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* THE JUSTICE SOCIETY IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Justice Society is a nonprofit organization focused on providing access to justice under the law and supporting litigation on behalf of victims of Government over-reach and abuse. One of The Justice Society's missions is to end persecution of private business through administrative process. Although this case arises in the context of the Federal Trade Commission ("FTC"), many federal administrative agencies are constructed in a similarly unconstitutional manner with the single-layer constraint on the President's removal of Commissioners and the dual-layer for-cause removal protections that insulate administrative law judges from Presidential control. Despite recognition by this Court that district courts have jurisdiction to entertain such structural constitutional challenges *before* litigants are forced to endure the gauntlet of an unconstitutional administrative process, most federal courts have misinterpreted and misapplied this Court's precedent to erroneously hold that they are powerless to exercise their jurisdiction to prevent this immediate constitutional injury.

As the Ninth Circuit conceded here, this interpretation and application of the law "makes little sense." A proper application of this Court's decisions in *Free Enter. Fund v. Public Co. Acct. Oversight Bd.*, 561 U.S. 477 (2010), and *Seila Law LLC v. CFPB*, 140 S.

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[1] The parties have consented to the filing of this brief. No counsel for any party authored this brief, and no counsel or party, other than The Justice Society and its counsel, paid for the preparation of submission of this brief.

Ct. 2183, 2196 (2020), establishes that the lower courts are not, as they have presumed, required to sit on their hands while litigants endure immediate constitutional injury from a structurally unconstitutional administrative process. Instead, this Court's precedent supports the opposite conclusion: federal courts have jurisdiction, and therefore the obligation, to act early to prevent such constitutional injury.

The importance of this Court's immediate and unequivocal clarification that district courts possess jurisdiction before unconstitutional administrative processes are initiated or completed to rule on structural constitutional violations, especially the structural constitutional violations at issue in this, cannot be overstated. Agencies like the FTC have been emboldened for far too long by their lack of accountability both before *and* after administrative proceedings, and their actions in investigations and enforcement actions against private parties have, put bluntly, gone off the rails. Secure in their knowledge that parties before them have little choice but to agree to their (often unreasonable and unfounded) settlement demands or be forced into the Thunderdome of the administrative process in which the federal agency is nearly assured to be the victor regardless of the merits and in which the party will suffer tremendous reputational and economic damage regardless of the ultimate outcome, federal agencies' demands have become only more extreme and their legal positions less tethered to the law and the confines of their legitimate enforcement authority. Because district courts have erroneously determined that they lack jurisdiction to act, parties have had no access to pre-enforcement

challenges to the constitutionality of an agency's administrative structure nor any adequate judicial review after the administrative process is complete. Confident that they cannot be held accountable either before or after parties are forced to walk the administrative plank, agencies have leveraged their own insulated, biased administrative processes to brutalize their opponents.

It is past time to right this ship. Clarification from this Court that the federal courts have immediate jurisdiction over structural constitutional challenges to administrative agencies will not rectify all of the legal ills that plague independent federal agencies, but it is a necessary step in the correct direction.[2]

SUMMARY OF THE ARGUMENT

Federal district courts have jurisdiction to immediately consider structural constitutional challenges to federal agencies; they need not (and should not) wait for the full administrative process to play out before they accept and decide such challenges. Unfortunately, most courts have misread the law and this Court's precedent as stripping them of such jurisdiction, and they have refused, therefore, to

[2] While the focus of Petitioner's specific challenge is the dual layer for-cause removal of FTC ALJs, this case also presents the Court with a perfect opportunity to make explicit what *Seila Law* implied – that the very existence of independent agencies like the FTC violate separation of powers and that *Humphrey's Executor* is no longer good law. *Seila Law*, 140 S. Ct. at 2212 (noting that, in *Seila* Law, the "Court . . . repudiated almost every aspect of *Humphrey's Executor*.") (Thomas, J., concurring in part and dissenting in part).

exercise their given jurisdiction in those cases. The resulting harm to parties subjected to the administrative agency's unconstitutional process are often disastrous.

To begin with, these parties' constitutional rights are immediately violated, which is presumptively irreparable. Beyond the initial constitutional violation, however, are the real injuries a party continues to endure from the unconstitutional administrative process itself. In many cases, the party must first face the Morton's fork of knuckling under to an agency's baseless allegations and draconian settlement demands or betting the health or even life of its company on fighting the agency through its administrative process in which the agency is virtually always the victor. The very few parties who decide to resist the agency, do not, in reality, expect any relief from the agency itself (who nearly always rules in its own favor) but are hoping to emerge from the administrative process so that they can *finally* have access to an Article III court that just might inject some semblance of fairness and application of the actual law into the case. Given the currently required deferential *Chevron* review for many agency decisions, however, there is often not much that even an Article III court can do at this late stage to right the agency's wrongs.

More insidious is the emboldening effect that this unconstitutional lack of any true accountability to the Executive or to the Judiciary at any stage has had on these agencies. Aware of their unchecked power, agencies have increasingly succumbed to the temptation to wield it in progressively unreasonable

and abusive ways, crushing under their administrative boot parties who dare to challenge them. The harm from this unconstitutional process is as real and dangerous as it is irreparable and unreviewable.

