LabMD, Inc.*, F.T.C. No. 9357, 2015 FTC LEXIS 272, at *6 n.1 (Nov. 13, 2015). The FTC Rules now allow so-called "reliable" hearsay, including from "investigational hearings" that a respondent may not have been represented at or known of. *See* 16 C.F.R. § 3.43.

> affirmed liability; and in 100 percent of the cases in which the administrative law judge ruled found no liability, the Commission reversed.

Joshua D. Wright, Comm'r, FTC, *Section 5 Revisited: Time for the FTC to Define the Scope of Its Unfair Methods of Competition Authority*, 6 (Feb. 26, 2015), *available at* http://bit.ly/2c3FSYZ.[16] He concluded, "This is a strong sign of an unhealthy and biased institutional process. . . . Even bank robbery prosecutions have less predictable outcomes than administrative adjudication at the FTC." *Id.*

While the ALJ may find in favor of respondents from time to time, it is the Commission—the same body that votes out the complaint—that always seems to find in favor of FTC staff. This process presents additional unfairness for businesses: For unlike in federal court, where appellate courts generally give

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[16] For more recent examples of the Commission reversing when the ALJ found no liability, *see, e.g., Impax Labs., Inc. v. FTC,* 994 F.3d 484, 491 (5th Cir. 2021); *LabMD, Inc. v. FTC*, 894 F.3d 1221, 1226 (11th Cir. 2018) (vacating Commission order). Notably, LabMD unsuccessfully sought collateral federal court review of the FTC's enforcement action directly in a U.S. Court of Appeals *and* in federal district court. *See, e.g., LabMD, Inc. v. FTC*, No. 1:14-cv-00810-WSD, 2014 U.S. Dist. LEXIS 65090 (N.D. Ga. May 12, 2014), aff'd 776 F.3d 1275 (11th Cir. 2015); *LabMD, Inc. v. FTC*, No. 13-15267, 2014 U.S. App. LEXIS 9802 (11th Cir. Feb. 18, 2014) (unpublished). Nonetheless, LabMD's cancer-detection business was destroyed by the FTC's meritless enforcement action. *See generally* Dune Lawrence, *A Leak Wounded This Company. Fighting the Feds Finished It Off*, Bloomberg Businessweek (Apr. 25, 2016), https://bloom.bg/3aMLfJS.

deference to district court factual findings, *see* Fed. R. Civ. Proc. 52(a)(6) (clear error standard applies to a district court's factual findings), the Commission reviews the ALJ's factual findings and "inferences drawn from those facts" *de novo*. *See McWane, Inc.*, F.T.C. No. 9351, 2014 FTC LEXIS 28, at *30 (Jan. 30, 2014); 16 C.F.R. § 3.54; *see also* BIO 2 ("If [the ALJ's decision] is reviewed, the Commission considers the case de novo[.]" (citing 16 C.F.R. § 3.54). And it is the *Commission's* factual findings that are then subject to deference in the Court of Appeals. *See, e.g., Impax Labs., Inc. v. FTC*, 994 F.3d 484, 491–92 (5th Cir. 2021) (affirming Commission decision reversing ALJ decision in favor of respondent);[17] *see also Schering-Plough Corp. v. FTC*, 402 F.3d 1056, 1062–63 (11th Cir. 2005).

Requiring Axon to proceed through this process before it can obtain a ruling on its constitutional claims—which numerous federal judges have already recognized as substantial—is neither fair nor required by law. This Court should make clear the federal courts remain open to protect constitutional rights and Axon need not spend millions of dollars going through FTC's Thunderdome to get its day in court.

III. FTC'S RIGGED ADMINISTRATIVE PROCESS IRREPARABLY HARMS AXON.

Forcing Axon through a protracted and expensive unconstitutional administrative process "before [it]

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[17] The *Impax* panel compared judicial review of the *Commission*'s factual findings to judicial review of a *jury's verdict*. *See* 994 F.3d at 491–92.

may assert [its] constitutional claim in a federal court means that by the time the day for judicial review comes, [it] will already have suffered the injury that [it is] attempting to prevent." *Tilton*, 824 F.3d at 298 (Droney, J., dissenting); *see also Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2196 (2020) ("[W]hen . . . a [removal restriction] provision violates the separation of powers it inflicts a 'here-and-now' injury on affected third parties that can be remedied by a court." (citation omitted)); *Bond v. United States*, 564 U.S. 211, 222 (2011). *Cf. Doe Co. v. Cordray,* 849 F.3d 1129, 1136 (D.C. Cir. 2017) (Kavanaugh, J., dissenting) ("Irreparable harm occurs almost by definition when a person or entity demonstrates a likelihood that it is being regulated on an ongoing basis by an unconstitutionally structured agency[.]").[18]

