APPENDIX

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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20-15662

AXON ENTERPRISE, INC., a Delaware corporation,

Plaintiff-Appellant,

v.

FEDERAL TRADE COMMISSION, a federal administrative agency; JOSEPH J. SIMONS; NOAH PHILLIPS; ROHIT CHOPRA; REBECCA SLAUGHTER; CHRISTINE WILSON, in their official capacities as Commissioners of the Federal Trade Commission,

Defendants-Appellees.

Filed: Jan. 28, 2021

Before: SILER*, LEE, and BUMATAY,
Circuit Judges.

OPINION

LEE, *Circuit Judge*:

Over the past century, Congress has established an array of quasi-independent executive agencies that

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* The Honorable Eugene E. Siler, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

enjoy partial insulation from presidential oversight and wield tremendous enforcement power. Instead of filing lawsuits in federal court, these agencies can commence administrative enforcement proceedings against companies and individuals, and make their cases before their own administrative law judges (ALJs). Not surprisingly, ALJs overwhelmingly rule for their own agencies.

Here, the Federal Trade Commission (FTC) investigated and filed an administrative complaint challenging Axon Enterprise, Inc.'s acquisition of a competitor. The FTC demanded that Axon spin-off its newly acquired company and provide it with Axon's own intellectual property. Axon responded by filing a lawsuit in federal district court, arguing that the FTC's administrative enforcement process violates Axon's due process rights and runs afoul of separation-of-powers principles.

The narrow question presented here is whether the district court has jurisdiction to hear Axon's constitutional challenge to the FTC's structure. The district court dismissed Axon's complaint, ruling that the FTC's statutory scheme requires Axon to raise its constitutional challenge first in the administrative proceeding.

We affirm the district court's dismissal because the Supreme Court's *Thunder Basin* trilogy of cases mandates that result. The structure of the FTC Act suggests that Congress impliedly barred jurisdiction in district court and required parties to move forward first in the agency proceeding. And because the FTC statutory scheme ultimately allows Axon to present its constitutional challenges to a federal court of appeals

after the administrative proceeding, Axon has not suffered any cognizable harm. We join every other circuit that has addressed a similar issue in ruling that Congress impliedly stripped the district court of jurisdiction.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Axon makes, among other things, body cameras for use by law enforcement. In May 2018, it acquired a competitor body camera company called Vievu LLC. About a month later, the FTC sent Axon a letter stating that the Vievu acquisition raised antitrust concerns. For about eighteen months, Axon cooperated with the FTC's investigation. In December 2019, the FTC demanded that Axon turn Vievu into a "clone" of Axon using Axon's intellectual property. If Axon refused this settlement demand, the FTC threatened to initiate an administrative proceeding to obtain this relief.

In response, Axon filed this action in the district court on January 3, 2020.[1] Axon made three substantive claims: (1) the FTC's administrative proceeding violates Axon's Fifth Amendment due process rights, (2) the FTC's structure violates Article II by providing improper insulation from the president, and (3) Axon's acquisition of Vievu did not violate antitrust law.

Axon argued that the FTC's administrative enforcement scheme violates its due process rights because the agency effectively acts as the prosecutor,

[1] The FTC filed an administrative complaint challenging the Vievu acquisition later that same day.

judge, and jury, and that it is entitled to a trial in district court. Axon notes that the FTC has not lost an administrative proceeding trial in the past quarter-century. It also maintains that the FTC's ALJs impermissibly enjoy dual-layer insulation from presidential control because only the FTC commissioners can remove them for cause and the commissioners, in turn, can be removed only for cause by the President.

Axon later filed a motion for preliminary injunction. The FTC opposed the preliminary injunction motion, relying mainly on jurisdictional grounds. The district court agreed with the FTC and dismissed Axon's complaint without prejudice due to a lack of subject matter jurisdiction. It determined that Congress impliedly precluded jurisdiction over Axon's claims when it enacted the FTC administrative review scheme.

Axon timely filed its notice of appeal to this court.

STANDARD OF REVIEW

We review de novo a district court's determination of subject matter jurisdiction. *See Gingery v. City of Glendale*, 831 F.3d 1222, 1226 (9th Cir. 2016).

DISCUSSION

The FTC Act does not expressly state that a party cannot sue in federal district court to challenge the agency's administrative enforcement process. But that does not rule out that Congress may still have impliedly precluded district court jurisdiction when it enacted a statutory scheme of administrative review. *See, e.g.*, *Bennett v. U.S. Sec. and Exch. Comm'n*, 844

F.3d 174, 181 (4th Cir. 2016); *Jarkesy v. U.S. Sec. and Exch. Comm'* 803 F.3d 9, 15 (D.C. Cir. 2015).

Courts have fashioned a two-step inquiry to determine whether Congress impliedly precluded jurisdiction. First, a court asks "whether Congress's intent to preclude district-court jurisdiction is 'fairly discernible in the statutory scheme.'" *Bennett*, 844 F.3d at 181 (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207 (1994)). Second, a court considers "whether plaintiffs' 'claims are of the type Congress intended to be reviewed within this statutory structure.'" *Id.* (quoting *Thunder Basin*, 510 U.S. at 212).

We conclude that, following this two-step analysis, Congress impliedly precluded district court jurisdiction over claims of the type brought by Axon when it enacted the FTC Act. We are guided and constrained by the so-called *Thunder Basin* factors set out by the Supreme Court in assessing this question.

I. The *Thunder Basin/Free Enterprise/Elgin* trilogy for determining implied preclusion of jurisdiction.

The Supreme Court set out the modern standard for implied preclusion of district court jurisdiction in three cases: *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477 (2010), and *Elgin v. Dep't of Treasury*, 567 U.S. 1 (2012). Because we apply the so-called *Thunder Basin* factors here, a closer look at each case will assist our analysis.

A. *Thunder Basin*

In *Thunder Basin*, the Supreme Court considered whether the Federal Mine Safety and Health Amendments Act of 1977, 30 U.S.C. §801 *et seq*., prevented a district court from exercising jurisdiction over a pre-enforcement challenge to the statute. 510 U.S. at 202. Thunder Basin Coal Company objected to an order by the Mine Safety and Health Administration (MSHA) requiring the company to post two members of a miner's union, who were not employees of the company, as representatives during a healthy and safety inspection. *See id.* at 205. Thunder Basin made two arguments: (1) the designation of nonemployee representatives violated collective bargaining principles under the National Labor Relations Act, and (2) forcing the company to challenge MSHA's regulatory interpretations through the administrative review process would violate due process because it would force the company to choose between possible penalties for violating the act or irreparable harm from complying with the agency's order. *See id.* at 205-06.

The Supreme Court concluded that the Mine Act precluded district court jurisdiction. Under the first step of the analysis, the Court held that it could discern Congress' intent to preclude district court jurisdiction based on the Mine Act's "detailed structure for reviewing violations," subject to review by the federal court of appeals. *Id*. at 207-08. Then under the second step, the Court determined that the claims were of the type Congress intended to be reviewed within this scheme. First, it concluded that the company's claims fell within the agency's expertise because they essentially required an interpretation of the parties' rights and duties under the relevant

statute and regulation. *Id.* at 214-15. Second, though the agency lacked the authority to decide constitutional issues, the court of appeals could address them after the parties concluded the administrative proceeding. *Id.* at 215. Third, the Court rejected the argument that due process required pre-enforcement action because it found that Thunder Basin would not face any serious prehearing deprivation that could not be remedied on appeal. *Id.* at 216-18.

The big takeaway from *Thunder Basin* is that an administrative review scheme can preclude district court jurisdiction, despite the possibility that the administrative process cannot address or remedy the alleged constitutional harm until a federal court of appeals reviews the case.

B. *Free Enterprise*

The second Supreme Court case, *Free Enterprise*, considered whether the structure of the Public Company Accounting Oversight Board violated Article II's vesting of executive power in the presidency. 561 U.S. at 483-84. An accounting firm sued after the Board released a report critical of the firm's auditing procedures and began a formal investigation. *Id.* at 487. The firm sought a declaratory judgment that the Board's structure violated the Appointment Clause and an injunction preventing the Board from exercising its powers. *Id.* Notably, the firm did not challenge the agency's final order or rule, but rather the Board's critical report.

The Supreme Court determined that the statutory scheme did not preclude jurisdiction. *Id.* at 489. For the second step of the analysis—whether the claims

are of the type meant to be reviewed within the statutory scheme—the Court identified three factors from *Thunder Basin* to consider: (1) whether a party can obtain "meaningful judicial review" within the statutory scheme, (2) whether the suit is "wholly collateral to a statute's review provisions," and (3) whether the claims are "outside the agency's expertise." *Id.* (internal quotation marks omitted).[2]

In ruling that statutory scheme did not strip jurisdiction, the Court held that the firm could not obtain meaningful review of its claim under the statutory scheme because it did not challenge a final agency order or rule. Though the Board acted under SEC oversight, the SEC can review only Board rules and sanctions. *Id.* at 489. This meant that "not every Board action is encapsulated in a final Commission order or rule." *Id.* at 490. The accounting firm was challenging the Board's critical report, which cannot be reviewed by the agency or the appellate court. So the only way the firm could raise its constitutional claim under the statutory scheme was to either challenge a "random" Board rule or willingly incur a Board sanction by violating a discovery order. *See id.* The Court thus held that the statutory scheme did not provide a meaningful judicial review. *Id.* The Court also concluded that the constitutional claims were outside the SEC's competence and expertise because they were "standard questions of administrative law" rather than "technical considerations of agency policy." *Id.* at 491 (alteration omitted).

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[2] Because the Court viewed these factors as originating from *Thunder Basin*, courts have sometimes called them the *Thunder Basin* factors.

Free Enterprise makes clear that if a party cannot seek judicial review for its grievances under the normal procedures of the statutory scheme, it does not have meaningful judicial review.

C. *Elgin*

Finally, the third Supreme Court case, *Elgin*, addressed whether the Civil Service Reform Act of 1978 (CSRA) "provides the exclusive avenue to judicial review when a qualifying employee challenges an adverse employment action by arguing that a federal statute is unconstitutional." 567 U.S. at 5. The petitioners argued that the federal government's Selective Service registration requirement for males violated the Equal Protection Clause. *Id*. at 6-7.

The Supreme Court found that Congress precluded district court jurisdiction over such claims. The majority opinion first concluded that there was a fairly discernible congressional intent to preclude jurisdiction because of the CSRA's detailed structure. *See id.* at 10-13.

The Court also found that the claims were of the type Congress intended to preclude. For the first *Thunder Basin* factor, the Court found that there was meaningful review even though the agency lacked the authority to address the constitutional issues because the statute ultimately "provides review in the Federal Circuit, an Article III court fully competent to adjudicate petitioners' claims. …" *Id*. at 17. For the second factor, the Court held that the claims were not wholly collateral to the CSRA scheme because the claims were "the vehicle by which they seek to reverse" the agency actions taken against them. *Id.* at 21-22. Finally, for the third factor, the Court explained that

the agency could bring its expertise to bear on "threshold" questions within the agency's expertise; for example, one petitioner's claim rested on an allegation of constructive discharge, which the agency could resolve in a manner that could avoid the need to reach the constitutional claim. *Id*. at 22-23.

Elgin thus clarified that a claim is not "wholly collateral" to a statutory review scheme if it is the "vehicle by which" a party seeks to prevail at the agency. *Elgin* also shows that sometimes an agency's expertise can affect constitutional claims if there are preliminary questions apart from the merits questions at issue.

With these three cases in mind, we now turn to the implied preclusion analysis.

II. Step one: The FTC Act evinces a fairly discernible intent to preclude district court jurisdiction.

Axon appears to concede that the FTC Act impliedly precludes jurisdiction for at least some claims. The FTC Act includes a detailed overview of how the FTC can issue complaints and carry out administrative proceedings. 15 U.S.C. §45. This provision is almost identical to the statutory review provision in the SEC Act, which other circuits have held shows a fairly discernible intent to strip district court jurisdiction. *See*, *e.g.*, *Hill v. SEC*, 825 F.3d 1236, 1241 (11th Cir. 2016); *Tilton v. SEC*, 824 F.3d 276, 281 (2d Cir. 2016). We thus hold that the FTC Act reflects a fairly discernible intent to preclude district court jurisdiction.

III. Step two: The *Thunder Basin* factors suggest that the claims are of the type to be reviewed within the statutory scheme.

We now turn to whether Axon's claims are of the type meant to be reviewed within the FTC Act's statutory scheme. Axon argues that it has three claims for the district court to decide: (1) the clearance process used to determine whether the FTC or DOJ will review a merger violates due process, (2) the fact that the FTC combines investigatory, prosecutorial, adjudicative, and appellate functions within a single agency violates due process, and (3) the dual-layer of protection given to FTC ALJs violates the Appointments Clause of Article II of the Constitution.[3]

Under the *Thunder Basin* factors, we must consider: (1) whether the plaintiff 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. *See Elgin*, 567 U.S. at 15 (citing *Thunder Basin*, 510 U.S. at 215). The D.C. Circuit has explained that these three factors do not "form three distinct inputs into a strict mathematical formula," but are rather "general guideposts useful for channeling the inquiry into whether the particular claims at issue fall outside an overarching congressional design." *Jarkesy*, 803 F.3d at 17. Several courts have also concluded that "the first factor—meaningful judicial review—is 'the most critical

[3] These three claims do not line up with the three claims that Axon brought in its complaint. Rather, Axon agreed that the FTC should decide the merits of the antitrust dispute and that the clearance process claim falls within its due process claim.

thread in the case law.'" *See, e.g.*, *Hill*, 825 F.3d at 1245 (quoting *Bebo v. SEC*, 799 F.3d 765, 774 (7th Cir. 2015)).

In applying these *Thunder Basin* factors, we conclude that Axon's claims are of the type meant to be reviewed within the statutory scheme.

A. Axon will have meaningful judicial review of its claims.

Axon's argument on the first *Thunder Basin* factor boils down to a simple premise: eventual review by the federal appellate court is not meaningful judicial review. But Supreme Court precedent, as well as rulings from our sister circuits, rejects that premise.

First, Axon argues that the FTC Act does not provide meaningful judicial review because the administrative process itself "creates ongoing constitutional harm that simply cannot be remedied in an after-the-fact appeal." But the Supreme Court in *Thunder Basin* held that the "petitioner's statutory and constitutional claims here can be meaningfully addressed in the Court of Appeals," even though the petitioner there similarly argued that the agency process itself would violate its constitutional rights. *See Thunder Basin*, 510 U.S. at 215; *see also FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 244 (1980) (rejecting petitioner's argument that "the expense and disruption of defending itself in protracted adjudicatory proceedings" warrants an exception to the agency review process).[4]

[4] Axon seeks to distinguish *Standard Oil* on the basis that it did not deal with an allegedly unconstitutional proceeding. Other

Other circuits have rejected this argument as well. As the Eleventh Circuit explained in *Hill v. SEC*, "[w]hether an injury has constitutional dimensions is not the linchpin in determining its capacity for meaningful judicial review." 825 F.3d at 1246; *see also Bennett v. U.S. Sec. and Exch. Comm'n*, 844 F.3d 174, 184 n.10 (4th Cir. 2016) ("[F]ederal courts require litigants who unsuccessfully challenge the constitutionality of the initial tribunal—including the authority of the presiding decision maker—to endure the proceeding and await possible vindication on appeal."); *Tilton*, 824 F.3d at 285 (explaining that "post-proceeding relief, although imperfect, suffices to vindicate the litigant's constitutional claim" dealing with the legitimacy of the tribunal).

In other words, Axon has no right to avoid the administrative proceeding itself. If the proceeding might harm Axon, that harm can still be ultimately remedied by a federal court of appeals, even if it is not Axon's preferred remedy of avoiding the agency process altogether. *See Bennett*, 844 F.3d at 185 n.12 (rejecting the argument that a court could not provide

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circuits have rejected this distinction, however. *See Jarkesy*, 803 F.3d at 26 ("If the injury inflicted on the party seeking review is the burden of going through an agency proceeding . . . then [*Standard Oil*] teaches that the party must patiently await the denouement of proceedings within the Article II Branch." (internal quotation marks omitted)); *Bennett*, 844 F.3d at 185 (rejecting the argument that "*Standard Oil* is inapposite because it did not involve a constitutional claim" because it "makes no material difference for assessing the meaningfulness of judicial review here, because *Thunder Basin* and *Elgin* establish that petitioners can obtain meaningful review of constitutional claims through a statutory scheme similar to the one here").

