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

REPLY BRIEF FOR PETITIONER

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

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
MATTHEW D. ROWEN
EVELYN BLACKLOCK
CLEMENT & MURPHY, PLLC
706 Duke Street
Alexandria, VA 22314
(202) 742-8900
paul.clement@clementmurphy.com

Counsel for Petitioner

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REPLY BRIEF

The government advances a sweeping vision of implied jurisdiction-stripping that only an unaccountable agency with serious constitutional flaws could love. Under that view, the agency holds all the cards—able to go to district court for immediate relief or consign the citizen to years of unconstitutional abuse—and Congress can strip courts of expressly granted jurisdiction by *granting* additional jurisdiction, a sleight of hand sure to leave the citizenry befuddled, but not amused. Fortunately, that vision finds no support in this Court's cases. Indeed, the government does not deny that *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 561 U.S. 477 (2010), rejected the same implied-repeal argument in the context of a comparable challenge to the structure and existence of a federal agency. And the absence of a district-court remedy in such circumstances would condemn parties like Axon to suffer constitutional injury without any means of obtaining adequate or meaningful relief. Nothing in the FTC Act (or the Administrative Procedure Act) supports that untenable result.

Perhaps recognizing that its jurisdictional argument contradicts *Free Enterprise Fund* and would shield unaccountable agencies from meaningful review, the government strays beyond the question presented and devotes considerable energy to faulting Axon for failing to identify a statutory cause of action. But the Court in *Free Enterprise Fund* was equally unmoved by that same cause-of-action objection, and for good reason. This is not a damages action; it is an equitable suit to enjoin unconstitutional government

action that is inflicting irreparable injury. Such suits have been endorsed by this Court for well over a century and can trace their roots back to *Marbury* and beyond. The government suggests that the APA did away with this long-settled practice, but the APA affirmatively codified the preexisting regime. Indeed, the APA *explicitly preserves* equitable claims for injunctive relief when, as here, there is no other path to meaningful relief. Federal courts thus retain not only the power to enjoin unconstitutional action by federal officials, but an obligation to do so to preserve individual liberty and the promise of the separation of powers.

ARGUMENT

I. The FTC Act Does Not Impliedly Strip The District Court Of Jurisdiction Over Axon's Structural Constitutional Claims.

Under 28 U.S.C. §1331, federal district courts have jurisdiction over "all" civil actions arising under the Constitution. Axon brought just such an action. It "challenges" the structure, procedures, and "very existence of the Federal Trade Commission," claims that plainly arise under the Constitution. Pet.App.29 (Bumatay, J., concurring in the judgment in part and dissenting in part). Resolving such claims is the bread-and-butter of federal courts, and wholly beyond the authority of the agency itself, which can hardly evaluate claims going to its very existence or enjoin its own operation. Providing access to federal district court is particularly vital when, as here (as the government never denies), a private party will suffer irreparable constitutional injury absent early judicial intervention. The FTC Act gives not even the slightest

hint that Congress intended to strip district courts of jurisdiction over such claims. To the contrary, the Act by its terms promises to grant judicial review over a specified set of claims, not to withhold it for others or to condemn citizens to suffer constitutional injuries without a remedy.

A. Plain Text and the *Thunder Basin* Factors Support Jurisdiction Here.

The government resists that conclusion, invoking the specific-controls-the-general canon and insisting that the Act's express grant of appellate-court review over specific final agency actions means that private parties cannot challenge *any* other "agency conduct"—regardless of the nature of the claims or injuries asserted—anywhere else, despite the express promise of §1331. U.S.Br.17. In other words, the government posits a categorical rule under which neither the statutory text nor the nature of the claims and injuries asserted makes any difference; a slog through even the most obviously unconstitutional agency review scheme remains mandatory before constitutional rights may be vindicated in court.