As Judge Bumatay explained below, "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." App. 43 (Bumatay, J., concurring in the judgment in part, dissenting in part). He continued: "By forcing Axon's [Article II and 'clearance process'] claims into the FTC

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[18] All of Axon's constitutional claims seek structural relief to avoid the irreparable harm of being subjected to a burdensome, unconstitutional administrative proceeding conducted by a constitutionally illegitimate agency. Nor does Axon's injury have anything to do with a final cease and desist order. Instead, Axon is challenging "the entire legitimacy" of FTC's inhouse administrative proceedings, "not simply cost and annoyance." *See Cochran,* 20 F.4th at 209–10.

administrative process, we effectively shut the courtroom doors to a party seeking relief from alleged constitutional infringements." App. 46 (Bumatay, J., concurring in the judgment in part, dissenting in part). That constitutes irreparable harm.

Further still, this Court's precedent indicates retrospective relief may be ill-suited for remedying removal defects. *See Collins*, 141 S. Ct. at 1787–89; *Cochran*, 20 F.4th at 232–33 (Oldham, J., concurring) (suggesting that, under *Collins*, "it will be very challenging to obtain meaningful retrospective relief for constitutional removability claims" and, as a result, "challengers with meritorious removability claims may often be left without any remedy if they are forced to wait until after enforcement proceedings conclude").[19]

That is not the only irreparable harm at issue—even accepting the dubious proposition that the "expense and disruption of . . . protracted adjudicatory proceedings" is merely "part of the social burden of living under government[.]" *See Standard Oil*, 449 U.S. at 244.[20] Time and again, courts have also held reputational harm, adverse publicity, loss of good will, and even unrecoupable compliance costs can constitute irreparable harm. *See, e.g., LabMD, Inc. v. FTC*, 678 F. App'x 816, 821 (11th Cir. 2016) ("The

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[19] Unlike here, where Axon seeks prospective injunctive relief, in *Collins*, "the only remaining remedial question concern[ed] retrospective relief." 141 S. Ct. at 1787; *id.* at 1795 (Gorsuch, J., concurring in part).

[20] The panel majority recognized that "sometimes the burden of an agency process may justify pre-enforcement relief." App. 15.

costs of complying with the FTC's Order would cause LabMD irreparable harm in light of its current financial situation."); *Ferrero v. Associated Materials, Inc.*, 923 F.2d 1441, 1449 (11th Cir. 1991) ("loss of customers and goodwill"); *Housworth v. Glisson*, 485 F. Supp. 29, 35 (N.D. Ga. 1978) ("injury . . . caused by the publicity attending the license revocations").

This should not be allowed to continue. This Court should not "require plaintiffs to bet the farm" as a condition precedent to obtaining judicial review. *See Free Enter. Fund*, 561 U.S. at 490–91. But that is exactly what is at stake. *See, e.g.,* App. 37–38 (Bumatay, J., concurring in judgment in part, dissenting in part) ("Without a guaranteed vehicle for court review, Axon's only recourse is to intentionally lose before the FTC to receive any assurance of Article III adjudication of its clearance process claim. . . . I see no reason why Axon must 'bet the farm' to get its day in court."); *see also* Jan M. Rybnicek & Joshua D. Wright, *Defining Section 5 of the FTC Act: The Failure of the Common Law Method and the Case for Formal Agency Guidelines*, 21 Geo. Mason L. Rev. 1287, 1307 (2014).[21] And the high (constitutionally dubious) price respondents—particularly small businesses and individuals—must pay to access judicial review through the FTC Act scheme underscores the importance of district court jurisdiction.

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[21] *Cf. Tilton*, 824 F.3d at 298 n.5 (Droney, J., dissenting) ("[I]t might well be that choosing to litigate is, in fact, equivalent to 'betting the farm.'"); *Cochran*, 20 F.4th at 230 (Oldham, J., concurring) ("Throughout the entire administrative process . . . the target must choose whether to settle or bet the farm.").

The FTC Act and similar statutory review schemes should not be interpreted to "enable the strong-arming of regulated parties into 'voluntary compliance' without the opportunity for judicial review—even judicial review of the question whether the regulated party is within the . . . [agency's] jurisdiction." *Sackett*, 566 U.S. at 130–31. "[A]t least at some point, even the temporary subjection of a party to a Potemkin jurisdiction so mocks the party's rights as to render end-of-the-line correction inadequate." *United States v. Microsoft Corp.*, 147 F.3d 935, 954 (D.C. Cir. 1998). So too here.

