No. _____

In the
Supreme Court of the United States

AXON ENTERPRISE, INC.,

Petitioner,

v.

FEDERAL TRADE COMMISSION, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

After petitioner acquired an essentially insolvent competitor, it found itself subjected to the review of the Federal Trade Commission (FTC), rather than the Department of Justice (DOJ). While the DOJ route promises early access to judicial review, the FTC track is an altogether different matter. Petitioner faced a series of unreasonable demands from the FTC, and the prospect of "litigating" before administrative law judges insulated by unconstitutional double-for-cause removal restrictions and subject to review by an unaccountable Commission. Rather than resign itself to the ongoing unconstitutional injuries inflicted by the FTC's process, petitioner filed suit in district court seeking to enjoin the unconstitutional FTC proceedings. That lawsuit focused on constitutional issues collateral to the underlying antitrust issues, but the district court nonetheless dismissed it for want of jurisdiction based on implications drawn from a statutory grant of jurisdiction to review the FTC's cease-and-desist orders. A divided Ninth Circuit affirmed, with the majority acknowledging that dismissal "makes little sense," and the dissent contending that dismissal contradicted this Court's precedents.

The questions presented are:

1. Whether Congress impliedly stripped federal district courts of jurisdiction over constitutional challenges to the Federal Trade Commission's structure, procedures, and existence by granting the courts of appeals jurisdiction to "affirm, enforce, modify, or set aside" the Commission's cease-and-desist orders.

2. Whether, on the merits, the structure of the Federal Trade Commission, including the dual-layer for-cause removal protections afforded its administrative law judges, is consistent with the Constitution.

PARTIES TO THE PROCEEDING

Petitioner, plaintiff-appellant below, is Axon Enterprise, Inc.

Respondents, defendants-appellees below, are the Federal Trade Commission, as well as Rebecca Slaughter, Noah Phillips, Rohit Chopra, and Christine Wilson, in their official capacities as Commissioners.

Former Commissioner Joseph J. Simons, in his official capacity as a Commissioner of the Federal Trade Commission, was also a defendant-appellee below, but his term expired on January 29, 2021. He is no longer a party to these proceedings.

CORPORATE DISCLOSURE STATEMENT

Axon Enterprise, Inc., has no parent corporation; no shareholder owns 10% or more of its stock.

STATEMENT OF RELATED PROCEEDINGS

The following proceedings are related:

- *Axon Enterprise, Inc. v. Federal Trade Commission*, No. 20-15662 (9th Cir.) (opinion issued Jan. 28, 2021; petition for rehearing en banc denied Apr. 15, 2021; motion to stay the mandate pending certiorari granted April 21, 2021); and
- *Axon Enterprise, Inc. v. Federal Trade Commission*, No. 2:20-cv-00014-DWL (D. Ariz.) (memorandum and order granting defendants' motion to dismiss and denying plaintiff's motion for preliminary injunction as moot issued Apr. 8, 2020).

There are no additional proceedings in any court that are directly related to this case within the meaning of this Court's Rule 14(b)(iii).

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PETITION FOR WRIT OF CERTIORARI

This case presents recurring issues of exceptional importance to our constitutional system. Petitioner Axon Enterprise, Inc. "challenges the very existence of the Federal Trade Commission—an independent agency created by Congress—as unconstitutional." App.28 (Bumatay, J., concurring in the judgment in part and dissenting in part). Resolving that kind of fundamental, structural constitutional claim is the *raison d'etre* of federal courts, and forcing citizens to endure constitutional injury before they can vindicate their rights is antithetical to our constitutional traditions, especially when deferring judicial relief makes fashioning a meaningful remedy difficult. Yet the district court here held that it lacked jurisdiction to hear Axon's claims, and a divided panel of the Ninth Circuit affirmed.

The panel majority acknowledged that the result of its decision—forcing Axon "to incur the very harms it seeks to avoid," App.43 (Bumatay, J.)—"makes little sense." App.18 (majority op.). Yet it deemed itself bound by this Court's precedent to reach this result nonetheless. In reality, this Court *rejected* a materially analogous argument in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 561 U.S. 477 (2010), holding that a party alleging a structural separation-of-powers challenge to an agency need not endure the administrative process over which an allegedly-unconstitutionally-insulated official presides before it can obtain judicial review. As the Court has since reiterated, an administrative regime that "violates the separation of powers … inflicts a 'here-and-now' injury on affected third

parties." *Seila Law LLC v. CFPB*, 140 S.Ct. 2183, 2196 (2020) (quoting *Bowsher v. Synar*, 478 U.S. 714, 727 n.5 (1986)). That injury arises from a constitutional violation that is decidedly not within the expertise, competence, or even jurisdiction of agencies, and is wholly collateral to the merits of whatever issues the agency may be considering.

Unfortunately, the Ninth Circuit is not alone in (mis)reading this Court's precedent to consign litigants to suffer constitutional injuries in ways that hamstring courts in providing meaningful relief. That makes this Court's intervention imperative, as only this Court can assure the lower courts that they are in fact *not* bound to impose upon structural constitutional challenges an order of battle that forces litigants to endure constitutional injuries and concededly "makes little sense." Intervention is particularly warranted, moreover, to ensure that structural constitutional violations are not relegated to second-class remedies. Courts should not be forced to grapple with strained doctrines about *de facto* officers or difficult severability questions when the alternative of addressing constitutional defects before the constitutional injury is endured is readily available.

The Ninth Circuit has consigned Axon to an administrative track that could take years (if not longer) even though Axon's constitutional claims are plainly meritorious. In particular, the dual-layer for-cause removal protections that insulate FTC administrative law judges from Presidential control are unconstitutional under *Free Enterprise Fund*. In a choice between resolving that straightforward

constitutional question now and forcing Axon to endure years of proceedings before those unconstitutional officers and only then ordering a constitutionally compliant do-over, there is no contest. Indeed, this Court could illustrate the advantages of choosing prompt judicial review that prevents constitutional injury by resolving that question itself and putting an end to this clearly unconstitutional agency arrangement. But, at a minimum, the Court should decide whether Axon really must suffer the constitutional injury of submitting itself to the jurisdiction of unaccountable executive officers before it can challenge their constitutionality.

OPINIONS BELOW

The Ninth Circuit's opinion, 986 F.3d 1173, is reproduced at App.1-46. The district court's opinion, 452 F.Supp.3d 882, is reproduced at App.49-89.

JURISDICTION

The Ninth Circuit issued its decision on January 28, 2021, App.1, and denied Axon's timely rehearing petition on April 15, 2021, App.47. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are included at App.90-107.