If that argument sounds familiar, it is because the government made it in *Free Enterprise Fund*, and this Court rejected it without noted dissent. The threshold question there was whether 15 U.S.C. §78(a)(1) stripped district courts of jurisdiction over structural constitutional challenges to the Public Company Accounting Oversight Board, "a Government-created, Government-appointed entity" under the auspices of the SEC. 561 U.S. at 485. Just as it argues here with respect to the FTC and 15 U.S.C. §45(c), the government argued there that §78(a)(1) provided the

"exclusive mechanism for parties aggrieved by the actions of [the Board] to obtain judicial review." U.S.Br.15, *Free Enter. Fund*, No. 08-861, 2009 WL 3290435 (U.S. filed Oct. 13, 2009). The Court rejected that argument unequivocally, for reasons that apply with full force here. *See Free Enter. Fund*, 561 U.S. at 489-91.

Just like §78(a)(1), §45(c) does not "expressly limit the jurisdiction that" "28 U.S.C. §§1331, 2201" "confer on district courts." *Id.* at 489. Sections 78(a)(1) and 45(c) are "almost identical," Pet.App.10, and neither says anything about divesting district courts of jurisdiction in *any* case, let alone in cases involving the kind of structural constitutional challenges at issue in both cases. Each provision merely *grants* courts of appeals jurisdiction to review certain forms of agency action and says nothing about foreclosing all meaningful relief for here-and-now injuries.

The government is thus left arguing that Congress' specific *grant* of jurisdiction over challenges to final agency action controls and impliedly repeals the more general grant of jurisdiction in §1331. That argument is deeply flawed. A specific provision controls over a more general provision only "when conflicting provisions cannot be reconciled," and only to the extent the specific provision actually applies. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 183 (2012). In other words, the more general provision is not "void[ed]," but only "suspended," in "cases covered by the specific provision"; the general rule "continues to govern in all other cases." *Id.* at 184. Thus, if Axon sought to use §1331 to obtain district-court review of a cease-and-

desist order, the specific-controls-the-general canon would have considerable purchase. But neither Axon nor Free Enterprise Fund sought district-court review of a final agency order for which appellate review was specified. Nor did either prematurely challenge some agency action that had not yet occurred and might never materialize. Instead, in both cases the plaintiff challenged the immediate constitutional injuries of being subjected to an unconstitutional and unaccountable agency or agency official wholly apart from whether that unconstitutional activity culminated in a final order. In those circumstances, the limited appellate-court jurisdiction over challenges to final agency action is inapposite and does not foreclose challenges that fall squarely within the ambit of §1331. Precluding judicial review over such claims would be not a proper application of the specific-controls-the-general canon, but a "very much disfavored" implied repeal of the jurisdiction Congress granted in §1331. *Id.* at 327.

The government's argument not only would work an improper implied repeal, but ignores what this Court requires to displace district-court jurisdiction. Given the clarity with which §1331 grants jurisdiction, a court may not limit that jurisdiction unless it first finds that "the 'statutory scheme' displays a 'fairly discernible' intent to limit jurisdiction." *Free Enter. Fund*, 561 U.S. at 489 (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207 (1994)); *see also Elgin v. Dep't of Treasury*, 567 U.S. 1, 8-12 (2012). But even when that is the case, the inquiry is not over. The question then becomes whether "*the claims at issue* 'are of the type Congress intended to be reviewed within th[e] statutory structure.'" *Free Enter. Fund*,

561 U.S. at 489 (alteration in original) (emphasis added) (quoting *Thunder Basin*, 510 U.S. at 207); *see also Elgin*, 567 U.S. at 15-23. In answering that question, this Court has looked to the three *Thunder Basin* factors. The government suggests that *Free Enterprise Fund* turned on "idiosyncratic factors that are absent here." U.S.Br.38. In reality, the Court's decision turned on its evaluation of the three factors, which, there and here, all "point against any limitation on review." *Free Enter. Fund*, 561 U.S. at 490.[1]

First, "a finding of preclusion could foreclose all meaningful judicial review" of the injury Axon asserts. *Id.* at 489 (quoting *Thunder Basin*, 510 U.S. at 212-13). The injuries in *Thunder Basin* and *Elgin* flowed from the final agency actions imposing fines and dictating job status. Those injuries could be fully remedied by review of the final agency action inflicting the injury. But in *Free Enterprise Fund* and here, the injury flows from being subjected to an unaccountable and unconstitutional agency. The injury is the same whether the unaccountability manifests itself in final agency action or years of delay while agency officials try to extract a settlement to avoid judicial oversight altogether. In those circumstances, meaningful judicial review is denied, not merely channeled, by

[1] It is therefore immaterial that "[t]he statute[s] in *Thunder Basin* [and *Elgin*]" shared certain "features" with the FTC Act's administrative-review provision. U.S.Br.35. Those features were equally shared by the statute in *Free Enterprise Fund*. What explains the difference in results is not some subtle difference in statutory wording, but the substantial differences in the nature of the claims and injuries at issue.

foreclosing judicial review unless and until there is final agency action.