"complete relief" to the Appointments Clause claim and explaining that the petitioner is not necessarily "entitled to her preferred remedy" given that "Congress may substitute remedies for illegal action"). Axon's argument also proves too much because then "[e]very person hoping to enjoin an ongoing administrative proceeding could make this argument," which would undermine the notion that it is "only in the exceptional cases … where courts allow plaintiffs to avoid the statutory review schemes prescribed by Congress." *Bebo*, 799 F.3d at 775.[5]

Axon also complains that it can obtain judicial review only if FTC prevails in the administrative proceeding and issues a cease and desist order. 15 U.S.C. §45(c). But that is true for any statutory review scheme that allows only for review of final agency orders. For example, the SEC review scheme allows judicial review only for "[a] person aggrieved by a final order of the Commission," 15 U.S.C. §78y(a)(1), yet every other circuit to have addressed the SEC

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[5] It is telling that Axon appears disappointed that "the best Axon can hope for is a remand for a complete do-over." A "do-over," however, is exactly the type of relief the Supreme Court has ordered when it has found a constitutional violation of an agency process. *See Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018) (after finding an Appointments Clause violation, concluding that "the 'appropriate' remedy for an adjudication tainted with an appointments violation is a new 'hearing before a properly appointed' official"); *see also Free Enterprise*, 561 U.S. at 508-513 (rejecting the argument that the Appointments Clause violation rendered all of the Board's actions and authority in violation of the Constitution and instead severing the unconstitutional tenure provisions from the statute and concluding that "petitioners are not entitled to broad injunctive relief against the Board's continued operations").

statutory scheme found that a party can obtain meaningful judicial review. *See Bennett*, 844 F.3d at 186; *Hill*, 825 F.3d at 1246; *Tilton*, 824 F.3d at 286-87; *Jarkesy*, 803 F.3d at 20; *Bebo*, 799 F.3d at 774. If we accepted Axon's argument, it would create a gaping loophole to the statutory scheme that Congress could not have intended. As the Fifth Circuit explained, "Congress provides meaningful judicial review by authorizing review of challenges to a final agency order by a federal circuit court." *Bank of La. v. FDIC*, 919 F.3d 916, 925 (5th Cir. 2019).

To be sure, sometimes the burden of an agency process may justify pre-enforcement relief. But that is for exceptional circumstances not relating to typical agency review. We agree with the Second Circuit's view in *Tilton*: "[T]he Supreme Court has concluded that post-proceeding judicial review would not be meaningful because the proceeding itself posed a risk of some additional and irremediable harm *beyond the burdens associated with the dispute resolution process*." 824 F.3d at 286 (emphasis added); *see also McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991) (finding that petitioners' claims were not precluded by a statutory review provision because petitioners would have had to "voluntarily surrender themselves for deportation" to obtain review); *Mathews v. Eldridge*, 424 U.S. 319, 331 (1976) (explaining that exhaustion was not required because petitioner faced harm arising from "his physical condition and dependency upon the disability benefits," not the alleged deprivation of due process that was the basis for his claim).

Axon does not face such a dire risk requiring pre-enforcement relief. *See Tilton*, 824 F.3d at 286 (concluding that "appellants have identified no such additional, irremediable harm here" because "[t]he only prospective injury that they describe is being subjected to an unconstitutional adjudicative procedure") (internal quotation marks omitted)); *Jarkesy*, 803 F.3d at 21 (finding that the petitioner's claim was not like *McNary*). Thus, Axon's alleged constitutional harm does not prevent the FTC Act's statutory review scheme from providing meaningful judicial review.

Second, Axon argues that the agency review process cannot provide meaningful review because it cannot address Axon's constitutional claims. Axon's argument makes sense from a policy perspective: it seems odd to force a party to raise constitutional challenges before an agency that cannot decide them. But the Supreme Court has rejected that argument. In *Elgin*, the Court held that, even if the agency cannot decide constitutional claims, a meaningful judicial review exists as long as the party ultimately can appeal to "an Article III court fully competent to adjudicate petitioners' claims." 567 U.S. at 17; *see also id.* (explaining that in *Thunder Basin* "we held that Congress' intent to preclude district court jurisdiction was fairly discernible in the statutory scheme '[e]ven if' the administrative body could not decide the constitutionality of a federal law" when "[t]hat issue … could be 'meaningfully addressed in the Court of Appeals' that Congress had authorized to conduct judicial review"); *Bank of Louisiana*, 919 F.3d at 926 ("Indeed, there can be meaningful review in the circuit court even if the agency itself lacks authority to decide

the constitutional question presented."); *Jarkesy*, 803 F.3d at 19 ("Because Jarkesy's constitutional claims, including his non-delegation challenge to Dodd-Frank, can eventually reach 'an Article III court fully competent to adjudicate' them, it is of no dispositive significance whether the Commission has the authority to rule on them in the first instance during the agency proceedings."). Here, Axon can present its constitutional claims to this court after the conclusion of the FTC enforcement proceedings. That is enough under Supreme Court precedent.

Third, the Supreme Court in *Elgin* rejected the premise of Axon's argument that there cannot be meaningful review if the agency process does not create an appropriate record for the federal court of appeals. It held that the court of appeals can take judicial notice of relevant facts or remand to the agency to make factual findings. *Elgin*, 567 U.S. at 19. Here, 15 U.S.C. §45(c) allows the court of appeals to "order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper."[6]

Finally, Axon argues—and the dissent agrees—that its claims resemble those from *Free Enterprise*. Under Axon's and the dissent's reading of *Free*

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[6] Axon's reliance on *Fashion Originators Guild of America v. FTC*, 114 F.2d 80 (2nd Cir. 1940) is inapt. That case dealt with a situation in which the petitioner asked the court to review whether it was proper for FTC to actively exclude evidence that it deemed irrelevant. *See id.* at 82-83. That does not affect whether a court can remand for further factfinding as it pertains to Axon's constitutional claims.

Enterprise, challenges to an "agency's structure, procedures, or existence … are not precluded from district court jurisdiction." Dissent at 37-38. As the dissent cogently points out, 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. And if we were writing on a clean slate, we would agree with the dissent.[7] *Cf. Ortega v. United States*, 861 F.2d 600, 603 & n. 4 (9th Cir.1988) ("This case is squarely controlled by the Supreme Court's recent decision. … [We] agree[ ] with the dissent that [appellant] deserves better treatment from our Government. Unfortunately, legal precedent deprives us of discretion to do equity.").

But the Supreme Court in *Free Enterprise* did not carve out a broad exception for challenges to an agency's structure, procedure, or existence. Rather, the Court justified district court jurisdiction on the narrow ground that the challenged action—the Board's critical report of the auditing firm—did not amount to a final order that could be appealed to a court under the statutory scheme. *Free Enterprise*, 561 U.S. at 490-91 ("We do not see how petitioners could meaningfully pursue their constitutional claims"

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[7] The dissent cites *Mace v. Skinner*, 34 F.3d 954 (9th Cir. 1994), and *Latif v. Holder*, 686 F.3d 1122 (9th Cir. 2012), but neither mandates district court jurisdiction here. *Mace* did not cite or apply *Thunder Basin*. And *Latif* did not consider the *Thunder Basin* factors under the second step of the implied preclusion analysis because the court ruled under the first step that Congress' intent to preclude jurisdiction was not "fairly discernable from the statutory scheme" at issue. 686 F.3d at 1129.

because the statute "provides only for judicial review of *Commission* action, and not every Board action is encapsulated in a final Commission order or rule"). In other words, "an uncomplimentary inspection report is not subject to judicial review" under the statute. *Id.* at 490. So the auditing firm had no way to obtain judicial review, other than selecting a "random" Board Rule to challenge or "incur a sanction (such as a sizable fine) by ignoring Board requests for documents and testimony." *Id.* The Court held that neither option offered access to a meaningful judicial review. *Id.* at 490-91. In other words, *Free Enterprise* does not appear to address a scenario where there is eventual judicial review, but rather speaks only to a situation of no guaranteed judicial review.

In Axon's case, though, it does not have to intentionally violate a "random" rule or incur sanctions by violating discovery orders to obtain judicial review of its claims. Under the statute, Axon has the right to seek judicial review from this court once the enforcement proceeding ends. It may not be an efficient mechanism to seek judicial review, but this court will eventually hear Axon's claims as long as it continues to oppose the FTC's actions. And any adverse order issued by the FTC would be stayed until Axon has had a chance to seek judicial review. *See* 15 U.S.C. §45(g)(1)-(2).[8] Under Supreme Court

[8] The dissent notes that Axon may not have an opportunity to have a court review the structure of the FTC if the FTC drops its investigation or Axon prevails on the merits during the administrative proceeding. But under either scenario, Axon has prevailed over FTC, and that ends the dispute. Put another way, Axon is not entitled to a judicial ruling on its constitutional claim

precedent, that amounts to meaningful judicial review. *See Thunder Basin*, 510 U.S. at 215 ("constitutional claims here can be meaningfully addressed in the Court of Appeals," despite petitioner's argument that the agency process itself would violate its constitutional rights); *Standard Oil Co. of Cal.*, 449 U.S. at 244. Perhaps the Supreme Court in the near future will clarify and extend the holding of *Free Enterprise* to include any constitutional challenge to any agency's structure, procedure, or existence. But based on our best reading of *Free Enterprise*, the Court has not done so yet. Thus, *Free Enterprise* does not control here. In sum, because "[t]he statutory scheme at issue in this case authorizes review of final [agency] orders in a federal circuit court," the FTC Act provides Axon meaningful judicial review under the first *Thunder Basin* factor. *Bank of Louisiana*, 919 F.3d at 926.[9]

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challenging the administrative proceeding if it has prevailed on the merits.

[9] Though Axon repeatedly points to cases involving a court asserting jurisdiction over pattern and practice claims, those cases are inapt. None of those cases even mention the possibility that Congress can impliedly preclude district court jurisdiction, so they are not relevant. *See generally McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479 (1991); *Gebhardt v. Nielsen*, 879 F.3d 980 (9th Cir. 2018); *Veterans for Common Sense v. Shinseki*, 678 F.3d 1013 (9th Cir. 2012). Moreover, many of these cases fit within the implied preclusion framework because they consider whether the parties could have obtained meaningful review or whether the claims at issue were collateral to the review scheme. *See McNary*, 498 U.S. at 496 (finding jurisdiction in part because, "if not allowed to pursue their claims in the District Court, respondents would not as a practical matter be able to obtain meaningful judicial review of their application denials or of their objections

B. Axon's constitutional claims are arguably "wholly collateral" to the enforcement proceeding.

Courts have offered two competing ways to consider the second *Thunder Basin* factor of whether a claim is "wholly collateral" to the statutory review scheme.

Some district courts have held that a claim is wholly collateral to the statutory enforcement scheme if it is not *substantively* intertwined with the merits dispute in the agency proceeding. *See, e.g.*, *Hill v. SEC*, 114 F. Supp. 3d 1297 (N.D. Ga. 2015). Because Axon's constitutional challenges can be substantively separated from the underlying antitrust claim before the FTC, Axon argues that they are wholly collateral to the merits claim.

In contrast, several of our sister circuits—the D.C. Circuit, Second Circuit, and the Fourth Circuit—have applied this factor in the *procedural* sense: "a claim is not wholly collateral if it has been raised in response to, and so is procedurally intertwined with, an administrative proceeding—regardless of the claim's substantive connection to the initial merits dispute in the proceeding." *Tilton*, 824 F.3d at 287; *see also*

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to INS procedures notwithstanding the review provisions"); *VCS*, 678 F.3d at 1034-35 (relying on the fact that the claim at issue could not have been raised under the statutory scheme); *City of Rialto v. W. Coast Loading Corp.*, 581 F.3d 865, 874 (9th Cir. 2009) (asking "whether the claim . . . is collateral to an alien's substantive eligibility" and "stress[ing] the importance of meaningful judicial review of agency action.").

Bennett, 844 F.3d at 187; *Jarkesy*, 803 F.3d at 22-25.[10] In other words, if the claim is the procedural vehicle that the party is using to reverse the agency action, it is not "wholly collateral" to the review scheme.

We agree that "the second reading is more faithful to the more recent Supreme Court precedent. … " *Bennett*, 844 F.3d at 187. *Elgin* found that a petitioner's constitutional claims were not wholly collateral when those claims were "the vehicle by which they seek to reverse the removal decisions" and to obtain relief. 567 U.S. at 22. Neither *Thunder Basin* nor *Free Enterprise* shed any light on whether "wholly collateral" should be construed procedurally or substantively. *See Free Enterprise*, 561 U.S. at 490-91 (not addressing the nature of "wholly collateral"); *Thunder Basin*, 510 U.S. at 212-13 (same).

While it is a close call, we find that the second *Thunder Basin* factor also supports preclusion of jurisdiction. Axon's complaint seeks to avoid the FTC process and the agency's settlement demands. Indeed, Axon's requested relief includes an injunction to prevent the FTC from pursuing its administrative enforcement action. The claims are therefore the "vehicle by which" Axon seeks to prevail at the agency level and are not wholly collateral to the review scheme.

C. The FTC lacks agency expertise to resolve the constitutional claims.

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[10] The Fifth, Seventh, and Eleventh Circuits have not definitively addressed this issue. *See Bank of Louisiana*, 919 F.3d at 928; *Hill*, 825 F.3d at 1251-52; *Bebo*, 799 F.3d at 773-74.

The third *Thunder Basin* factor—whether the claims are outside the agency's expertise—weighs against jurisdiction-stripping.

Like the second factor, this third factor is cloaked in ambiguity. The Supreme Court in *Free Enterprise* took a straightforward approach: when an issue does not involve "technical considerations of [agency] policy" and instead involves "standard questions of administrative law, 561 U.S. at 491 (internal quotation marks omitted), the issue lies outside the agency's expertise. On the other hand, the Court several years later in *Elgin* arguably appeared to take a more expansive view of agency expertise, stating that there may be "threshold questions that may accompany a constitutional claim and to which the [agency] can apply its expertise" or "preliminary questions unique to the employment context [that] may obviate the need to address the constitutional challenge." 567 U.S. at 22-23. Some circuits have read *Elgin* as suggesting that if an agency can moot the constitutional claims by resolving the merits issues before the agency, then the agency can bring its expertise to bear. *See, e.g.*, *Bank of Louisiana*, 919 F.3d at 929 (citing *Jarkesy*, 803 F.3d at 29).

We, however, disagree with the expansive reading of *Elgin*. Such an approach is hard to reconcile with *Free Enterprise* unless we assume that *Elgin* somehow overruled *Free Enterprise* sub silentio. *See Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18, 120 S. Ct. 1084, 1096, 146 L. Ed. 2d 1 (2000) ("This Court does not normally overturn, or so dramatically limit, earlier authority *sub silentio.*"); *see also United States v. Obaid*, 971 F.3d 1095, 1102 (9th Cir. 2020)

(citing *Shalala*, 529 U.S. at 18) ("We should not assume that the Supreme Court has implicitly overruled its precedent."). Indeed, such an interpretation renders this third factor virtually meaningless because any challenge to an administrative process can be mooted if a party prevails on the substantive merits.

A narrower reading of *Elgin* reconciles it with *Free Enterprise*. The constitutional challenges in *Elgin* required the determination of certain "*threshold*" questions that were directly within the agency's expertise. For example, one petitioner's claim relied on the preliminary issue of whether he was subject to a constructive discharge. *See Elgin*, 567 U.S at 23. In other words, *Elgin* stands for the unremarkable proposition that an agency's expertise can sometimes help decide an issue and thus obviate the need to resolve a constitutional claim. It does not establish a broad rule that an agency can always moot a claim by simply ruling for the party.

Here, there are no threshold questions that need to be addressed before reviewing Axon's constitutional claims. The due process and Appointments Clause claims do not turn on the antitrust merits of the case, so there is little room for the FTC to bring its expertise to bear. Rather, Axon's claims are more like the "standard questions of administrative law" that the *Free Enterprise* Court addressed.

Thus, the third factor weighs against preclusion.

* * *

The *Thunder Basin* factors point in different directions here. Axon will have meaningful judicial review of its claims from within the statutory review

scheme, which points to jurisdiction preclusion. The "wholly collateral" factor also likely favors preclusion, though that is far from clear. On the other hand, the agency expertise factor weighs against preclusion.

We agree with the other circuits, however, 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. *See Bennett*, 844 F.3d at 183 n.7; *Bebo*, 799 F.3d at 774.