STATEMENT OF THE CASE

A. Legal Background

1. For nearly 150 years, Congress has vested the federal district courts with "original jurisdiction of all civil actions arising under the Constitution, laws, or

treaties of the United States." 28 U.S.C. §1331. As this Court has long recognized, that grant of federal-question jurisdiction empowers "federal courts to issue injunctions to protect rights safeguarded by the Constitution," *Bell v. Hood*, 327 U.S. 678, 684 (1946), including injunctions against federal officers and agencies, *see, e.g.*, *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015); *Von Hoffman v. City of Quincy*, 71 U.S. (4 Wall.) 535, 554 (1866).

Moreover, while federal courts require litigants to demonstrate injury-in-fact, they do not require them to endure the full brunt of constitutional injuries before seeking injunctive relief. To the contrary, as this Court recently reaffirmed, even a material *threat* of injury generally suffices for injunctive relief. *See TransUnion LLC v. Ramirez*, 141 S.Ct. 2190, 2210 (2021). These principles are deeply engrained when it comes to individual constitutional rights, like the First Amendment right to free speech. Cases holding that a denial of such rights is an irreparable injury that justifies immediate injunctive relief are legion. *See, e.g.*, *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S.Ct. 63, 67 (2020). There is no reason for a different rule when it comes to the structural provisions of the Constitution, especially when this Court has gone to great lengths to emphasize that these structural provisions are designed to protect individual rights, not institutions of government for their own sake. *See, e.g.*, *Bond v. United States*, 564 U.S. 211, 222 (2011).

Of course, Congress has the power to constrain the original jurisdiction of the federal district courts, at least so long as it leaves *some* judicial forum for constitutional challenges. *See, e.g.*, *Bowen v Mich.*

Acad. of Fam. Physicians, 476 U.S. 667, 672-73 (1986). But given the background principles discussed above, when faced with a dispute over whether a district court has jurisdiction to redress an imminent or ongoing constitutional injury, "the question is not whether Congress has specifically conferred jurisdiction, but whether it has taken it away." *Elgin v. Dep't of the Treasury*, 567 U.S. 1, 25 (2012) (Alito, J., dissenting); *accord, e.g.*, *Verizon Md. Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 642 (2002).

When Congress wants to "exclude[]" particular claims from the jurisdiction of the federal district courts, it generally makes that intention known "expressly." *Id.* at 644. For example, Congress has channeled review of some agencies' actions to particular courts. *E.g.*, 42 U.S.C. §7607(b)(1). Congress generally has confined judicial review to *final* agency action, rather than allowing piecemeal judicial review of every step in an agency's decisional process. *E.g.*, 5 U.S.C. §504. Congress has sometimes required parties to present certain challenges to the agency before they may pursue them in court. *E.g.*, 8 U.S.C. §1252(d)(1). And on rare occasions, Congress has attempted to preclude judicial review of agency action entirely. *E.g.*, 12 U.S.C. §1818(j)(1).

In limited circumstances, this Court has inferred a congressional intent to eliminate district-court jurisdiction even when Congress did not say so explicitly in statutory text. In particular, "when Congress creates procedures 'designed to permit agency expertise to be brought to bear on particular problems,'" those procedures may be exclusive. *Free Enter. Fund*, 561 U.S. at 489 (citation omitted).

Accordingly, when a party wants to challenge an agency *action*, it often must wait until that action becomes final, even if it claims that the action the agency is threatening to take is unconstitutional. *See, e.g.*, *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994); *Elgin*, 567 U.S. at 8. But when the challenge is not to agency *action*, but to the agency's *structure* or authority to take *any* action, this Court has not forced parties to wait until the conclusion of an agency's decisional process before asserting that being subject to the agency process is itself an ongoing constitutional injury.

To the contrary, the sole time this Court has confronted whether a statutory provision governing judicial review of agency action ousted a district court of jurisdiction over a constitutional challenge to the agency itself, the Court concluded that the statute did not. *See Free Enter. Fund*, 561 U.S. at 489 (upholding district-court jurisdiction over removal and Appointments Clause challenges). As the Court explained, because those kinds of structural "constitutional claims are … outside" an agency's "competence and expertise," *id.* at 491, there is little reason to think they "'are of the type Congress intended to be reviewed within [a] statutory structure'" designed for review of an agency's *actions* under its statutory mandate. *Id.* at 489 (quoting *Thunder Basin*, 510 U.S. at 212). Indeed, it would be strange to assume that Congress intended parties to suffer ongoing constitutional injuries and to force agencies to opine on their own constitutionality before a federal court may address such questions—particularly given that "[a]djudication of the constitutionality of congressional enactments has

generally been thought beyond the jurisdiction of administrative agencies." *Oestereich v. Selective Serv. Sys. Local Bd. No. 11*, 393 U.S. 233, 242 (1968).

2. The Federal Trade Commission Act, Pub. L. No. 63-203, 38 Stat. 717 (1914), "declares unlawful" all "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. §45(a)(1). To help enforce that command, the FTC Act "created and established" the Federal Trade Commission. *Id.* §41. The FTC is "an independent administrative agency." 16 C.F.R. §0.1. By law, it "shall be composed of five Commissioners," "[n]ot more than three of [whom] shall be members of the same party." 15 U.S.C. §41. Each member "shall be appointed by the President, by and with the advice and consent of the Senate, … for terms of seven years" and may be "removed by the President" only "for inefficiency, neglect of duty, or malfeasance in office." *Id.*

The FTC is "empowered and directed to prevent persons, partnerships, or corporations" from engaging in the methods, acts, or practices the Act prohibits. *Id.* §45(a)(2); *see also* 16 C.F.R. §0.1. To that end, the statute confers upon the Commission a sweeping array of authorities, including the power "to investigate and report the facts relating to any alleged violations of the antitrust Acts," "to investigate and make recommendations for the readjustment of the business of any corporation alleged to be violating the antitrust Acts in order that the corporation may thereafter maintain its organization, management, and conduct of business in accordance with law," and "to transmit" evidence it "obtains" "to the Attorney

General" for use in "criminal proceedings under appropriate statutes." 15 U.S.C. §46(d), (e), (k)(1). The Act further empowers the Commission to issue "civil investigative demand[s]" to entities it believes may have evidence "relevant to," *inter alia*, "antitrust violations," and authorizes the Commission to enforce these investigative demands by filing an enforcement petition "in [an appropriate] district court of the United States." *Id.* §57b-1(c)(1), (e).

Among its many powers, the Commission may initiate enforcement proceedings against individuals and businesses that it believes may be engaged in a prohibited method, act, or practice. *See id.* §45(b); 16 C.F.R. §3.11. The agency begins by determining whether to pursue the action itself, or whether to have the Department of Justice do so. The "clearance" process through which the agency makes that decision has no statutory basis, is completely lacking in transparency, and, as one Senator remarked, could be made "by a coin flip" for all the public knows. Dist.Ct.Dkt.15 at 12. If a case is put on the "DOJ track," then DOJ pursues it in a federal district court, where the defendant gets all the procedures and protections that come along with an Article III tribunal, including an impartial fact-finder who owes no allegiance to the prosecuting entity, and the protections of the Federal Rules of Evidence and Civil Procedure.