IV. FTC'S UNCONSTITUTIONAL STRUCTURE THREATENS INDIVIDUAL LIBERTY.

On the merits, FTC's existence offends the Constitution in many ways. "Administrative agencies have been called quasi-legislative, quasi-executive or quasi-judicial, as the occasion required, in order to validate their functions within the separation-of-powers scheme of the Constitution." *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting). So too FTC. *See, e.g., Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935). But the fact remains that FTC's structure and procedures are unconstitutional, and no amount of creative labeling can change this.

Leaving aside the constitutionally dubious for-cause removal protections the Commissioners

(particularly the Chair) enjoy,[22] the two-tier ALJ removal restrictions plainly violate the Constitution. The FTC Chief ALJ cannot exercise the judicial power.[23] *See also* U.S. Const. Art. III, § 1; *FTC v. Eastman Kodak Co.*, 274 U.S. 619, 623 (1927) (FTC does not exercise "judicial powers"). Instead, no matter how one chooses to describe the work ALJs are tasked with doing, "under our constitutional structure they *must be* exercises of—the 'executive Power.'"[24] *City of Arlington v. FCC*, 569 U.S. 290, 304 n.4 (2013) (citing U.S. Const. Art. II, §1, cl. 1); *see also Free Enterprise Fund*, 561 U.S. at 514; *id.* at 516 (Breyer, J., dissenting). This Court has held "Congress cannot limit the President's authority" through granting "two levels of protection from removal for those who nonetheless exercise significant executive power."[25]

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[22] These removal restrictions are unconstitutional. *See Seila Law*, 140 S. Ct. at 2211–17 (Thomas, J., concurring in part, dissenting in part). *Humphrey's Executor* was wrongly decided, has not withstood the test of time, and should be overruled. *See id.* at 2212 (Thomas, J., concurring in part, dissenting in part); *In re Aiken Cnty.*, 645 F.3d 428, 441–42 (D.C. Cir. 2011) (Kavanaugh, J., concurring); *see also* Daniel Crane, *Debunking Humphrey's Executor*, 83 Geo. Wash. L. Rev. 1835 (2015); Daniel Crane, *FTC Independence After Seila Law*, CSAS Working Paper 22-02, https://administrativestate.gmu.edu/wp-content/uploads/sites/29/2022/03/Crane-FINAL.pdf.

[23] This is no reflection on the character, competence, integrity, and impartiality of the FTC Chief ALJ, who is highly respected.

[24] "The entire 'executive Power' belongs to the President alone." *Seila Law*, 140 S. Ct. at 2197; *see* U.S. Const. Art. II, § 1.

[25] As the panel majority observed, "ALJs wield tremendous power and still remain a part of the executive branch—even if

Free Enter. Fund, 561 U.S. at 514. Straightforward application of *Lucia v. SEC*, 138 S. Ct. 2044 (2018), requires the conclusion that the FTC Chief ALJ is an Officer of the United States, who exercises significant executive power, *see id.* at 2055. The FTC Chief ALJ enjoys at least two tiers of removal protections. 5 U.S.C. § 7521(a); 15 U.S.C. § 41. This arrangement violates Article II. *Free Enter. Fund*, 561 U.S. at 514.

That is a problem because "[i]n the case of a removal defect, a wholly unaccountable government agent asserts the power to make decisions affecting individual lives, liberty, and property." *Collins,* 141 S. Ct. at 1797 (Gorsuch, J., concurring in part). Indeed, "[i]f anything, removal restrictions may be a greater constitutional evil than appointment defects. . . . It is the power to supervise—and, if need be, remove—subordinate officials that allows a new President to shape his administration and respond to the electoral will that propelled him to office." *Id.* at 1796 (Gorsuch, J., concurring in part). After all, "[f]ew things could be more perilous to liberty than some 'fourth branch' that does not answer even to the one executive official who is accountable to the body politic." *Id.* at 1797 (Gorsuch, J., concurring in part) (citing *FTC v. Ruberoid Co.*, 343 U.S. at 487 (Jackson, J.,

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Congress bestowed them with the title 'judge'—and they should thus theoretically remain accountable to the President and the people." App. 25. *Cf. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 537 F.3d 667, 692 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) ("[T]he constitutional text and the original understanding . . . established that the President possesses the power under Article II to remove officers of the Executive Branch at will."), *overruled*, 561 U.S. 477 (2010).

dissenting)); *see also City of Arlington*, 569 U.S. at 313–14 (Roberts, C.J., dissenting).