This is not to minimize Axon's serious concerns about how the FTC operates. For one, Axon raises substantial questions about whether the FTC's dual-layered for-cause protection for ALJs violates the President's removal powers under Article II. *See*, *e.g.*, *Free Enterprise*, 561 U.S. at 484 (ruling that dual for-cause limitations of Board members violates separation-of-powers); *Lucia v. SEC*, 138 S. Ct. 2044 (2018) (holding that SEC ALJs are "Officers" subject to the Appointments Clause); *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2192 (2020) (finding that the removal restrictions on the director of the CFPB violated Article II of the Constitution).

This case implicates one of the inherent tensions in the modern administrative state: Congress wanted to insulate ALJs from political interference, but ALJs wield tremendous power and still remain a part of the executive branch—even if Congress bestowed them with the title "judge"—and they should thus theoretically remain accountable to the President and the people. As the Supreme Court cautioned in *Free Enterprise*, the "growth of the Executive Branch, which now wields vast power and touches almost

every aspect of daily life, heightens the concern that it may slip from the Executive's control, and thus from that of the people." 561 U.S. at 499. *See also, e.g.*, Linda D. Jellum, *"You're Fired!" Why the Alj Multi-Track Dual Removal Provisions Violate the Constitution and Possible Fixes*, 26 Geo. Mason L. Rev. 705, 743 (2019) (arguing that, in light of *Free Enterprise*, ALJs' dual-layers of protection violate the Constitution).

Further, Axon raises legitimate questions about whether the FTC has stacked the deck in its favor in its administrative proceedings. Axon claims—and FTC does not appear to dispute—that FTC has not lost a single case in the past quarter-century. Even the 1972 Miami Dolphins would envy that type of record. Indeed, a former FTC commissioner acknowledged that the FTC adjudication process might unfairly favor the FTC given the agency's stunning win rate. Axon essentially argues that the FTC administrative proceeding amounts to a legal version of the Thunderdome in which the FTC has rigged the rules to emerge as the victor every time. But we cannot move beyond the *Thunder Basin* factors, which mandate our conclusion that Axon cannot bring a claim in district court. Axon can have its day in court—but only after it first completes the FTC administrative proceeding.

IV. Axon's Clearance Process Claim

Finally, we address separately Axon's novel and superficially appealing argument that it lacks a meaningful judicial review of the government's "clearance process" claim.

Before deciding whether to move forward with an enforcement action, the FTC and the U.S. Department of Justice confer and decide which agency will bring the action, according to Axon. This alleged "black box" decision process has a significant impact on Axon and other targets of investigation: They may avail themselves of the procedural protections offered at a trial in district court (if the Department of Justice files a complaint), or they may be shunted to an administrative proceeding (if the FTC pursues the matter). Axon argues that it has no meaningful judicial review of this "clearance process" decision under the FTC statutory scheme, and thus should be able to raise it in district court.

But a closer look at this claim shows that it is really not about pre-investigation or pre-enforcement decisions, but rather about the procedures the FTC will use. Axon takes issue with the fact that, when the FTC takes the case, companies are deprived "of the substantive or procedural protections enjoyed by litigants in federal district court." In other words, the clearance process falls within Axon's due process claim because it is arguing that it will face an unfair proceeding before the FTC. Indeed, Axon admitted as much.

But Axon will eventually have meaningful judicial review of its due process claim because it can raise it before a federal court of appeals after the administrative proceeding. If the court of appeals rules that the FTC administrative proceeding violates Axon's due process rights, it will presumably be then entitled to a trial in district court. On the other hand, if the FTC proceeding does not run afoul of due

process, then Axon's complaint is ultimately that it prefers the Department of Justice over the FTC to lead the enforcement action. But the executive branch enjoys latitude in deciding what type of enforcement action to pursue and which agency will lead it. *Cf. Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (agency's decision not to pursue enforcement is unreviewable under the APA); *Standard Oil*, 449 U.S. at 242-45 (1980) (agency's decision to enforce is unreviewable). Absent any due process concerns, the target of an enforcement action cannot dictate the choices of the executive branch.

And under the *Thunder Basin* factors, Axon's clearance process claim—which is a due process claim—falls within the statutory review scheme. First, Axon has an opportunity for judicial review at the end of the process. *See supra* pp. 11, 13-21. Even though Axon asserts that the harm from the clearance process occurred before the enforcement action began, what matters is that Axon is currently in an administrative proceeding that ultimately leads to judicial review.[11] Second, Axon's challenge to the FTC's adjudicative procedures is not "wholly collateral" to the statutory scheme because it is the "vehicle by which" it seeks to succeed at the agency proceeding. Finally, there is a stronger argument that the agency expertise factor warrants preclusion of the clearance process claim than for Axon's other claims. The FTC might have valuable insight into how the

[11] Had Axon brought its clearance process claim early in the investigation, before the enforcement proceeding began, though, Axon might have had a stronger case for district court jurisdiction, but that issue is not properly before us.

clearance process works and demonstrate that the process does in fact comport with due process, which makes such questions more like the "threshold" issues addressed in *Elgin* than allowing the agency to avoid constitutional issues be deciding the case on the substantive merits.

Thus, we find that Axon's clearance process claim, just like its other claims, is of the type Congress intended to be reviewed under the FTC Act's statutory review scheme.

CONCLUSION

We hold that Supreme Court precedent compels the preclusion of district court jurisdiction over Axon's claims. The FTC Act reflects a fairly discernible intent to preclude district court jurisdiction, and Axon can ultimately obtain meaningful judicial review of its claims before this court once the FTC administrative proceeding concludes. We AFFIRM the district court's dismissal for lack of subject matter jurisdiction.

BUMATAY, Circuit Judge, concurring in the judgment in part and dissenting in part:

Axon Enterprise, Inc., a major manufacturer of law-enforcement equipment, challenges the very existence of the Federal Trade Commission—an independent agency created by Congress—as unconstitutional. First, Axon alleges that the "clearance process" used by the FTC and the Department of Justice to divide up antitrust investigations violates due process and equal protection guarantees. Second, the company claims that the double layer of termination protection for the FTC's administrative law judges infringes on the president's Article II authority. Finally, it challenges

the constitutionality of the FTC's administrative structure, which vests it with investigative, prosecutorial, and adjudicative powers.

At first blush, this case appears to be a weighty constitutional one. Indeed, the advent of independent, administrative agencies has called on courts to test the bounds of the Constitution's defined structural limitations. But those issues are not the subject of this appeal. The district court dismissed the case for lack of jurisdiction, ruling that Axon must first raise its arguments before the FTC. So the narrow, but equally important, question before the court is whether the district court has jurisdiction to consider Axon's broad constitutional claims in the first instance.

Following Supreme Court precedent and according due respect to separation-of-powers principles, I believe the clear answer to that question—at least for some of Axon's claims—is yes. The majority holds otherwise. Although thoughtfully considering the question, my friends in the majority unfortunately rule that Axon is precluded from its day in court and instead must bring its claims to the FTC—the very agency it seeks to have declared unconstitutional. To get there, the majority misapplies Court precedent and ignores the injuries Axon is trying to vindicate. What's worse, by funneling the challenge to the FTC back to the FTC, Axon may forever be foreclosed from obtaining meaningful judicial review of its claims. For these reasons, I respectfully dissent.

I.

Congress established the FTC over 100 years ago when President Woodrow Wilson signed the Federal

Trade Commission Act into law. 38 Stat. 717 (1914). The FTC is tasked with preventing the use of "unfair methods of competition" and "unfair or deceptive acts or practices" in commerce. 15 U.S.C. §45(a)(2). The Act authorizes administrative proceedings within the agency to determine if a party is engaged in these prohibited methods, acts, or practices. *Id.* §45(b). It also empowers the FTC to issue a "cease and desist" order against an antitrust violator. *Id*. After such an order, review of the administrative adjudication is only permitted in the "appropriate court of appeals of the United States." *Id*. §45(b), (d), (g).

Although the Act is silent on this question, we must decide what role district courts play when a party—like Axon—asserts broad constitutional claims against the FTC itself. To start, it is a well-settled presumption that Congress intended subject matter jurisdiction in the district courts for all claims arising under federal law. *See Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 350-51 (1984); 28 U.S.C. §1331. To be sure, there is also a narrow exception to that presumption: sometimes Congress delegates jurisdiction exclusively to an administrative agency to consider a claim in the first instance. *See Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207 (1994). Such action effectively strips district courts of original jurisdiction over the claim. While this jurisdiction stripping is usually explicit, it may also come implicitly. *See id.* In all cases, we should favor a "narrower construction" of jurisdiction stripping over a "broader one." *ANA Int'l Inc. v. Way*, 393 F.3d 886, 891 (9th Cir. 2004).

The Supreme Court has established a two-step framework for discerning whether Congress impliedly precluded district court jurisdiction over a party's claim. *See Thunder Basin*, 510 U.S. 200. Under that precedent, district courts are impliedly precluded from exercising jurisdiction when (1) Congress's intent to make an administrative process exclusive is "fairly discernible" from the statutory scheme, and (2) the claims at issue "are of the type Congress intended to be reviewed within th[at] statutory structure." *Id.* at 207, 212 (simplified). At the second step, we consider what's known as the *Thunder Basin* factors: (1) whether the claims can be afforded "meaningful judicial review" without district court jurisdiction; (2) whether the claim is "wholly collateral" to the agency's review provisions; and (3) whether the claims are "outside the agency's expertise." *Id.* at 212-13.

In *Thunder Basin*, the Court considered whether a statutory scheme of administrative review followed by judicial review in a federal appellate court precluded district court jurisdiction over a plaintiff's statutory and constitutional claims. *Id.* at 206. The Court noted that the plaintiff's claims could be "meaningfully addressed in the Court of Appeals" and that the case therefore did "not present the 'serious constitutional question' that would arise if an agency statute were construed to preclude all judicial review of a constitutional claim." *Id.* at 215 n.20. Notably, the Court explained that an agency's statutory framework will generally not serve as a bar to district court jurisdiction over a constitutional challenge to the agency's procedures, when Congress only allows appellate review of individual determinations. *Id.* at

213 (describing *McNary v. Haitian Refugee Center, Inc.*, 498 U. S. 479 (1991)).

The Court demonstrated how to apply the *Thunder Basin* factors in two subsequent cases: *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010), and *Elgin v. Department of Treasury*, 567 U.S. 1 (2012).

In *Free Enterprise Fund*, the Court found concurrent district court jurisdiction for a claim challenging the constitutionality of an independent board's existence. 561 U.S. at 490. In that case, a plaintiff was able to bring its constitutional claim in district court because the board's statutory scheme only guaranteed judicial review of a board sanction or rule. *Id.* Such cramped judicial review wasn't enough to divest the district court's jurisdiction in the Court's view because "not every Board action is encapsulated in" an appealable order. *Id.*

Two years later, in *Elgin*, the Court determined another independent board had exclusive jurisdiction to review claims dealing with the constitutionality of—not the board itself—but of federal statutes bearing on its merits determinations. 567 U.S. at 5-6. The Court concluded the board's administrative procedures provided ample review since any merits determination was reviewed by the Federal Circuit and, thus, the constitutional issue would ultimately be adjudicated by an Article III court. *Id.* at 17.

Our circuit has also considered the dividing line between exclusive agency jurisdiction and concurrent district court jurisdiction. In a case challenging an executive agency's authority, we have held that "any examination of the constitutionality of [an agency's

power]," rather than the merits of an individual action, "should logically take place in the district courts, as such an examination is neither peculiarly within the agency's 'special expertise' nor an integral part of its 'institutional competence.'" *Mace v. Skinner*, 34 F.3d 854, 859 (9th Cir. 1994). We later concluded that plaintiffs raising "broad constitutional claims that do not require review of the merits of their individual [agency] grievances" are not precluded from bringing their challenge in the district court. *Latif v. Holder*, 686 F.3d 1122, 1129 (9th Cir. 2012) (applying *Elgin* to a Department of Homeland Security challenge); *see also Americopters, LLC v. FAA*, 441 F.3d 726, 736 (9th Cir. 2006) (allowing for district court "residual jurisdiction" when a constitutional claim for damages is not "inextricably intertwined" with an agency order).[1]

While jurisdictional questions are often complex, the lesson of these cases is straightforward: 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. On the other hand, complaints regarding the agency's application of substantive law to the merits of an

[1] The majority wrongly discards these precedents. First, I disagree that *Mace* is not controlling in light of *Thunder Basin*. Maj. Op. at 19 n.7. The majority posits no irreconcilability between the cases and so *Mace* remains binding law. *See Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (holding that precedent of this court remains binding unless it is "clearly irreconcilable" with intervening Court decisions). Second, while it is contestable whether *Latif* was a *Thunder Basin* step one or two case, I fail to see why its guidance should be ignored here.

individual case are exclusively relegated to the agency's administrative process. Accordingly, our duty should be to scrutinize each claim to determine whether it's merely an attack on a merits determination or something more existential to the agency.

The demarcation of jurisdiction along these lines most respects the separation of powers. Congress created the agency adjudicatory process precisely to apply agency expertise to the merits of individual claims. Having district court proceedings parallel to an agency's administrative proceeding amounts to a collateral attack on agency decision-making and would undermine its congressionally mandated role. *See Elgin*, 567 U.S. at 14. Thus, preserving exclusive agency jurisdiction over individualized claims furthers Congress's intent. But to the extent the claims target the agency's existence, structure, or procedures under the Constitution, rather than its merits decisions, the district court remains an appropriate forum for such action. After all, pronouncing the constitutionality of a government function is precisely the business of Article III courts.

II.

Applying the foregoing principles, Axon was entitled to bring some of its claims before the district court. The *Thunder Basin* factors demonstrate that Axon's clearance process and ALJ challenges represent "broad constitutional claims" not requiring review of the "merits of individual" agency actions. *Latif*, 686 F.3d at 1129. The district court was thus wrong to dismiss them at the outset. In contrast, Axon's claim against the FTC's adjudicatory structure,

at bottom, contests the agency's antitrust determinations and must be brought before the FTC.

A. Axon's Due Process and Equal Protection Challenge to the Clearance Process

Axon's first constitutional challenge targets the clearance process used by the FTC and the DOJ to divide their overlapping jurisdictions to review mergers and enforce antitrust laws. According to Axon, the clearance process decides if companies must answer to either the DOJ, with the prospect of a federal lawsuit in district court, or the FTC, with its administrative proceedings. Which agency has purview over an industry can mean a world of difference for the companies involved. For example, unlike federal court proceedings, the FTC's administrative hearings do not trigger the protections of the Federal Rules of Civil Procedure or Evidence. Furthermore, the FTC administrative hearings are presided over by an FTC Commissioner or ALJ rather than an impartial Article III judge. Despite the importance of the DOJ-FTC split, the clearance process is, according to Axon, a "black box" that isn't codified in any statute, rule, or regulation. Axon alleges that the clearance decision appears to be made "by a coin flip." Such an arbitrary process, Axon asserts, violates due process and equal protection under the Fifth Amendment.

Under the *Thunder Basin* factors, I would conclude that the district court has jurisdiction over this claim.[2]

1. Meaningful Review

Most fundamentally, the FTC Act provides insufficient meaningful review of Axon's clearance process claim. Not all actions the FTC takes are subject to Article III scrutiny. Indeed, the Act only provides for court of appeals review of an FTC "cease and desist" order. 15 U.S.C. §45(c). Accordingly, without a cease-and-desist order, the FTC's actions are largely immune from judicial review. Moreover, the Act limits available relief, allowing courts to grant only a "decree affirming, modifying, or setting aside [an FTC] order[.]" *Id.*

Under this statutory scheme, Axon's claim might never make it to an Article III judge. Axon challenges the very process by which cases arrive at the FTC's doorstep rather than the DOJ's. In other words, as Axon sees it, the FTC and DOJ's joint decision to subject the company to the FTC's jurisdiction is the harm in and of itself. *Cf. Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2196 (2020) (holding that a person subject to an unconstitutional agency's power suffers from a "here-and-now" injury). Under that theory of injury, Axon may not be able to meaningfully pursue its constitutional claim.