Parties put on the "administrative-enforcement" track are not so lucky. They will instead have their cases decided by an ALJ to whom the FTC has "delegate[] the initial performance of statutory fact-finding functions and initial rulings on conclusions of

law." 16 C.F.R. §0.14; *see id.* §3.42(a). These ALJs "are appointed under the authority and subject to the prior approval of the Office of Personnel Management," *id.* §0.14, and are substantially insulated from executive oversight. Under the Administrative Procedure Act, "[a]n action may be taken against an [ALJ] … by the agency in which [she] is employed only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board." 5 U.S.C. §7521(a). MSPB members, in turn, may be removed by the President only for "inefficiency, neglect of duty, or malfeasance in office." *Id.* §1202(d). Thus, just like the PCAOB members in *Free Enterprise Fund*, FTC ALJs are insulated from Presidential control by two levels of for-cause-removal protections.

FTC ALJs exercise a broad array of functions. They are empowered to oversee discovery, conduct hearings, resolve motions, superintend settlement discussions, issue decisions on contested questions of fact and law, and, where appropriate, order a remedy. *See* 16 C.F.R. §§3.22-26, 3.41-46, 3.51, 3.56. ALJ decisions can be appealed to the Commission, *see id.* §3.54, 3.56, which may issue various remedial orders if it finds a violation of (among other things) the FTC Act or the federal antitrust laws. *See* 15 U.S.C. §45(b). As one might expect of a forum in which the investigator, prosecutor, trial-level judge, and appellate-level judge all work for the same agency, the FTC fares shockingly well in proceedings before its own ALJ: The FTC has not lost a case on its home turf in a quarter century.

The FTC Act contains a provision for judicial review: If the Commission issues a "cease and desist" order, then the affected party "may obtain a review of such order in the court[s] of appeals of the United States," which have "exclusive" "jurisdiction" "to affirm, enforce, modify, or set aside [such] orders." *Id.* §45(c)-(d); *see also id.* §45(g) (setting time limits). Unlike other administrative-review statutes, *see, e.g.*, 5 U.S.C. §7703(d)(1) ("any final order or decision of the [Merit Systems Protection] Board"); 15 U.S.C. §78y(a)(1) ("a final order of the [Securities and Exchange] Commission"); 30 U.S.C. §816(a)(2) ("any order" of the Mine Safety and Health Review Commission), the FTC Act does not expressly provide for (or preclude) federal-court jurisdiction over any agency action *other than* a "cease and desist" order. And the FTC Act says nothing whatsoever about judicial actions initiated by the governed to challenge the constitutionality of the structure, procedures, or existence of the Commission.

B. Factual and Procedural Background

1. Axon makes body-worn cameras and digital evidence management systems for law enforcement. In May 2018, Axon acquired Vievu LLC, an essentially insolvent competitor, for approximately $13 million. "About a month later, the FTC sent Axon a letter stating that the Vievu acquisition raised antitrust concerns." App.3. The FTC subsequently subjected Axon and its executives to extensive and expensive investigatory proceedings.

After complying with the FTC's investigation for 18 months with no end in sight, Axon offered to walk away from its acquisition entirely. Indeed, Axon

offered not only to divest all Vievu assets, but to infuse a divestiture buyer with millions of dollars in working capital. But, acting with the confidence that comes from believing itself to be fully insulated from timely or meaningful judicial review, the FTC deemed even that offer insufficient. Instead, "the FTC demanded that Axon turn Vievu into a 'clone' of Axon using Axon's intellectual property," and threated Axon with "an administrative proceeding" if it refused to do so. App.3. The FTC referred to its demand (without irony or understatement) as a "blank check." CA9.ER126 ¶3.

At that point, "Axon filed this action in the district court" challenging the constitutionality of FTC ALJs and of the FTC itself.[1] As Axon explained, under a straightforward application of *Lucia v. SEC*, 138 S.Ct. 2044 (2018), FTC ALJs are principal officers subject to the Appointments Clause. And under an equally straightforward application of *Free Enterprise Fund*, their dual-layer protections from removal are unconstitutional. Axon further argued that the combination of "investigatory, prosecutorial, adjudicative, and appellate functions within a single agency," and the uncodified, black-box "clearance" process through which the FTC and DOJ arbitrarily assign merger investigations to either an administrative-enforcement track or a district-court-

[1] Axon initially sought a declaratory judgment that its acquisition of Vievu was lawful under antitrust law, but it later voluntarily dismissed that claim. Only the constitutional claims remain.

enforcement track, violate the Due Process Clause. App.11.[2]

"The FTC filed an administrative complaint challenging the Vievu acquisition" hours after Axon filed its complaint. App.3 n.1. The administrative proceedings were assigned to the FTC's Chief (and, currently, only) ALJ. *See* Order Designating Administrative Law Judge, *In re Axon Enter., Inc.*, No. 9389, 2020 WL 468939 (F.T.C. Jan. 6, 2020).

Axon responded to the FTC's escalation by asking the district court for a preliminary injunction halting the administrative proceedings pending resolution of Axon's constitutional claims. Axon expressly excluded its antitrust claim from its motion as a basis for injunctive relief; the motion instead relied only on Axon's constitutional claims. Dist.Ct.Dkt.15 at 5 n.4. The Commission opposed Axon's motion not by contesting whether Axon was suffering ongoing irreparable injuries (constitutional and otherwise) or by defending its structure on the merits, but solely on jurisdictional grounds, arguing that the FTC Act's judicial review provision for cease-and-desist orders implicitly ousts district courts of jurisdiction over structural constitutional challenges to the FTC Act. Dist.Ct.Dkt.19 at 1, 14 n.12; *see* App.52. After holding oral argument limited to that jurisdictional issue, the district court dismissed Axon's complaint for lack of subject-matter jurisdiction and denied Axon's preliminary injunction motion as moot. App.89.

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[2] Axon also preserved a challenge to the FTC itself, arguing that *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), should be overruled. *See* CA9.Br.46 n.23; CA9.ER.150.

Axon filed a motion for expedited appeal, which the Ninth Circuit granted. App.52. The Ninth Circuit further stayed the FTC proceedings. CA9.Dkt.40; *see also* Order, *In re Axon Enter., Inc.*, No. 9389 (F.T.C. Oct. 8, 2020).