The experience of one such party, LabMD, Inc., a specialized Georgia cancer detection lab, who chose to fight the FTC's unconstitutional and corrupt investigation and enforcement action against it, is equal parts horrifying and instructive. In that case, the FTC entered into an improper relationship with a for-profit Pennsylvania-based internet security firm, Tiversa Holding Company, and its CEO, Robert Boback. The FTC knew that Tiversa's business was to seek out so-called data security breaches on the internet and to monetize the alleged data breach by trying to sell the company whose data it "found" Tiversa's remediation services. At least one FTC Commissioner expressly warned the FTC staff not to get involved with Tiversa or to use it as a source of information for data breach investigations because it was a commercial entity that had a financial interest in intentionally exposing and capturing sensitive files on computer networks. Eager to exploit an easy source of potential data breach information for its investigations and enforcement actions, however, the FTC ignored this warning and jumped into bed with Tiversa.

As the FTC Commissioner had warned, however, Tiversa turned out to be a bad actor, and it used its improper relationship with the FTC to shakedown private businesses. Tiversa did not, as it had represented, find the sensitive data files of its victims, like LabMD, simply floating around out on the

internet. Instead, it misappropriated proprietary *FBI enhanced* peer-to-peer ("eP2P") software that it was provided in its role as a federal contractor to the FBI and U.S Attorney's Office for the Western District of Pennsylvania to hack into and steal companies' confidential and sensitive files. It would then contact the company whose files it had stolen, falsely claim that the company had a data breach and that its sensitive files were exposed on the internet, and offer its remediation services for a hefty fee.

But Tiversa's treachery did not end there. When a company, such as LabMD, refused to purchase Tiversa's remediation services, Tiversa would retaliate by reporting that company's non-existent "data breach" to the FTC. Tiversa would then instruct its employees to fabricate evidence to make it appear as though the victim company's sensitive data had spread across the internet, including to ISP addresses of known identity thieves. Tiversa provided this fabricated "evidence" to the FTC, and, at least in LabMD's case, the FTC presented this fabricated evidence in its enforcement action against LabMD.

Because LabMD was entitled to virtually no discovery or other due process in the administrative proceedings and because its post-administrative remedies have been, in reality, severely limited, it is unclear even now the degree to which FTC officers were complicit in Tiversa's chicanery. What the existing evidence does show, however, is that the FTC officer's hands were unclean. First, they not only ignored their Commissioner's express warning not to get involved with Tiversa, but also took no steps to

address or protect against the known dangers of the relationship. Second, at some point in the administrative process, the FTC realized that the evidence that Tiversa had provided about LabMD actually showed that LabMD's file had been taken from its own computer, *not* found floating around out on the internet. Rather than come clean about this critical fact, the FTC instead *instructed Tiversa to strip that information out of the data* to conceal these facts and then reproduce it to the FTC.[3] Third, the FTC allowed Tiversa to create a sham entity called The Privacy Institute through which it funneled its "evidence" to the FTC, a fact that the Eleventh Circuit later found should have sounded alarm bells.

While the full extent of Tiversa's illegal activities did not surface during LabMD's administrative process (or even for years after), a former Tiversa employee blew the whistle on some of Tiversa's illegal actions in his immunized testimony before the FTC ALJ. He exposed the fact that Tiversa had not accessed LabMD's sensitive data through commercially available peer-to-peer ("P2P") software, like LimeWire, but had instead used its own proprietary software to break in and steal the file. (The whistleblower would not admit under oath that Tiversa used the FBI's eP2P software to hack and steal files until he testified in a separate civil proceeding in 2019). The whistleblower also exposed that the FTC's "evidence" provided by Tiversa, supposedly showing LabMD's sensitive files spreading across the internet, was fabricated, and he confirmed

[3] Wallace shared his legal file containing this information with LabMD in October 2018. Without it, LabMD likely never would have been able to discover this aspect of the FTC's corruption.

that no one had ever seen LabMD's stolen files other than Tiversa. He further confirmed that Tiversa reported LabMD, along with about 88 other companies, to the FTC because those companies had refused to purchase Tiversa's remediation services.

As the Eleventh Circuit would later describe it, *"[T]he aroma that comes out of the investigation of this case is that Tiversa was shaking down private industry with the help of the FTC,"* and "*the FTC acted as the hammer to Tiversa's anvil. A government agency should not [wield] its significant power and resources to aid a private company's shakedown racket*."

In light of the whistleblower's testimony, the FTC was forced to withdraw all the evidence and testimony it had presented. Because it did not have any non-fabricated evidence or non-perjured testimony, the FTC should have dismissed its case against LabMD. *But it did not*. Instead, the FTC continued to pursue LabMD in the enforcement action by pivoting to a new legal theory of liability that conflicted with the plain language of Section 5, contradicted the FTC's own longstanding policy statement interpreting the Act, and went against the Act's legislative history, as the Eleventh Circuit would later hold in staying and ultimately vacating the Commission's Final Order against LabMD.

In a rare moment of sanity in this otherwise bizarre process, the FTC ALJ rejected the FTC's new theory and dismissed the complaint against LabMD. Undeterred, however, the FTC appealed the ALJ's dismissal to the Commission. And as it always does,

the Commission reversed the ALJ and entered a final order against LabMD.