The government insists that after-the-fact review must be adequate because courts have the power to consider structural constitutional challenges as objections to final agency orders. U.S.Br.42. But that ignores that Axon, like Free Enterprise Fund, suffers injuries that are antecedent to and independent from any final agency order. Those injuries are not just distinct, but irreparable, especially given the United States' sovereign immunity from damages claims. "Irreparable harm occurs almost by definition when a person or entity demonstrates a likelihood that it is being regulated on an ongoing basis by an unconstitutionally structured agency." *Doe Co. v. CFPB*, 849 F.3d 1129, 1136 (D.C. Cir. 2017) (Kavanaugh, J., dissenting).

The fact that one manifestation of that unconstitutional injury can be partially redressed by vacatur *years later* is hardly an adequate remedy for the "here-and-now" constitutional injury Axon is suffering *today*. *Seila Law LLC v. CFPB*, 140 S.Ct. 2183, 2196 (2020). Courts have the power to vacate a second conviction obtained in violation of the Double Jeopardy Clause, but that does not mean that defendants must suffer through a second trial before they can obtain relief or even appeal. *See, e.g.*, *Abney v. United States*, 431 U.S. 651 (1977). The same logic applies here. The courts' ability to provide limited relief later does not preclude access to more complete and meaningful relief now. *Cf. Seila Law*, 140 S.Ct. at 2196 ("While [a post-removal suit] is certainly one way to review a removal restriction, it is not the only

way.").[2] Moreover, a remedy that stops constitutional injury before it happens is far more appropriate and targeted. A party subject to a cease-and-desist order may ultimately deserve to have its conduct halted, but no one deserves to suffer constitutional injury at the hands of an unconstitutional agency.

The government suggests that Axon could seek to enjoin the agency proceedings via a petition for mandamus in a "court of appeals," U.S.Br.50, but it is hard to see why mandamus relief is either necessary or appropriate, let alone how the government's concession is consistent with its sweeping implied-jurisdiction-stripping theory. Unlike §1331, which clearly grants district courts jurisdiction, no statute expressly confers mandamus jurisdiction on the courts of appeals. The Mandamus Act gives mandamus jurisdiction only to "[t]he district courts," 28 U.S.C. §1361, and the All Writs Act does not provide an independent grant of jurisdiction, *Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28, 33 (2002). And even if mandamus were otherwise available, Axon would have to show the inadequacy of other remedies, which would bring us back to the question whether an injunction under §1331 is available. Finally, the FTC Act's limited authorization for appellate review of cease-and-desist orders says nothing about the

[2] The government notes (at 47 n.3) that *Seila Law*'s "here-and-now" reference came in a case where the government, and not the regulated party, invoked district-court jurisdiction. But what matters is not the precise procedural posture of that suit, but the Court's recognition that parties subject to improperly insulated agency officials suffer an immediate constitutional injury that obviates the need to wait for an alternative path for challenging the removal restriction.

availability of appellate mandamus relief while a "Commission proceeding" is "ongoing." U.S.Br.50. If that limited statutory authorization does not impliedly preclude appellate mandamus relief (despite the absence of *any* express authorization for such relief), it cannot possibly impliedly preclude injunctive relief under §1331 and its express grant of jurisdiction to district courts.

