No. 21-86

IN THE
Supreme Court of the United States

AXON ENTERPRISE, INC.,

Petitioner,

v.

FEDERAL TRADE COMMISSION, ET AL.,

Respondents.

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

BRIEF OF SEPARATION OF POWERS CLINIC AT ANTONIN SCALIA LAW SCHOOL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus is the Separation of Powers Clinic within The C. Boyden Gray Center for the Study of the Administrative State at George Mason University's Antonin Scalia Law School. *Amicus* has an interest in studying, researching, and raising awareness of the proper application of the U.S. Constitution's separation of powers constraints on the exercise of federal government power. The Clinic provides students an opportunity to discuss, research, and write about separation of powers issues in ongoing litigation.

SUMMARY OF THE ARGUMENT

This Court should reverse the Ninth Circuit's decision barring Axon from immediately challenging the dual-layer, for-cause removal protections applicable to Federal Trade Commission ALJs. Allowing Axon to bring its challenge to an Article III court without exhausting a constitutional challenge against the tenure protections before the commission itself would not only ensure the availability of meaningful judicial review and meaningful relief, but would also help to maintain consistency with this

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[1] No counsel for any party has authored this brief in whole or in part, and no entity or person, aside from *amicus curiae* and its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. The parties have filed blanket consent letters.

Court's removal protection precedents and encourage parties to bring removal protection claims.

Agencies like the FTC have an incentive to drag out administrative proceedings and bring weighty charges against regulated parties with an aim toward compelling settlements outside the supervision of judicial review. In so doing, these agencies essentially sit as the final arbiter of the constitutionality of their own exercises of power, including the constitutionality of the appointments and removal procedures governing their own agency officials. This current scheme raises concerns about a *de facto* delegation of Article III judicial power to Article II agencies, which lack expertise in resolving constitutional and structural challenges and have an inherent conflict of interest. Permitting judicial evaluation of challenges like Axon's would help to alleviate these concerns because an Article III court could resolve those core constitutional claims *before* a regulated party is compelled to settle with an agency structured in a potentially unconstitutional fashion. *See* Part I.A, *infra*.

More, in those instances where parties obtained judicial review only *after* completion of the agency's consideration of their constitutional challenge, retrospective relief was rarely awarded. In such cases, the challengers essentially obtain only a pyrrhic victory: success on the constitutional claim, but no meaningful remedy like a new administrative hearing. Members of this Court and the lower courts have also strenuously disagreed about the scope of appropriate remedial relief for constitutional

structural violations. These disagreements show the significance of remedial issues and provide even more force to party requests for judicial review of their constitutional challenge prior to years of proceedings before administrative agencies. This Court could alleviate the impact of disagreements over retrospective remedies by holding that parties like Axon can bring their claims in district court *ex ante*, allowing constitutional deficiencies to be cured on the front end rather than after the termination of years of unconstitutional agency proceedings. *See* Part I.B, *infra*. In short, allowing Axon's claim at an earlier stage of proceedings, and without exhaustion before the agency, would extricate similar parties from their current predicament of choosing between forgoing judicial review of structural constitutional challenges altogether, or obtaining only a pyrrhic victory after the fact.

Finally, the Ninth Circuit's holding that Axon cannot receive judicial review before suffering the very injury it challenges—i.e., years of ongoing unconstitutional agency proceedings—is especially pernicious because Axon's claim is clearly meritorious under this Court's precedents. *See* Part II, *infra*.

ARGUMENT

I. The Court Should Permit Judicial Review Without Administrative Exhaustion of Core Separation-of-Powers Challenges Like Axon's.

The Court should hold that parties like Axon can immediately obtain judicial review of their core separation-of-powers claims against executive agencies because (1) depending on the agency involved, parties required to exhaust constitutional claims before the agencies subject to the constitutional challenge frequently never obtain judicial review as a result of agencies strongly incentivizing, and essentially compelling, settlement during administrative proceedings, *see* Part I.A, *infra*; and (2) when parties actually do obtain judicial review after the completion of the constitutional violation and succeed on the merits of their challenges, jurists disagree about whether retrospective relief is appropriate, with most cases resulting in hollow victories.

Those negative consequences and sharp disagreements would be mitigated, or perhaps even obviated altogether, by allowing claims like Axon's to receive judicial review *before* parties are compelled to settle during agency proceedings or obtain only a hollow victory after the termination of lengthy agency proceedings. By removing an unwarranted obstacle to meaningful review and meaningful relief, the Court's removal protection precedents would have more force, and parties would not be entirely disincentivized from

bringing separation-of-powers claims. *See* Part I.B, *infra*.