The Supreme Court has already told us that judicial review is insufficient when a statutory scheme

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[2] I limit my analysis to the second step of the *Thunder Basin* inquiry since Axon acknowledges that the FTC Act provides for exclusive agency jurisdiction over some claims.

only permits appeal of limited agency actions because not every agency action is "encapsulated" in an appealable order. *Free Enterprise Fund*, 561 U.S. at 490. Here, the interagency clearance process is similarly not necessarily "encapsulated" in a cease-and-desist order. The FTC, for instance, may decide to drop its investigation of Axon, or Axon may settle or prevail on the merits in the administrative proceedings. In such circumstances, Axon will still have been injured by the clearance process but have no cease-and-desist order to appeal its claim.[3]

Without a guaranteed vehicle for court review, Axon's only recourse is to intentionally lose before the FTC to receive any assurance of Article III adjudication of its clearance process claim. But, as the Court has said, conditioning judicial review on incursion of a harm is "tantamount to a complete denial of [judicial] review." *McNary*, 498 U.S. at 496. Indeed, parties shouldn't have to risk "severe punishment" "before testing the validity of [a] law." *Free Enterprise Fund*, 561 U.S. at 490 (simplified). As

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[3] The majority concludes that if Axon prevails on the antitrust merits, "that ends the dispute." Maj. Op. 20 n.8. I respectfully disagree. Winning on the antitrust merits does nothing to remedy Axon's *independent* injury of being subject to an unconstitutional structure or procedure. In *Free Enterprise Fund*, the agency's investigation of the plaintiff "produced no sanction;" nevertheless, the Court held that the firm was permitted to bring its constitutional challenge against the PCAOB in district court. 561 U.S. at 490. That is because "a separation-of-powers violation may create a 'here-and-now' injury" that is *independent* on the agency's merits determinations. *Id.* at 513; *see also Seila Law*, 140 S. Ct. at 2196 (recognizing the longstanding ability of "private parties aggrieved by an official's exercise of executive power to challenge the official's authority to wield that power").

a result, I see no reason why Axon must "bet the farm" to get its day in court. *Id.*[4]

Furthermore, adequate relief is a hallmark of meaningful review. *See Elgin*, 567 U.S. at 22. Here, even if Axon's claim reaches a court, the only relief afforded under the FTC Act is modification or setting aside of an FTC cease-and-desist order. 15 U.S.C. §45(c). Such relief would not be adequate to address the alleged harms of an unconstitutional clearance process. If Axon raises a valid constitutional infringement, it is entitled to relief appropriate to remedy the violation, such as injunctive or declaratory relief. *See, e.g.*, *Free Enterprise Fund*, 561 U.S. at 513 (holding that the firm was entitled to declaratory relief to ensure that it would be subject only to "a constitutional agency"). And since appellate courts "have no jurisdiction to grant … remedies" other than those provided by Congress, *Latif*, 686 F.3d at 1128, Axon could not obtain necessary relief under the Act. The Act's complete lack of appropriate remedies for Axon cuts strongly against an implied congressional intent to displace district court jurisdiction. *See Americopters*, 441 F.3d at 735 (holding that district courts have "residual jurisdiction" to hear claims against an agency when the law does not grant the

[4] The majority recognizes that *Free Enterprise Fund* requires a "guaranteed" right of appeal to receive meaningful review. Maj. Op. 20. But the majority doesn't explain how Axon obtains such review if the FTC chooses not to place Axon in administrative proceedings or issue a cease-and-desist order as is required for judicial review under the FTC Act. In such cases, the majority must concede no judicial review is possible. I believe this violates the holding of *Free Enterprise Fund*.

court of appeals jurisdiction over the appropriate form of relief).

2. Wholly Collateral

Axon's clearance claim is also "wholly collateral" to the administrative proceedings. A claim is not wholly collateral when it is the "vehicle" by which a party "seek[s] to reverse" an agency's decision. *Elgin*, 567 U.S. at 22. Here, Axon challenges the FTC's very jurisdiction to investigate any antitrust claims, not any particular FTC order or sanction. Indeed, as of the filing of Axon's complaint, the FTC had not established any antitrust violation by Axon or issued any cease-and-desist order.[5] But, as alleged by Axon, the clearance process itself injures its rights independent of any potential FTC sanctions for antitrust violations. Thus, the clearance process claim doesn't serve as a "vehicle" to reverse an agency decision. *Id.* As such, Axon's claim most resembles *Free Enterprise Fund*'s challenge to an independent

[5] The majority suggests that Axon did not act quick enough. The majority contends, if Axon filed its claims "early in the investigation," then it might have had a stronger case for district court jurisdiction. Maj. Op. 29 n.11. Such a malleable test for district court jurisdiction is seemingly unworkable. *See Elgin*, 567 U.S. at 15 (rejecting jurisdictional rules that rely on "amorphous distinctions" and "hazy" lines). After all, how "early" is early enough? Is the day before the FTC files its enforcement action enough? Two weeks before? This "early enough" test ignores Court precedent which focuses not on the timing of the claim, but on the *nature* of the claim. *See, e.g.*, *Thunder Basin*, 510 U.S. at 207 (looking to the three-factor test despite the claim being "pre-enforcement"). More fundamentally, nothing in the FTC Act suggests that Congress intended such an "early-in-the-investigation" test.

board's "existence" and is, therefore, "collateral" to any FTC merits adjudication. 561 U.S. at 490.

Moreover, there is no danger that Axon's claim is a collateral attack on an individual agency determination in disguise. Axon may still be prosecuted for its putative violation of antitrust laws, regardless of any district court litigation casting doubt on the clearance process. In other words, whether the clearance process complies with due process is wholly collateral to whether Axon committed an antitrust violation.

3. Agency Expertise

Like in *Free Enterprise Fund*, Axon's challenge to the interagency clearance process is patently "outside the Commission's competence and expertise." 561 U.S. at 491. While the FTC possesses substantial expertise in the antitrust field and historic experience with particular industries, Axon's claim doesn't implicate such expertise. Instead, it relies on principles of due process and equal protection, which are "standard questions" of constitutional law that "courts have no disadvantage handling." *Id.* (simplified). The FTC's expertise might illuminate the clearance process, its origins, and its justifications, but it can't shed particular light on whether the process satisfies due process and equal protection guarantees.

Axon's claim is unlike the one in *Elgin* where agency expertise could answer "threshold questions" that may "obviate the need to address the constitutional challenge." *Elgin*, 567 U.S. at 22-23. In *Elgin*, agency expertise was only relevant for addressing "preliminary questions" which may have demonstrated that the plaintiffs suffered *no* statutory

injury at all and disposed of the need to address the constitutional question. *Id.* But here, Axon's claim is a "question[] of administrative law," like that in *Free Enterprise Fund*, 561 U.S. at 491, which are left for courts to decide. Indeed, no FTC finding on an antitrust question could negate the injury Axon experienced from being subject to a putatively unconstitutional clearance process. In other words, the FTC's expertise on antitrust matters can't moot Axon's claimed injuries and so the constitutional question must be reached regardless of any agency's determination.

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Given that all three *Thunder Basin* factors indicate that jurisdiction stripping would be inappropriate here, I would reverse the district court's dismissal of the clearance process claim.[6]

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[6] The majority contends that it is following "every other circuit that has addressed a similar issue" in finding no district court jurisdiction over any of Axon's claims. Maj. Op. 5. First, if so, those other decisions conflict with our court's precedent. *See Mace*, 34 F.3d at 858-60; *Americopters*, 441 F.3d at 735-36; *Latif*, 686 F.3d at 1128-29. Second, I am not so sure that every other circuit agrees with the majority. The Fifth Circuit has recently granted rehearing en banc in a directly analogous case and, thus, has vacated a panel decision following the majority's reasoning. *See Cochran v. SEC*, 978 F.3d 975 (5th Cir. Oct. 30, 2020). Finally, I find the dissents in several of those cases to be more persuasive. *See Cochran v. SEC*, 969 F.3d 507, 519 (5th Cir. 2020) (Haynes, J., dissenting) (distinguishing *Elgin* and *Thunder Basin* because the parties there challenged "the constitutionality of a substantive statute that gave rise to an administrative action" rather than "the constitutional grounding of the agency overseeing the proceedings."); *Tilton v. SEC*, 824 F.3d 276, 298 (2d Cir. 2016) (Droney, J., dissenting) ("Forcing the appellants to

B. Axon's Article II Challenge to FTC's ALJs

Axon also alleges that the FTC's ALJs are unconstitutionally shielded from removal by the Executive. The FTC is headed by five Commissioners, nominated by the President and confirmed by the Senate. 15 U.S.C. §41. The President may not remove Commissioners during their seven-year terms except for "inefficiency, neglect of duty, or malfeasance in office." *Id.* In turn, the Commissioners appoint ALJs who can only be removed for good cause. *See* 5 U.S.C. §7521(a), (b)(1). Axon asserts this is an impermissible dual layer of protection from Executive control. *See* U.S. Const. art. II, §1, cl. 1, 3. In this way, Axon's claim closely mimics the Article II argument made in *Free Enterprise Fund*, 561 U.S. at 495-97 (holding that Article II forbids providing two layers of tenure protections to officers of the United States).

On initial consideration, it appears that Axon's complaint here is tied to the FTC's merits determination since it only sustains an injury upon an ALJ sanction. But on closer inspection, that's not the case. According to Axon, its injury is rooted in the violation of the separation of powers, apart from any FTC antitrust penalty. I agree that the Constitution's structural provisions "protect[] the liberty of all persons" by ensuring no government entity acts "in excess of [its] delegated governmental power." *Bond v. United States*, 564 U.S. 211, 222 (2011). Thus, when an agency violates this principle, "liberty is at stake,"

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await a final Commission order before they may assert their constitutional claim in a federal court means that by the time the day for judicial review comes, they will already have suffered the injury that they are attempting to prevent.").

id., and it "create[s] a 'here-and-now' injury," *Free Enterprise Fund*, 561 U.S. at 513. *See also Seila Law*, 140 S. Ct. at 2196 ("[W]hen [a tenure protection] provision violates the separation of powers it inflicts a 'here-and-now' injury on affected third parties that can be remedied by a court."). In other words, a government agency inflicts injury on a person whenever it subjects that person to unconstitutional authority—regardless of whether a sanction is levied by the agency. *Free Enterprise Fund*, 561 U.S. at 513. Thus, even without an FTC finding of an antitrust violation, Axon raises a cognizable injury by being made to appear before a putative unconstitutional officer.

With this understanding of Axon's ALJ challenge, its *Thunder Basin* analysis largely tracks that of the clearance process claim, and, thus, it should not have been precluded from district court jurisdiction. After all, to guarantee Article III review of its ALJ challenge, Axon would similarly have to incur the very harms it seeks to avoid. The firm would need to be subject to the ALJ, an officer it argues is unconstitutionally insulated from Executive control, and intentionally lose its case on the merits before the FTC. Only then could a cease-and-desist order issue, allowing Axon to litigate its constitutional injury before an Article III court. But if Axon prevails on the antitrust merits before the FTC, its ALJ claim will never reach a federal judge and will never be reviewed outside of the very agency it challenges. And even if Axon does reach a court, the company could not obtain injunctive or declaratory relief under the limited remedies of the FTC Act. *See* 15 U.S.C. §45(c).

The constitutionality of the FTC ALJs is also wholly collateral to the merits of Axon's alleged antitrust violation—each with distinct injuries and separate remedies. For example, an Axon victory on its ALJ claim would not be dispositive on any allegation that it violated antitrust laws. Indeed, Axon could still be prosecuted for violating antitrust laws regardless of whether the ALJs' tenure protection fails to comply with the Constitution.

Finally, as with the clearance process claim, whether the ALJs' removal protections violate Article II is a "standard question[] of administrative law," which doesn't turn on statutory questions within the FTC's expertise. *Free Enterprise Fund*, 561 U.S. at 491. For example, no amount of antitrust expertise can tell us whether ALJs must be directly removable by the President. Nor are there threshold statutory questions "squarely within" the FTC's expertise that "may obviate the need to address the constitutional challenge." *Elgin*, 567 U.S. at 22-23.

I would therefore hold that all three *Thunder Basin* factors—meaningful review, wholly collateral, and agency expertise—favor district court jurisdiction on this claim. I would reverse the district court's dismissal of Axon's Article II claim against the FTC ALJs.

C. Axon's Due Process Challenge to FTC's Investigatory, Prosecutorial, and Adjudicative Functions

Axon finally contends that the FTC's administrative adjudicatory process violates due process by combining the role of investigator, prosecutor, and adjudicator within one agency.

Although Axon cloaks this claim as one about an unconstitutional structure, at bottom, it is a complaint about the agency's individualized merits determination. So, I agree that this claim is precluded from district court review.

In Axon's view, the FTC's structure is "inherently biased." Under the FTC Act, the agency investigates antitrust violations, *see* 15 U.S.C. §57b-1; it prosecutes the enforcement action, *see* 16 C.F.R. §3.11; and then it adjudicates any appeal from an ALJ's initial decision, *id.* §3.52. Axon asserts that its structure has granted the FTC an "undisputed 100% win rate" within the administrative process for the past 25 years. As a result, Axon believes it is a "virtual certainty" that it will lose its case before the Commission, which violates due process protections.

Although Axon maintains that the FTC is unconstitutionally structured, what it really fears is the FTC determining that it violated antitrust laws. Unlike Axon's other claims, a biased adjudicatory process only injures Axon if it results in an unfavorable order. Such a loss will necessarily be encapsulated in an FTC sanction, which is directly appealable to the circuit court and can be set aside, affording Axon meaningful review and full relief. *See* 15 U.S.C. §45(c).

Since this claim falls squarely within the FTC's province and expertise and any injury flowing from the alleged constitutional violation will be guaranteed a court of appeals review, I would hold that all three *Thunder Basin* factors—meaningful judicial review, wholly collateral, and agency expertise—favor the

FTC's exclusive jurisdiction here. I thus concur in affirming the district court's dismissal of this claim.

III.

Congress established the FTC's administrative process to adjudicate the merits of antitrust enforcement actions. But Congress did not completely eliminate the district court's role in adjudicating constitutional claims against the FTC. To be sure, for some claims, when the constitutional issue is directly intertwined with the agency's individual merits decision, the agency should resolve the matter in the first instance. As Court precedent shows, Axon's claim of unconstitutional bias is one example of such a claim. But when "[p]laintiffs raise broad constitutional claims that do not require review of the merits," our precedent clearly permits parties to select their forum. *Latif*, 686 F.3d at 1129. Such is the case with Axon's constitutional claims against the clearance process and the FTC ALJs.

By forcing Axon's claims into the FTC administrative process, we effectively shut the courtroom doors to a party seeking relief from alleged constitutional infringements. Now, Axon's only recourse is to antagonize the FTC into prosecuting the enforcement proceeding against it and then lose in that forum—all the while, further subjecting the company to the harm it seeks to avoid. The FTC Act does not mandate this unfortunate result. Both the Constitution and our precedent counsel against it, too. For that reason, I respectfully dissent from the dismissal of Axon's clearance process and ALJ claims.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20-15662

AXON ENTERPRISE, INC., a Delaware corporation,

Plaintiff-Appellant,

v.

FEDERAL TRADE COMMISSION, a federal administrative agency; JOSEPH J. SIMONS; NOAH PHILLIPS; ROHIT CHOPRA; REBECCA SLAUGHTER; CHRISTINE WILSON, in their official capacities as Commissioners of the Federal Trade Commission,

Defendants-Appellees.

Filed: April 15, 2021

Before: SILER*, LEE, and BUMATAY,
Circuit Judges.

ORDER

Judge Lee voted to deny the petition for rehearing en banc, and Judge Siler recommended denying the petition for rehearing en banc. Judge Bumatay would vote to grant the petition for rehearing en banc. The

* The Honorable Eugene E. Siler, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App P. 35. The petition for rehearing en banc is DENIED.

Appendix C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV-20-00014-PHX-DWL

AXON ENTERPRISE INC.,

Plaintiff,

v.

FEDERAL TRADE COMMISSION, et al.,

Defendants.

ORDER

Filed: April 8, 2020

INTRODUCTION

Pending before the Court is Plaintiff Axon Enterprise, Inc.'s ("Axon") motion for preliminary injunction. (Doc. 15.)

Axon sells various technological tools, including body-worn cameras, to police departments. In May 2018, Axon acquired one of its competitors. This acquisition prompted the Federal Trade Commission ("FTC") to conduct an antitrust investigation. In January 2020, just as the FTC was about to initiate a formal administrative proceeding to challenge the acquisition, Axon filed this lawsuit, which seeks to enjoin the administrative proceeding based on three

constitutional claims: *first*, that the FTC's structure violates Article II of the Constitution because its commissioners are not subject to at-will removal by the President and its administrative law judges ("ALJs"), who are appointed by its commissioners, are also insulated from at-will removal; *second*, that the FTC's combined role of "prosecutor, judge, and jury" during administrative proceedings violates the Due Process Clause of the Fifth Amendment; and *third*, that the FTC and the Antitrust Division of the U.S. Department of Justice, which are both responsible for reviewing the antitrust implications of acquisitions but employ different procedures and substantive standards when conducting such review, utilize an arbitrary and irrational "clearance" process when deciding which agency will review a particular acquisition, in violation of the Equal Protection Clause of the Fifth Amendment. (Doc. 15 at 6-15.)[1]

The constitutional claims Axon seeks to raise in this case are significant and topical. Indeed, the Supreme Court recently held oral argument in a case that raises similar issues. *Seila Law LLC v. Consumer Fin. Prot. Bureau*, No. 19-7. This Court, however, is not the appropriate forum to address Axon's claims. It is "fairly discernable" from the FTC Act that Congress intended to preclude district courts from reviewing the type of constitutional claims Axon seeks to raise here—instead, Axon must raise those claims during

[1] In its reply, Axon clarifies that it "is not challenging the mere fact of concurrent jurisdiction, but rather the arbitrary way in which the agencies determine which of two vastly different (and often outcome-determinative) procedures will be applied to a particular company." (Doc. 21 at 2 n.1.)

the administrative process and then renew them, if necessary, when seeking review in the Court of Appeals. Thus, this Court lacks subject matter jurisdiction over this action, Axon's request for a preliminary injunction must be denied, and this action must be dismissed.