That is not the only constitutional problem with FTC's administrative enforcement scheme. Among other infirmities, FTC's combination of investigative, prosecutorial, and adjudicative functions violates due process.[26] Under our Constitution, FTC is not allowed to act as investigator, prosecutor, and judge of its own cause. *See Williams v. Pennsylvania*, 136 S. Ct. 1899, 1905 (2016) ("[A]n unconstitutional potential for bias exists when the same person serves as both accuser and adjudicator in a case."). *Cf. FTC v. Facebook, Inc.*, No. 20-3590 (JEB), 2022 U.S. Dist. LEXIS 5415, at *67 (D.D.C. Jan. 11, 2022) ("So what role does provide the best analogy for analyzing Chair Khan's actions in voting to file this case? The Court concludes it is that of a prosecutor."). *See generally* Andrew N. Vollmer, *Accusers as Adjudicators in Agency Enforcement Proceedings*, 52 U. Mich. J.L. Reform 103 (2018).

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[26] Axon's Complaint alleges FTC's black-box "clearance" process also violates due process and principles of equal protection. *See* Axon Compl., ¶¶ 29–35, *Axon Enterprise, Inc. v. FTC*, Dkt. 1, No. 20-cv-00014 (D. Ariz. Jan. 3, 2020), *available at* https://axon-2.cdn.prismic.io/axon-2/1438309c-d103-472e-85a5-929e79642aa5_1-3-20+Axon+FTC+Complaint+-+File-stamped+version.pdf. That claim is plausible and should proceed. *See also Willowbrook v. Olech*, 528 U.S. 562, 564 (2000); *Ashcroft v. Iqbal*, 556 U.S. 662, 677–79 (2009) (well-pleaded factual allegations should be treated as true at Rule 12 stage). *Cf. Gupta,* 796 F. Supp. 2d at 513–14. *See generally* Alyson M. Cox, Note, *From Humphrey's Executor to Seila Law: Ending Dual Federal Antitrust Authority*, 96 Notre Dame L. Rev. 395, 413–14 (2020) (explaining Axon's "clearance" process claim).

More broadly, as Professors Chapman and McConnell have explained:

> The basic idea of due process, both at the Founding and at the time of adoption of the Fourteenth Amendment, was that the law of the land required each branch of government to operate in a distinctive manner, at least when the effect was to deprive a person of liberty or property. . . . The judiciary was required to adjudicate cases in accordance with longstanding procedures, unless the legislature substituted alternative procedures of equivalent fairness.

Chapman & McConnell, *Due Process as Separation of Powers*, 121 Yale L.J. 1672, 1781–82 (2012). "Fundamentally, . . . [due process] was about securing the rule of law. It ensured that the executive would not be able unilaterally to deprive persons within the nation of their rights of life, liberty, or property except as provided by common law or statute and as adjudicated by independent judicial bodies[.]" *Id.* at 1808. Experience confirms that FTC's biased inhouse enforcement process fails this test. *See* Section II, *supra.* FTC's rigged administrative Thunderdome is the antithesis of due process, more closely resembling something out of a Kafkaesque nightmare.

This should not be allowed to stand. If FTC wants to prosecute Axon to deprive it of private rights and force it to give up its intellectual property to create a "clone" competitor, *see* Pet. Br. 12–13, 48, Article III and due process require FTC to do so in federal

court.[27] *See also United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1993 (2021) (Gorsuch, J., concurring in part, dissenting in part) ("Any suggestion that the neutrality and independence the framers guaranteed for courts could be replicated within the Executive Branch was never more than wishful thinking."); *Lorenzo v. SEC*, 872 F.3d 578, 602 (D.C. Cir. 2017) (Kavanaugh, J., dissenting) ("Administrative adjudication of individual disputes is usually accompanied by deferential review. . . . That agency-centric process is in some tension with Article III of the Constitution, the Due Process Clause of the Fifth Amendment, and the Seventh Amendment.").

CONCLUSION

This Court should reverse the judgment of the court of appeals.

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[27] *Cf. Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 714–15 (2015) (Thomas, J., dissenting) ("Nineteenth-century American jurisprudence confirms that an exercise of the judicial power was thought to be necessary for the disposition of private, but not public, rights.").

Respectfully submitted,

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