3. In a divided opinion, the Ninth Circuit affirmed. To determine whether Axon's constitutional claims "are of the type Congress intended to" subject to the FTC Act's judicial review procedures, the majority considered Axon's claims through the lens of three factors it derived from this Court's cases: "(1) whether [Axon] can obtain meaningful judicial review in the statutory scheme, (2) whether the claim is 'wholly collateral' to the statutory scheme, and (3) whether the claim is outside the agency's expertise." App.11.

Starting with the first factor, the majority read this Court's cases as instructing that as long as agency proceedings are capable of culminating in "a final order that [can] be appealed to a court" with jurisdiction to hear all of the challenger's claims, "meaningful judicial review" exists—full stop. App.18-19. Although it felt bound by this Court's precedent to reach that conclusion, the majority noted that it "would agree with the dissent" (and Axon) if it "were writing on a clean slate." App.18. As the majority explained, "it makes little sense to force a party to undergo a burdensome administrative proceeding to raise a constitutional challenge against the agency's structure before it can seek review from the court of appeals." App.18. And "from a policy perspective," the majority observed, "it seems odd to force a party to raise constitutional challenges before

an agency that cannot decide them." App.16. The majority therefore suggested that "[p]erhaps the Supreme Court in the near future will clarify" whether its precedent really compels that dubious result. App.20.

Turning to the second factor, the majority noted that "[c]ourts have offered two competing ways to consider … whether a claim is 'wholly collateral' to the statutory review scheme." App.21. Some courts hold "that a claim is wholly collateral to the statutory enforcement scheme" as long as it "is not *substantively* intertwined with the merits dispute in the agency proceeding." App.21. Other courts "appl[y] this factor in the *procedural* sense," and hold that "if [a] claim is the procedural vehicle that the party is using to reverse the agency action," then "it is not 'wholly collateral' to the review scheme." App.21-22.

Although the majority found it "a close call" and "far from clear," it agreed with the second set of courts. App.22, 25. That effectively ended its analysis of this factor. Because "Axon's complaint seeks to avoid the FTC process and the agency's settlement demands," and "Axon's requested relief includes an injunction to prevent the FTC from pursuing its administrative enforcement action," the majority concluded that Axon's claims are "the 'vehicle by which' Axon seeks to prevail at the agency level and are not wholly collateral to the review scheme"—even though they have no relationship to the merits and the FTC has no authority to address them. App.22; *see also* App.28 (same for "Axon's challenge to the FTC's [pre-enforcement] adjudicative procedures").

As for whether Axon's constitutional claims are outside the agency's expertise, the majority found "this third factor … cloaked in ambiguity." App.23. It noted that the Fifth and D.C. Circuits have read *Elgin* "as suggesting" that an agency "can bring its expertise to bear" simply because it "can moot the constitutional claims by resolving the merits issues before [it]." App.23 (citing *Bank of La. v. FDIC*, 919 F.3d 916, 929 (5th Cir. 2019), and *Jarkesy v. SEC*, 803 F.3d 9, 29 (D.C. Cir. 2015)). But it rejected that "expansive reading of *Elgin*" as irreconcilable with *Free Enterprise Fund*. App.23. The majority instead concluded that an issue "lies outside the agency's expertise" as long as it "does not involve 'technical considerations of [agency] policy.'" App.23 (alteration in original) (quoting *Free Enter. Fund*, 561 U.S. at 491). The majority explicitly found that there are "no threshold questions" in this case antecedent to the constitutional issues, and that Axon's "due process and Appointments Clause claims do not turn on the antitrust merits of the case, and thus that this factor "weigh[ed] against preclusion" of Axon's Article II claim and its claim challenging the FTC's unification of multiple functions. App.24. But it found this factor weighed in favor of preclusion when it came to Axon's challenge to "the clearance process used to determine whether the FTC or DOJ will review a merger," App.11, because "[t]he FTC might have valuable [albeit secret] insight into how the clearance process works," App.29.

The final tally was thus mixed, with the first factor "point[ing] to jurisdiction preclusion," the second "likely favor[ing] preclusion" but "far from clear," and the third "weigh[ing] against preclusion."

App.25. But the majority ultimately discarded the second and third factors on the view that, under this Court's precedents, "the presence of meaningful judicial review is enough to find that Congress precluded district court jurisdiction over the type of claims that Axon brings." App.25.

4. Judge Bumatay dissented in part. Reviewing this Court's cases, he concluded that they set forth a clear rule: "Absent legislative language to the contrary, challenges to an agency's *structure*, *procedures*, or *existence*, rather than to an agency's adjudication of the merits on an individual case, may be heard by a district court." App.33. Thus, "to the extent [Axon's] claims target the agency's existence, structure, or procedures under the Constitution, rather than its merits decisions," he would have held that "the district court remains an appropriate forum for such action," as "pronouncing the constitutionality of a government function is precisely the business of Article III courts." App.34. Applying that rule, Judge Bumatay would have "reverse[d] the district court's dismissal of Axon's Article II claim" challenging FTC ALJs' two layers of for-cause removal protections, as well as Axon's challenge to the FTC's black-box, pre-enforcement "clearance process." App.44. He agreed with the majority, however, that Axon's due process challenge to the "combining [of] the role of investigator, prosecutor, and adjudicator within one agency … is precluded from district court review." App.44-45.

REASONS FOR GRANTING THE PETITION

Under this Court's decisions in *Free Enterprise Fund* and *Lucia*, there can be no serious dispute that

Axon is being subjected to an unconstitutional process. The dual-layer removal protections afforded FTC ALJs are patently unconstitutional. And there are grave doubts that other aspects of the FTC's structure and procedures comply with separation of powers and due process principles as well. Yet, according to the Ninth Circuit, there is nothing the federal courts can do to remedy that ongoing constitutional injury unless and until Axon subjects itself to the unconstitutional process and suffers the full range of unconstitutional injuries.

That is not and cannot be the law. No court would tolerate this dynamic when it came to the ongoing violation of other constitutional rights, and there is no reason for a different result when it comes to the Constitution's structural provisions, which equally safeguard individual rights. This Court said as much in *Free Enterprise Fund*. There, the Court expressly *rejected* the argument that a judicial review provision materially indistinguishable from the one in the FTC Act impliedly strips federal district courts of jurisdiction over constitutional challenges directed not to a specific agency *action*, but to the structure, procedures, or very existence of the agency. Yet the majority here nonetheless concluded that this Court's precedent compels the exact opposite result—even while acknowledging that that result "makes little sense." App.18. The court reached that conclusion only by reading *Free Enterprise Fund* far too narrowly and reading *Thunder Basin* far too broadly, when in fact both decisions compel the conclusion that Judge Bumatay reached in dissent.