BACKGROUND

I. Factual Background

Axon, which was formerly known as TASER International, Inc., is a Delaware corporation that sells various technological tools, including body-worn cameras and cloud-computing software, to police departments. (Doc. 1 ¶¶ 13, 19-21; Doc. 15-2 ¶ 2.) In May 2018, Axon acquired one of its competitors, Vievu. (Doc. 1 ¶ 24.) The next month, the FTC notified Axon that it was investigating the acquisition. (*Id.* ¶ 25.) Axon cooperated with the investigation over the next 18 months. (*Id.* ¶ 26.) Axon contends that it "spent in excess of $1.6 million responding to the FTC's investigational demands, including attorney and expert fees, ESI production and related hosting and third-party vendor fees and expenses." (Doc. 15-2 at 3 ¶ 5.)

Axon contends that, at the conclusion of the investigation, the FTC gave it a choice. First, it could agree to a "blank check" settlement that would rescind its acquisition of Vievu and transfer some of its intellectual property to the newly restored Vievu. (Doc. 1 ¶ 27.) According to Axon, the FTC's "vision" was to turn Vievu into a "clone" of Axon—"something Vievu never was nor could be without impermissible government regulation." (*Id.*) Second, if Axon declined

those terms, the FTC would pursue an administrative complaint against Axon. (*Id.*)

II. Procedural History

On January 3, 2020, Axon filed this lawsuit. (Doc. 1). In its complaint, Axon outlines the factual history discussed above and alleges a violation of its Fifth Amendment rights to due process and equal protection (*id.* ¶¶ 57-60), alleges that the FTC's structure violates Article II of the Constitution (*id.* ¶¶ 61-62), and seeks a declaration that its acquisition of Vievu didn't violate any antitrust laws (*id.* ¶¶ 63-69).

Also on January 3, 2020 (but later that day), the FTC filed an administrative complaint challenging Axon's acquisition of Vievu. (Doc. 15 at 2 n.1.) An evidentiary hearing in the administrative proceeding was originally scheduled for May 19, 2020. (Doc. 22 at 2.) That hearing has now been continued until late June 2020.

On January 9, 2020, Axon filed a motion for a preliminary injunction, seeking to enjoin further FTC proceedings against it. (Doc. 15.)

On January 23, 2020, the FTC filed an opposition to Axon's motion. (Doc. 19.) The FTC relegated the merits of Axon's constitutional claims to a footnote and instead focused on whether the Court possesses subject matter jurisdiction. (Doc. 19 at 1, 14 n.12).

On January 30, 2020, Axon filed a reply. (Doc. 21.) That same day, Axon filed a motion for expedited consideration. (Doc. 22.) Over the FTC's opposition (Doc. 23), the Court granted the motion and scheduled oral argument for April 1, 2020. (Doc. 24.)

On March 10, 2020 the Court issued a tentative order. (Doc. 29.)

On March 27, 2020, the New Civil Liberties Alliance ("NCLA") filed a motion for leave to submit an amicus brief in support of Axon. (Doc. 32.) That motion was granted. (Doc. 33.)

On April 1, 2020, the Court heard oral argument. (Doc. 39.)[2]

On April 2, 2020, Axon supplemented the record by filing certain documents generated during the administrative proceeding. (Doc. 40.)

ANALYSIS

"Subject-matter limitations on federal jurisdiction serve institutional interests. They keep the federal courts within the bounds the Constitution and Congress have prescribed." *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999). "[C]ourts have an 'independent obligation' to police their own subject matter jurisdiction." *Animal Legal Def. Fund v. U.S. Dep't of Agric.*, 935 F.3d 858, 866 (9th Cir. 2019) (citation omitted). *See also* Fed. R. Civ. Proc. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.").

In general, district courts "have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

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[2] Due to the COVID-19 pandemic, the Court allowed counsel for the FTC and NCLA to attend the hearing telephonically. (Docs. 31, 34.) Additionally, the Court allowed media organizations and members of the public to listen to the hearing telephonically. (Doc. 37.)

28 U.S.C. §1331. This includes the authority to "declare the rights and other legal relations of any interested party seeking such a declaration." *Id.* §2201. "This grant of jurisdiction, however, is not absolute." *Kerr v. Jewell*, 836 F.3d 1048, 1057 (9th Cir. 2016). Among other things, Congress can "preclude[] district court jurisdiction" over claims pertaining to the conduct of an administrative agency by creating a review framework that evinces a "fairly discernable" intent to require such claims "to proceed exclusively through the statutory review scheme." *Id.* at 1057-58 (citation omitted). *See also Bennett v. SEC*, 844 F.3d 174, 178 (4th Cir. 2016) ("Congress can … impliedly preclude jurisdiction by creating a statutory scheme of administrative adjudication and delayed judicial review in a particular court.").

The issue here is whether Congress, by enacting the FTC Act, intended to require constitutional challenges to the FTC's structure and processes to be brought via the FTC Act's adjudicatory framework. If so, this Court lacks subject matter jurisdiction to entertain Axon's claims.

I. Background Law

On three occasions between 1994 and 2012, the Supreme Court addressed whether Congress's enactment of a scheme of administrative adjudication should be interpreted as an implicit decision by Congress to preclude district court jurisdiction. Although none of those decisions involved the FTC Act, they control the analysis here. *Cf. Bennett*, 844 F.3d at 178-81 (identifying these cases as "the trilogy").

The first decision, *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), addressed the preclusive effect of the Federal Mine Safety and Health Amendments Act of 1977 ("Mine Act"). Thunder Basin, a coal company, objected to a Mine Act regulation that required it to post the names of certain union representatives. *Id.* at 203-04. Rather than seek review of the regulation through the Mine Act's judicial-review scheme, which contemplates that "[c]hallenges to enforcement [will be] reviewed by the Federal Mine Safety and Health Review Commission … and by the appropriate United States court of appeals," Thunder Basin filed a lawsuit in federal district court in which it argued that the Mine Act's review scheme violated its due process rights under the Fifth Amendment. *Id.* at 204-06. The district court issued an injunction in Thunder Basin's favor but the Supreme Court reversed, concluding that the district court lacked subject matter jurisdiction over the action. *Id.* at 205-07.

The Court held that when a statutory scheme, such as the Mine Act, "allocate[s] initial review to an administrative body" and authorizes only "delayed judicial review," courts must analyze three factors—(1) "the statute's language, structure, and purpose," (2) "its legislative history," and (3) "whether the claims can be afforded meaningful review"—when assessing whether Congress's intent to "preclude initial judicial review" can be "fairly," if impliedly, "discerned" from the statutory scheme. *Id.* at 207. The Court then analyzed these factors and concluded that all three supported a finding of preclusion.

First, the Court noted that the Mine Act creates a "detailed structure" for regulated parties to seek review of enforcement activity under the Act—a mine operator is entitled to challenge an adverse agency order before an ALJ, then seek review of the ALJ's order before the Federal Mine Safety and Health Review Commission, and then, if necessary, seek review of any adverse decision by the Commission in a federal Court of Appeals. *Id.* at 207-08. This structure, the Court concluded, "demonstrates that Congress intended to preclude challenges such as the present one." *Id.* at 208. The Court also noted that the Mine Act contains provisions that enable the Secretary of Labor (who is responsible for enforcing the Mine Act) to file an action in district court when seeking certain types of relief. *Id.* at 209. Because "[m]ine operators enjoy no corresponding right," the Court concluded these provisions served as further proof of Congress's intent to preclude. *Id.*

Second, the Court stated that "[t]he legislative history of the Mine Act confirms this interpretation." *Id.* at 209-11.

Third, the Court addressed whether a finding of preclusion would result, "as a practical matter," in the elimination of Thunder Basin's ability "to obtain meaningful judicial review" of its claims. *Id.* at 213 (quotation omitted). The Court concluded that no such risk was present because Thunder Basin's "statutory and constitutional claims … can be meaningfully addressed in the Court of Appeals." *Id.* at 215. In reaching this conclusion, the Court observed that "[t]he Commission has addressed constitutional questions in previous enforcement proceedings" but

clarified that, "[e]ven if this were not the case," the availability of eventual review by an appellate court was sufficient. *Id.*

The second component of the trilogy, *Free Enterprise Fund v. Public Co. Accounting Oversight Bd*, 561 U.S. 477 (2010), addressed the preclusive effect of the Sarbanes-Oxley Act of 2002 ("the Sarbanes–Oxley Act") and its interaction with the Securities Exchange Act. Among other things, the Sarbanes–Oxley Act created an entity called the Public Company Accounting Oversight Board ("PCAOB"), which was tasked with providing "tighter regulation of the accounting industry." *Id.* at 484. The PCAOB was composed of five members who were appointed by the Securities and Exchange Commission ("the Commission"). *Id.* The PCAOB's broad regulatory authority included enforcing not only the Commission's rules, but also "its own rules," and it possessed the authority to "issue severe sanctions in its disciplinary proceedings, up to and including the permanent revocation of a firm's registration, a permanent ban on a person's associating with any registered firm, and money penalties of $15 million." *Id.* at 485.

The plaintiff in *Free Enterprise Fund* was a Nevada accounting firm that been investigated by the PCAOB and then criticized in a report issued by the PCAOB. *Id.* at 487. In a lawsuit filed in federal district court, the accounting firm argued that the PCAOB's structure was unconstitutional because its board members, as well as the Commission members who appointed them, were shielded from Presidential control. *Id*. The district court concluded it had subject

matter jurisdiction over the lawsuit but rejected the accounting firm's constitutional claim on the merits. *Id.* at 488. The Supreme Court reversed, agreeing with the district court's jurisdictional analysis but concluding that, on the merits, the PCAOB's structure was unconstitutional.

When addressing the jurisdictional issue, the Court cited *Thunder Basin* as supplying the relevant standards but concluded that, under those standards, jurisdiction was not precluded. *Id.* at 489-91. Central to the Court's analysis was the fact that the relevant adjudicatory framework didn't provide for judicial review over all of the PCAOB's activities. Specifically, the Commission was only empowered "to review any [PCAOB] rule or sanction." *Id.* at 489. Commission action, in turn, could receive judicial review under 15 U.S.C. §78y. *Id.* This structure was underinclusive, the Court stated, because it "provides only for judicial review of *Commission* action, and not every Board action is encapsulated in a final Commission order or rule." *Id.* Put another way, the Court did "not see how [the accounting firm] could meaningfully pursue [its] constitutional claims" because the conduct it wished to challenge (*e.g.,* the PCAOB's release of the critical report) "is not subject to judicial review." *Id.* at 489-90. Thus, the Court concluded that Congress did not intend to "strip the District Court of jurisdiction over these claims." *Id.* at 491.

The final component of the trilogy, *Elgin v. Dep't of Treasury*, 567 U.S. 1 (2012), addressed the preclusive effect of the Civil Service Reform Act of 1978 ("CSRA"). The CSRA is a "comprehensive system for reviewing personnel action taken against federal

employees." Id. at 5 (quotation omitted). Under the CSRA, an employer seeking to terminate (or pursue certain other adverse employment actions against) a covered employee must provide notice, representation, an opportunity to respond, and a reasoned decision. Id. at 5-6. An employee who disagrees with the agency's decision may seek review by the Merit Systems Protection Board ("MSPB"). Id. at 6. And an employee who disagrees with the MSPB's decision may seek judicial review in the Federal Circuit. Id.

In *Elgin*, a male employee was terminated because he hadn't registered with the Selective Service. *Id.* at 6-7. The employee appealed to the MPSB, arguing that the statute requiring men (but not women) to register with the Selective Service is unconstitutional, but the employee didn't seek further review in the Federal Circuit after the MSPB rejected his claim—instead, he (and others) filed a lawsuit in federal district court raising the same constitutional challenge and requesting various forms of equitable relief, including reinstatement. *Id.* The district court concluded it had jurisdiction to resolve the constitutional claim but the Supreme Court reversed, holding that "the CSRA precludes district court jurisdiction over petitioners' claims even though they are constitutional claims for equitable relief." *Id.* at 8.

The Court began by reaffirming that, under *Thunder Basin*, "the appropriate inquiry" when evaluating whether Congress intended to preclude district court jurisdiction "is whether it is 'fairly discernible' from the [statute] that Congress intended [litigants] to proceed exclusively through the statutory review scheme, even in cases in which the [litigants]

raise constitutional challenges to federal statutes." *Id.* at 8-10. Next, the Court "examined the CSRA's text, structure, and purpose." *Id.* at 10-11. After discussing the various forms of review available under the statute, the Court concluded that "[g]iven the painstaking detail with which the CSRA sets out the method for covered employees to obtain review of adverse employment actions, it is fairly discernible that Congress intended to deny such employees an additional avenue of review in district court." *Id.* at 11-12. The Court also noted that the CSRA expressly allows employees to assert one particular type of claim in federal district court. *Id.* at 13 (citing 5 U.S.C. §7702(b)(2)). The existence of this provision, the Court stated, "demonstrates that Congress knew how to provide alternative forums for judicial review based on the nature of an employee's claim. That Congress declined to include an exemption … for challenges to a statute's constitutionality indicates that Congress intended no such exception." *Id.*

The Court also addressed whether a preclusion finding would effectively "foreclose all meaningful judicial review" of the plaintiffs' constitutional claim. *Id.* at 15-21 (citing *Free Enterprise Fund*, 561 U.S. at 489). The Court concluded that such a risk was not present, even though "the MSPB has repeatedly refused to pass upon the constitutionality of legislation," because the Federal Circuit, "an Article III court fully competent to adjudicate [constitutional] claims," could address those constitutional claims during the final stage of the statutory review process. *Id.* at 16-18. The Court also rejected the notion that the Federal Circuit would be hamstrung by an inadequately developed record when conducting this

review, explaining that "[e]ven without factfinding capabilities, the Federal Circuit may take judicial notice of facts relevant to the constitutional question" and noting that "we see nothing extraordinary in a statutory scheme that vests reviewable factfinding authority in a non-Article III entity that has jurisdiction over an action but cannot finally decide the legal question to which the facts pertain." *Id.* at 19-21.

II. Whether It Is "Fairly Discernable" From The FTC Act That Congress Intended To Preclude District Court Jurisdiction Over Axon's Constitutional Challenges

With this backdrop in mind, the Court will turn to the FTC Act. Nothing in the FTC Act expressly divests district courts of jurisdiction to entertain constitutional claims of the sort raised by Axon in this action, but *Thunder Basin*, *Free Enterprise Fund*, and *Elgin* all recognize that Congress may implicitly preclude such jurisdiction through the enactment of an administrative review scheme. The question here is whether such intent is "fairly discernable" from the FTC Act. *Thunder Basin*, 510 U.S. at 207 (citation omitted).

A. Text, Structure, And Purpose Of The FTC Act

Under *Thunder Basin* and its progeny, the first factor to consider when assessing "[w]hether a statute is intended to preclude initial judicial review" is "the statute's language, structure, and purpose." Thunder Basin, 510 U.S. at 207. This factor strongly supports a finding of preclusion in this case.