A. Parties Often Never Receive Judicial Review of Core Separation-of-Powers Challenges.

As amici at earlier stages of this litigation have observed, it can be exceedingly rare for parties to complete administrative proceedings and obtain subsequent judicial review. *See, e.g.*, Cert. Amicus Br. of Washington Legal Foundation 11 ("In the past quarter century only two companies have obtained judicial review of an FTC merger decision."); *Cochran v. SEC*, 20 F.4th 194, 210 n.15 (5th Cir. 2021) (en banc) (noting that the court could identify only two individuals who had obtained judicial review after completing proceedings at the Securities and Exchange Commission). The tremendous costs inherent in the proceedings, combined with the agencies' interest in structuring the proceedings to compel settlement and avoid subsequent judicial review, often lead parties to settle and thereby forgo subsequent judicial review. *See, e.g.*, Adam M. Katz, *Eventual Judicial Review*, 118 Colum. L. Rev. 1139, 1153 (2018) ("[T]he incentive to settle SEC enforcement actions is … paramount, making it, practically speaking, extremely unlikely for defendants to ... have the opportunity to appear before a federal court."); Urska Velikonja, *Securities Settlements in the Shadows*, 126 Yale L. J. Forum 124, 130 (2016) (noting that in fiscal year 2015, the SEC settled over 400 cases in administrative proceedings but less than 100 through court settlements).

This raises several serious concerns.

First, allowing agencies to be the final arbiters of their own constitutionality implicates separation of powers considerations. The "general liberty of the people can never be endangered … so long as the judiciary remains truly distinct from both the legislative and executive," *The Federalist* No. 78 (A. Hamilton), which is why the "allocation of powers in the Constitution is absolute," *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 575 U.S. 43, 69 (2015) (Thomas, J., concurring). Article I vests the "legislative Powers" in Congress, Article II vests the "executive Power" in a President, and Article III vests "[t]he judicial Power of the United States" in the federal courts. U.S. CONST. art. I; *id.*, art. II; *id.*, art. III. As this Court and its Members have repeatedly noted, it is "the 'province and duty of the judicial department'"—and not an executive agency—"'to say what the law is.'" *See, e.g.*, *Branch v. Smith*, 538 U.S. 254, 272 (2003); *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051, 2057 (2019) (Thomas, J., concurring in the judgment) (quoting *Marbury v. Madison*, 5 U.S. 137 (1803)).

But under the regime affirmed by the Ninth Circuit here, the executive can choose to become the de facto judiciary by delaying and extending agency proceedings indefinitely until the party has no option but to settle, making the prospect of subsequent judicial review largely illusory. The ability of an agency to arrogate this power raises significant concerns. *See PDR Network*, 139 S. Ct. at 2057 (Thomas, J. concurring). That said, the Court need

not definitively resolve whether such an autocratic view of agency power violates the Constitution's careful separation of powers, because "[a]t a minimum," the Court's "constitutional-avoidance precedents would militate against" adopting the government's position that Axon must hold out hope for subsequent judicial review, potentially after years of enduring unconstitutional proceedings. *Id.*

Second, as "this Court has often observed," agencies "are generally ill suited to address structural constitutional challenges" like Axon's, "which usually fall outside the adjudicators' areas of technical expertise." *Carr v. Saul*, 141 S. Ct. 1352, 1360 (2021). Even worse, an agency has a clear self interest in rejecting—and in seeking to avoid subsequent judicial review of—core separation-of-powers challenges to the agency's own structure and actions.

Third, the Court is especially chary of finding that Congress has precluded all judicial review of constitutional challenges, as demonstrated by the Court's requirement that "where Congress intends to preclude judicial review of constitutional claims, its intent to do so must be clear," given the "serious constitutional question" that would arise if "a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Elgin v. Dep't of Treasury*, 567 U.S. 1, 9 (2012) (cleaned up). Although in cases like Axon's there is a statutorily prescribed theoretical *possibility* of subsequent judicial review after the completion of proceedings at certain agencies, in practice that possibility rarely materializes. The Court's hesitation against finding

that Congress precluded judicial review of constitutional matters should militate in favor of holding that Axon's challenge may be resolved in the first instance by an Article III court, given the serious prospect that there will ultimately be no meaningful judicial review at all once the agency has disposed of the matter.

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These concerns would be avoided or at least strongly mitigated if parties like Axon were able to bring their core constitutional challenges immediately before an Article III court, *before* the agency drags out proceedings.

B. Subsequent Judicial Review of Removal Challenges Usually Results in Hollow Victories.

Even when parties are able to obtain judicial review of a removal protection challenge *after* the completion of the agency proceedings, the result is often a hollow victory.

As demonstrated below, removal protection challenges typically result in severance of the unconstitutional provisions but no retrospective relief for the litigating party such as a new administrative hearing. Courts have found that agencies can cure removal protection violations by "ratifying" prior actions, or by asserting that the removal protections played an inadequate role in the challenged agency action. In either scenario, the challenger himself receives no actual meaningful remedy. The original

action was taken by an unconstitutionally structured agency, and so long as the agency officials involved in adjudicating the matter remain essentially the same, the agency has a strong interest in just redoing and reaffirming the earlier, previously constitutionally infirm action. Because this gives the appearance of unfairness and encourages agencies to engage in empty formalism, there has been strong disagreement among jurists about the appropriate retrospective remedy in these cases, as further detailed below. *See* Part I.B.1, *infra*.

This Court could obviate those difficult remedial questions and simultaneously put muscle behind its removal protection decisions by allowing parties like Axon to bring core separation-of-powers claims in district court *before* spending years in potentially unconstitutional administrative proceedings. This allows the agency to correct illegality on the front end. *See* Part I.B.2, *infra*.

1. Retrospective Relief Is Hotly Disputed but Rarely Meaningful.

In *Free Enterprise Fund*, the Court held that it could resolve an immediate challenge—*i.e.*, during the pendency of an ongoing agency investigation—to the removal provisions of members of the Public Company Accounting Oversight Board ("PCAOB"), similar to the immediate relief Axon seeks here. *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 491 (2010). The Court agreed with the *Free Enterprise Fund* challengers on the merits of the removal

challenge, and the case was promptly remanded to the district court, which entered a stipulated judgment[2] the same day that the PCAOB agreed to withdraw its inspection reports against the underlying complainant.[3]

But that prompt and effective relief is absent in cases in which parties bring their removal protection challenges *after* completion of the unconstitutional agency proceedings, as the Ninth Circuit insists Axon must do here. In each of the significant removal protection cases discussed below, parties prevailed on their challenges but—over sharp dissents—were denied retrospective relief.

Seila Law. In *Seila Law LLC v. Consumer Financial Protection* Bureau ("CFPB"), the Court addressed a challenge to the CFPB Director's removal protections in the context of an enforcement proceeding that the CFPB filed in court after administrative proceedings had reached an impasse. 140 S. Ct. 2183, 2194 (2020). The Court held that the removal protections for the Director were unconstitutional but then sharply disagreed about whether retrospective relief was appropriate.

Seven Justices declined to address whether the agency's intervening attempts to ratify the prior

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[2] Judgment, *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, No. 1:06-cv-217 (D.D.C. Feb. 23, 2011), ECF No. 66.

[3] *See* Kent Barnett, *To the Victor Goes the Toil—Remedies for Regulated Parties in Separation-of-Powers Litigation*, 92 N.C. L. Rev. 482, 519 n.214 (2014) (outlining the subsequent history of the *Free Enterprise Fund* litigation).

Director's actions were valid, instead remanding that issue to the Ninth Circuit. *Id.* at 2208–09 (majority op.); *id.* at 2224 (Kagan, J., concurring in the judgment with respect to severability and dissenting in part). Justices Thomas and Gorsuch would have instead concluded that "the alleged ratification does not cure the constitutional injury" and instead would have denied the CFPB's petition to enforce its investigative demand against Seila Law. *Id.* at 2221 (Thomas, J., concurring in part and dissenting in part).

On remand, a panel of the Ninth Circuit concluded that a subsequent CFPB Director had cured the process of any unconstitutional taint by ratifying the investigative demand after this Court's decision. *See CFPB v. Seila Law LLC*, 984 F.3d 715, 718 (9th Cir. 2020). Four judges dissented from the Ninth Circuit's refusal to rehear that decision en banc, arguing that the ratification "effectively means that Seila Law is entitled to no relief from the harms inflicted by an unaccountable and unchecked federal agency." *CFPB v. Seila Law LLC*, 997 F.3d 837, 840 (9th Cir. 2021) (Bumatay, J., joined by Callahan, Ikuta, and VanDyke, JJ., dissenting from the denial of rehearing en banc). To those jurists, the court had "resurrect[ed] Goliath on the battlefield so that he can defeat David." *Id.* at 839. They argued that "ratification does not seem to be a proper remedy for separation-of-powers violations such as we face today" because it leaves the party "with no relief at all" and does not "'create incentives to raise' separation-of-powers challenges." *Id.* at 843 (quoting *Lucia v. SEC*, 138 S. Ct. 2044, 2055 n.5 (2018)).

Collins. In *Collins v. Yellen*, this Court addressed the removal protections for directors of the Federal Housing Finance Agency ("FHFA") in the context of a suit challenging the FHFA's amendment four years earlier to a stock purchase agreement. 141 S. Ct. 1761, 1773–74 (2021). The Court concluded the removal protections were unconstitutional. *Id.* at 1783.

On the issue of remedy, the Court's members again disagreed sharply. The majority rejected the notion that the relevant FHFA director's actions were necessarily void—despite acknowledging that voiding of the actions likely would have been the appropriate remedy if the director taking the action had been improperly *appointed*. Although the Court recognized that the plaintiffs might have an "entitlement to retrospective relief" upon a proper showing, *id.* at 1788, the Court established no governing test to clearly guide such an analysis. The majority justices merely gave examples where an unconstitutional removal protection statute would result in retrospective relief: (1) where "the President had attempted to remove a Director but was prevented from doing so by a lower court decision," or (2) where the President "made a public statement … assert[ing] that he would remove the Director if the statute did not stand in the way." *Id.* at 1789. The majority remanded the matter to the Fifth Circuit to determine whether there was a sufficient link between the removal protection and the challenged action. *Id.*

Justice Gorsuch disagreed, arguing that the proper remedy would be to "set aside" the Director's actions because they were taken "by someone erroneously

claiming the mantle of executive power—and thus taken with no authority at all." *Id.* at 1795 (Gorsuch, J., concurring in part). Justice Gorsuch rejected the view that removal protection violations can receive relief only upon a strong causal chain, whereas Appointments Clause violations typically result in near-automatic retrospective relief. "It is unclear to me why this distinction should make a difference. … If anything, removal restrictions may be a greater constitutional evil than appointment defects." *Id.* at 1795–96. He also disagreed with "task[ing] lower courts and the parties with reconstructing how executive agents would have reacted to" a situation in which the FHFA Directors were removable without case. *Id.* at 1798. "But *how* are judges and lawyers supposed to construct the counterfactual history?"—"don't we need testimony from [the President] or his closest staff?" *Id.* at 1798–99. Justice Gorsuch stated that "the Court sounds the call to arms and declares a constitutional violation only to head for the hills as soon as it's faced with a request for meaningful relief." *Id.* at 1799.

On remand, the en banc Fifth Circuit likewise splintered over the proper relief. Twelve judges voted to remand to the district court for consideration of the issue, *see Collins v. Yellen*, 27 F.4th 1068, 1069 (5th Cir. 2022) (en banc), but five judges dissented and would have held that no relief was warranted because there was no evidence that the President disagreed with what the FHFA Directors had done, *id.* at 1069 (Haynes, J., dissenting). The district court has not yet addressed the matter on remand.

Social Security Commissioner Challenges. The lower courts are currently considering dozens of challenges to the for-cause removal protection of the Social Security Commissioner. In nearly every decision, the adjudicating court has agreed that the removal protection provision is unconstitutional[4] but has declined to provide retrospective relief such as a new administrative hearing.[5]

The rationale for denying relief has varied. Some courts hold that the claimant had not demonstrated the ALJ's "decision was the result of a lack of oversight by the President"[6] or that "the outcome of this case contravened the President's policy

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[4] The Department of Justice has since conceded this point as well, issuing an opinion from the Office of Legal Counsel concluding that the Commissioner's statutory removal protections are unconstitutional under the reasoning of *Collins v. Yellen*. *See Constitutionality of the Commissioner of Social Security's Tenure Protection*, 45 Op. O.L.C. ___, 2021 WL 2981542 (July 8, 2021).

[5] *See, e.g.*, *Kaufmann v. Kijakazi*, No. 21-35344, ___ F.4th ___, 2022 WL 1233238, at *6 (9th Cir. Apr. 27, 2022); *Timm v. Kijakazi*, No. 21-cv-131, 2022 WL 843920, at *7 (E.D. Wis. Mar. 21, 2022); *Moore v. Kijakazi*, ___ F. Supp. 3d ___, 2022 WL 702518, at *4 (D.S.C. Mar. 9, 2022); *Rives v. Comm'r of Soc. Sec.*, No. 1:20-cv-2549, 2022 WL 681273, at *2–3 (N.D. Ohio Mar. 8, 2022); *Brittany A. v. Comm'r of Soc. Sec.*, No. 2:20-cv-6549, 2022 WL 682671, at *9–10 (S.D. Ohio Mar. 8, 2022); *Dareth T. v. Kijakazi*, No. 2:20-cv-06913, 2022 WL 671540, at *3 (C.D. Cal. Mar. 7, 2022); *Scott E. v. Kijakazi*, No. 1:21-cv-00110, 2022 WL 669687, at *5–6 (D. Me. Mar. 6, 2022).

[6] *See Standifird v. Kijakazi*, No. 3:20-cv-1630, 2022 WL 970741, at *3 (S.D. Cal. Mar. 31, 2022).

preference."[7] Where the ALJ who decided the claim was appointed by a Commissioner with improper removal protections and was acting pursuant to authority delegated by that Commissioner, courts have generally held that a subsequent Acting Commissioner's *en masse* ratification of all prior ALJ appointments cures any defect in authority.[8] Additional courts have rejected relief on the basis that it is unlikely President Trump would have wanted to remove the very same Commissioner he had appointed,[9] despite the fact that this Court's seminal removal case involved a postmaster who had been appointed and removed by the same President, *see Myers v. United States*, 272 U.S. 52, 106 (1926).

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These cases demonstrate that if parties like Axon cannot obtain relief *ex ante* for their removal

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[7] *Dixon v. Kijakazi*, No. 4:21-cv-00033, 2022 WL 1096424, at *10 (E.D.N.C. Feb. 1, 2022), *adopted*, 2022 WL 1096844 (E.D.N.C. Apr. 12, 2022)

[8] *See, e.g.*, *Perez-Kocher v. Comm'r of Soc. Sec.*, No. 6:20-cv-2357, 2021 WL 6334838, at *6 (M.D. Fla. Nov. 23, 2021), *adopted*, 2022 WL 88160 (M.D. Fla. Jan. 7, 2022); *Rives v. Comm'r of Soc. Sec.*, No. 1:20-cv-02549, 2022 WL 1076216, at *22 (N.D. Ohio Feb. 4, 2022), *adopted*, 2022 WL 681273. *But see Sylvia A. v. Kijakazi*, No. 5:21-cv-076, 2021 WL 4692293, at *3 (N.D. Tex. Sept. 13, 2021) (holding that there is a plausible claim to retrospective relief because "an ALJ is 'in effect using the Commissioner's authority on loan, and thus flaws in the Commissioner's authority are flaws in the ALJ's authority'"), *adopted*, 2021 WL 4622528 (N.D. Tex. Oct. 7, 2021).

[9] *See, e.g.*, *Michele T. v. Comm'r of Soc. Sec.*, ___ F. Supp. 3d ___, 2021 WL 5356721, at *5 (W.D. Wash. Nov. 17, 2021).

protection claims, there will likely be no relief at all—even when the claim is meritorious. *See* Part II, *infra*.

2. Early Judicial Review Provides Meaningful Relief, Obviates Remedial Disputes, and Incentivizes Challenges.

The Court can avoid those hollow victories and difficult remedial questions by allowing Axon to bring its challenge into an Article III forum now. This would require the agency to correct constitutional defects *before* administrative proceedings have concluded, thereby providing meaningful "here-and-now" relief for a "here-and-now injury," *Free Enter. Fund*, 561 U.S. at 513, and extricating parties from their current predicament of choosing between forgoing their chance at judicial review altogether, *see* Part I.A, *supra*, or obtaining only a pyrrhic victory after the fact, *see* Part I.B, *supra*. As noted above, that is precisely what happened in *Free Enterprise Fund* itself, where the Court authorized immediate judicial review and the PCAOB withdrew its inspection reports against the underlying complainant. *See* Part I.B.1, *supra*.

This would also put real weight behind this Court's removal protection decisions, which thus far have resulted only in the prospective relief of severing the offending statutory provisions, thereby creating an almost insurmountable disincentive for litigants to challenge unconstitutional agency structures. Further, allowing immediate judicial review would further the Court's stated goal in previous structural

constitutional cases, such as *Lucia v. SEC*, of "creat[ing] incentives to raise" such challenges. 138 S. Ct. at 2055 n.5. As the *Collins* petitioners stated in their reply brief, "[n]o one would bring a separation of powers lawsuit if the only remedy were a judicial declaration years after the fact that the Constitution was violated." Reply Br. of Pet. at 1, *Collins*. Appointments Clause and removal protection constitutional violations raise similar significant issues for which remedial relief through litigation is integral to maintaining constitutionally consistent governmental structure. *See Collins*, 141 S. Ct. at 1795–96 (Gorsuch, J., concurring in part); *Seila Law*, 997 F.3d at 843 (Bumatay, J., joined by Callahan, Ikuta, and VanDyke, JJ., dissenting from the denial of rehearing en banc). In both scenarios, enacted statutes have allegedly improperly allocated or constrained executive authority, causing the President to "not be held fully accountable for discharging his own responsibilities," *Free Enter. Fund*, 561 U.S. at 514, and in both scenarios there is little incentive to bring a challenge absent the prospect of meaningful relief.

There are good reasons for incentivizing parties to bring such claims. The separation of powers is designed to "secure[] the freedom of the individual," *Bond v. United States*, 564 U.S. 211, 221 (2011), and "[i]n the case of a removal defect, a wholly unaccountable government agent asserts the power to make decisions affecting individual lives, liberty, and property," but the "chain of dependence between those who govern and those who endow them with power is broken," *Collins*, 141 S. Ct. at 1797 (Gorsuch, J.,

concurring in part). Relatedly, remedying unconstitutional provisions on the front end would promote respect for the Constitution. It is cold comfort, for instance, to tell Social Security claimants that they will not receive even a new administrative hearing despite the court's conclusion that the Commissioner's removal protections are unconstitutional.

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Given agencies' self interest in delaying and avoiding judicial review, *see* Part I.A, *supra*, and the likelihood of a hollow victory from any judicial review after the completion of agency proceedings, *see* Part I.B, *supra*, it makes eminent sense to allow parties like Axon to obtain immediate judicial review of their core separation-of-powers challenges, especially in cases like this one where Congress has provided no textual indication that it intended to bar review of such claims. *See* Pet. Br. 39. This Court should reverse the Ninth Circuit's contrary holding.

II. The Ninth Circuit's Ruling Is Especially Inequitable Because Axon's Underlying Challenge Is Obviously Meritorious.

The Ninth Circuit's holding that Axon must continue suffering the harm it challenges—*i.e.*, years of unconstitutional administrative proceedings—before Axon can raise that challenge in court is all the more indefensible because the dual-layer, for-cause removal protections for FTC ALJs is unconstitutional

under a relatively straightforward application of this Court's precedents.

In *Free Enterprise Fund*, the Court held that the Constitution prohibits insulating certain executive officers from presidential supervision via two layers of for-cause tenure protection. *See* 561 U.S. at 484, 486–87. At the time, it was unclear whether the Court's holding extended to ALJs, in part because at the time there was no clear precedent on whether ALJs were "Officers of the United States." *Id.* at 507 n.10; U.S. Const. art. II, § 2, cl.2. In *Lucia*, this Court subsequently held that SEC ALJs are Article II "Officers" because they "hold a continuing office established by law," have "equivalent duties and powers … in conducting adversarial inquiries" as other officials the Court had deemed to be principal "Officers," and there was no requirement that the ALJs' decisions be reviewed by the full panel of SEC Commissioners. 138 S. Ct. at 2053–54.

Taken together, *Free Enterprise Fund* and *Lucia* establish that the Constitution does not authorize multiple layers of for-cause removal protection for agency ALJs who are Article II "Officers." The FTC's ALJs enjoy the same multi-layered removal protection as SEC ALJs, *see* 5 U.S.C. §§ 7521(a), 1202(d), and FTC ALJs apparently qualify as "Officers" given that their powers are very similar to the SEC ALJs' powers in *Lucia*, *see* 16 C.F.R. § 3.42(c) (authorizing the FTC's ALJs to take all necessary action to conduct fair and impartial hearings such as regulating the course of the hearings, administering oaths, issuing subpoenas and orders, taking depositions, compelling

admissions, and making initial decisions for the FTC). *Compare with Lucia*, 138 S. Ct. at 2053–54.

Thus, Axon's underlying challenge is straightforward and likely to be meritorious. Consequently, there is no difficult line-drawing about whether Axon has demonstrated a "here-and-now injury" worthy of immediate judicial resolution. *Free Enter. Fund*, 561 U.S. at 513.

CONCLUSION

Amicus urges the Court to reverse the Ninth Circuit.

Respectfully submitted,

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