Because the court below grounded its jurisdictional ruling on this Court's precedents, only this Court can remedy this untenable state of affairs. Doing so not only would vindicate this Court's precedent, but would ensure that courts can provide meaningful remedies to constitutional violations, rather than confronting difficult severability questions or entertaining dubious rights-denying doctrines like the *de facto* officer doctrine.

The Court's intervention is particular warranted because the claims Axon raises are so plainly meritorious. This Court has now made abundantly clear both that ALJs are "Officers of the United States" and that dual-layer for-cause removal protections unconstitutionally insulate such officers from the control of the President. That is precisely how FTC ALJs operate, removable for cause only by an agency whose members are themselves removable only for cause. And secure in the knowledge that it can always plead its case to ALJs answerable to no politically accountable actor, the FTC has not hesitated to wield its "independent" power extravagantly. This is a case in point: The FTC would not even accept Axon's agreement to divest itself of a perfectly lawful acquisition *and* infuse the purchaser with millions of dollars in working capital, but rather insisted that Axon surrender its own *intellectual property* to this newly-propped-up competitor as well. Such a remarkable demand is unfortunately the kind of thing that can be expected from a "'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 (2021) (Gorsuch, J., concurring).

The answer to such ongoing constitutional injury in virtually every other context is simple: The federal courts are available to ensure that government officials are held to account and ongoing constitutional violations do not run their course. There is no basis for a different rule when it comes to the most basic structural protections of our Constitution. Those protections exist not to protect the branches from each other, but to protect the governed from having their liberty deprived by unaccountable government officials. When there is an ongoing, glaring violation of the Constitution of the kind Axon is enduring, only the clearest of textual prohibitions on judicial review could potentially preclude judicial review. Nothing in the FTC Act comes close. This Court's intervention is imperative to put an end to this ongoing—and, according to the Ninth Circuit, effectively un-remediable—constitutional violation.

I. The Court Should Grant Certiorari To Decide Whether Congress Impliedly Stripped District Courts Of Jurisdiction Over Constitutional Challenges To The FTC's Structure, Procedures, And Existence.

Just this past year, this Court reiterated that a removal protection that "violates the separation of powers … inflicts a 'here-and-now' injury on affected third parties." *Seila Law*, 140 S.Ct. at 2196 (quoting *Bowsher*, 478 U.S. at 727 n.5); *cf. Ryder v. United States*, 515 U.S. 177, 182-83 (1995). Yet in the decision below, the Ninth Circuit held that no court can remedy that "here-and-now injury" unless and until Axon endures the unconstitutional process and suffers injury in the here and now. In the Ninth Circuit's

view, this Court's cases compel the conclusion that, by *granting* courts of appeals limited jurisdiction to affirm, enforce, modify, or set aside FTC cease-and-desist orders, Congress implicitly *stripped* district courts of jurisdiction to resolve and remedy constitutional challenges to an agency's structure, procedures, and existence. In reality, nothing in this Court's cases compels that illogical result. Absent clear textual language to the contrary, the answer to an ongoing injury at the hands of unaccountable federal officers is an injunction, not being consigned to a legal limbo.

1. This Court has squarely confronted the question whether Congress impliedly stripped district courts of jurisdiction over *structural* constitutional challenges to an agency one—and only one—time: in *Free Enterprise Fund*. And in a section of its opinion without noted dissent, the Court answered that question with a resounding no.

As the Court explained, "[p]rovisions for agency review do not restrict judicial review unless the 'statutory scheme' displays a 'fairly discernible' intent to limit jurisdiction, and the claims at issue 'are of the type Congress intended to be reviewed within th[e] statutory structure.'" 561 U.S. at 489 (quoting *Thunder Basin*, 510 U.S. at 207). While such intent typically may be fairly discerned when it comes to challenges to a specific agency *action*, the Court found no reason to assume that Congress intended to force parties to await an adverse agency order that may never materialize—let alone "bet the farm" by flouting an agency's demands to prompt one—before they may present *structural* constitutional challenges in court.

Id. at 491. After all, far from involving the kinds of "fact-bound inquiries" that are "within [an agency's] expertise," such challenges are decidedly "outside [an agency's] competence and expertise," and are "'collateral' to any [agency] orders or rules from which review might be sought." *Id.* The Court thus had little trouble concluding that Congress did not impliedly strip district courts of jurisdiction over such claims by affirmatively granting courts of appeals the power "to affirm or modify and enforce or to set aside [a final SEC] order in whole or in part." 15 U.S.C. §78y.

That reasoning should have controlled here. Indeed, if anything, this is an easier case. The FTC Act's judicial review provision is "almost identical to the statutory review provision in the SEC Act" at issue in *Free Enterprise Fund*. App.10. Just like the SEC Act, the FTC Act does not "expressly limit the jurisdiction that" Congress has "confer[red] on district courts" through 28 U.S.C. §1331. *Free Enter. Fund*, 561 U.S. at 489; *see* 15 U.S.C. §45. "Nor does it do so implicitly." *Free Enter. Fund*, 561 U.S. at 489. And the lone point of departure between the two provisions cuts in favor of reading the FTC Act *more* narrowly when it comes to jurisdiction-stripping, as it specifically addresses only FTC "cease and desist" orders, 15 U.S.C. §45(c)-(d), whereas the SEC Act governs judicial review of any "final order of the" SEC, *id.* §78y.

Moreover, just like in *Free Enterprise Fund*, Axon's structural constitutional challenges lie far "outside the [agency's] competence and expertise" and are "'collateral' to any [agency] orders or rules from which review might be sought," as they challenge the

very "existence" of the FTC and its ALJs, not any particular agency or ALJ action. 561 U.S. at 491. Indeed, assessing whether the agency's own structure complies with the Constitution and the "[a]djudication of the constitutionality of congressional enactments" more broadly "has generally been thought beyond the jurisdiction of administrative agencies." *Oestereich*, 393 U.S. at 242. Accordingly, just as in *Free Enterprise Fund*, there is no reason to think that Congress would have wanted to force Axon to invite an FTC cease-and-desist order before it can bring a constitutional challenge materially indistinguishable from the one that prevailed in *Free Enterprise Fund*.

2. The Ninth Circuit reached a contrary conclusion only by misreading both *Free Enterprise Fund* and the cases on which it relied. The majority did not dispute that Axon's structural constitutional claims are plainly "outside the [FTC's] competence and expertise." *Free Enter. Fund*, 561 U.S. at 491; *see* App.8-9. And the majority recognized that "Axon's constitutional challenges can be *substantively* separated from the underlying antitrust claim before the FTC." App.21. Yet it nonetheless concluded that the bare fact that the FTC Act establishes procedures for reviewing FTC cease-and-desist orders suffices to oust district courts of jurisdiction to resolve constitutional challenges that go to the legitimacy of the agency itself and seek to halt ongoing constitutional injuries. App.25-26.

The majority tried to distinguish *Free Enterprise Fund* on the theory that it "speaks only to a situation of no guaranteed judicial review." App.19. But, as Judge Bumatay explained, that is precisely the case

here. Axon's complaint is not that it will suffer injury *if* the FTC ultimately issues a cease-and-desist order. Its complaint is that the very act of "subject[ing] the company to the FTC's jurisdiction is the harm in and of itself." App.36 (Bumatay, J.). To be sure, that unconstitutional process *may* ultimately produce an appealable FTC cease-and-desist order. But there is certainly no guarantee that it will; proceedings could take a different course, or Axon could buckle to the extreme demands of an unaccountable agency. But even if it does produce an appealable FTC cease-and-desist order, "not every agency action" Axon seeks to challenge will necessarily be "'encapsulated' in [that] appealable order." App.36-37 (Bumatay, J.). And even as to those that are, the FTC Act does not give courts of appeals jurisdiction to grant the kind of structural injunctive relief Axon seeks, but rather "allow[s] courts to grant only a 'decree affirming, modifying, or setting aside [an FTC] order.'" App.36 (Bumatay, J.) (quoting 15 U.S.C. §45(c). Thus, just as in *Free Enterprise Fund*, there is little reason to think that Congress envisioned the FTC Act's limited cease-and-desist-order review procedures as a "meaningful" substitute for the traditional jurisdiction of district courts to review constitutional challenges to an agency's structure, procedures, or existence.

Making matters worse, the majority's myopic focus on whether there is *some* prospect of judicial review is at odds with *Thunder Basin* and *Elgin* as well. *Thunder Basin* did not create a blanket rule that the bare existence of a statutory regime for judicial review of agency action suffices to strip district courts of jurisdiction over any and all challenges involving that agency. If that were the rule, then *Thunder*

Basin would have been a much shorter opinion. The Court would not have needed to examine whether the claims at hand were "of the type Congress intended to be reviewed within th[e] statutory structure," *Thunder Basin*, 510 U.S. at 212, as there was no dispute there that the claims were *capable* of being resolved in conjunction with judicial review of the agency's final decision, *see id.* at 215. Yet the Court focused its analysis principally on the *nature* of the claims and the extent to which they implicated the agency's expertise, while barely mentioning the fact that they could ultimately be pressed before a court of appeals. *See id.* at 213-16.

Likewise in *Elgin*, this Court did not begin and end its analysis with its conclusion that the statute did "not foreclose all judicial review of petitioners' constitutional claims, but merely direct[ed] that judicial review shall occur in the Federal Circuit." 567 U.S. at 10. The Court instead just treated that as a threshold question to answer before examining "whether it [wa]s 'fairly discernible' from the" statute that "Congress intended" the particular claims at hand "to proceed exclusively through the statutory review scheme." *Id.* In other words, both *Thunder Basin* and *Elgin* treated the *absence* of meaningful judicial review as sufficient to *foreclose* a conclusion that a claim is "of the type Congress intended to be reviewed within th[e] statutory structure"—which makes perfect sense given "the strong presumption that Congress did not mean to prohibit all judicial review." *Thunder Basin*, 510 U.S. at 207 & n.8 (quoting *Bowen,* 476 U.S. at 672). But neither treated the *presence* of some mechanism for judicial review as sufficient to compel a contrary conclusion. The panel

majority here was thus simply wrong in its view that "under Supreme Court precedent the presence of meaningful judicial review is enough to find that Congress precluded district court jurisdiction over the type of claims that Axon brings." App.25.

3. The majority's conclusion that Axon's claims are not "collateral" to the merits of any ultimate order the FTC may issue is (if possible) even more obviously incorrect. According to the majority, what matters is not whether a claim is "substantively" collateral to the merits—*i.e.*, whether it can be resolved without considering the merits—but whether a claim is "procedurally" collateral—*i.e.*, whether it is "the procedural vehicle that the party is using to reverse the agency action." App.22. In the majority's view, because Axon's complaint "seeks to avoid the FTC process and the agency's settlement demands," Axon's claims are not "collateral" even though they concededly "can be *substantively* separated from the underlying antitrust claim before the FTC." App.21. That utterly circular test effectively punishes the victim of an ongoing constitutional violation for satisfying the redressability requirement of standing. As long as the structural constitutional problem could be remedied by calling a halt to the unconstitutional proceedings, the Ninth Circuit would deem the challenge procedurally non-collateral. That is nonsense, and is decidedly not how this Court has articulated what it means for a claim to be "collateral" to the merits.

Remarkably, the majority claimed that *Free Enterprise Fund* "shed [no] light on whether 'wholly collateral' should be construed procedurally or

substantively." App.22. That claim is inexplicable. This Court explained exactly why the petitioners' claims were "collateral" there, and it is fundamentally inconsistent with the decision below. The claims were collateral not because they avoided calling the Board's jurisdiction into question (they most certainly did), but because they "object[ed] to the Board's existence," and not "to any Commission orders or rules from which review might be sought." *Free Enter. Fund*, 561 U.S. at 490. Axon's claims are "collateral" for precisely the same reason: They too go to the "existence" of the FTC, its ALJs, and its procedures, not "to any of" the FTC's orders. Just as in *Free Enterprise Fund*, those claims "transcend[] any particular proceeding" or outcome, *id.*, as the "here-and-now injury" Axon is suffering by being subjected to an unconstitutional proceeding will exist and persist regardless of the outcome that proceeding produces. *See* App.42-44 (Bumatay, J.).

The Ninth Circuit majority misread *Elgin* on this "collateral" issue as well. *See* App.21-22. The petitioners in *Elgin* "did not challenge the constitutional grounding of the agency overseeing the proceedings." *Cochran v. SEC*, 969 F.3d 507, 519 (5th Cir. 2020) (Haynes, J., dissenting) (discussing *Elgin*). They instead challenged only the merits of their case-specific discharges from employment—"precisely the type of personnel action regularly adjudicated by the MSPB." *Elgin*, 567 U.S. at 6-7, 22. Again, that is the exact opposite of what Axon is trying to do here. Far from bringing a case-specific challenge to the merits of an agency decision, Axon's motion to enjoin the FTC proceedings disavows reliance on the antitrust merits and relies entirely on Axon's structural constitutional

claims. That more than suffices to demonstrate that those claims are "collateral" to the merits.