The text and structure of the FTC Act closely resemble those of the Mine Act, which was the statutory scheme at issue in *Thunder Basin*. The FTC Act sets out a detailed scheme for preventing the use of unfair methods of competition. 15 U.S.C. §45(a)-(b). Additionally, the FTC Act's enforcement provisions create timelines and mechanisms for adjudicating alleged violations that are similar to those outlined in the Mine Act. *Compare* 15 U.S.C. §45(b) *with* 30 U.S.C. §815. Finally, and most important, the FTC Act's judicial review process is similar to the Mine Act's, up to and including conferring "exclusive jurisdiction" upon the relevant Court of Appeals to affirm, modify, or set aside final agency orders. *Compare* 15 U.S.C. §45(c)-(d) *with* 30 U.S.C. §816(a). In *Thunder Basin*, the Supreme Court held that this type of "detailed structure" suggested "that Congress intended to preclude challenges such as the present one." 510 U.S. at 208. Similarly, in *Elgin*, the Supreme Court held when a statutory scheme sets out in "painstaking detail" the process for aggrieved parties to obtain review of adverse decisions, "it is fairly discernible that Congress intended to deny such employees an additional avenue of review in district court." 567 U.S. at 11-12. The FTC Act has a "detailed structure" that includes "painstaking detail" concerning how to seek review, so the same inference arises here. *Cf. Hill v. SEC*, 825 F.3d 1236, 1242 (11th Cir. 2016) (concluding that a review scheme "materially indistinguishable" from that in *Thunder*

Basin demonstrated congressional intent to preclude district court jurisdiction).[3]

The FTC Act also contains a provision authorizing the FTC (but not regulated parties) to file a lawsuit in federal district court. *See* 15 U.S.C. §53(a) (authorizing the FTC to "bring suit in a district court of the United States" when certain conditions are satisfied). In *Thunder Basin*, the Supreme Court stated that an inference of preclusive effect arose because the Mine Act allowed the Secretary of Labor to file certain claims in district court but "[m]ine operators enjoy no corresponding right." 510 U.S. at 209. *See also Elgin*, 567 U.S. at 13 (provision allowing employees to file claims in district court showed that "Congress knew how to provide alternative forums for judicial review based on the nature of an employee's claim. That Congress declined to include an exemption … for challenges to a statute's constitutionality indicates that Congress intended no such exception."). So, too, here.

Finally, the purpose of the FTC Act suggests that Congress intended to preclude district court jurisdiction. Congress intended the FTC to act as a successor to the Interstate Commerce Commission and enforce "its broad mandate to police unfair business conduct." *FTC v. AT&T Mobility LLC*, 883 F.3d 848, 854 (9th Cir. 2018). To that end, "Congress deliberately gave the FTC broad enforcement powers."

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[3] In its reply, Axon points out several ways in which the text, structure, and purpose of the FTC Act arguably differ from the text, structure, and purpose of the CSRA. (Doc. 21 at 4-5.) However, Axon does not attempt to make such a showing with respect to the Mine Act.

Id. This is similar to the Mine Act's purpose of "strengthen[ing] and streamlin[ing] health and safety enforcement requirements," *Thunder Basin*, 510 U.S. 221, as well as the CSRA's purpose of introducing an "integrated scheme of administrative and judicial review" to "replace an outdated patchwork of statutes and rules," *Elgin*, 567 U.S. at 13-14 (citation omitted). In other words, where Congress acts to introduce a statutory scheme that brings order from chaos, it indicates that Congress intended to preclude district court jurisdiction. The FTC Act was such an attempt.[4]

…

…

B. Legislative History Of The FTC Act

Thunder Basin suggests the second relevant preclusion factor is the underlying statute's legislative history. 510 U.S. at 207. However, Justice Scalia, joined by Justice Thomas, issued a concurring opinion

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[4] This conclusion is bolstered by the slate of recent cases concluding that the SEC's authorizing legislation precludes district court jurisdiction over constitutional challenges to the SEC's structure. *See, e.g., Bennett*, 844 F.3d at 181-82; *Hill*, 825 F.3d at 1242-1245; *Tilton v. SEC*, 824 F.3d 276, 282-81 (2d Cir. 2016); *Jarkesy v. SEC*, 803 F.3d 9, 16-17 (D.C. Cir. 2015); *Bebo v. SEC*, 799 F.3d 765 (7th Cir. 2015). Although those decisions are not binding here, their logic is persuasive. The review provisions of the FTC Act are "materially indistinguishable," *Hill*, 825 F.3d at 1242, and "nearly identical," *Jarkesy*, 803 F.3d at 16, to those contained in 15 U.S.C. § 78y, which itself resembles the review provisions in the Mine Act. Thus, the Court is not persuaded by the NCLA's colorful argument that *Bennett, Hill, Tilton*, *Jarkesy,* and *Bebo* were all wrongly decided and this Court should not "follow the herd of courts off the cliff in disregarding the jurisdictional significance of *Free Enterprise*." (Doc. 32-2 at 21.)

in *Thunder Basin* objecting to the consideration of legislative history as part of the preclusion analysis, stating that such consideration only "serve[d] to maintain the illusion that legislative history is an important factor in this Court's deciding of cases, as opposed to an omnipresent makeweight for decisions arrived at on other grounds." *Id.* at 219 (Scalia, J., concurring).

The Supreme Court's subsequent decisions in this area, *Free Enterprise Fund* and *Elgin*, did not address (much less focus on) legislative history, and the Supreme Court has issued subsequent opinions in other contexts that reject the use of legislative history as a legitimate interpretative tool. *See, e.g., Epic Sys. Corp. v. Lewis*, 138 S.Ct. 1612, 1631 (2018) ("[L]egislative history is not the law. It is the business of Congress to sum up its own debates in its legislation, and once it enacts a statute [w]e do not inquire what the legislature meant; we ask only what the statute means.") (citations and internal quotation marks omitted). Thus, it is unclear whether this portion of *Thunder Basin* retains validity. Indeed, the FTC does not mention legislative history in its response brief (Doc. 19) and Axon barely mentions it its reply (Doc. 21 at 4 [criticizing the FTC for failing to "point to legislative history for the FTC Act that is similar to the CSRA's"]).

In any event, to the extent legislative history remains a relevant consideration, and to the extent it is possible to draw any meaningful conclusions from the FTC Act's legislative history (which the Court doubts), it tends to support the inference that Congress sought to preclude district court jurisdiction

over the type of claims presented here. Judicial review of final, and only final, FTC actions was a component of the FTC Act from its earliest iterations. *See* Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 Antitrust L. J. 1, 4 (2003). The debate focused on the breadth of judicial review and settled on the standard contained in §45 to this day: deference to the FTC's findings of fact, but otherwise silent. *Id.* at 5, 76-77, 80 (discussing the FTC Act's proponents' "essential faith in the workings of a commission"), 90-92. It does not appear Congress ever considered amending the FTC Act to route complaints through any process other than administrative proceedings. *Id.*

C. Availability Of Meaningful Review And Associated Considerations

In *Thunder Basin*, the Supreme Court identified the third preclusion factor as "whether the claims can be afforded meaningful review" and then addressed—in the portion of the opinion concerning this factor—whether the claims were "wholly collateral" to the statute's review provisions and whether the claims fell outside the agency's expertise. 510 U.S. at 207, 212-15. However, in both *Elgin* and *Free Enterprise Fund*, the Supreme Court seemed to frame the third factor as a conjunctive, three-part test involving consideration of (1) whether a finding of preclusion would foreclose all meaningful judicial review; (2) whether the suit is "wholly collateral" to a statute's review provisions; and (3) whether the claims are "outside the agency's expertise." *Elgin*, 567 U.S. at 15-16; *Free Enterprise Fund*, 561 U.S. at 489-90. It is

therefore unclear whether these are distinct factors or simply different ways of addressing the same thing.

Although the Ninth Circuit has not resolved this issue, other appellate courts have recognized its "unsettled" nature and concluded that "the most critical thread in the case law is … whether the plaintiff will be able to receive meaningful judicial review without access to the district courts." *Bebo,* 799 F.3d at 774. *See also Hill*, 825 F.3d at 1245 ("We agree with the Second and Seventh Circuits that the first factor—meaningful judicial review—is 'the most critical thread in the case law.'") (citation omitted). The Court agrees and will follow the same approach here.

1. Availability Of Meaningful Review

Axon's overarching argument is that this case "is materially indistinguishable" from *Free Enterprise Fund* and that "the FTC Act affords no meaningful review of Axon's claims outside this lawsuit." (Doc. 21 at 2-5.) This argument is unavailing.

As noted, *Free Enterprise Fund* focused on the fact that the PCAOB could engage in some forms of regulatory activity, including the issuance of reports, that were effectively immune from judicial review due to a mismatch in the administrative review scheme—the SEC could only review a "rule or sanction" promulgated by the PCAOB, "and not every Board action is encapsulated in a final Commission order or rule." 561 U.S. at 489.

This sort of mismatch is not present under the FTC Act, at least with respect to the constitutional

claims Axon seeks to raise here.[5] Fundamentally, Axon believes the FTC shouldn't be allowed to investigate or challenge its acquisition of Vievu. Yet these are claims that Axon can present during the pending administrative proceeding—indeed, Axon has now presented them[6]—and then renew, if necessary, when seeking review of the FTC's final cease-and-desist order in a federal appellate court. Critically, Axon acknowledges that it "could, in theory, raise its constitutional claims on appeal from an adverse Commission order" and merely argues that the availability of such review "is irrelevant" because "the Commission rules do not allow Axon to depose the DOJ officials who participated in the clearance process without first getting the permission of the FTC-appointed ALJ" and "there will be no guarantee of an administrative record that will allow a reviewing court to decide those claims." (Doc. 21 at 7-8.) But these are essentially the same arguments the Supreme Court rejected in *Thunder Basin* and *Elgin*, which hold that the eventual availability of review in a federal appellate court—even if preceded by litigation before administrative bodies that refused to

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[5] During oral argument, Axon emphasized that the Court must conduct an independent preclusion analysis as to each of its three constitutional claims. The Court has done so and concludes, for the reasons discussed below, that Axon may obtain meaningful review of each claim through the FTC's administrative framework, that none of the three claims is wholly collateral to the FTC Act's review provisions, and that the FTC's agency expertise could be brought to bear on each claim.

[6] S*ee* FTC Doc. No. D9389, Answer and Defenses of Respondent Axon Enter. Inc., Affirmative Defenses 14-18. This document is available here.

consider or develop the constitutional claims—is sufficient. *Thunder Basin*, 510 U.S. at 213-15 (finding of preclusion warranted because Thunder Basin's "statutory and constitutional claims … can be meaningfully addressed in the Court of Appeals," "[e]ven if" the agency has a track record of refusing to consider such claims during the administrative proceeding); *Elgin*, 567 U.S. at 16-21 (no risk that finding of preclusion would foreclose meaningful review, even though "the MSPB has repeatedly refused to pass upon the constitutionality of legislation," because the Federal Circuit, "an Article III court fully competent to adjudicate [constitutional] claims," could address those claims during the final stage of the statutory review process or remand to the MSPB with instructions to receive the necessary evidence).

Similarly, here, if the FTC issues an adverse decision and Axon seeks further review, the Ninth Circuit can take judicial notice of facts that bear upon Axon's constitutional claims. *Singh v. Ashcroft*, 393 F.3d 903, 905 (9th Cir. 2004) (holding that, even though a statute limited the Ninth Circuit to reviewing the administrative record, "it is nonsense to suppose that we are so cabined and confined that we cannot exercise the ordinary power of any court to take notice of facts that are beyond dispute"). And if the facts needed by the Ninth Circuit are beyond judicial notice, the FTC Act specifically provides that "the court may order such additional evidence to be taken before the [FTC] and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper." 15 U.S.C. §45(c). In other words, "there is nothing extraordinary in a

statutory scheme that vests reviewable authority in a non-Article III entity that has jurisdiction over an action but cannot finally decide the legal question to which the facts pertain." *Elgin*, 567 U.S. at 19. *See also Bank of La. v. FDIC*, 919 F.3d 916, 925-928 (5th Cir. 2019) (rejecting claim that statute did not provide for meaningful judicial review because the administrative proceedings only allowed "limited discovery").

Axon attempts to escape this conclusion by narrowly focusing on particular aspects of the FTC's conduct and arguing that those aspects are effectively immune from judicial review. For example, Axon argues that "the clearance decision, which put the FTC, rather than the DOJ, in charge of the Axon/Vievu merger," was an effectively unreviewable decision that "caused real harm before any administrative action was filed." (Doc. 21 at 6.) Axon also contends in a footnote that the mere fact of "being regulated" by the FTC is a cognizable injury. (*Id.* at 6 n.4.)

The problem with these arguments is that they are divorced from the facts of this case. Even assuming *arguendo* that a company that was investigated by the FTC for acquiring a competitor, spent money complying with the FTC's investigative demands, and ultimately persuaded the FTC not to oppose the acquisition might lack an effective mechanism for challenging the constitutionality of the FTC's investigatory effort (because there would be no administrative proceeding in which to raise those claims), Axon stands in different shoes here. It didn't file this lawsuit in mid-2018, upon the FTC's initiation of the investigation. Instead, it filed suit 18 months

later, mere hours before the FTC initiated an administrative proceeding against it (which Axon was apparently racing to the courthouse to beat). Thus, unlike the accounting firm in *Free Enterprise Fund*, which had its reputation impugned by a critical report issued by the PCAOB but could not challenge that report in any subsequent administrative proceeding, here Axon can raise (and has raised) all of its constitutional challenges, including its challenge to the clearance process, during the FTC administrative proceeding[7] and may renew those challenges when seeking review by a federal appellate court. *See* 15 U.S.C. §45(c)-(d) (an entity dissatisfied with an FTC cease-and-desist order may seek review in the court of appeals "within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business," and the appellate court thereafter has exclusive jurisdiction to "affirm,

[7] Following oral argument, Axon filed documents showing that the attorneys representing the FTC in the administrative proceeding have refused to comply with Axon's requests for discovery pertaining to the FTC/DOJ clearance process. (Doc. 40.) These documents do not alter the "meaningful review" analysis for two reasons. First, the documents only reflect the existence of a discovery dispute between counsel that has not yet been brought to the ALJ's attention. The ALJ could, at least theoretically, side with Axon and order the FTC's counsel to produce the requested discovery materials. Second, even if Axon is barred from seeking clearance-related discovery during the administrative proceeding, *Thunder Basin* and *Elgin* hold that the appellate courts' eventual ability to consider constitutional claims during the final stage of the review process and, if necessary, remand for additional fact-finding means that "meaningful review" remains available.

enforce, modify, or set aside orders of the Commission").

Axon also contends that the absence of effective judicial review is demonstrated by the fact that it (like the accounting firm in *Free Enterprise Fund*) filed this lawsuit before the initiation of administrative proceedings. (Doc. 21 at 3 & n.3.) This argument overlooks that the plaintiff in *Thunder Basin* also filed a pre-enforcement challenge, yet the Supreme Court still concluded that conferring jurisdiction upon the district court would "be inimical to the structure and purpose" of the comprehensive statutory review scheme. *Thunder Basin*, 510 U.S. at 781. *Free Enterprise Fund* did not overrule *Thunder Basin* on this point. 561 U.S. at 490-91. *See also Hill*, 825 F.3d at 1249 ("[I]t makes no difference that the Gray respondents filed their complaint in the face of an impending, rather than extant, enforcement action. The critical fact is that the Gray respondents can seek full postdeprivation relief under §78y."); *Great Plains Coop v. Commodity Futures Trading Comm'n*, 205 F.3d 353, 355 (8th Cir. 2000) ("Great Plains's complaint is an impermissible attempt to make an 'end run' around the statutory scheme. Allowing the target of an administrative complaint simply to file for an injunction in a federal district court would … allow the plaintiff to short-circuit the administrative review process and the development of a detailed factual record by the agency.").

Finally, the NCLA identifies three cases—(1) *Lucia v. SEC*, 138 S. Ct. 2044 (2018), (2) *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479 (1991), and (3) *Veterans for Common Sense v. Shinseki*, 678 F.3d 1013

(9th Cir. 2012)—as purportedly showing that district courts possess jurisdiction to resolve the sort of constitutional challenges Axon seeks to raise here (Doc. 32-2).[8] All three decisions are easily distinguishable.

In *Lucia*, the petitioner had been charged with securities law violations by the SEC. 138 S.Ct. at 2049-50. During the ensuing administrative proceeding, Lucia sought to raise a constitutional challenge—he argued the SEC ALJ presiding over his case hadn't been appointed in the manner required by the Appointments Clause of Article II of the Constitution. *Id.* This challenge went nowhere during the administrative proceeding (which resulted in the imposition of a $300,000 fine and a lifetime ban from the securities industry), but Lucia renewed it when seeking review by the D.C. Circuit (which also rejected it) and again when seeking review in the Supreme Court. *Id.* at 2050-51. The Supreme Court agreed with Lucia on the merits of his Appointments Clause claim, *id.* at 2051-55, and then stated that "[t]he only issue left is remedial." *Id.* at 2055. Because Lucia had raised a "timely challenge" by "contest[ing] the validity of [the ALJ's] appointment before the Commission, and continued pressing that claim in the Court of Appeals and [the Supreme Court]," the Court concluded he was entitled to a new hearing before a different, properly-appointed ALJ. *Id.* at 2055-56.