LabMD appealed to the Eleventh Circuit, and in 2018, almost ten years after LabMD's administrative nightmare had begun and four years after it had been forced out of business, the Eleventh Circuit vacated the Commission's Final Order. By then, of course, the damage had long been done. The reputational and financial costs of the FTC's enforcement action against LabMD put LabMD out of the lab business in 2014. And the legal avenues, much touted by lower courts as "adequate judicial review" following the administrative process, have proved to be theoretical and illusory, even in the face of agency behavior as outrageous as that in LabMD's case. In actuality, adequate post-administrative process review is rarely available; certainly, no judicial review or remedy adequate to redress the immediate and ongoing constitutional violations inherent in forcing parties to participate in an unconstitutional agency process is truly available.

District courts have jurisdiction to prevent these unconstitutional injuries before they begin, and with it, the obligation to exercise their jurisdiction. Given the muddled state of the law in the lower courts on this matter, however, clarification from this Court of the district court's jurisdiction is urgently needed, and Axon's case is the ideal vehicle for this Court to provide it.

ARGUMENT

The federal district courts' refusal to exercise jurisdiction over structural constitutional challenges before a party is made to endure an agency's unconstitutional administrative enforcement process strays from this Court's precedent and causes both immediate and ongoing irreparable injury to parties pursued by these agencies. The harm that companies incur when they are forced to endure this unconstitutional process is significant, even fatal, and no adequate post-agency judicial review can even begin to redress these injuries. This Court should reverse the Ninth Circuit's decision and assure district courts of their jurisdiction to decide such structural constitutional matters regardless of the status or state of the administrative process.

I. The Grievous Injuries Resulting from Forcing Litigants to Endure Ongoing Constitutional Violations from Structurally Unconstitutional Agency Action Before They Are Allowed Access to an Article III Court Are Not Hypothetical.

As Petitioner Axon Enterprise, Inc. has rightly argued here, the injuries a party incurs when made to participate in "litigation" through structurally unconstitutional agency processes are immediate, and this immediate, irreparable constitutional injury should be dispositive. In reality, however, these significant, immediate injuries are just the beginning of the injuries that flow from having to participate in the agency's unconstitutional process. Because of the protections they enjoy from unconstitutional

limitations on the removal process for both ALJs and Commissioners, and because the law as it is now being applied essentially eliminates the ability of a party to hold either the agency or any of its individual actors accountable, the agency and its officers are *de facto* accountable to no one, and they know it. Indeed, as the FTC's administrative process is currently constructed, its personnel are not even accountable to the President whose executive authority the agency purports to wield. *See, e.g., Collins v. Yellen*, 141 S. Ct. 1761, 1797 (2020) ("Few 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.") (Gorsuch, J., concurring in part) (internal citations omitted).

As a result, the enforcement behavior of these agencies and their personnel is bounded only by the naked hope that the agency and its agents will act constitutionally and in good faith, without any meaningful recourse even when the facts of a particular case reveal that such hope has been misplaced. Emboldened by the constraints on litigants' discovery and due process rights in the administrative process; by the lower courts' current refusal to decide structural constitutional challenges to an agency before a party undergoes the administrative gauntlet; and by the agency's virtually unblemished record of success in front of itself, the behavior of such agencies and its personnel have, candidly, run amok.

Take as one example the FTC's enforcement case against LabMD, Inc., a highly specialized Georgia-based cancer detection center. In 2010, the FTC

opened an investigation into LabMD for what it alleged were "unfair practices" under Section 5 of the FTC Act. *See LabMD v. Federal Trade Comm'n* ("*LabMD I*"), 678 Fed Appx. 816, 818 (11th Cir. 2016). The FTC opened this investigation based exclusively upon information and "data" it received from Tiversa Holding Company ("Tiversa"), a Pennsylvania-based for-profit internet security company, who claimed to have downloaded a file (the "1718 File") from a LabMD computer using commercially available P2P file-sharing software (i.e., LimeWire). *Id.*; *see also LabMD v. Federal Trade Comm'n* ("*LabMD III*"), No. 1:19-mi-00071, 2019 WL 11502794, at *9 (N.D. Ga. 2019), adopted in full by *LabMD, Inc. v. FTC*, No. 16-16270 (11th Cir., Dec. 23, 2019). LabMD's 1718 File contained legally protected patient information of thousands of LabMD patients. *LabMD I*, 678 Fed Appx. at 818. Tiversa claimed that LabMD's 1718 File was not only accessible to Tiversa through LimeWire but that it had spread throughout the internet and that other nefarious actors, including known identity thieves, had also been able to access and disseminate the 1719 File. *Id.*

As the evidence eventually revealed, however, *all* of Tiversa's supposed information and evidence was false and fabricated; it was part of Tiversa's larger scheme to leverage its inappropriate relationship with the FTC to extort private companies, like LabMD, into buying its computer security and remediation services. *Id.*; *see also LabMD III*, 2019 WL 11502794, at *8. In fact, the evidence now shows that the FTC knew, even before it made the decision to bring an enforcement action against LabMD, that Tiversa's "evidence" was suspect, and perhaps false. Rather than acknowledging that it

lacked any legitimate factual basis for its investigation and ultimate enforcement action against LabMD, the FTC instead conspired with Tiversa to hide the truth — that there was never a data breach at LabMD at all, much less any spread of LabMD's 1718 File over the internet. Evidence uncovered years later, but inaccessible to LabMD at the relevant time, revealed that the FTC required Tiversa to alter the documentation of LabMD's supposed data security breach to *conceal* the fact that the 1718 File was never accessed by anyone other than Tiversa. *See, e.g., LabMD, Inc. v. Tiversa Holding Company et al.,* Case No. 20-1731, ECF Doc. No. 73 at 23-27 (3d Cir. 2020). Worse, the evidence now shows that Tiversa illegally accessed LabMD's 1718 File *not* through publicly available P2P software like LimeWire but through misappropriated proprietary FBI eP2P software that Tiversa had been given by the FBI and the U.S. Attorney's Office in the Western District of Pennsylvania in its role as a contractor on child pornography investigations. Because the evidence proving this blockbuster fact was actively concealed until years later, however, LabMD could not make the FTC ALJ nor the Eleventh Circuit aware that the alleged LabMD data breach (i.e., Tiversa's alleged access of the 1718 File through LimeWire) never occurred and that, instead, Tiversa unlawfully abused law enforcement software to illegally hack into LabMD's computer network to steal the file. *Id.*[4]

[4] Undoubtedly, such crucial and devastating information regarding the rotten core of the FTC's case could and would have been uncovered had the FTC chosen to pursue LabMD through the judicial process, with its full panoply of discovery and due process

The FTC knew, however, that there were significant problems with the veracity of the data provided by Tiversa. Instead of acknowledging these issues and dropping its pursuit of LabMD, however, the FTC *instructed Tiversa to alter* the LabMD 1718 File to conceal some of those problems.[5] The FTC then used Tiversa's data as the basis of its enforcement action against LabMD. *See LabMD III*, 2019 WL 11502794, at *9. In August 2013, the Commission filed a complaint alleging that LabMD violated Section 5 of the FTC Act by failing to provide reasonable and appropriate security for its customers' personal information and that this failure caused (or was likely to cause) substantial consumer injury. *Id.* at *7.

At this time (and for years after the FTC enforcement action was concluded), LabMD was completely in the dark about the collusion between the FTC and Tiversa and their unlawful actions. And because LabMD was forced into the administrative

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rights, instead of through the administrative process, in which LabMD's ability to engage in meaningful discovery and the benefit of a neutral Article III judge was unavailable.

[5] Because of the limitations on discovery in the administrative process, LabMD was prevented from learning about the FTC's instructions to Tiversa to alter the data that it was providing to the FTC about LabMD until long after the administrative action, after the Eleventh Circuit appeal vacating the FTC decision, and after the Eleventh Circuit's decision granting LabMD its fees and costs was briefed. Despite the fact that these damning facts were unknown to the Eleventh Circuit, it nonetheless issued a scathing opinion denouncing the FTC, its inappropriate relationship with Tiversa, and its unreasonable pursuit of LabMD even after Tiversa's evidence was exposed as false and fraudulent during the ALJ proceedings. *See LabMD III*, 2019 WL 11502794, at *7-9.

track at the FTC, where discovery and other rights are severely limited and no neutral Article III judge is available to oversee the proceedings, LabMD's ability to contemporaneously discover and bring to light this corruption of the FTC enforcement process was nonexistent.

Even so, LabMD availed itself of every legally available option to stop to the FTC's baseless enforcement action. It moved to dismiss the complaint for failure to state a case cognizable under Section 5, which the Commission denied. It sought relief from the U.S. District Court in the Northern District of Georgia challenging, among other things, the FTC's enforcement action as facially unconstitutional and sought an injunction against the FTC proceedings. *LabMD, Inc. v. F.T.C.*, No. 1:14-CV-00810-WSD, 2014 WL 1908716, at *6 (N.D. Ga. May 12, 2014), *aff'd*, 776 F.3d 1275 (11th Cir. 2015). The district court, however, (erroneously) determined that it lacked jurisdiction to rule on the merits of LabMD's constitutional challenges unless and until it had final agency action before it. *Id.*

Having been denied preliminary relief from both the Commission and the district court, LabMD was then forced into the Thunderdome of the FTC administrative process. Following what little "discovery" was available, LabMD moved for summary judgment, which was also denied. It proceeded to hearings before the ALJ, which began in May 2014 and concluded in July 2015. *LabMD III*, 2019 WL 11502784, at *8.

On May 5, 2015, Richard Wallace, a former Tiversa employee turned whistleblower, testified under a grant of immunity in the FTC action and exposed Tiversa's

scheme,[6] including the false and fabricated evidence that it had manufactured against LabMD.[7] *Id.* Even

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[6] Based on the information available at the time, the Special Master described Tiversa's scheme as follows:

> Tiversa infiltrated LabMD's network in 2008, copied the 1718 File (which LabMD calls "theft"), notified LabMD that it had a copy of the 1718 File, and repeatedly asked LabMD to buy [Tiversa's] breach detection services, *falsely claiming* that copies of [the 1718 File] were being searched for and downloaded on peer-to-peer networks.
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> After LabMD declined to purchase Tiversa's services, Tiversa informed the FTC in 2009 that LabMD and other companies had been subject to data breached involving its customers' personal information. "Tiversa's CEO [Boback] instructed one of his employees to 'make sure [LabMD is] at the top of the list' of companies that had suffered a security breach that was given to the FTC."
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> * * * * *
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> Tiversa did not include any of its clients on the list [given to the FTC.] Tiversa hoped the FTC would contact the companies on its list so they would feel pressured to purchase Tiversa's services out of fear of an enforcement action.