Second, Axon's "general challenge[s]" to the FTC's structure, procedures, and very existence are plainly "'collateral' to any Commission orders" "from which review might be sought." *Free Enter. Fund*, 561 U.S. at 490. Just like Free Enterprise Fund, Axon does not seek to challenge any particular "actions taken in the administrative proceeding," let alone any "order" the proceeding may ultimately produce. U.S.Br.14. Axon's challenge is more fundamental: It challenges the FTC's (and ALJ's) power to proceed at all. It thus makes no difference that "district courts *ordinarily* lack authority to review or enjoin FTC administrative proceedings." U.S.Br.32 (emphasis added). Parties ordinarily challenge the merits of some particular agency action, not the constitutionality of the agency or its very authority to act in lieu of a different agency that is constitutionally structured and affords far greater access to judicial review. The extraordinary challenge here is wholly collateral to the merits of the proceedings in the underlying case; it goes to the agency's very "existence." *Free Enter. Fund*, 561 at 490.

The government's contrary argument appears to conflate "collateral" with "pending." In the government's view, a challenge is not wholly collateral

as long as the action seeks to enjoin pending agency proceedings. U.S.Br.53. Of course, there were no pending proceedings when Axon first brought its claims. Axon.Opening.Br.12-13. But the flaws in the government's theory run far deeper than that inconvenient fact. Agency investigations or proceedings may need to be at least imminent for a party to have Article III standing, but it cannot be that once there is sufficient agency activity to confer standing, that same activity renders any challenge non-collateral. That heads-I-win-tails-you-lose argument distorts the meaning of "collateral" and would preclude review under §1331 altogether.[3]

That is certainly not the sense that this Court used "collateral" in *Free Enterprise Fund*. The challenge there was sufficiently collateral, despite the presence of sufficient agency activity to confer standing, because Free Enterprise Fund's objections, like Axon's, went to the agency's "existence, not to any of its" particular actions or orders. 561 U.S. at 490.

The government's view is equally incompatible with how this Court uses the term in its collateral-order jurisprudence. As the government notes, appellate review of district-court decisions generally must await a final order, but that does not mean that the pendency of district-court proceedings suffices to

[3] The government briefly suggests that Axon did not have Article III standing until the FTC initiated the enforcement action. U.S.Br.53. In reality, Axon was already suffering constitutional injury by virtue of the ongoing investigative proceedings, and it indisputably faced a material and imminent threat of a full-blown administrative proceeding. *Cf. TransUnion LLC v. Ramirez*, 141 S.Ct. 2190, 2210 (2021).

render all orders non-collateral. To the contrary, this Court's cases recognize a narrow class of challenges that are wholly collateral to the pending proceedings on the underlying merits. For example, a double jeopardy objection satisfies the collateral-order doctrine because the defendant's objection is separate from the merits of the second prosecution. *See Abney*, 431 U.S. at 659-60. The objection runs to the "very authority of the Government" to initiate the second proceeding, *id.* at 659, and the constitutional injury is not fully remedied by vacatur of any conviction because the defendant will by then have already "run the gauntlet" of an invalid proceeding, *id.* at 662. The same can be said for Axon's objection and the inadequacy of any remedy that occurs long after Axon has endured proceedings before an unaccountable and unconstitutional agency or ALJ.

Third, the FTC lacks both "institutional competence to resolve" Axon's structural constitutional claims and "authority to grant the type of relief requested." *McCarthy v. Madigan*, 503 U.S. 140, 147-48 (1992). That is not just a matter of constitutional issues being outside the normal ambit of agency expertise. The FTC may be more comfortable with competition policy than with the Due Process Clause, but it can still tweak an agency rule to provide clearer notice or a more extensive opportunity to be heard. But the idea that an ALJ can declare himself or his parent agency unconstitutional is another matter altogether. The power of an umpire to call balls and strikes does not include the power to declare the distinction arbitrary or throw the commissioner out of the league.

Not even the government suggests that this factor cuts against jurisdiction, as it is obvious that "no amount of antitrust expertise can tell us whether ALJs must be directly removable by the President." Pet.App.44 (Bumatay, J.). But it does not work to concede the third factor yet insist that the other factors tip the balance against jurisdiction. The very fact that the legal questions go to the existence of the agency, its ALJ, and its jurisdiction, underscores that those issues are collateral to the merits (which are delegated to the agency) and that a remedy that waits until the constitutional injury is complete is no remedy at all.[4]