It is curious that the NCLA views *Lucia* as supporting Axon's jurisdictional claims. Unlike Axon,

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[8] Axon did not cite *Lucia* or *Shinseki* in its motion or reply but did include one citation to *McNary*. (Doc. 15 at 11.)

the petitioner in *Lucia* didn't file a preemptive lawsuit in federal court when he learned the SEC would be pursuing an administrative proceeding against him. Instead, he raised his constitutional claims during the administrative proceeding and then renewed them when seeking review of the agency's final decision in an appellate court. Indeed, the Supreme Court identified his conscientious compliance with the requirements of the administrative-review scheme as a reason why he was entitled to relief. Although Lucia and his counsel may, understandably, view the relief that was ultimately granted in *Lucia* as less-than-meaningful in practice,[9] the *Lucia* decision itself—to the extent it says anything about implicit preclusion—tends to reaffirm the Supreme Court's holdings in *Thunder Basin* and *Elgin* that eventual review in an appellate court is meaningful review.

Next, in *McNary*, a group of undocumented aliens filed an action in district court asserting that the Immigration and Naturalization Service had committed a pattern and practice of constitutional violations when administering a particular immigration benefit program. 498 U.S. at 483-84. The question presented in *McNary* was whether section

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[9] The NCLA, which "now represents Ray Lucia," argues that his "odyssey belies blithe statements that eventual, possible appellate review is 'meaningful review' for [a claim alleging] a defect in the tribunal itself." (Doc. 32-2 at 14.) Likewise, Axon's counsel stressed during oral argument that a years-long administrative and appellate process that might result in a redo of the entire process couldn't possibly amount to meaningful review. Although the Court doesn't discount these sentiments, they find no support in *Lucia*, *Elgin*, and *Thunder Basin*, which the Court must follow.

210(e) of the Immigration and Nationality Act ("INA"), "which bars judicial review of individual determinations except in deportation proceedings, also forecloses this general challenge to the INS'[s] unconstitutional practices." *Id.* at 491. The Supreme Court concluded the district court possessed jurisdiction over the pattern-and-practice lawsuit because: (1) the plain language of section 210(e) only barred jurisdiction over lawsuits challenging "the denial of an individual application" and thus did not, by implication, encompass "general collateral challenges to unconstitutional practices and policies used by the agency in processing applications" (*id.* at 491-92): (2) the statute also contained a provision requiring appellate courts to limit their review to the administrative record, yet the type of administrative record created in an individual case[10] would be meaningless in a pattern-and-practice case (*id.* at 492-94); and (3) Congress could have mirrored "more expansive" language from other statutes, so its choice to use narrower language in section 210(e) was suggestive of an intent to allow the plaintiffs' claim to proceed (*id.* at 494). Additionally, the Court noted:

> [B]ecause there is no provision for direct judicial review of the denial [of the requested benefit] … unless the alien is later apprehended and deportation proceedings are initiated, most aliens denied [the

[10] Specifically, that record would "consist[] solely of a completed application form, a report of medical examination, any documents or affidavits that evidence an applicant's agricultural employment and residence, and notes, if any, from [a Legalization Office] interview." *Id.* at 493.

> requested benefit] can ensure themselves review in courts of appeals only if they voluntarily surrender themselves for deportation. Quite obviously, that price is tantamount to a complete denial of judicial review for most undocumented aliens.

Id. at 496-97.

There are at least four reasons why this case is different from, and not controlled by, *McNary*. First, because *McNary* addressed whether an affirmative jurisdiction-stripping statute encompassed a certain type of claim, the Court performed a textual analysis that turned on the wording of the statutory provision in question.[11] Here, the question isn't whether Axon's claims fall within some provision of the FTC Act that attempts to strip district courts of jurisdiction over certain categories of claims. Instead, the question is whether the existence of the regulatory scheme itself evinces an implicit judgment by Congress that district court jurisdiction should be precluded. Second, and in a related vein, *McNary* was decided before *Thunder Basin*, *Free Enterprise Fund*, and *Elgin*, which are the key cases addressing the topic of implicit preclusion. To the extent there is any conflict between *McNary* and the trilogy, the later-decided cases control. Third, the appellate-review provisions of section 210(e) of the INA and the FTC Act are materially different—the former requires appellate courts to limit their review

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[11] The provision at issue in *McNary*, codified at 8 U.S.C. § 1160(e)(1), provides: "There shall be no administrative or judicial review of a determination respecting an application for adjustment of status under this section except in accordance with this subsection."

to the administrative record while the latter specifically allows appellate courts to remand for additional fact-finding.[12] *Cf. Elgin*, 567 U.S. at 21 n.11 (distinguishing *McNary* because it involved "a statutory review scheme that provided no opportunity for the plaintiffs to develop a factual record relevant to their constitutional claims before the administrative body and then restricted judicial review to the administrative record created in the first instance," whereas "the CSRA review process is not similarly limited"). Fourth, and finally, an adverse jurisdictional ruling in *McNary* would have required the plaintiffs to voluntarily surrender for deportation in order to pursue their claims. Axon, in contrast, does not have to "bet the farm" to obtain review—it can raise its constitutional claims during the existing administrative proceeding. *See, e.g., Jarkesy*, 803 F.3d at 20-21 (distinguishing *McNary* on this ground); *Bebo*, 799 F.3d at 775 n.3 (same).

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[12] *Compare* 8 U.S.C. § 1160(e)(3)(B) ("Such judicial review shall be based solely upon the administrative record established at the time of the review by the appellate authority and the findings of fact and determinations contained in such record shall be conclusive unless the applicant can establish abuse of discretion or that the findings are directly contrary to clear and convincing facts contained in the record considered as a whole.") *with* 15 U.S.C. § 45(c) ("If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper.").

Last, in *Shinseki*, the plaintiffs brought a class action against the Department of Veterans Affairs ("VA"), arguing that "the VA's handing of mental health care and service-related disability claims deprives [the plaintiffs] of property in violation of the Due Process Clause of the Constitution and violates the VA's statutory duty to provide timely medical care and disability benefits." 678 F.3d at 1017. The Ninth Circuit addressed whether "the Veterans' Judicial Review Act ['VJRA'] … deprives us of jurisdiction over these claims." *Id.* at 1019. The court explained:

> [T]he VJRA supplies two independent means by which we are disqualified from hearing veterans' suits concerning their benefits. First, Congress has expressly disqualified us from hearing cases related to VA benefits in [38 U.S.C.] §511(a) … and second, Congress has conferred exclusive jurisdiction over such claims to the Veterans Court and the Federal Circuit.

Id. at 1022-23. With this backdrop in mind, the court concluded the district court lacked jurisdiction over the plaintiffs' first two claims, which related to mental health care (*id.* at 1026-28) and disability benefit claims (*id.* at 1028-32). However, with respect to the plaintiffs' final claim—a constitutional challenge to the procedures employed by VA regional offices—the court concluded it fell outside the VJRA's jurisdiction-stripping provision because (1) as a textual matter, section 511(a) only precludes judicial review of "'decisions' affecting the provision of benefits to any individual claimants," yet the plaintiffs "do[] not challenge decisions at all. A consideration of the

constitutionality of the procedures in place, which frame the system by which a veteran presents his claims to the VA, is different than a consideration of the decisions that emanate through the course of the presentation of those claims"; and (2) "the VJRA does not provide a mechanism by which the organizational plaintiffs here might challenge the absence of system-wide procedures, which they contend are necessary to afford due process. … Because [the plaintiffs] would be unable to assert [their] claim in the review scheme established by the VJRA, that scheme does not operate to divest us of jurisdiction." *Id.* at 1033-35 (internal citation omitted).

Shinseki is distinguishable for many of the same reasons as *McNary*. It addressed whether an affirmative jurisdiction-stripping statute should, as a textual matter, be construed to encompass a particular type of claim and emphasized that an adverse ruling would effectively preclude the plaintiffs from ever raising their claim. Here, the question is whether the FTC Act evinces an implied intent to preclude district court jurisdiction and an adverse ruling wouldn't preclude Axon from raising its claims—it has already done so in the pending administrative proceeding and can renew them, if necessary, when seeking review in appellate court.

2. Wholly Collateral

The next consideration is whether the claim is "wholly collateral" to the statute's review provisions. Unfortunately, "the reference point for determining whether a claim is 'wholly collateral' is not free from ambiguity." *Bennett*, 844 F.3d at 186. "Neither *Elgin*

nor *Free Enterprise Fund* clearly defines the meaning of 'wholly collateral.'" *Bebo*, 799 F.3d at 773.

Since *Elgin*, courts seeking to assess whether a claim is "wholly collateral" have taken two approaches. *Bebo,* 799 F.3d at 773-74. First, some courts have looked to "the relationship between the merits of the constitutional claim and the factual allegations against the plaintiff." *Id.* at 773. These courts have taken their cue from *Free Enterprise Fund*, which concluded that the accounting firm's claims were "wholly collateral" because they were unrelated to "any … orders or rules from which review might be sought." 561 U.S. at 489-491. As a result, these courts have concluded that a claim is wholly collateral if the basis for the claim would exist regardless of the merits decision of the agency. *Hill v. SEC*, 114 F. Supp. 3d 1297, 1309 (N.D. Ga. 2015) ("What occurs at the administrative proceeding and the SEC's conduct there is irrelevant to this proceeding which seeks to invalidate the entire statutory scheme."); *Duka v. SEC*, 103 F. Supp. 3d 382, 391 (S.D.N.Y. 2015) ("Similarly, [plaintiff] contends that her Administrative Proceeding may not constitutionally take place, and she does not attack any order that may be issued in her administrative proceeding relating to the outcome of the SEC action.") (internal quotations omitted); *Gupta v. SEC*, 796 F. Supp. 2d 503, 513 (S.D.N.Y. 2011) ("These allegations … would state a claim even if Gupta were entirely guilty of the charges made against him in the OIP."). Notably, these courts have either been directly overruled or had their holdings called into serious doubt. *Hill*, 825 F.3d at 1252; *Tilton*, 824 F.3d at 291.

Second, other courts have looked to *Elgin* when evaluating the meaning of "wholly collateral." *Bebo*, 799 F.3d at 774. These courts seize on *Elgin*'s conclusion that the claims in that case were not wholly collateral because they were "the vehicle by which [plaintiffs] seek to reverse the removal decision, to return to federal employment, and to receive compensation." 567 U.S. at 22. The Courts of Appeals that have chosen between these two approaches have unanimously favored the second approach. Bennett, 844 F.3d at 187 ("However, we think the second reading is more faithful to the more recent Supreme Court precedent. …"); Tilton, 824 F.3d at 288 ("The appellants' Appointments Clause claim arose directly from that enforcement action and serves as an affirmative defense within the proceeding."); Jarkesy, 803 F.3d at 23 ("Here, [plaintiff's] constitutional and APA claims do not arise 'outside' the SEC administrative enforcement scheme—they arise from actions the Commission took in the course of that scheme. And they are the 'vehicle by which' Jarkesy seeks to prevail in his administrative proceeding.") (quoting Elgin, 567 U.S. at 22).

These approaches can be viewed as two sides of the same inquiry. *Free Enterprise Fund*'s "wholly collateral" finding turned on the fact that the accounting firm's claims were "collateral to any … orders or rules from which review might be sought." 561 U.S. at 490. In other words, the fact the accounting firm was seeking to challenge agency action beyond the scope of what was reviewable under the statutory scheme is what rendered its claims collateral. *Id. Elgin* focused on whether the claims at issue were "the vehicle by which [plaintiffs] seek to

reverse" adverse action. 567 U.S. at 22. That is, both cases looked to whether there was a way for the plaintiff to challenge the agency conduct at issue. No such vehicle existed in *Free Enterprise Fund*—the claims which the accounting firm sought to bring had no path to judicial review. In contrast, the *Elgin* plaintiffs did have a path to judicial review and they could have raised their constitutional claims in the course of that path.

The best way to harmonize *Free Enterprise Fund* and *Elgin* is to conclude that the "wholly collateral" consideration turns on whether a vehicle exists (or could exist) for the plaintiff ultimately to receive judicial review of its constitutional claim. If no vehicle exists, the claim is "wholly collateral" to the review scheme, and this consideration would weigh in favor of a district court exercising jurisdiction. This does "reduce[] the factor's independent significance," but it is "more faithful to the more recent Supreme Court precedent" and harmonizes seemingly discordant case law. Bennett, 844 F.3d at 187. See also Tilton, 824 F.3d at 288; Jarkesy, 803 F.3d at 27 ("[T]he possibility that [an agency] order in [plaintiff's] favor might moot some or all of his challenges does not make those challenges 'collateral' and thus appropriate for review outside the administrative scheme. … [T]hat possibility [is] a feature … not a bug.") (quotation omitted).

Given this backdrop, there is no merit to Axon's argument that its constitutional claims are "wholly collateral" to the issues to be adjudicated during the administrative proceeding because its "claims (just like those in *Free Enterprise Fund*) go to the agency's

constitutional authority" and "do not 'arise[] out of' an enforcement proceeding." (Doc. 21 at 9-10.) Because Axon can assert (and already has asserted) its constitutional claims during the administrative proceeding, and because Axon retains the ability to seek further review of those claims in a federal appellate court, those claims are not "wholly collateral" to the FTC Act's review provisions. This logic also disposes of Axon's contention, raised during oral argument, that its constitutional challenge to the clearance process is "wholly collateral" because the clearance process isn't even enshrined in the FTC Act—Axon's ability to raise this challenge as part of the enforcement proceeding shows it isn't "wholly collateral" under *Elgin*.

Finally, one additional clarification is necessary with respect to the concept of "wholly collateral" claims. Axon's briefing can be interpreted as suggesting its claims are wholly collateral because they are constitutional in nature. (Doc. 21 at 8-9.) But in *Elgin*, the Supreme Court expressly rejected "a jurisdictional rule based on the nature of an employee's constitutional claim." 567 U.S. at 15. Creating such a rule would "deprive the aggrieved employee, the [agency], and the district court of clear guidance about the proper forum for the employee's claims at the outset of the case" because the line between constitutional challenges to statutes and other types of constitutional challenges was "hazy at best." *Id.* Likewise, *Elgin* rejected a rule that would have reserved "facial constitutional challenges to statutes" for district courts. *Id.* At bottom, "exclusivity does not turn on the constitutional nature of" a claim. *Id. Thunder Basin* reached a similar conclusion,

holding that because a due process challenge "can be meaningfully addressed in the Court of Appeals," the mere fact the plaintiff had asserted a constitutional challenge was insufficient to establish district court jurisdiction. 510 U.S. at 215.

Thunder Basin and *Elgin*, in short, foreclose the possibility that the Court has jurisdiction over Axon's due process and equal protection claims simply because they are constitutional in nature—*Thunder Basin* precluded jurisdiction over a due process claim, 510 U.S. at 215, and *Elgin* precluded jurisdiction over an equal protection claim, 567 U.S. at 7, 16. *See also Bebo*, 799 F.3d at 768 (district court lacked jurisdiction even though plaintiff sought to challenge a statute as "facially unconstitutional under the Fifth Amendment because it provides the SEC 'unguided' authority to choose which respondents will and which will not receive the procedural protections of a federal district court, in violation of equal protection and due process guarantees").

The potential wrinkle is that Axon is also asserting an Article II claim, which was not raised in *Thunder Basin* or *Elgin* but was the claim at issue in *Free Enterprise Fund*. Despite that wrinkle, the logic of *Elgin* extends to preclude jurisdiction over that claim here. *Elgin* was concerned with a lack of clarity when it came to deciding whether jurisdiction was precluded and rejected "hazy" line drawing. 567 U.S. at 15. For example:

> [P]etitioners contend that facial and as-applied constitutional challenges to statutes may be brought in district court, while other constitutional challenges must be heard by

> the [agency]. But, as we explain below, that line is hazy at best and incoherent at worst. The dissent's approach fares no better. The dissent carves out for district court adjudication only facial constitutional challenges to statutes, but we have previously stated that "the distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge.

Id. (citation omitted). Axon's Article II claim, at bottom, attacks the for-cause removal protection for FTC commissioners (15 U.S.C. §41) and ALJs (5 U.S.C. §7521). (Doc. 15 at 12-14.) In other words, Axon brings a facial constitutional challenge to a statute. *Elgin* makes clear that the facial nature of the claim is not, alone, enough to establish district court jurisdiction. The weight of authority from outside the Ninth Circuit supports this conclusion. *Hill*, 825 F.3d at 1246 ("Whether an injury has constitutional dimensions is not the linchpin in determining its capacity for meaningful judicial review."); *Jarkesy*, 803 F.3d at 403 ("In any case, assuming *arguendo* that Jarkesy put forth a non-delegation doctrine challenge, he is wrong to assign it talismanic significance. He seems to assume that whenever a respondent in an administrative proceeding attacks a statute on its face, a district court has jurisdiction to hear the challenge, whereas the agency does not. That is mistaken.").