4. Other courts have similarly misread this Court's precedents in challenging the structure of the SEC. *See Gibson v. SEC*, 795 F.App'x 753, 755-56 (11th Cir. 2019) (per curiam); *Bennett v. SEC*, 844 F.3d 174, 186 (4th Cir. 2016); *Tilton v. SEC*, 824 F.3d 276, 279 (2d Cir. 2016); *Jarkesy v. SEC*, 803 F.3d 9, 12 (D.C. Cir. 2015); *Bebo v. SEC*, 799 F.3d 765, 774 (7th Cir. 2015).[3] But multiple judges have disagreed, *see, e.g.*, *Tilton*, 824 F.3d at 292 (Droney, J., dissenting); *Duka v. SEC*, 103 F.Supp.3d 382, 390 (S.D.N.Y. 2015) (Berman, J.); *Ironridge Glob. IV, Ltd. v. SEC*, 146 F.Supp.3d 1294, 1303-04 (N.D. Ga. 2015) (May, J.); *Gupta v. SEC*, 796 F.Supp.2d 503, 512-13 (S.D.N.Y. 2011) (Rakoff, J.), including in a dissenting opinion that recently prompted the Fifth Circuit to grant rehearing en banc to reconsider the issue, *see Cochran*, 969 F.3d at 518 (Haynes, J., dissenting), *vacated*, 978 F.3d 975 (5th Cir. 2020) (en banc) (per curiam) (oral argument held Jan. 20, 2021).

That multiple courts have misread this Court's precedent only underscores the need for this Court's intervention. This Court has never read *any* statute to impliedly strip district courts of jurisdiction to hear "challenges to an agency's *structure*, *procedures*, or

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[3] The jurisdictional issue is not materially different in challenges to the structure of the SEC, rather than the FTC; even the Solicitor General has acknowledged that that has no bearing on the jurisdictional issue. *See* Resp.Br.12, *Gibson v. SEC*, No. 20-276 (U.S. Dec. 4, 2020). But the stakes for companies in the merger context, and the FTC's unblemished record on its home turf, underscore the unfairness of denying review here.

existence." App.33 (Bumatay, J.). To the contrary, the lone time the Court considered that question, it reached the exact opposite conclusion. *See Free Enterprise Fund*, 561 U.S. at 490-91. That is the only result that makes sense. When litigants assert that they are being subjected to ongoing unconstitutional actions at the hands of unaccountable officials, telling them to call back later after the unconstitutional process had run its course is a complete non sequitur. These litigants are not claiming that agency *action* will inflict injury when it becomes final, but that the agency *structure* is inflicting a "here-and-now injury." In the context of individual constitutional rights, the answer to such ongoing constitutional injuries is immediate judicial intervention to fix the constitutional problem. *See, e.g.*, *Roman Cath. Diocese*, 141 S.Ct. at 67; *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality op.). There is no reason for a different rule when it comes to structural constitutional problems, especially when those structural provisions exist to vindicate individual rights, not for their own sake. *See Bond*, 564 U.S. at 222.

Deferring judicial review not only allows constitutional injuries to go unremedied in the short run, but creates remedial complications in the long run. If courts do not intervene until after an unconstitutional process ends, they face difficult questions of severability and the temptation to indulge dubious doctrines, like the *de facto* officer doctrine. The far more straightforward solution is to enjoin unconstitutional practices at the outset and redress constitutional injuries before they occur.

II. This Court Should Grant Certiorari To Decide Whether FTC Adjudicators Are Unconstitutionally Insulated From Presidential Control.

The Ninth Circuit's erroneous jurisdictional ruling is particularly inequitable because the ongoing constitutional injuries Axon is suffering are so obvious. The dual-layer for-cause removal protections afforded FTC ALJs are plainly unconstitutional under *Free Enterprise Fund* and *Lucia*. Rather than force Axon to suffer constitutional injuries at the hands of *ultra vires* officials, this Court should clarify the jurisdiction of the federal courts and exercise that jurisdiction to resolve that purely legal (and straightforward) question itself. *See, e.g.*, *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994) (granting certiorari to consider constitutional argument that was not passed on below).

Like the jurisdictional issue, the constitutional merits here should have been controlled by *Free Enterprise Fund*. After concluding that Congress had not impliedly stripped the district court of jurisdiction in *Free Enterprise Fund*, this Court went on to hold that Article II officers wield executive power unconstitutionally if they are insulated from Presidential control by multiple levels of tenure protection. 561 U.S. at 483. There, not only were members of the PCAOB protected from removal except "for good cause shown," but the President did not get to decide whether "good cause" existed. *Id.* at 486 (quoting 15 U.S.C. §7211(e)(6)). That decision was instead vested in SEC Commissioners—who themselves (the Court assumed) could be removed

only "under the *Humphrey's Executor* standard of 'inefficiency, neglect of duty, or malfeasance in office.'" *Id.* at 487 (quoting 295 U.S. at 620). While the Court had previously upheld a *single* layer of for-cause-removal protection, it found this dual-layer protection scheme "contrary to Article II's vesting of the executive power in the President," as "[n]either the President, nor anyone directly responsible to him, nor even an officer whose conduct he may review only for good cause, has full control over the Board." *Id.* at 496.

The Court did not decide in *Free Enterprise Fund* whether its holding applied to ALJs, because it was unsettled at the time whether (or which) ALJs are Article II "Officers of the United States." *Id.* at 507 n.10. But this Court has since held in *Lucia* that SEC ALJs are Article II officers, not mere employees, as they "hold a continuing office established by law … to a position created by statute" and "have equivalent duties and powers … in conducting adversarial inquiries" as other adjudicators that the Court has found qualify as principal officers. 138 S.Ct. at 2053.

There can be no serious dispute that FTC ALJs are principal officers too, as they are virtually indistinguishable from SEC ALJs. Both may be "appoint[ed]" by their respective Commissions, 5 U.S.C. §3105, *i.e.*, by the Heads of the Departments, *see Free Enter. Fund*, 561 U.S. at 511; 26 Fed. Reg. 6,191 at §1a, 75 Stat. 837 (Eff. July 9, 1961) (Reorganization Plan No. 4 of 1961). Both "'exercis[e] significant authority pursuant to the laws of the United States.'" *Freytag v. CIR*, 501 U.S. 868, 881 (1991). Both "take testimony," "conduct trials," "administer oaths, rule on motions, and generally

'regulat[e] the course of' a hearing, as well as the conduct of parties and counsel." *Lucia*, 138 S.Ct. at 2053 (SEC ALJs); *see* 16 C.F.R. §3.42(c) (empowering FTC ALJs to, among other things, "receive evidence," "conduct … hearings," "administer oaths," "rule upon … motions," and "regulate the course of the hearings and the conduct of the parties and their counsel"); p.9, *supra*. Both are empowered to "make and file initial decisions," which may then be appealed to the respective full Commission. 16 C.F.R. §3.42(c)(9) (FTC ALJs); *see* 17 C.F.R. §201.360(a)(1) (similar for SEC ALJs). And both "have all powers necessary" to "dispos[e] of" the proceedings over which they preside. 16 C.F.R. §3.42(c) (FTC ALJs); *see* 17 C.F.R. §§201.111, 200.14(a) (similar for SEC ALJs).

Nor can there be any serious dispute that the dual-layer protections afforded FTC ALJs are unconstitutional under *Free Enterprise Fund*. Just like the PCAOB members the Court considered there, FTC ALJs may be removed only "for good cause established and determined by" someone other than the President (namely, the Merit Systems Protection Board). 5 U.S.C. §7521(a). And just like the SEC Commissioners who wielded limited removal power in *Free Enterprise Fund*, MSPB members may be removed by the President only for "inefficiency, neglect of duty, or malfeasance in office." *Id.* §1202(d). Here too, then, "[n]either the President, nor anyone directly responsible to him, nor even an officer whose conduct he may review only for good cause, has full control over" FTC ALJs. *Free Enter. Fund*, 561 U.S. at 496. Thus, under a straightforward application of this Court's cases, the removal procedures governing FTC ALJs are "contrary to Article II's vesting of the

executive power in the President." *Id.* The Court should take the opportunity to resolve that question now, and put an end to this patently unconstitutional scheme.[4]

III. The Questions Presented Are Recurring And Exceptionally Important, And This Is An Excellent Vehicle To Address Them.

The importance of the constitutional principles at the heart of this case is self-evident, as this Court's decisions in *Collins*, *Arthrex*, *Seila Law*, *Lucia*, and *Free Enterprise Fund* well illustrate. And *when* parties may raise those kinds of constitutional issues is every bit as important. After all, as the majority in this case recognized, "it makes little sense to force a party to undergo a burdensome administrative proceeding to raise a constitutional challenge against the agency's structure before it can seek review from the court of appeals." App.18. More broadly, when a party is suffering ongoing constitutional injury, there is no valid basis to make it endure the constitutional harm before obtaining a remedy. Courts recognize this instinctively when traditional individual rights, like free speech and free exercise, are at issue, even going so far as to recognize the deprivation of constitutional rights as irreparable injury per se. There is no reason to treat structural constitutional claims differently and force those litigants to let the

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[4] Axon has also preserved a challenge to the removal protection Congress afforded FTC Commissioners. *See, e.g.*, CA9.ER.150; CA9.Br.46 n.23; 15 U.S.C. §41 (Commissioners may be removed only for "inefficiency, neglect of duty, or malfeasance in office"). Accordingly, should the Court be inclined to revisit *Humphrey's Executor*, this case presents an appropriate opportunity to do so.

constitutional harm run its full course before they can seek a cure.

Deferring judicial review not only is inequitable, but creates remedial confusion that often leaves successful litigants without a meaningful remedy. Take, for instance, the case of Raymond J. Lucia. The administrative proceedings against him began in September 2012. After a hearing before an unconstitutionally appointed SEC ALJ and an appeal to a Commission that is itself insulated from Presidential control, Lucia was found to have violated the Advisers Act, directed to pay a penalty, and barred from ever again working in the securities business (which he had done, without incident, for more than two decades). In 2018, this Court ruled in his favor on his Appointments Clause claim. *Lucia*, 138 S.Ct. 2044. But that just led to another administrative proceeding in which the new ALJ unsurprisingly declined to break from his predecessor's views which had been approved by the Commission. *See In the Matter of Raymond J. Lucia Companies, Inc.*, Adm. Proc. File No. 3-15006 (S.E.C. June 16, 2020).

Lucia's experience underscores that it is virtually impossible to unring the bell after someone has been forced to endure an unconstitutional process. In other cases, deferring judicial review has forced the Court to confront challenging severability questions or embrace dubious remedial doctrines, like the *de facto* officer doctrine. *See, e.g.*, *Collins*, 141 S.Ct. at 1795-99 (Gorsuch, J., concurring in part); *United States v. Arthrex, Inc.*, 141 S.Ct. 1970, 1988-94 (2021) (Gorsuch, J., concurring in part and dissenting in part). In contrast to those prior cases, this case would allow the

Court to decide critically important constitutional and jurisdictional issues without having to confront such thorny remedial issues, and without the specter of pre-ordained agency proceedings on the back end. That is because, unlike in *Lucia*, the FTC proceedings are stayed. *See* CA9.Dkts.40, 58; *see also* Resp.Br.13, *Gibson v. SEC*, No. 20-276 (U.S. Dec. 4, 2020) (Solicitor General noting that Axon's case and *Cochran* "present better vehicles than [*Gibson*]" because "the courts of appeals in [*Axon* and *Cochran*] have enjoined or stayed [the agency proceedings]").[5]

Moreover, this case well illustrates what awaits parties subjected to the jurisdiction of unaccountable executive officers insulated from any prospect of immediate judicial review. When the FTC complained about Axon's acquisition of Vievu, Axon offered not only to divest, but to infuse the new owner with millions of dollars in working capital. Yet even that was not enough for the FTC, which instead insisted that Axon surrender its intellectual property too and effectively "turn Vievu into a 'clone' of Axon." App.3. And that is to say nothing of the black-box "clearance" process through which Axon was relegated to an administrative forum in which the agency has not lost a case for a quarter of a century. On top of all that, the Commission has even managed to suggest (in Axon's own case) that FTC ALJs need not be subject

[5] To be sure, some difficult remedial questions may still arise when timely judicial review is permitted. But courts have additional remedial options, can avoid the skewing effect of decisions rendered by unconstitutional officers, and, perhaps most important, can ensure constitutionally proper and accountable decisionmaking in the first instance.

to *any* Presidential control whatsoever. *See* Order Denying Respondent's Motion to Disqualify the Administrative Law Judge, *In re Axon Enter., Inc.*, No. 9389, 2020 WL 5406806 (F.T.C. Sept. 3, 2020) (opining that "the President wields a constitutionally adequate degree of control over ALJs, *to the extent Presidential oversight over persons with adjudicative functions is necessary*" (emphasis added)). Those are the actions of an agency that has taken the "independent" label too far, that believes it has no guardrails, and that views itself as judge and jury of all persons and entities within its regulatory bailiwick.

In short, unless this Court intervenes, parties targeted for administrative enforcement will continue to be forced to defend themselves in the very agency tribunals they challenge as unconstitutional. As a direct result, "independent" agencies like the FTC will continue to act as if they are accountable to no one. That is not a state of affairs this Court should allow to persist. After all, "[f]ew things could be more perilous to liberty than some 'fourth branch' that does not answer even to the one executive official who is accountable to the body politic." *Collins*, 141 S.Ct. at 1797 (Gorsuch, J., concurring). The Court should grant certiorari and ensure that Axon's inevitable victory on the merits of its constitutional claims is not a Pyrrhic one.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

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