B. Neither Constitutional Avoidance nor Judicial Economy Justifies Abstention.

With all three *Thunder Basin* factors cutting against it, the government falls back on constitutional avoidance and tries to analogize this case to *Elgin*, where a decision on a statutory issue "within [the agency's] expertise" could have "'avoid[ed] the need to reach [one petitioner's] constitutional claims.'" U.S.Br.54 (quoting *Elgin*, 567 U.S. at 23). But

[4] That is equally true of Axon's Fifth Amendment challenges to the amalgamation of functions within a single entity and the black-box clearance process by which the FTC and DOJ dole out antitrust enforcement. As Judge Bumatay recognized, the FTC "can't shed particular light on whether the process satisfies due process and equal protection guarantees." Pet.App.40 (Bumatay, J.). The government has no response. Nor does the government deny that, as with Axon's structural separation-of-powers claim, Axon's Fifth Amendment challenges raise "standard questions" of constitutional law that "do not require technical considerations" of policy and that "courts are at no disadvantage in answering." *Free Enter. Fund*, 561 U.S. at 491.

Thunder Basin, *Elgin*, and *Free Enterprise Fund* all involved constitutional claims, and constitutional avoidance principles are baked into the three factors, especially the third. Thus, where, as in *Elgin*, the issue implicates agency expertise, the agency may be able to resolve it favorably to the regulated party and obviate any need for a court to ever address the constitutional claim. But in a case like this and *Free Enterprise Fund*, where the claim is so wholly beyond the agency's ken that agency officials are duty-bound to ignore it, there is no prospect for constitutional avoidance. There is only the very real possibility that the government will inflict constitutional injury without being held to account forever—or at least not until it is too late to provide a meaningful remedy. That kind of "constitutional avoidance" is not a virtue.[5]

The government's paean to the values served by the finality requirement likewise misses the point. To be sure, there may be "good reason[s]" why parties *ordinarily* cannot go straight to federal district court any time the FTC takes one of "myriad preliminary steps" that precedes "a final order." U.S.Br.15-16. But

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[5] The constitutional injury here and in *Free Enterprise Fund* goes well beyond "the expense and disruption of defending itself in protracted adjudicatory proceedings," U.S.Br.48 (quoting *FTC v. Standard Oil Co.*, 449 U.S. 232, 244 (1980)), which is inherent in any scheme that defers judicial review until final agency action. That suffices to distinguish *Standard Oil*, where the party sought to challenge "[t]he Commission's issuance of its complaint" for lack of statutory authority. 449 U.S. at 239. That is precisely the kind of non-collateral challenge to agency action that can be both reviewed and fully remedied at the conclusion of the proceeding that the complaint initiated.

the challenge here (and in *Free Enterprise Fund*) is not to some preliminary agency action that may or may not get merged into a final agency action. The challenge is to the agency's very structure and the very existence of the proceedings, and those proceedings inflict immediate and irreparable injury. In that context, unlike a typical challenge to a non-final agency action, telling a party to come back when they are really injured is a non-sequitur.

The government's worries about "burden[ing] reviewing courts," U.S.Br.15, are equally misplaced. There is a finite universe of challenges that go to the very existence and structure of administrative agencies. Resolving that finite universe of claims before irreparable constitutional injuries are inflicted will hardly overburden the courts. And such claims are precisely the kind that should be definitively resolved without waiting for numerous regulated parties to be dragged through unconstitutional agency proceedings, while most accede to the enormous settlement pressures inherent in those proceedings. If the FTC is unconstitutionally structured, or its ALJ unconstitutionally insulated, or its jurisdiction arbitrarily assigned, then regulated parties deserve to know about it, rather than have constitutional infirmities linger for years.

The glaring unconstitutionality of the ALJs here and in *Cochran* underscores the point. After *Lucia*, there is no serious argument that those ALJs are anything but principal officers. And after *Free Enterprise Fund*, there is no serious argument that their double-for-cause insulation from presidential removal affords sufficient presidential control. But

years after this Court put the writing on the wall, countless citizens continue to endure proceedings before unconstitutional and unaccountable officers. The modest judicial resources necessary to connect the dots between *Lucia* and *Free Enterprise Fund* to hold ALJs unconstitutional will not overtask the system.[6]

Finally, deferring judicial review in this context leads to its own burdens, as it forces courts "to confront challenging severability questions or embrace dubious remedial doctrines, like the *de facto* officer doctrine." Axon.Opening.Br.49. The government offers no response. And those issues are not just complicated, but often leave injured parties wholly without a remedy. *See Cochran v. SEC*, 20 F.4th 194, 232-33 (5th Cir. 2021) (en banc) (Oldham, J., concurring). In short, considerations of constitutional avoidance and judicial economy do not justify abstention in the face of the clear grant of jurisdiction in §1331 and the clear imperative to prevent the kind of here-and-now irreparable injury suffered by Axon.

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[6] The government's insistence on finality and concerns about judicial resources also overlooks the fact that "*the Commission* … may bring suit in a district court of the United States to enjoin any … act or practice" that "the Commission has reason to believe … is violating, or is about to violate, any provision of law [the FTC] enforce[s]." 15 U.S.C §53(b) (emphasis added); *see, e.g.*, *AMG Cap. Mgmt., LLC v. FTC*, 141 S.Ct. 1341, 1345 (2021). The very fact that the FTC Act makes immediate district-court review available (albeit only for the FTC) underscores that there is nothing sacrosanct about appellate-court review and no reason to think that Congress implicitly foreclosed district-court actions like this.

II. Nothing In The APA Or The FTC Act Precludes Axon's Right To Equitable Relief.

Unable to explain how the FTC Act could impliedly repeal §1331's express grant of jurisdiction, the government changes the subject and faults Axon for failing to identify a statutory cause of action. U.S.Br.27. But even setting aside that the cause-of-action issue was not addressed in any of the decisions below, *cf. Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("we are a court of review, not of first view"), and is not fairly included in the question presented here or in *the government's own question presented* in *Cochran*, this issue need not detain the Court long. The government raised this same no-cause-of-action alternative argument in *Free Enterprise Fund* to no avail, and it fares no better in the sequel. Axon is relying on the well-established equitable action to enjoin unconstitutional government action that can trace its roots all the way back to *Marbury* and beyond. *See Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 326-37 (2015) (equitable authority to enjoin unlawful conduct by governmental officials "trac[es] back to England"). "[I]t is undisputed that federal courts need no statutory basis to award *equitable* relief for constitutional violations." Don R. Willett & Aaron Gordon, *Rights, Structure, and Remediation*, 131 Yale L.J. 2126, 2187 (2022); *accord* Caleb Nelson, *"Standing" and Remedial Rights in Administrative Law*, 105 Va. L. Rev. 703, 716 (2019). Nothing in the FTC Act or the APA displaces that well-established equitable action or demands some separate statutory cause of action.

When an individual alleges that a federal law violates her First Amendment rights, her right to resort to federal court to enjoin that ongoing constitutional violation is uncontroversial. No one demands that the statute that abridges her First Amendment rights also give her a statutory cause of action. Axon's constitutional claims are no different. Indeed, this Court squarely rejected the government's argument in *Free Enterprise Fund* that the plaintiffs' claims faltered for lack of a "private right of action."[7] 561 U.S. at 491 n.2. It could hardly be otherwise, as any other conclusion would render separation-of-powers claims decidedly second-class, notwithstanding this Court's longstanding recognition that "[l]iberty is always at stake when one or more of the branches seek to transgress the separation of powers." *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring); *see Free Enter. Fund*, 561 U.S. at 501; *Bond v. United States*, 564 U.S. 211, 222 (2011). Indeed, this Court has preferred suits by litigants actually injured by a separation-of-powers violation to actions filed by officials pursuant to an express cause of action. *Compare City of New York*, 524 U.S. at 428-36 (exercising jurisdiction), *with Raines v. Byrd*, 521 U.S. 811, 818-30 (1997) (finding jurisdiction lacking despite an express cause of action).

To be sure, this Court has cast doubt on the availability of federal-court *damages* actions for

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[7] The government claims that "[t]he APA's review provisions" did not "appl[y]" in *Free Enterprise Fund*, U.S.Br.41, but the applicability (or lack thereof) of the APA played zero role in the Court's analysis. *See Free Enter. Fund*, 561 U.S. at 491 n.2.

alleged constitutional violations at the hands of federal government actors in the absence of a statute creating a right to such relief. But the creation of a damages remedy is a distinctly legislative act that implicates all manner of subsidiary legislative questions, ranging from the statute of limitations to secondary liability to the availability of contribution. This Court has never had the same qualms about the essentially judicial task of fashioning *equitable* relief to stop ongoing invasions of constitutional rights. In fact, the Court has pointed to the availability of equitable relief as counseling hesitation in extending *Bivens* and "as the proper means for preventing entities from acting unconstitutionally." *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001); *see also* James E. Pfander & Jacob P. Wentzel, *The Common Law Origins of* Ex Parte Young, 72 Stan. L. Rev. 1269, 1327 (2020) (reporting that "federal courts … deployed the injunction as a 'catchall' tool for nonstatutory review of administrative action with … exuberance … after Congress granted general federal question jurisdiction in 1875").[8]

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[8] Equity of course has never "suppl[ied] a right of action to every would-be plaintiff [allegedly] suffering harm as a result of unlawful behavior by administrative officials," Nelson, *supra*, at 716, and the preliminary-injunction factors and equitable discretion further cabin appropriate relief. But whatever the precise contours of available equitable relief, equity plainly supplies a right to relief here. "To qualify for relief under general principles of equity," a plaintiff must advance non-trivial arguments "that the defendants [have] behav[ed] unlawfully" and that their challenged conduct "amount[s] to 'an invasion of recognized [and particularized] legal rights.'" *Id.* (quoting *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 125 (1940)). Axon's

The government acknowledges, as it must, the courts' well-entrenched authority to enjoin unconstitutional government action, but argues (at 27-30) that entertaining an equitable right of action here would be inconsistent with the APA and the FTC Act. But the government itself admits that a basic "purpose" of "the APA" was "to codify the law governing equitable relief against federal agencies." U.S.Br.29. And the law governing such equitable relief, long before and long after the APA's codification, has allowed actions just like this. *See, e.g.*, *Stark v. Wickard*, 321 U.S. 288, 307-09 (1944) (recognizing plaintiffs' equitable right "to seek appropriate relief [against federal administrative officials] in the federal courts in the exercise of their general jurisdiction"); *Am. Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 110 (1902) (similar); *see also Bell v. Hood*, 327 U.S. 678, 683-85 (1946) (collecting cases). Indeed, since the APA was enacted, this Court has resolved the merits of a wide array of disputes brought against executive branch officials by plaintiffs seeking equitable relief for violations of their constitutional rights, including *Trump v. Hawaii*, 138 S.Ct. 2392, 2416 (2018), *City of New York*, and *Free Enterprise Fund*, to name just a few.

The government emphasizes that, under Section 10(c) of the APA, one "presumptively must seek review

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claims inarguably satisfy that standard. Axon's Article II claims are far from trivial, *see Free Enter. Fund*, 561 U.S. at 483-96; *Lucia v. SEC*, 138 S.Ct. 2044, 2053 (2018), and the right not to be subjected to a constitutional violation at the hands of unaccountable officials is a particularized right that Axon can assert on its own behalf, *see Seila Law*, 140 S.Ct. at 2196; *Bond*, 564 U.S. at 222.

by using the 'special statutory review proceeding.'" U.S.Br.25 (quoting 5 U.S.C. §703). But the very same provision goes on to make clear that this presumption is rebutted "in the absence or inadequacy" of review through such a proceeding. 5 U.S.C. §703. In these situations, a party may invoke "any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction." *Id.* Thus, in a situation like this, where Axon does not seek "review" of any cease-and-desist order and instead seeks to enjoin ongoing constitutional violations, the various APA provisions read together affirmatively authorize declaratory and injunctive relief from "a court of competent jurisdiction," which precisely describes a district court exercising its jurisdiction under §1331.

While the government may insist that delayed judicial review that occurs only after the constitutional injury is inflicted and only if agency proceedings culminate in a cease-and-desist order is perfectly "adequate," that is plainly not the case, as explained above. Indeed, there is no reason to think the test for "adequacy" under §10(3) is any different from the considerations this Court articulated in *Thunder Basin*, which all favor district-court jurisdiction here. Far from aiding the government, the APA thus provides a statutory endorsement for the kind of equitable relief Axon seeks here.

III. Timely Judicial Review Of Claims Like Axon's Is A Critical Bulwark For Preserving Individual Liberty.

Congress chose not to divest district courts of their traditional jurisdiction over structural constitutional challenges like Axon's for good reason: Allowing unconstitutionally unaccountable agencies to exercise virtually unfettered power with little prospect of judicial review is a recipe for separation-of-powers disaster. Indeed, one need look no further than the status quo to see the problems. Despite the clear defect with the double-insulation of its ALJs from presidential removal and the precariousness of *Humphrey's Executor*, the FTC has been able to avoid any day of reckoning in the Article III courts by wielding its largely unaccountable power to elicit "cheap settlements" that have little, if anything, to do with the merits. Jan M. Rybnicek & Joshua D. Wright, *Defining Section 5 of the FTC Act: The Failure of the Common Law Method and the Case for Formal Agency Guidelines*, 21 Geo. Mason L. Rev. 1287, 1307 (2014). Because the FTC itself controls the timing of any cease-and-desist order (*i.e.*, any judicial review), it can draw out investigations and inflict mounting costs on the regulated, all via a structure that is plainly unconstitutional. This is a case in point. The FTC has already tried to extract from Axon everything it can think of, rejecting even Axon's offer to walk away altogether from the supposedly offending transaction. And lopsided settlements disconnected from the merits are the least of a party's problems once the FTC has sunk its teeth in. *See* Justice.Society.Br.11-25 (summarizing LabMD case).

The government claims (at 57) that Axon's concerns are overblown because the FTC's win rate on its home turf is not quite 100%. But even the government's own source acknowledges that "liability" was found in "100 percent" of FTC proceedings, "exclud[ing]" only a handful of cases that were "dismissed" due to "a change in the law." Maureen K. Ohlhausen, *Administrative Litigation at the FTC*, 12 J. Comp. L. & Econ. 623, 631-32 (2016). In all events, whether the FTC's record is more like the 1995-96 Bulls or the 1972 Dolphins is beside the point. There is no denying that the decks are so heavily stacked in the FTC's favor that it takes a bold party indeed to run the full gauntlet of an administrative proceeding in hopes of obtaining a judicial oversight at the end of that costly process, especially if the only likely "remedy" at that point is a remand for another round of costly proceedings before the same agency.

While it is alarming to see a federal agency convert its enforcement authority into a "shakedown racket," *LabMD, Inc. v. FTC*, 2019 WL 11502794, at *11 (N.D. Ga. Oct. 1, 2019), no one ever suggested that absolute power tends to purify. When an agency serves as prosecutor, grand jury, judge, appellate "court," and executioner, and the regulated community is subject to "the absolutely uncontrolled and arbitrary action of a public and administrative officer," overreach is inevitable. *McAnnulty*, 187 U.S. at 110. It is simply "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." Richard A. Posner, *The Federal Trade Commission*, 37 U. Chi. L. Rev. 47, 53 (1969).

The separation of powers exists precisely to guard against the accumulation of all power in a single government actor. And the Framers did not go through all the trouble of carefully allocating power among the three branches actually mentioned in the Constitution just to allow those same powers to be concentrated in a single unenumerated branch. "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." *Collins v. Yellen*, 141 S.Ct. 1761, 1797 (2020) (Gorsuch, J., concurring in part) (emphasis omitted). Few things would be a healthier tonic for our government than providing an early opportunity for the constitutionality of administrative agencies and their officers to be tested in Court. If the current structures conform to the Framers' design, then the courts will confirm as much, and the scope for further structural challenges will be minimal and manageable. But if the current structures are, in fact, unconstitutional, the governed deserve to know as much before they are forced to endure constitutional injuries before unconstitutional and unaccountable government officials. There is nothing to fear in allowing challenges like Axon's to proceed in district court beyond a reaffirmation of the Framers' vision.

CONCLUSION

For the foregoing reasons, this Court should reverse.

Respectfully submitted,

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

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
MATTHEW D. ROWEN
EVELYN BLACKLOCK
CLEMENT & MURPHY, PLLC
706 Duke Street
Alexandria, VA 22314
(202) 742-8900
paul.clement@clementmurphy.com

Counsel for Petitioner

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