3. Agency Expertise

"The final consideration within the *Thunder Basin* framework" is whether Axon's claims "fall[] outside the [FTC's] expertise." *Tilton*, 824 F.3d at 289. *See also Elgin*, 567 U.S. at 22. This factor looks to "whether agency expertise could be brought to bear on the questions presented." *Hill*, 825 F.3d at 1251 (internal quotation marks and alterations omitted). Like the other considerations, this consideration requires a full understanding of the *Thunder Basin* trilogy.

Free Enterprise Fund concluded that agency expertise played no role because the accounting firm's constitutional claims were not "fact-bound inquiries" and its statutory claims did "not require 'technical considerations of [agency] policy." 561 U.S. at 419 (citing *Johnson v. Robison*, 415 U.S. 361, 373 (1974)). In contrast, *Elgin* rejected the argument that the plaintiffs' constitutional arguments were outside the statutory scope of review because that argument "overlook[ed] the many threshold questions that may accompany a constitutional claim and to which the [agency] can apply its expertise." 567 U.S. at 22. Resolution of substantive arguments that did fall under the agency's expertise in favor of a plaintiff could "avoid the need to reach his constitutional claims." *Id.* In other words, the ability to "fully dispose of the case" before reaching the constitutional claims was an example of an agency's expertise being brought to bear. *Id.*

Again, *Free Enterprise Fund* and *Elgin* can be difficult to harmonize. The Courts of Appeals that have recognized this tension have generally opted to apply *Elgin*'s approach to the agency expertise

consideration. *Bennett*, 844 F.3d at 187-88; *Hill*, 825 F.3d at 1250-51; Tilton, 824 F.3d at 289-290; Jarkesy, 803 F.3d at 28-29; Bebo, 799 F.3d at 772-73. Those courts reasoned that Elgin was the latest and more comprehensive assessment of the agency expertise factor, so its interpretation controlled. In following Elgin, those courts concluded that "[agency] expertise can otherwise be brought to bear" and that the plaintiffs' claims, including structural Article II claims, were subject to the statutory review scheme.

That said, *Free Enterprise Fund* and *Elgin* must be read as complementary, and thus the question isn't which standard controls, but where Axon's claims fall in the spectrum they create. The apparent conflict arises because *Elgin*, although its rule is clear, was not dealing with the sort of structural challenge that was raised in *Free Enterprise Fund*. If *Elgin*'s rule were applied as some courts have described it, agency expertise could be brought to bear in any case, which is an outcome that would conflict with *Free Enterprise Fund* and *Thunder Basin*. On the other hand, carving out a "*Free Enterprise Fund* exception" based on the content of a specific claim would run counter to *Elgin*'s reasoning, which is the Supreme Court's most recent formulation of the agency expertise consideration.

The key to harmonizing *Free Enterprise Fund* and *Elgin* is that the agency expertise analysis in *Free Enterprise Fund* was driven by the fact that, for the accounting firm to obtain judicial review through the statutory scheme, it would have had to force the issue by willfully and intentionally violating a rule and then raising the only defense possible—that the agency was unconstitutional. Only then would the accounting

firm's claims be before the SEC and subject to judicial review. 561 U.S. at 491. In contrast, in *Elgin*, the agency had several avenues through which it could obviate the need to reach a constitutional question. 567 U.S. at 22.

The same is true here. Axon maintains it has done nothing wrong. The FTC, in applying its own expertise, may agree. Thus, as in *Elgin*, there may be no need for a federal appellate court to reach Axon's constitutional claims. Were Axon forced to forego any defense other than its constitutional claims, then, and only then, would Axon be in the same position as the plaintiff in *Free Enterprise Fund*. Here, though, Axon has substantive defenses that may obviate the need to reach the constitutional question. It has not willfully broken a rule in order to vindicate its constitutional claims, nor does it need to do so. Thus, matters remain that would benefit from the FTC's expertise.

Axon argues the FTC cannot bring its expertise to bear because there is no way Axon can win—the FTC is so hopelessly biased that any litigant is doomed to lose. (Doc. 21 at 10.) Yet even if the FTC incorrectly rules against Axon during the administrative proceeding, "there are precious few cases involving interpretation of statutes authorizing agency action in which [a court's] review is not aided by the agency's statutory construction." *Mitchell v. Christopher*, 996 F.3d 375, 379 (D.C. Cir. 1993). Additionally, the FTC's alleged win rate is something of a red herring—nothing in the *Thunder Basin* trilogy suggests that a court conducting a jurisdictional-preclusion analysis must begin by gathering statistics concerning the particular agency's "win rate" and then use those

statistics as a metric for evaluating whether the review being provided is truly meaningful.[13]

Accordingly, IT IS ORDERED that:

(1) Axon's complaint (Doc. 1) is **dismissed without prejudice** due to a lack of subject matter jurisdiction.

(2) Axon's motion for preliminary injunction (Doc. 15) is **denied as moot**.

(3) The Clerk of the Court shall enter judgment accordingly and terminate this action.

Dated this 8th day of April, 2020.

[handwritten: signature]
Dominic W. Lanza
United States District Judge

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[13] In addition to lacking any support in the case law, this approach would also raise practical problems. For example, although Axon asserts that the FTC has a 100% win rate, some law review articles suggest that "FTC opinions that were appealed by losing respondents were reversed 20 percent of the time compared to a 5-percent reversal rate for such opinions appealed from district courts [in cases brought by the DOJ's Antitrust Division]." Terry Calvani & Angela M. Diveley, *The FTC at 100: A Modest Proposal for Change*, 21 GEO. MASON L. REV. 1169, 1181 (2014). During oral argument, Axon argued this law review article is misleading because "it includes cases that go all the way back to 1976" and there haven't been any appellate reversals of the FTC in recent years. It is unclear how courts would go about choosing which temporal cutoffs to employ if "win rate" statistics were truly part of the analysis.

Appendix D

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. II, § 1, cl. 1

The executive Power shall be vested in a President of the United States of America.

U.S. Const. art. II, § 2, cl. 2

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

28 U.S.C. § 1331

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

5 U.S.C. § 1202

(a) The term of office of each member of the Merit Systems Protection Board is 7 years.

(b) A member appointed to fill a vacancy occurring before the end of a term of office of the member's predecessor serves for the remainder of that term. Any appointment to fill a vacancy is subject to the requirements of section 1201. Any new member serving only a portion of a seven-year term in office may continue to serve until a successor is appointed and has qualified, except that such member may not continue to serve for more than one year after the date on which the term of the member would otherwise expire, unless reappointed.

(c) Any member appointed for a 7-year term may not be reappointed to any following term but may continue to serve beyond the expiration of the term until a successor is appointed and has qualified, except that such member may not continue to serve for more than one year after the date on which the term of the member would otherwise expire under this section.

(d) Any member may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office.

5 U.S.C. § 7521

(a) An action may be taken against an administrative law judge appointed under section 3105 of this title by the agency in which the administrative law judge 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.

(b) The actions covered by this section are--

(1) a removal;

(2) a suspension;

(3) a reduction in grade;

(4) a reduction in pay; and

(5) a furlough of 30 days or less;

but do not include--

(A) a suspension or removal under section 7532 of this title;

(B) a reduction-in-force action under section 3502 of this title; or

(C) any action initiated under section 1215 of this title.

15 U.S.C. § 41

A commission is created and established, to be known as the Federal Trade Commission (hereinafter referred to as the Commission), which shall be composed of five Commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate. Not more than three of the Commissioners shall be members of the same political party. The first Commissioners appointed shall continue in office for terms of three, four, five, six, and seven years, respectively, from September 26, 1914, the term of each to be designated by the President, but their successors shall be appointed for terms of seven years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the Commissioner whom he shall succeed: *Provided, however*, That upon the expiration of his term of office a Commissioner shall continue to serve until his successor shall have been appointed and shall have qualified. The President shall choose a chairman from the Commission's membership. No Commissioner shall engage in any other business, vocation, or employment. Any Commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. A vacancy in the Commission shall not impair the right of the remaining Commissioners to exercise all the powers of the Commission.

The Commission shall have an official seal, which shall be judicially noticed.

15 U.S.C. § 45

(a) Declaration of unlawfulness; power to prohibit unfair practices; inapplicability to foreign trade

(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.

(2) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan institutions described in section 57a(f)(3) of this title, Federal credit unions described in section 57a(f)(4) of this title, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to part A of subtitle VII of Title 49, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended, except as provided in section 406(b) of said Act, from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

(3) This subsection shall not apply to unfair methods of competition involving commerce with foreign nations (other than import commerce) unless--

(A) such methods of competition have a direct, substantial, and reasonably foreseeable effect--

(i) on commerce which is not commerce with foreign nations, or on import commerce with foreign nations; or

(ii) on export commerce with foreign nations, of a person engaged in such commerce in the United States; and

(B) such effect gives rise to a claim under the provisions of this subsection, other than this paragraph.

If this subsection applies to such methods of competition only because of the operation of subparagraph (A)(ii), this subsection shall apply to such conduct only for injury to export business in the United States.

(4)

(A) For purposes of subsection (a), the term "unfair or deceptive acts or practices" includes such acts or practices involving foreign commerce that--

(i) cause or are likely to cause reasonably foreseeable injury within the United States; or

(ii) involve material conduct occurring within the United States.

(B) All remedies available to the Commission with respect to unfair and deceptive acts or practices shall be available for acts and practices described in this paragraph, including restitution to domestic or foreign victims.

(b) Proceeding by Commission; modifying and setting aside orders

Whenever the Commission shall have reason to believe that any such person, partnership, or

corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this subchapter, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record

in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require, except that (1) the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section; and (2) in the case of an order, the Commission shall reopen any such order to consider whether such order (including any affirmative relief provision contained in such order) should be altered, modified, or set aside, in whole or in part, if the person, partnership, or corporation involved files a request with the Commission which makes a satisfactory showing that changed conditions of law or fact require such order to be altered, modified, or set aside, in whole or in part. The Commission shall determine whether to alter, modify, or set aside any order of the Commission in response to a request made by a person, partnership, or

corporation under paragraph (2) not later than 120 days after the date of the filing of such request.

(c) Review of order; rehearing

Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission, and thereupon the Commission shall file in the court the record in the proceeding, as provided in section 2112 of Title 28. Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question determined therein concurrently with the Commission until the filing of the record and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgement to prevent injury to the public or to competitors pendente lite. The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of

the Commission. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 1254 of Title 28.

(d) Jurisdiction of court

Upon the filing of the record with it the jurisdiction of the court of appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive.

(e) Exemption from liability

No order of the Commission or judgement of court to enforce the same shall in anywise relieve or absolve any person, partnership, or corporation from any liability under the Antitrust Acts.

(f) Service of complaints, orders and other processes; return

Complaints, orders, and other processes of the Commission under this section may be served by anyone duly authorized by the Commission, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the residence or the principal office or place of business of such person, partnership, or corporation; or (c) by mailing a copy thereof by registered mail or by certified mail addressed to such person, partnership, or corporation at his or its residence or principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post office receipt for said complaint, order, or other process mailed by registered mail or by certified mail as aforesaid shall be proof of the service of the same.

(g) Finality of order

An order of the Commission to cease and desist shall become final--

(1) Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; but the Commission may thereafter modify or set aside its order to the extent provided in the last sentence of subsection (b).

(2) Except as to any order provision subject to paragraph (4), upon the sixtieth day after such order is served, if a petition for review has been duly filed; except that any such order may be

stayed, in whole or in part and subject to such conditions as may be appropriate, by--

(A) the Commission;

(B) an appropriate court of appeals of the United States, if (i) a petition for review of such order is pending in such court, and (ii) an application for such a stay was previously submitted to the Commission and the Commission, within the 30-day period beginning on the date the application was received by the Commission, either denied the application or did not grant or deny the application; or

(C) the Supreme Court, if an applicable petition for certiorari is pending.

(3) For purposes of subsection (m)(1)(B) and of section 57b(a)(2) of this title, if a petition for review of the order of the Commission has been filed--

(A) upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals and no petition for certiorari has been duly filed;

(B) upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals; or

(C) upon the expiration of 30 days from the date of issuance of a mandate of the Supreme Court directing that the order of the

Commission be affirmed or the petition for review be dismissed.

(4) In the case of an order provision requiring a person, partnership, or corporation to divest itself of stock, other share capital, or assets, if a petition for review of such order of the Commission has been filed--

(A) upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals and no petition for certiorari has been duly filed;

(B) upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals; or

(C) upon the expiration of 30 days from the date of issuance of a mandate of the Supreme Court directing that the order of the Commission be affirmed or the petition for review be dismissed.

(h) Modification or setting aside of order by Supreme Court

If the Supreme Court directs that the order of the Commission be modified or set aside, the order of the Commission rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of thirty days from the time it was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected to accord with the mandate, in which event

the order of the Commission shall become final when so corrected.

(i) Modification or setting aside of order by Court of Appeals

If the order of the Commission is modified or set aside by the court of appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered in accordance with the mandate of the court of appeals shall become final on the expiration of thirty days from the time such order of the Commission was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected so that it will accord with the mandate, in which event the order of the Commission shall become final when so corrected.

(j) Rehearing upon order or remand

If the Supreme Court orders a rehearing; or if the case is remanded by the court of appeals to the Commission for a rehearing, and if (1) the time allowed for filing a petition for certiorari has expired, and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered upon such rehearing shall become final in the same manner as though no prior order of the Commission had been rendered.

(k) "Mandate" defined

As used in this section the term "mandate", in case a mandate has been recalled prior to the expiration of thirty days from the date of issuance thereof, means the final mandate.

(l) Penalty for violation of order; injunctions and other appropriate equitable relief

Any person, partnership, or corporation who violates an order of the Commission after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $10,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the Attorney General of the United States. Each separate violation of such an order shall be a separate offense, except that in a case of a violation through continuing failure to obey or neglect to obey a final order of the Commission, each day of continuance of such failure or neglect shall be deemed a separate offense. In such actions, the United States district courts are empowered to grant mandatory injunctions and such other and further equitable relief as they deem appropriate in the enforcement of such final orders of the Commission.

(m) Civil actions for recovery of penalties for knowing violations of rules and cease and desist orders respecting unfair or deceptive acts or practices; jurisdiction; maximum amount of penalties; continuing violations; de novo determinations; compromise or settlement procedure

(1)

(A) The Commission may commence a civil action to recover a civil penalty in a district court of the United States against any

person, partnership, or corporation which violates any rule under this subchapter respecting unfair or deceptive acts or practices (other than an interpretive rule or a rule violation of which the Commission has provided is not an unfair or deceptive act or practice in violation of subsection (a)(1)) with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule. In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than $10,000 for each violation.

(B) If the Commission determines in a proceeding under subsection (b) that any act or practice is unfair or deceptive, and issues a final cease and desist order, other than a consent order, with respect to such act or practice, then the Commission may commence a civil action to obtain a civil penalty in a district court of the United States against any person, partnership, or corporation which engages in such act or practice--

(1) after such cease and desist order becomes final (whether or not such person, partnership, or corporation was subject to such cease and desist order), and

(2) with actual knowledge that such act or practice is unfair or deceptive and is unlawful under subsection (a)(1) of this

section.

In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than $10,000 for each violation.

(C) In the case of a violation through continuing failure to comply with a rule or with subsection (a)(1), each day of continuance of such failure shall be treated as a separate violation, for purposes of subparagraphs (A) and (B). In determining the amount of such a civil penalty, the court shall take into account the degree of culpability, any history of prior such conduct, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

(2) If the cease and desist order establishing that the act or practice is unfair or deceptive was not issued against the defendant in a civil penalty action under paragraph (1)(B) the issues of fact in such action against such defendant shall be tried de novo. Upon request of any party to such an action against such defendant, the court shall also review the determination of law made by the Commission in the proceeding under subsection (b) that the act or practice which was the subject of such proceeding constituted an unfair or deceptive act or practice in violation of subsection (a).

(3) The Commission may compromise or settle any action for a civil penalty if such compromise or settlement is accompanied by

a public statement of its reasons and is approved by the court.

(n) Standard of proof; public policy considerations

The Commission shall have no authority under this section or section 57a of this title to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. In determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination.