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 AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER AXON ENTERPRISE, INC.

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QUESTION PRESENTED

By authorizing appellate courts to "affirm, enforce, modify, or set aside" cease-and-desist orders issued by the Federal Trade Commission, did Congress impliedly strip district courts of jurisdiction over constitutional challenges to the FTC's structure, procedures, and existence?

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Founded in 1973, Pacific Legal Foundation is a nonprofit, tax-exempt, California corporation established for the purpose of litigating matters affecting the public interest. PLF provides a voice in the courts for Americans who believe in limited constitutional government, private property rights, and individual freedom.

PLF is the most experienced public-interest legal organization defending the constitutional principle of separation of powers in the arena of administrative law. PLF's attorneys have participated as lead counsel in several cases involving the role of the Judicial Branch as an independent check on the Executive and Legislative branches under the Constitution's Separation of Powers. *See, e.g.*, *U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 578 U.S. 590 (2016) (judicial review of agency interpretation of Clean Water Act); *Sackett v. EPA*, 566 U.S. 120 (2012) (same); *Rapanos v. United States*, 547 U.S. 715 (2006) (agency regulations defining "waters of the United States"). It also regularly participates in this Court as amici. *See, e.g.*, *Lucia v. SEC*, 138 S. Ct. 2044 (2018) (SEC administrative-law judge is "officer of the United States" under the Appointments Clause).

This case addresses the federal courts' jurisdiction to hear constitutional challenges to an administrative agency's structure. The decision under review held that the Federal Trade Commission Act implicitly

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

strips federal courts of jurisdiction to entertain structural constitutional challenges to the Federal Trade Commission's in-house process and its officers' removal protections. PLF writes separately to explain how the result below abdicates the judicial duty vested by the sovereign people in the judicial branch, infringes on the separation of powers, and threatens core constitutional and individual liberties.

INTRODUCTION AND SUMMARY OF ARGUMENT

The "judicial Power of the United States" belongs to federal courts, which "*shall*" hear "*all* Cases . . . arising under this Constitution." U.S. Const. art. III, § 2 (emphasis added). Nearly 150 years ago, Congress vested district 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 case, then, should be easy. Axon brings claims "arising under the Constitution." It argues that the Federal Trade Commission violates the Constitution's separation of powers, Due Process of Law Clause, and Equal Protection guarantees. These are issues that the FTC cannot resolve in its in-house adjudication, and so—consistent with Article III and Section 1331—Axon filed suit in federal court. Yet the courts below dismissed Axon's case because, they said, the Federal Trade Commission Act implicitly strips district courts of the power to hear the claims.

That is wrong. The FTC Act says nothing about Article III, Section 1331, or jurisdiction stripping. It says merely that a Court of Appeals will review a final cease-and-desist order from the FTC. Such language falls well short of displacing clear constitutional and statutory text.

But more fundamentally, courts cannot relinquish their constitutionally vested duty to interpret the law. Failure to exercise jurisdiction here would thus undermine the Framers' constitutional design and disregard the will of We the People—from whom the federal government derives all its power. By splitting government into three distinct branches, the Framers—following the lead of the sovereign people—secured liberty by pitting power against power. And central to this plan is the courts' role to check other branches by saying what the law is.

Closing the courthouse doors to Axon undercuts these core constitutional protections. It would force Axon to endure years of executive adjudication instead of accessing an independent Article III tribunal. In fact, under the opinions below, Axon will *never* be heard by a federal district court. That may be useful for the FTC, but "[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).

This Court has long recognized that the Judicial Branch must patrol the boundaries of the separation of powers. By enforcing those constitutional metes and bounds, judges preserve liberty, guard against arbitrary rule, and give life to the sovereign people's instructions. Axon deserves nothing less than that.

ARGUMENT

I. The Constitution Embodies the Sovereign People's Will To Prevent Arbitrary Rule

Our Constitution vests distinct powers in three branches of government to prevent consolidated power and arbitrary rule—and to protect liberty.

Collins v. Yellen, 141 S. Ct. 1761, 1780 (2021) ("[T]he separation of powers is designed to preserve the liberty of all the people."); *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991) ("The ultimate purpose of th[e] separation of powers is to protect the liberty and security of the governed."); *Bowsher v. Synar*, 478 U.S. 714, 721 (1986) ("The declared purpose of separating and dividing the powers of government, of course, was to 'diffus[e] power the better to secure liberty.'" (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring))); *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 118 (2015) (Thomas, J., concurring) ("To the Framers, the separation of powers and checks and balances were more than just theories. They were practical and real protections for individual liberty in the new Constitution."). But this constitutional feature works only when each branch properly exercises its power. And when they don't, our constitutional order is put at risk.

A. The People Delegated Power to Distinct Branches, Each To Check the Others

Because mere "parchment barriers" are insufficient to prevent concentrations of power, *The Federalist No. 48*, at 333 (Madison) (Cooke ed. 1961), the Constitution "giv[es] to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others," *id. No. 51*, at 349 (Madison). This design is "necessary to control the abuses of government." *Id.* "Ambition," Madison taught, "must be made to counteract ambition." *Id.* Of course, the three "great powers—legislative, executive, and judicial—are all necessary to a good government," but "[li]berty and security in

government depend not on the limits, *which the rulers may please to assign* to the exercise of their own powers, but on the boundaries, within which their powers are circumscribed by the constitution." James Wilson, Lectures on Law ch. x, at 705 (1791) (emphasis added) ["Wilson Lectures"], *reprinted in* 1 Collected Works of James Wilson 431, 440 (Kermit L. Hall & Mark David Hall eds., Liberty Fund 2011).