Id., at *7

[7] Tiversa victimized many other parties through its shakedown scheme. It falsely claimed to have found the blueprints for President Obama's Marine One helicopter on an Iranian computer. It invaded the confidential patient fields of Open Door Clinic, a non-profit organization treating sexually transmitted diseases, and attempted its shakedown scheme on that clinic. Tiversa likewise hacked and stole an investment firm's private file containing the social security numbers and personal information of 2,000 clients, including Supreme Court Justice Stephen Breyer. *See, e.g.,* http://www.washingtonpost.com/wp-dyn/content/article/2008/07/08/AR2008070802997.html. *See* 2015 House of Representatives

without knowing the full extent of Tiversa's illegal use of the FBI's eP2P software to hack LabMD and its collusion with the FTC, the Eleventh Circuit characterized Tiversa's actions as a "shakedown scheme" enabled by the FTC: *"[T]*he *aroma that comes out of the investigation* of this case is that *Tiversa was shaking down private industry with the help of the FTC*." *Id.*, at *5 (quoting Judge Tjoflat at oral argument) (emphasis added).[8]

Wallace testified before the FTC ALJ that Tiversa perpetrated this exact shakedown scheme on LabMD. Wallace also testified that, at the direction of Tiversa's CEO, Robert Boback, he had manipulated and fabricated data to make it appear that LabMD's 1718 File was found at four IP addresses, including those of known identity thieves, which was false. A list of those fabricated IP addresses was introduced into evidence

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Committee on Oversight and Government Reform Report, "*Tiversa, Inc.: White Knight or Hi-Tech Protection Racket?"* available at http://www.databreaches.net/wp-content/uploads/2015.01.02-Staff-Report-for-Rep.-Issa-re-Tiversa.pdf.

[8] As neither LabMD nor the Eleventh Circuit knew at the time, however, the actual facts were even more egregious. In his testimony before the FTC, Mr. Wallace did not fully come clean that the software that Tiversa used was the proprietary eP2P software that the FBI had given Tiversa for use in its work as a government contractor for the U.S. Attorney's Office in Pennsylvania. Mr. Wallace's omission was likely caused by the fact that at that time, he was represented by the former U.S. Attorney for the Western District of Pennsylvania, Mary Beth Buchanan, who had a strong personal interest in keeping the role her office had played in enabling Tiversa's thefts and fraud concealed. Mr. Wallace finally first testified under oath that Tiversa was using the FBI's proprietary eP2P software to perpetrate its schemes in 2019.

by the FTC at the ALJ hearings to show the spread of LabMD's 1718 File on the internet. *Id.* at *8.

Through Wallace's explosive testimony, it became clear to both the FTC's counsel and to the ALJ that the "evidence" provided by Tiversa was false, fabricated, and perjured. *Id.* at *8. As Judge Tjoflat would later opine to FTC's appellate counsel, "it should have become obvious after you – after the evidence collapsed and your – and Complaint Counsel couldn't go any further." *Id.* So, of course, the FTC dismissed its enforcement action built upon perjury and fabricated evidence with apologies to LabMD, right? In a word, no.[9]

Instead, the FTC withdrew the Tiversa "evidence" upon which its investigation and enforcement action had been built, but it *refused* to dismiss the action. Unable to provide *any* non-fabricated evidence or non-perjured testimony that the 1718 File had ever been seen by anyone other than Tiversa or had otherwise spread across the internet, the FTC instead changed its

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[9] In a separate lawsuit against the specific FTC actors who perpetrated this parade of horribles against LabMD, *Daugherty v. Sheer*, 891 F.3d 386, 392 (D.C. Cir. 2018), LabMD alleged that the FTC's motivation for its unrelenting pursuit of LabMD was motivated by the FTC's desire to retaliate against and silence LabMD's CEO, Mike Daugherty, who published a book, "The Devil Inside the Beltway, the Shocking Expose of the US Government," in September 2013 detailing the facts that he had uncovered at that time about the perversity of the FTC's actions against LabMD. The book was published one month after the FTC filed its complaint against LabMD. Unfortunately, this separate lawsuit was scuttled by the D.C Circuit's (erroneous) ruling that the FTC employees in question enjoyed qualified immunity, allowing them to evade accountability for their actions. *Id.*

legal theory midstream. *Id.* at *8. The FTC now claimed for the first time – contrary to the plain language of the FTC Act, the FTC's own longstanding written interpretation of Section 5, and even Section 5's legislative history – that the fact that Tiversa managed to download the 1718 File was itself "substantial injury" even without spread and that the hypothetical risk of future harm to the privacy interests of LabMD's patients was enough to satisfy Section 5's "substantial injury" prong. *Id.* Ultimately, the Eleventh Circuit fully rejected the FTC's radical new legal theory as an unreasonable interpretation of Section 5, even after giving it the required *Chevron* deference. *Id.* at *6 and *8; *see also LabMD I*, 678 Fed Appx. at 819-821.

After rejecting the FTC's new legal position, the FTC ALJ dismissed the FTC's complaint against LabMD. *See LabMD III*, 2019 WL 11502794, at *8 (explaining ALJ's ruling for LabMD) (internal citations omitted). Unfortunately for LabMD, however, the matter did not end there. Presumably knowing that the Commission regularly reverses ALJs who rule against it, the FTC appealed the ruling to the full Commission. Despite the shocking record of fabricated evidence and perjury by the FTC's witnesses, the Commission reversed the ALJ's dismissal of the complaint in July 2016. The Commission determined that LabMD's alleged failure to prevent LimeWire from being installed on one of its computers was an unfair data security under Section 5. *LabMD, Inc. v. Federal Trade Comm'n*, ("*LabMD II*") 894 F.3d 1221, 1226-27 (11th Cir. 2018) (describing the decision of the Commission). The Commission further held that the FTC did not have to prove that LabMD's 1718 File had

spread around on the internet to satisfy the "substantial injury" prong of Section 5; instead, the unauthorized disclosure of the 1718 File caused "intangible harm," and the mere exposure of the 1718 File on LimeWire was "likely to cause substantial injury." *Id.* at 1227.

In September 2016, LabMD appealed the Commission's ruling to the Eleventh Circuit and moved it to stay the Commission's ruling pending appeal. In an unusual move, the Eleventh Circuit granted the stay, finding good cause to believe that the FTC's interpretation of unfair practices under Section 5 in this case was unreasonable, even after according the FTC's interpretation the required *Chevron* deference.[10] *LabMD I*, 678 Fed. Appx. at 820-21. Despite this clear warning from the Eleventh Circuit that its legal position was untenable, the FTC continued its pursuit of LabMD unphased. *See LabMD III*, 2019 WL 11502794, at *6 (noting the Eleventh Circuit's stay should have "telegraphed to the FTC that its position was unreasonable.") In 2018, the Eleventh Circuit vacated the Commission's Final Order as unenforceable. *LabMD II*, 894 F.3d at 1237.

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[10] The Eleventh Circuit determined that "it is not clear that a reasonable interpretation of [Section 5's unfair practices] includes intangible harms like those that the FTC found in this case," and it cited to the FTC's own Policy Statement which provided that "the FTC is not concerned with merely speculative harms" and to the legislative history which specifically stated, "emotional impact and more subjective types of harm alone are not intended to make an injury unfair." *LabMD I*, 678 Fed Appx. at 820 (internal citations omitted).

In October 2018, LabMD sought its costs and fees from the FTC under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412. Under the EAJA, for a court to award a party fees and costs against the United States, it must find that the position taken by the United States (here, the FTC) was "not substantially justified." *LabMD III*, 2019 WL 11502794, at *2-3.

The Eleventh Circuit delegated the EAJA matter to Magistrate Judge Walter Johnson acting as Special Master. In his 34-page Report and Recommendation ("R&R"), which was adopted in full by the Eleventh Circuit, Special Master Johnson excoriated the FTC for its outrageous and unjustified behavior in its investigation and enforcement action against LabMD. The R&R was particularly critical of the FTC's "inappropriate relationship" with Tiversa. It noted that the FTC had been explicitly warned in advance by one of its own Commissioners about the dangers in relying on information from Tiversa, but it ignored this warning.[11] In particular, the one FTC Commissioner who dissented from the decision to issue a complaint against LabMD in 2012, Commissioner Rosch, expressly warned that "Tiversa is more than an ordinary witness, informant, or 'whistle-blower.' *It is a commercial entity that has a financial interest in intentionally exposing and capturing sensitive files on computer networks, and a business model of offering its*

[11] In his November 13, 2015 Decision, the FTC ALJ observed "FTC Staff did not heed then-Commissioner Rosch's warning, and also did not follow his advice. Instead, Complaint Counsel chose to further commit to and increase its reliance on Tiversa." *Id.* at n.7 (internal citations omitted).

services to help organizations protect against similar infiltrations." *Id.* at n.7 (emphasis added). Commissioner Rosch further advised that, under these circumstances, the FTC staff should not rely on Tiversa for evidence or information to avoid the appearance of impropriety. *Id.* Those prescient warnings were brushed aside.

The R&R also noted the significant problems that the FTC's inappropriate relationship with Tiversa had caused:

> [T]he lack of substantial justification for the FTC's prosecution of LabMD *goes back to the very beginning of this matter* and *arose from the inappropriate relationship between Tiversa and the FTC* and its unquestioning reliance on what turned out to be false assertions by Tiversa.

Id., at *6 (emphases added). The R&R further documented that the FTC's improper relationship with Tiversa came to the attention of the Committee on Oversight and Government Reform of the U.S. House of Representatives, whose staff investigated Tiversa. On January 2, 2015, that Committee published a Report which found, among other things, that

> The FTC used Tiversa as the source of convenient information used to initiate enforcement actions, and Tiversa used the FTC to [sic] in further pursuing the company's *coercive business practices. . .. The FTC accepted information from Tiversa through a shell organization without questioning the motives or*

> *reason for the third party, or, significantly, the veracity of the underlying information.*

Id., at *7 (quoting 2015 Report from House Committee on Oversight and Government Reform) (emphasis added).[12] The R&R also noted Judge Tjoflat's condemnation of the FTC/Tiversa relationship at oral argument: *"[T]he aroma that comes out of the investigation of this case is that Tiversa was shaking down private industry with the help of the FTC*." *Id.* at *5 (emphasis added). Ultimately, the R&R concluded that "*the FTC acted as the hammer to Tiversa's anvil. A government agency should not weld its significant power and resources to aid a private company's shakedown racket*." *Id.* at *11 (emphasis added). The R&R then summarized the prejudicial impact of the FTC's ill-advised relationship with Tiversa as follows:

> Looking back at all that has transpired in this case, *the FTC's assertion that it had an "undisputed factual basis to investigate LabMD" rings hollow*. *The FTC only received information about the 1718 File because LabMD had rejected Tiversa's shakedown attempt.* The FTC knew or should have known how Tiversa was getting its leads on companies it was reporting, *and should have been suspicious when Tiversa relayed the*

[12] As noted herein, the facts learned later turned out to be even worse. The FTC did not simply accept Tiversa's evidence without questioning it. Instead, it colluded with Tiversa to alter the data to conceal that the data had been discovered only on LabMD's computer. And some evidence indicates that the FTC directly or impliedly instructed Tiversa to create the fabricated evidence that LabMD's 1718 File had spread to bad actors on the internet.

> *1718 File surreptitiously. But, it was not*. As the aforementioned Congressional Report observed, *the FTC was accepting information from Tiversa without questioning its motives or the veracity of that information. But it should have.*
>
> *Even if the FTC could be excused for not verifying the facts before issuing a complaint (which it should not be)*, it became clear during the trial before the ALJ that the *Tiversa's assertions about the spread of the 1718 File were lies. Instead of dismissing the case,* which is what Judge Tjoflat said should have happened, *the FTC kept going after LabMD. Despite admitting that Tiversa's claims were false, the FTC came up with a new theory that the Eleventh Circuit subsequently found to be an unreasonable application of § 5(n) of the FTC Act. . ..*

Id., at *9 (emphasis added). The court aptly summarized, "The FTC encountered in LabMD an opponent who was not buying what the FTC was selling. *In response, the FTC crushed LabMD*." *Id.* (emphasis added).

Indeed, despite having no merit, the FTC investigation and enforcement action was fatal to LabMD. *Id.* The reputational damage caused by the FTC's actions and the staggering time and money resources required to resist the FTC forced LabMD to cease lab operations in 2014. *Id.* CEO Mike Daugherty not only lost his previously lucrative business, but thousands upon thousands of potential cancer patients lost this innovative cancer detection center as a

valuable, possibly life-saving resource. Unlike the vast majority of FTC targets, LabMD chose to fight rather than capitulating to what was eventually exposed to be a completely baseless, unlawful, and even corrupt investigation and enforcement action. But by the time LabMD was fully vindicated, the damage was done. No post-administrative judicial review can unring that bell.

The real world lessons in the tragic LabMD FTC investigation and enforcement experience are important to this Court's reaffirmation of district courts' obligation to exercise their jurisdiction to adjudicate structural constitutional challenges to agencies and agency action before parties are involuntarily subjected to the FTC's rigged and unconstitutional administrative process. Without such early intervention by the Article III courts, non-agency parties are herded into the administrative killing fields from which they can never emerge without grievous, often fatal, injury.

II. Adequate Judicial Review After Unconstitutional Administrative Action Is Illusory.

In this case, the Government has argued that judicial review *after* a litigant has undergone the agency's administrative process is adequate, and the lower courts have often given lip service to this same notion. In reality, however, it is bunkum. Easier for a camel to pass through the eye of a needle than for a party wronged by the unconstitutional administrative process to avail itself of any meaningful judicial review or remedy. A party may or may not survive the

administrative Thunderdome, but it will never recover from it. *See* WLF Cert. Br. at 10 (collecting cases and authorities); *see also Tilton v. SEC*, 824 F.3d 276, 298 (2d Cir. 2016) (Dronery, J., dissenting) ("Forcing the appellants to await a final Commission order before they may assert their constitutional claim in federal court means that by the time the day for judicial review comes, they will already have suffered the injury that they are attempting to prevent. . . .[W]hile there may be review, it cannot be considered truly 'meaningful' at that point.")

Examining the allegedly available post-administrative remedies emphasizes this truth.[13] In theory, for example, a party like LabMD could pursue the FTC officers who perpetrated this corrupt, fraudulent enforcement action against it under *Bivens v. Six Unknown Named Agents of Fed. Bureau of*

[13] The discussion of these post-administrative process remedies is itself a bit presumptuous because, in the real world, most parties against whom the FTC or other federal agency brings its full force to bear simply buckle under that pressure, even when they know they have not violated any statute or regulation. It is no secret that litigating against the federal government in any context is an expensive, risky, and uphill battle. Litigating against an administrative agency through the ALJ process, in which rights are severely limited and the agency is nearly always the winner regardless of the merits, is even more so. Most litigants either cannot afford the exercise or are unwilling to bet the life of their company on it. *See, e.g., LabMD III,* 2019 WL 11502794, at *9 (noting that most private parties enter consent decrees with the FTC "to avoid the type of long and protracted legal battle that played out here."); *see also* Atlantic Legal Fund and CATO Institute Cert. Br.17-22 (detailing the intense pressure on companies to settle with, rather than fight, the FTC even where the company has engaged in no wrongdoing).

Narcotics, 403 U.S. 388 (1971). In reality, however, courts interpret and apply qualified immunity as an almost impenetrable shield, insulating federal officers from liability for even egregious, intentional conduct. *See, e.g., Daugherty v. Sheer*, 891 F.3d 386, 392 (D.C. Cir. 2018).[14]

Relief under the Federal Tort Claims Act ("FTCA") is also more theoretical than actual. In principle, the FTCA permits parties aggrieved by the actions of federal agencies to sue for damages. In reality, the relief the FTCA actually permits is extremely narrow, and most litigants, no matter how provably aggrieved, will not be able to successfully mount an FTCA claim. First, the pre-filing requirements for bringing an FTCA action are complex, and the average litigant is unlikely to know of and adequately comply with them. Second, even when litigants can overcome these initial obstacles, the FTCA does not permit recovery for intentional, as opposed to negligent, misconduct *unless* that federal agency falls into the FTCA's "law enforcement proviso" contained in 28 U.S.C. § 2680(h). To fall within this proviso, a federal agent or agency