Thus, "if one part" of government "should, at any time, usurp more power than the constitution gives, or make an improper use of its constitutional power, one or both of the other parts may correct the abuse, or may check the usurpation." *Id.* at 707–08. Each branch, in other words, must ensure that the others stay in their constitutional lanes. And, in particular, "policing the enduring structure of constitutional government when the political branches fail to do so is one of the most vital functions of this Court." *N.L.R.B. v. Noel Canning*, 573 U.S. 513, 572 (2014) (Scalia, J., concurring in the judgment) (cleaned up). These checks exist to secure the people from arbitrary government—precisely the protection the people wanted when they delegated power to distinct branches.

1. All of government's power comes from the sovereign people

A sovereign people—not sovereign states or sovereign legislatures—delegated powers to the government's three branches. "We the people," James Madison explained, are "the fountain of all power." V Elliot's Debates at 500 (1787). Our new government would consist of "agents and overseers for the people to whom they are constantly responsible." XX *The*

Documentary History of the Ratification of the Constitution (DHRC) at 934 (John Jay); *see also* IV Elliot's Debates at 9 (James Iredell explaining that "[t]he people are known with certainty to have originated it themselves," and "[t]hose in power are their servants and agents."). Indeed, "all the power government now has," Oliver Ellsworth said, "is a grant *from the people*." III DHRC at 489. John Marshall, too, well understood that the people would "delegate [powers] cautiously, for short periods, to their servants, who are accountable for the smallest mal-administration." IX DHRC at 1124. The people's "servants" must exercise powers day-to-day because the people "cannot exercise the powers of Government personally [them]selves. [They] must trust agents." *Id.* at 1118.

This idea—a sovereign people parceling out power to agents within the government—amounted to a "revolution in the[] conception of law, constitutionalism, and politics." Gordon S. Wood, *The Creation of the American Republic* 383 (1969). Government officials were now simply "the people's agents." *Id.* at 385; *see also* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1434 (1987) ("government officials" became "merely agents of principals who had prescribed limits on the agents' power in the founding charter"); *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 471–72 (1793) ("[T]he sovereignty of the nation is in the people of the nation," because the people "are truly the sovereigns of the country."). Nowhere had a sovereign people delegated enumerated powers to separate representative branches. *See* IX DHRC at 995 (Madison) (the new government "is in a manner unprecedented: We cannot find one express example in the experience of the world:—It stands by itself."); *see* Wood, *Creation* at 383.

Early cases recognized that We the People played a special role under the Constitution. *Glass v. The Sloop Betsey*, 3 U.S (3 Dall.) 6, 13 (1794) (explaining that "[i]n America, . . . the case is widely different" from Europe because here "[s]overeignty was, and is, in the people"); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 266 (1796) (Although Parliament could legislate "in every possible case in which [it] thought proper to act," "in this country, thank God, a less arbitrary principle prevails. The power of the Legislatures is limited[.]"); *VanHorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 307–08, 28 F. Cas. 1012 (C.C.D. Pa. 1795) (Patterson, J.) (Although "in England, the authority of the Parliament runs without limits," "[i]n America the case is widely different" because "[t]he Constitution is certain and fixed; it contains the permanent will of the people.").

By delegating limited powers to representative agents in three separate branches of government, America's sovereign people stood alone on the world stage. Liberty—long revered by Englishmen—found a new and powerful source of protection through a revolutionary Constitution.

2. The people delegated only part of their power to separate branches

Innovation came with a corollary: As sovereign, the people "delegate [power] in such proportions, to such bodies, on such terms, and under such limitations as they think proper." II DHRC at 472 (James Wilson). Only a "portion of their authority" is delegated, and the people may do so "on whatever conditions they choose to fix." Wilson Lectures, ch. XI at 728; *see* IX DHRC at 1124 (John Marshall stating that the people "delegate [powers] cautiously" "to their servants").

The people must delegate powers—but to whom? And how much?

The Constitution answers those questions. *See* U.S. Const. art. I, § 1; art. II, § 1; art. III, § 3 (vesting power in legislative, executive, and judicial branches, respectively). It placed three different powers in three separate branches, with some overlap. *See, e.g.*, *id.* art. I, § 7, cl. 2 (presidential veto). *See Hayburn's Case*, 2 U.S. (2 Dall.) 408, 410 n.* (1792) ("[T]he legislative, executive and judicial departments are each formed in a separate and independent manner; and [] the ultimate basis of each is the constitution only, within which the limits of which each department can alone justify any act of authority.").

These are the only powers of the federal government. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 387 (1798) ("All the powers delegated by the people of the United States to the Federal Government are defined, and NO CONSTRUCTIVE powers can be exercised by it[.]") (Chase, J.); *The Federalist No. 47*, at 324 (Madison) (identifying the "legislative, executive, and judiciary" as "all" of government's powers). As established by the Framers, the government's authority "is to be collected, not from tacit implication, but from the positive grant expressed in the instrument of union." James Wilson, State House Yard Speech (Oct. 6, 1787), *reprinted in* 1 Collected Works of James Wilson 171, 172 (Kermit L. Hall & Mark David Hall eds., Liberty Fund 2011).

B. The People Delegated to Courts the Independent Duty To Hear Cases and Controversies To Police the Constitution's Structure and Protect the People's Liberty

Only federal judges were vested with the "judicial Power of the United States," and this power both empowers and obligates them to interpret and construe the Constitution and federal law. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."); *The Federalist No. 78*, at 525 (Hamilton) ("The interpretation of the laws is the proper and peculiar province of the courts."); *see* Wilson Lectures ch. XI at 742–43 ("[T]he operation and validity of" the laws "should come regularly in question before a court, forming a portion of the judicial department.").

Federal courts exercised this delegated duty from day one. "As early as . . . 1792 the federal circuit court" determined a congressional act "violat[ed] the separation of powers." Gordon S. Wood, *Empire of Liberty* 453 (2009). In that case, the Court explained that Congress could not infringe the separation of powers by conferring non-judicial powers on courts. *Hayburn's Case*, 2 U.S. at 410 n.*. And by interpreting statutes and the Constitution, judges "were simply . . . fulfilling their duty of applying the proper law," Wood, *Creation* at 461, by serving as "an impenetrable bulwark against every assumption of power in the legislative or executive," 1 Annals of Cong. 457 (1789) (Madison). Indeed, "right from the nation's beginning," the judicial branch "acquired a special power that it has never lost." Wood, *Empire of Liberty* at 468.

And so the "Judiciary—no less than the other two branches—has an obligation to guard against deviations from [constitutional] principles." *Perez*, 575 U.S. at 118–19 (Thomas, J., concurring). Therefore, "[w]hen a party properly brings a case or controversy to an Article III court, that court is called upon to exercise the 'judicial power of the United States.'" *Id.* at 119 (quoting U.S. Const. art. III, § 1). "Article III judges cannot opt out of exercising their check" on other branches. *Id.* at 125. In fact, "the Judiciary has a *responsibility* to decide cases properly before it, even those it 'would gladly avoid.'" *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 194–95 (2012) (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821)) (emphasis added).

What's more, the judiciary is obligated to exercise *independent* judgment. *See The Federalist No. 78*, at 523 (Hamilton) (The judiciary has "neither Force nor Will, but merely judgment."); *see generally* Philip A. Hamburger, *Law and Judicial Duty* 507–35 (2008); *cf. also* Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 Yale L.J. 1672, 1679 (2012) (noting that, for centuries, "due process" has "consistently referred to the guarantee of legal *judgment* in a case by an authorized *court* in accordance with settled law") (emphasis added). These "independent tribunals of justice will consider themselves in a peculiar manner the guardians of [the people's] rights." 1 Annals of Cong. 457 (Madison). Indeed, the separation of powers—especially the independent judiciary—is "necessary to control the abuses of government." *The Federalist No. 51*, at 349 (Madison).

As many Founders saw it, the "exercise of the [judicial] power is unavoidable, the Constitution not

being a mere imaginary thing . . . but a written document . . . to which, therefore, the judges cannot wilfully blind themselves." Letter from James Iredell to Richard Spaight (Aug. 26, 1787), *in* Griffith J. McRee, II *Life and Correspondence of James Iredell* 173, 174 (1857).[2]

Just so here: the Judicial Branch cannot "willfully blind" itself from hearing Axon's claim that an agency of the Executive Branch is unconstitutionally structured.

II. Delaying Review of Axon's Structural Constitutional Claims Poses a Grave Threat to the Separation of Powers and Individual Liberty

A. Article III Extends the Judicial Power to "All Cases" Arising Under the Constitution

To give life to the sovereign people's will, Article III sets a baseline by giving federal courts jurisdiction over all constitutional claims. *Perez*, 575 U.S. at 118–19 (Thomas, J., concurring). The "*Constitution* assigns th[e] job" of deciding these cases "to the Judiciary." *Stern v. Marshall*, 564 U.S. 462, 484 (2011) (emphasis added). Article III says "all" cases "arising under the Constitution" are "vested" in the courts, and under this "first class of cases to which [] jurisdiction extends," the Constitution "submit[s]" such questions "to the Judiciary of the United States." X DHRC at 1413 (Madison).

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[2] https://books.google.com/books?id=9lR7AAAA-MAAJ&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false.

Justice Story long ago recognized the import of Article III's language: the "judicial power of the United States *shall be vested* (not may be vested)" in federal courts. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 328 (1816). The "*whole judicial power*," he explained, must be vested in some federal court—either originally in lower courts or through the Supreme Court's appellate jurisdiction. *Id.* at 329–30. The "judicial Power" includes "*all* Cases" "arising under this Constitution"—so federal courts must have jurisdiction over *all* such cases. U.S. Const. art. III, § 2 (emphasis added). So while a federal action could (and did) arise in state courts, the Supreme Court or a lower federal court must have jurisdiction over any appeal. *Martin*, 14 U.S. at 328.

Hamilton read Article III the same way: "The evident aim of the plan of the convention is, that all causes of the specific classes" named in Article III "shall for weighty public reasons receive their *original or final* determination in the courts of the Union." *The Federalist No. 82*, at 556 (emphasis added). Justice Story repeated Hamilton: the judicial power "should be, at all times, vested either in an original or appellate form, in some courts created under its authority." *Martin*, 14 U.S. at 331; *see also* Joseph Story, III *Commentaries on the Constitution of the United States* 573 (1833) ("[I]t is absolutely obligatory upon congress, to vest all the jurisdiction in the national courts, in that class of cases at least, where it has declared that it shall extend to 'all cases.'").

Further, Article III's mandatory "all" and "shall" language for constitutional claims disappears in the Diversity Clause, suggesting that Congress holds broad authority to strip that basis for jurisdiction. U.S. Const. art. III, § 2 (Judicial power extends to

cases "between Citizens of different States."); *see* Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. Rev. 205, 240–46 (1985) (arguing for this "two-tier" approach to federal jurisdiction under Article III). But "in all cases . . . that raise federal issues," "Article III requires that the federal judiciary be able to exercise all of the judicial power of the United States that is vested by the Constitution." Steven G. Calabresi & Gary S. Lawson, *The Unitary Executive, Jurisdiction Stripping, and the Hamdan Opinions: A Textualist Response to Justice Scalia*, 107 Colum. L. Rev. 1002, 1005 (2007). "Article III creates a field of constitutionally mandatory federal court jurisdiction," and "Congress has no power to reduce this constitutionally granted jurisdiction." *Id.* at 1014; *see also* Akhil Reed Amar, *America's Constitution: A Biography* 226–29 (2005) (Congress could not "transfer the final word in federal-law cases from federal courts to state judges" because "'all' meant just what it said: Federal courts had to be the last word in 'all'" cases involving the Constitution.).

Said simply: "'All Cases' [in Article III] meant *all* cases." Amar, *America's Constitution* at 228; *see Osborn v. Bank of U.S.*, 22 U.S. (9 Wheat.) 738, 819 (1824) (Article III "enables the judicial department to receive jurisdiction to the full extent of the constitution, laws, and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it."); *Cohens*, 19 U.S. at 378 (Article III's text "extends the jurisdiction of the Court to all the cases described, without making in its terms any exception whatever."). If a case implicates a constitutional claim, some federal court must have jurisdiction to

hear it—either directly or as an appeal from state courts—or the "judicial Power" would not be vested in federal courts. And that plainly runs afoul of Article III.

B. The Constitution Precludes Congress from Stripping All Federal Courts of Jurisdiction Over Federal Claims

"[T]he Judiciary has a *responsibility* to decide cases properly before it, even those it 'would gladly avoid.'" *Zivotofsky*, 566 U.S. at 194–95 (quoting *Cohens*, 19 U.S. at 404). Judicial abdication undercuts the Constitution's goal of dividing the government's powers to secure liberty. And judges would violate their oath and "obligation to guard against deviations" from constitutional principles. *Perez*, 575 U.S. at 118–19 (Thomas, J., concurring). *See also Stern*, 564 U.S. at 484 (noting that the Constitution assigns to the judiciary the "job" of resolving "matters of common law and statute as well as constitutional law, issues of fact as well as issues of law") (cleaned up); *see also* 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, 631–32 (noting that the "judicial Power" requires independent judges to provide due process of law).

Limits on federal courts' jurisdiction are irrelevant here. True, as noted, Congress may generally regulate courts' jurisdiction and may even remove some types of cases from federal courts (in diversity cases, for example). Congress may also restrict the Supreme Court's appellate jurisdiction. *See* U.S. Const. art. III, § 2 ("[T]he supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress

shall make."). And given Congress's power to create (or eliminate) lower courts, it may also strip lower courts of jurisdiction, too.

Even so, the Constitution precludes Congress from stripping *all* federal courts of jurisdiction over federal claims. If, therefore, Congress eliminates lower federal courts and thereby removes certain claims from those courts, then those claims *must* be vested in the Supreme Court. *See* Amar, *America's Constitution* at 226–29. Some scholars have argued that the original meaning of the Exceptions Clause even prohibits Congress from stripping the Supreme Court of *any* constitutional claims. *See* Calabresi & Lawson, *supra* at 1037 (arguing that the Exceptions Clause merely allows Congress to "make[] 'Exceptions' to the Supreme Court's appellate jurisdiction when it adds those cases to the Court's original jurisdiction" but the Supreme Court must have *some* jurisdiction over all such claims). Congress's ability to regulate jurisdiction of constitutional claims, in other words, cannot go so far as to wrest the federal judicial power—the ability to hear claims arising under the Constitution—from federal courts altogether. *All* federal judicial power must rest in *some* federal court(s).

This Court need not wade too deep in these waters. Deciding just how much jurisdiction stripping Article III permits sits beyond this case. It is enough to understand that We the People, through the Constitution, delegated the "judicial Power" to federal courts. And the "judicial Power" includes all cases arising under the Constitution. In theory, this could be left solely to the Supreme Court's appellate jurisdiction, but here we *know* district courts have original jurisdiction over Axon's claims. Section 1331 echoes Article III's lan-

guage when it affirmatively *confers* jurisdiction on district courts to hear "all civil actions arising under the Constitution." 28 U.S.C. § 1331. Through Section 1331, Congress has done precisely what Justice Story says the Constitution requires: Congress has "vested" one part of the "judicial Power"—"all Cases . . . arising under this Constitution"—in "inferior Courts" (the district courts) that the "Congress" has "from time to time ordain[ed] and establish[ed]." U.S. Const. art. III.

Nothing in the FTC Act changes that. Certainly no explicit text comes close. So does the FTC Act *implicitly* trample Congress's jurisdictional command and Article III's baseline? No chance. All signs point in one direction: The judiciary must hew to its constitutional duty, exercise jurisdiction, and interpret the law in Axon's case.

C. Congress Has Conferred Jurisdiction to District Courts Over Axon's Claims, So Courts Must Hear the Case

No doubt, Axon's arguments "aris[e] under the Constitution." It claims that the FTC's structure violates the separation of powers as well as the Fifth Amendment's due process and equal protection guarantees. No doubt, too, that Section 1331 grants district courts jurisdiction over such claims. And in our system, courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them." *Colorado River Water Cons. Dist. v. United States*, 424 U.S. 800, 817 (1976).

So far, so good. "In light of § 1331, the question is not whether Congress has specifically conferred jurisdiction,"—because we already know that it has—"but whether it has taken it away." *Elgin v. Dep't of Treasury*, 567 U.S. 1, 25 (2012) (Alito, J., dissenting).

And to answer that question, courts require a "heightened showing" from statutes which might "preclude judicial review of constitutional claims." *Webster v. Doe*, 486 U.S. 592, 603 (1988). Congress "must be clear" to "avoid the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Id.*

Here, no text—let alone *clear* text—in the FTC Act explicitly precludes judicial review. Instead, the FTC asks this court to squint—and squint hard—to find that Congress *implicitly* intended to entirely shut the district courts on Axon's claims. But if Axon cannot go to district court now, it will *never* go to district court because the FTC Act contemplates review (of cease-and-desist orders) only in circuit courts. Thus, the FTC's argument would mean that the Act erases Section 1331 for Axon's constitutional claim.

The FTC Act simply cannot bear such a strained reading. Its language falls well short of a "heightened showing" that Congress intended to override Section 1331. Here's the text:

> Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States[.]

15 U.S.C. § 45(c).

That comes nowhere close to stripping federal courts of jurisdiction to hear Axon's structural claim. Nor does any other part of the FTC Act. So whether this Court considers the factors in *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), the opinion in

Elgin, 567 U.S. 1, or basic jurisdictional principles, it must reach the same conclusion: The FTC Act allows Axon's structural challenge to proceed in federal court. But even more fundamentally, the Constitution requires the judiciary to *exercise*—not abdicate—its judicial power.

D. Ignoring Axon's Case Now Will Undermine Rights That the Judicial Power Was Designed To Protect

Without judicial intervention, Axon will never have access to a district court. Its claims will be ignored. It will suffer through years of constitutional injuries with no recourse. The Framers designed the judiciary to protect against such abuses. And that is not something that judges "can[] opt out of exercising." *Perez*, 575 U.S. at 118–19, 125 (Thomas, J., concurring).

1. The FTC violates due process by acting as a judge in its own cause, which requires court intervention now

Axon raises a fundamental problem that must be resolved *before* it submits to the FTC's proceeding: the Commission exercises prosecutorial and judicial power. This mixing of authority violates an age-old maxim deeply ingrained in the Anglo-American tradition: no man can be a judge in his own cause.

The roots of this doctrine extend back to at least the Seventeenth Century when Lord Coke held that "no one ought to be a judge in his own cause." *See Dr. Bonham's Case*, 77 Eng. Rep. 646 (C.P. 1610); 1 William Blackstone, Commentaries *91 ("[I]t is unreasonable that any man should determine his own quarrel."). That rule sprouted on our side of the Atlantic, universally recognized by the Founders. *See, e.g.*, *The*

Federalist No. 10, at 59 (Madison) ("No man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and not improbably, corrupt his integrity."); *id., No. 80*, at 538 (Hamilton) ("No man ought certainly to be a judge in his own cause, or in any cause in respect to which he has the least interest or bias."); Wilson Lectures ch. XI at 739 (Any act that will "make a man judge in his own cause, is void in itself.").

Early post-ratification cases further reflect this view. In *Calder v. Bull*, the Supreme Court explained that "certain vital principles in our free Republican governments" must prevail, including the axiom that no law "make[] a man a Judge in his own cause." 3 U.S at 388. And just as judges could not be biased, neither could jurors. *United States v. Burr*, 25 F. Cas. 49, 50 (C.C.D. Va. 1807) (Marshall, C.J.) (in Aaron Burr treason trial, Chief Justice Marshall held that unfair jurors must be eliminated as they are "presumed to have a bias on [h]is mind which will prevent an impartial decision of the case"). Fairness in adjudicatory hearings, in other words, was part and parcel of our constitutional system from the beginning.

No wonder, then, that the Supreme Court has long held that "[a] fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). Adjudications require neutral decisionmakers, which "helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (due process clause has a "requirement of neutrality in adjudicative proceedings"). Neutrality means "an absence of actual bias in the trial of cases," *Murchison*, 349 U.S. at 136, and also no *potential* for

bias, *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 884–85 (2009). Even the *appearance* of bias raises due-process concerns. *Id.* at 885; *Williams v. Pennsylvania*, 579 U.S. 1, 8 (2016) (judges cannot hear cases where "an unconstitutional potential for bias exists").

Examples illustrate the principle. A judge cannot hear a case where a party has given millions of dollars to a judge's reelection campaign. *Caperton*, 556 U.S. at 886. That's because "[j]ust as no man is allowed to be a judge in his own cause, similar fears of bias arise when—without the consent of the other parties—a man chooses the judge in his own cause." *Id.* Nor may a judge preside over a case when he receives a portion of a fine that he levies. *Tumey v. Ohio*, 273 U.S. 510 (1927); *see Ward v. Vill. of Monroeville*, 409 U.S. 57, 60 (1972) (judge cannot have a financial interest that "offer[s] a possible temptation"). Indeed, a "judge cannot have a *prospective* financial relationship with one side." *In re Al-Nashiri*, 921 F.3d 224, 235 (D.C. Cir. 2019) (citation omitted). In other words, a "procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law." *Tumey*, 273 U.S. at 532.

These rules apply to administrative agencies. *Withrow v. Larkin*, 421 U.S. 35 (1975); *see also Tumey*, 273 U.S. at 522 (impartiality applies to anyone acting in a "judicial or quasi judicial capacity"). So a due process problem might arise in agency proceedings if "conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment." *Withrow*, 421 U.S. at 47.

In short, "when governmental agencies adjudicate . . . it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process." *Hannah v. Larche*, 363 U.S. 420, 442 (1960). "[N]eutrality in adjudicative proceedings," is a part of that process. *Marshall*, 446 U.S. at 242. So, as this Court reaffirmed just last year, "no man can be a judge in his own case consistent with the Due Process Clause." *Chrysafis v. Marks*, 141 S. Ct. 2482, 2482 (2021).

The FTC has long tested this rule by combining investigatory, prosecutorial, and judicial authority in commissioners. And as commissioners recently explained *in this case*, they are "responsible for *every final decision* in this adjudication." *In the Matter of Axon Enter., Inc.*, No. 9389, 2020 WL 5406806, at *5 (F.T.C. Sept. 3, 2020) (emphasis added). The Commission "can modify or set aside any aspect of the ALJ's decision with which it disagrees." *Id.* at *4. "[A]ll of the ALJ's findings, rulings, and conclusions are subject to review and modification by the Commission." *Id.* So "the Commission can be held accountable for any ALJ decision that becomes final to the same extent as if the Commission had authored it." *Id.* "[E]ven when no party requests review" of the ALJ's decision, the Commission can "review . . . the initial decision." *Id.* at *5.

More still, the Commission "decides motions to dismiss filed before the evidentiary hearing, motions for summary decision, and motions to strike portions of the pleadings." *Axon*, 2020 WL 5406806, at *5. This "comprehensive oversight" includes the option to "preside in lieu of the ALJ." *Id.* at *5 & nn.8, 9. Commissioners, in other words, control all judicial-like proceedings in the case.

But this merely scratches the surface. Commissioners *also* act as prosecutors. They "issue[] the complaint" and "maintain[] controls over the case from beginning to end." *Axon*, 2020 WL 5406806, at *4. *See* FTC Memorandum of Law in Opposition to Defendant Facebook, Inc.'s Motion to Dismiss Amended Complaint, *FTC v. Facebook, Inc.*, No. 1:20-cv-03590-JEB, at 43 (D.D.C. Nov. 17, 2021) (FTC's admitting, in a recent complaint that it "is acting as a plaintiff or prosecutor.").[3]

This dual role raises the specter of acting as a judge in one's own cause in violation of the Constitution. *See Chrysafis*, 141 S. Ct. at 2482. And the concern has not gone overlooked. Richard A. Posner, *The Federal Trade Commission*, 37 U. Chi. L. Rev. 47, 53 (1969) ("It is too much to expect men of ordinary character and competence to be able to judge impartially in cases that they are responsible for having instituted in the first place."); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 Harv. L. Rev. 1231, 1248 (1994). Indeed, "[n]o thoughtful observer is entirely comfortable with the FTC's . . . combining of prosecutory and adjudicatory functions." Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission, 58 Antitrust L.J. 43, 119 (1989). Other agencies with adjudicatory schemes—like the NLRB and SEC—separate prosecutorial and adjudicatory functions, 29 U.S.C. §§ 151, 160 (NLRB); 15 U.S.C. § 78a, *et seq*. (SEC), but these agencies also suffer from similar bias problems.

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[3] https://www.ftc.gov/system/files/documents/cases/085_2021.11.17_ps_memo_in_opp_to_mtd.pdf.

Data paint the picture. In nearly all cases at the FTC, Commissioners—who vote to file the complaint—win. Even former Commissioners see the problem. *See* Maureen K. Ohlhausen, *Administrative Litigation at the FTC: Effective Tool for Developing the Law or Rubber Stamp?*, 12 J. Competition L. & Econ. 623, 626 & 627 n.9 (2016) ("FTC serves prosecutorial and adjudicative roles" that resulted in a "liability rate" of "100 percent" over a decade at FTC); Terry Calvani & Angela M. Diveley, *The FTC at 100: A Modest Proposal for Change*, 21 Geo. Mason L. Rev. 1169, 1182 (2014) "(Even if one cannot conclusively demonstrate that blending the prosecutorial and adjudicative functions is unfair, it certainly gives rise to the perception of unfairness."); Joshua D. Wright, Comm'r, FTC, Remarks, *Section 5 Revisited: Time for the FTC to Define the Scope of Its Unfair Methods of Competition Authority* at 6 (Feb. 26, 2015) ("[I]n 100 percent of cases where the administrative law judge ruled in favor of the FTC staff, the Commission affirmed liability; and in 100 percent of the cases in which the administrative law judge [] found no liability, the Commission reversed. This is a strong sign of an unhealthy and biased institutional process.") (footnote omitted). And no evidence can "dispel concerns about whether the Commission's decisions suffer from institutional or political bias." Nicole Durkin, *Rates of Dismissal in FTC Competition Cases from 1950–2011 and Integration of Decision Functions*, 81 Geo. Wash. L. Rev. 1684, 1703 (2013). Nor is the problem limited solely to the FTC. *See* Drew Thornley & Justin Blount, *SEC In-House Tribunals: A Call for Reform*, 62 Vill. L. Rev. 261 (2017) (detailing SEC win rate for in-house adjudication and perceived bias in proceedings); Giles D. Beal IV, *Judge, Jury,*

and Executioner: SEC Administrative Law Judges Post-Dodd Frank, 20 N.C. Banking Inst. 413, 417 (2016).

At the very least, this raises the *appearance* of unfairness—something that the Due Process Clause prohibits. And if this case were in federal court—involving allegedly biased Article III judges—Axon could *immediately* seek mandamus to have the judge recused from the case. "Since 1792, federal statutes have compelled district judges to recuse themselves when they have an interest in the suit." *Liteky v. United States*, 510 U.S. 540, 544 (1994). The "basis of recusal was expanded" in 1821 to "include all judicial relationship or connection with a party that would in the judge's opinion make it improper to sit." *Id.* Statutes eventually ensured impartial judges, 28 U.S.C. §§ 144, 455, which require recusal for general bias or even when "impartiality might reasonably be questioned," *Liteky*, 510 U.S. at 548. Judicial recusal is so vital that courts widely allow interlocutory review of recusal denials. *In re Sch. Asbestos Litig.*, 977 F.2d 764, 778 (3d Cir. 1992).

But Axon will have to sit through a constitutionally deficient process with no remedy until it reaches the Court of Appeals. That approach threatens constitutional guarantees, and it ignores the real harm happening *now*. The judiciary—vested with the power to decide such cases—must exercise the jurisdiction Congress gave it.

2. Without federal court intervention now Axon will never receive judicial consideration of its equal protection claim

The FTC Act contemplates judicial review of cease-and-desist orders only. In that scenario, Axon will never get the chance to ask a federal district judge to oversee discovery for any of its claims or defenses. And, as it now stands, Axon will *never* have access to required factual development, since the Commission's ALJ has denied Axon's request for discovery into its clearance / equal protection claim. *See In the Matter of Axon Enter., Inc.*, No. 9389, 2020 WL 4346544 (F.T.C. July 21, 2020).

So, if the administrative proceeding continues and—as is likely, given the FTC's in-house track record—a cease-and-desist order is imposed and Axon seeks judicial review, what will Axon say to an appellate court when there is no record from which to argue? With no arrows in its quiver, Axon would have no case to make. Discovery is essential to develop this claim. Without it, the "essential constitutional promise" of Due Process to a "fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker" would ring hollow. *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004). If district courts have no jurisdiction to entertain Axon's structural claims now, Axon will go to the appellate court empty handed. This result threatens to deprive Axon from *even developing* its constitutional claim.

But consistent with the Due Process Clause, judicial review of constitutional claims must not be limited to an agency's findings or the record developed

at the agency. *City of Chicago v. Int'l College of Surgeons*, 522 U.S. 156, 180 (1997) (Ginsburg, J., dissenting). Instead, due process guarantees the right to present evidence to support a constitutional claim. *Jenkins v. McKeithen*, 395 U.S. 411, 429 (1969). "[D]iscovery must be a two-way street." *Wardius v. Oregon*, 412 U.S. 470, 475 (1973). So keeping Axon from ever developing facts surely is not what Congress intended in the FTC Act. After all, it would make little sense for Congress to funnel a claim that the FTC has argued (and ALJ agreed) is irrelevant to the administrative proceeding through that very proceeding.

Instead, Congress merely said that a party ordered by the FTC to "cease and desist" "may obtain a *review of such order* in the court of appeals." 15 U.S.C. § 45(c) (emphasis added). Congress cannot eliminate discovery for constitutional claims. *See Elgin*, 567 U.S. at 33–34 (Alito, J., dissenting) (explaining that inability to develop a record in an agency proceeding cuts against implicit jurisdiction stripping because Congress did not "intend[] to impose these pinball procedural requirements instead of permitting petitioners' claims to be decided in a regular lawsuit in federal district court"). And that's what Axon deserves: "a regular lawsuit in federal district court." *Id.* Anything less would prevent Axon from ever making its constitutional case, which would undermine the liberty our Constitution is designed to protect. *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 490 (2010) (no implicit jurisdiction stripping when the Court "d[id] not see how petitioners could meaningfully pursue their constitutional claims under the Government's theory").

III. *Thunder Basin* Does Not Apply, But Even If It Does, Axon Prevails

The Constitution, Section 1331, and common sense decide this case. But in any event, Axon should get its day in court even under *Thunder Basin* and *Elgin*.

A. Axon's No-Win Situation Demands Court Intervention

The government's heads-it-wins-tails-you-lose approach would deprive Axon of any federal court review if Axon "prevails" in the FTC's administrative proceeding. Should, despite all the constitutional problems lurking in the FTC process, Axon manage to overcome the stacked deck, it will have nowhere left to turn to make its core constitutional arguments.

That alone should decide this case. *Thunder Basin* recognized that the question in implicit jurisdiction-stripping cases is whether it is "'fairly discernible' that Congress intended to impose these" results. *Elgin*, 567 U.S. at 33–34 (Alito, J., dissenting). But there is nothing in the Act or in this Court's precedents that suggest Congress wanted the FTC to play a rigged game.

Thunder Basin, for example, involved a statutory claim that could be reviewed in the administrative proceeding. *See* 510 U.S. at 205. As Justice Alito explained in *Elgin*, "[t]he only constitutional issue" in *Thunder Basin*, "was a matter of timing." 567 U.S. at 32 (Alito, J., dissenting). The petitioner sought judicial review to enjoin enforcement of the Federal Mine Safety and Health Amendments Act of 1977, but it did not challenge the constitutional structure of the agency tasked with the Act's administration. Rather, it argued that delayed judicial review of its injunctive claim would violate due process. *See* 510 U.S. at 218;

see also Elgin, 567 U.S. at 31 (Alito, J., dissenting) (noting that in *Thunder Basin* the plaintiff "could have pursued a very similar statutory claim . . . *within the administrative process*" (emphasis added)). So if the plaintiff in *Thunder Basin* won in the agency proceeding, it would have received all the relief it asked for: nonenforcement of the Mine Act. The same was true in *Elgin*, too, where petitioners wanted to stop the enforcement of a federal statute—something that plainly could be remedied in an agency proceeding. The agency in *Elgin* had the power to provide the full remedy sought by petitioners. *See Elgin*, 567 U.S. at 12–13 (noting petitioners made a "constitutional challenge[] to federal statutes")

Not here. Axon's case turns not on timing, not on substance of antitrust statutes, not on anything the FTC itself can remedy. It turns on the very structure of the FTC. And those are claims that the agency can't decide. *See Carr v. Saul*, 141 S. Ct. 1352, 1360 (2021) ("[A]gency adjudications are generally ill suited to address structural constitutional challenges."). Indeed, Axon cannot possibly win on these claims in the administrative process. Thus, delayed review is meaningless here where a court would have nothing (relevant) left to review.

That puts this case far beyond *Thunder Basin* and *Elgin*. Unlike there, here Axon cannot get ultimate relief in the agency proceeding. If the FTC Act implicitly strips courts of jurisdiction, then, Axon will have no remedy. Instead, Axon will have to fight on the FTC's own turf over substantive antitrust law for years (while spending millions of dollars) and hope to beat the FTC in its own house, against its own judge, under its own rules.

But even if Axon finally climbs out of the FTC's internal procedure with a "win," it will have lost. Its constitutional claims could be "moot." There will be no cease-and-desist order for a court to review. Axon will be out of luck. And this is the *best-case* scenario. That not only undermines the legitimacy of agency adjudication, but it also threatens the very liberty and constitutional rights our system is designed to protect.

B. Axon's Here-and-Now Injury Will Only Worsen as the FTC Process Continues

Axon does not complain of a possible injury or potential bias. It is being harmed *now*. And that injury will continue day after day until federal courts intervene.

When parties face this kind of here-and-now injury, federal courts stand ready to hear the case. *Seila Law LLC v. Consumer Fin. Protection Bureau*, 140 S. Ct. 2183, 2196 (2020) ("[W]hen such a provision violates the separation of powers it inflicts a 'here-and-now' injury on affected third parties that can be remedied by a court."). It's long been established that parties may make separation-of-powers challenges in federal court. *Bond v. United States*, 564 U.S. 211, 222 (2011). "[A]n injured person[]" has "standing to object to a violation of a constitutional principle" such as "actions that transgress separation-of-powers limitations." *Id.*; *see also Free Enterprise Fund*, 561 U.S. at 491 n.2 (explaining that parties may bring constitutional claims to federal court under separation-of-powers principles).

That is precisely what Axon asks. It is suffering an injury today because of structural constitutional violations. Only a federal court can remedy that injury. And the harm deepens as days tick by. It must get its day in court.

Axon's injuries are real. They're happening now. And they will continue if courts refuse to exercise their constitutionally vested powers. This threatens the separation of powers and individual liberty—the very things the Constitution in general and judicial power in particular were designed to protect. And because reading the FTC Act to preclude jurisdiction will undermine core constitutional principles, this Court should hesitate before finding any implicit or hidden "intent" from Congress in the FTC Act's vague terms. *See Free Enterprise Fund*, 561 U.S. at 489–90. Section 1331, after all, provides a much clearer answer.

CONCLUSION

This case falls squarely within the power that We the People delegated to the Judicial Branch and the jurisdiction that Congress gave federal district courts. The FTC Act does not cast aside a sovereign people's fundamental law, or a jurisdictional grant from the people's representatives. "[J]udges cannot opt out of exercising" their duties. *Perez*, 575 U.S. at 119, 125 (Thomas, J., concurring). The separation of powers,

individual liberty, and our constitutional order deserve at least that much.

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Respectfully submitted,

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