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[14] Additionally, since this Court's decision in *Bivens*, which extended a remedy against federal officers for Fourth Amendment violations, this Court has extended the *Bivens* remedy in only two other contexts: violations of the Fifth and Eighth Amendments. *See, e.g., Johnson v. Burden*, 781 F. App'x 833, 836 (11th Cir. 2019). Outside of these three contexts, expanding the *Bivens* remedy is now a "disfavored" judicial activity. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017). As a result, whether a court will recognize a *Bivens* remedy for other constitutional violations, such First Amendment violations, in any given case is far from certain. And, even if it does, the shield of qualified immunity will usually still serve to foreclose that review.

must be "empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." *Id.* Because the officers of many administrative agencies, including the FTC, have no authority to execute searches, to seize evidence, or to make arrests, they do not fall within this law enforcement proviso.

On paper, however, the FTCA would still seem to permit aggrieved parties to pursue administrative agencies and agents for negligence. But here, too, the FTCA has significant limitations that eliminate much negligent agency conduct from its scope. The FTCA's "discretionary function exception" provides that the FTCA's waiver of sovereign immunity does *not* apply to any claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." *See* 28 U.S.C § 2680(a). Lower courts routinely determine that the decision whether to initiate an administrative investigation or prosecution is a discretionary function, thus shielding many actions taken by federal agencies in the performance of these functions from FTCA liability. *See, e.g., Loumiet v. United States*, 828 F.3d 935, 942 (D.C. Cir. 2016) (noting that agency decisions whether to initiate administrative actions are "quintessentially discretionary").

Some courts, like the D.C. Circuit in *Loumiet*, have held that "the FTCA's discretionary-function exception does not provide a blanket immunity against tortious conduct that a plaintiff plausibly alleges also flouts a

constitutional prescription." 828 F.3d at 943 (noting that seven other circuits, "including the First, Second, Third, Fourth, Fifth, Eighth, and Ninth, have either held or stated in dictum that the discretionary-function exception does not shield government officials from FTCA liability when they exceed the scope of their constitutional authority.") But the Circuits are split on this critical issue, s*ee, e.g., Shivers v. United States,* 1 F.4th 924, 928–35 (11th Cir. 2021) (holding that even unconstitutional conduct by federal officers does not remove that conduct from the discretionary function exception); *Linder v. United States,* 937 F.3d 1087 (7th Cir. 2019), *cert. denied*, 141 S. Ct. 159, (2020) (same), and this Court has not resolved that conflict. In short, even where an aggrieved party can establish that an agency's conduct was negligent, intentional, or even unconstitutional, it is the rare case in which either *Bivens* or the FTCA will provide any actual review or remedy.[15]

It is perhaps a fair rejoinder that this Court has intentionally narrowed the *Bivens* remedy, and that Congress intentionally drafted the FTCA to limit lawsuits against the Government to rare and specific circumstances. It is also conceivable that in some cases, it is the lower courts' misapplication of *Bivens*

[15] The limited recovery available under the EAJA is also not "adequate" review. That statute limits recovery only to the fees and costs incurred in the litigation and caps the hourly rate for attorneys at a level well below what most law firms charge for a paralegal. It also it contains no provisions to adjudicate or compensate the prevailing party's constitutional injuries nor for any of the other damages it has incurred, including the loss of its reputation and even its business.

and the FTCA that have resulted in a greater than intended narrowing of these remedies. Even if so, however, these points emphasize the acute need for district courts to exercise their given jurisdiction to enter the fray at the beginning, when the constitutionality of the agency and its process are at issue. As LabMD's tragic experience illustrates, once a party is forced to participate in the unconstitutional administrative process, the injuries are both immediate and ongoing, and they are *de facto* unreviewable and irreparable, even when that party is vindicated on the merits.

LabMD did nothing wrong – it was a victim of Tiversa's illegal hack and subsequent shakedown scheme behind which the FTC unquestioningly (and perhaps corruptly) put its full and considerable force. LabMD bet the farm to defend itself, and it was fully vindicated. But that victory was in many ways pyrrhic: it lost the farm in the process. Though LabMD availed itself of every opportunity the law permitted to try to stave off the FTC's unconstitutional process, the courthouse doors remained firmly closed to it until it was too late. And even on the outrageous facts of its case, LabMD has encountered obstacle after obstacle in its efforts to hold accountable those at the FTC who used its administrative process to crush LabMD.

CONCLUSION

Federal district courts exist to exercise jurisdiction over "all civil actions arising under the Constitution, laws or treaties of the United States." 28 U.S.C. § 1331. Structural constitutional challenges to federal agencies fall securely within that jurisdictional grant, and this

Court's precedent establishes that the fact that such challenges arise in the context of federal agency action does not require (indeed, does not allow) district courts to await the commencement or conclusion of such administrative proceedings to exercise their jurisdiction over such matters. The lower courts have misread or misunderstood this Court's directives, however, and have refused to assert their given jurisdiction in such cases. The resulting injury to parties subjected to these unconstitutional agency actions is immediate and irreparable—but it is avoidable. Clarifying that district courts have and should exercise immediate jurisdiction in such cases clears the path for litigants to avoid immediate and ongoing constitutional violations at a point in that process where that result can make an actual, instead of illusory, difference.

Respectfully submitted,

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May 16, 2022