No. 20-15662

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Axon Enterprise, Inc.,
Plaintiff-Appellant,
v.
Federal Trade Commission, et al.,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
(CV 20-00014-DWL)

PLAINTIFF-APPELLANT'S REPLY BRIEF

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> "It cannot be that simply by pointing to any [agency] statute, governmental defendants can foreclose a constitutional claim."
>
> *Sierra Club v. Trump,*
> 929 F.3d 670, 697 (9th Cir. 2019)

At bottom, the FTC's position is this: If a constitutional challenge *can* be brought in an administrative case, it *must* be brought there, and once there, cannot be considered "wholly collateral" to those proceedings. And, once there, the requirement for meaningful review is automatically satisfied because *eventual* judicial review is *possible*. This is not the law in the Ninth Circuit.

The FTC's Answering Brief ("AB") [1] does little to actually address Axon's arguments, and its silence on numerous critical points and authorities is deafening. The Commission responds with its generic mantra that district court action is barred once an administrative proceeding starts, and pre-enforcement jurisdiction is barred for lack of final agency action. But this reasoning would preclude ALL district court jurisdiction of anything the FTC touches, which would effectively overrule *Free Enterprise, McNary, VCS*, and numerous other precedents of this Court. As those

[1] "AB" references are to FTC's Answering Brief filed June 1, 2020 (No. 24). "OB" references are to Axon's Corrected Opening Brief filed May 2, 2020 (No. 18). "Amicus Br." references are to the Amicus Brief filed May 8, 2020 (No. 21) by the New Civil Liberties Alliance and TechFreedom. "ER" references are to Axon's Excerpts of Record filed May 1, 2020 (No. 14). "Doc." references are to the district court's docket where not contained in the ER.

authorities demonstrate, district courts have jurisdiction over constitutional claims that cut to the heart of an agency's existence and authority or that challenge uncodified agency practices unrelated to individual merits determinations. There simply is no discernible congressional intent in the FTC Act to preclude such claims.

I. FTC ACT'S STATUTORY REVIEW SCHEME DOES NOT ENCOMPASS AXON'S CONSTITUTIONAL CLAIMS.

A. No Jurisdiction-Stripping Intent From § 45's Text or Legislative History.

The FTC's position is that the mere "existence" of a statutory review scheme is conclusive evidence of congressional intent to funnel all claims—including all constitutional claims—through the administrative process, regardless of the agency's expertise, competence or authority to decide those claims and irrespective of any actual entanglement with the antitrust merits. Of course, if this were true, there would be no need for the *Thunder Basin* factors for assessing "fairly discernible" congressional jurisdiction-stripping intent. Instead, the mere fact of the statute would be enough. But the statute itself is not enough. Neither the text nor legislative history of the FTC Act reveals *any* congressional intent, let alone *clear* intent, to preclude district court jurisdiction over constitutional claims otherwise within their federal question duty to decide.

There is no excuse for the FTC Answering Brief's wholesale failure to address the following critical points in Axon's Opening Brief, other than there simply is no reasonable response:

- *Free Enterprise*'s finding that 15 U.S.C. § 78y—the SEC counterpart to 15 U.S.C. § 45 here—did not provide "an exclusive route to review" and that the text of § 78y, which the FTC concedes is "nearly identical" to § 45(c) (AB15-16), does not expressly **or implicitly** limit a district court's federal question jurisdiction over constitutional claims. 561 U.S. at 489.

- That 15 U.S.C. § 45(c)'s jurisdictional limitation of judicial review to "cease and desist" orders is "plainly more restrictive than those statutes [Mine Act, Sarbanes-Oxley Act, CSRA] authorizing judicial review of 'final decisions,' 'final agency action,' or 'an order.'" *Louisiana Real Estate Appraisers Bd. v. FTC*, 917 F.3d 389, 393 (5th Cir. 2019).

- This Court's holding in *Latif v. Holder*, 686 F.3d 1122, 1129 (9th Cir. 2012), that when a statute (like § 45 here) only grants appellate jurisdiction "to affirm, amend, modify, or set aside" an agency's orders, the appellate court lacks jurisdiction "to grant other remedies," including injunctive relief as Axon has requested here.[2]

[2] The FTC's assertion (AB31 n.6) that eventual review will provide Axon with a "cause of action" if it is ultimately aggrieved by a final order of the FTC, is patently

- That the plain language of § 45(d) only vests "exclusive" jurisdiction in the appellate court at the end of the administrative case "[*u*]*pon the filing of the [Commission's] record with it*", not sooner. (OB26; Amicus Br. 20-21).

- That the FTC's enforcement powers are non-exclusive in any event. It is undisputed that the DOJ, state attorneys general, private parties and even international bodies have a place in the congressional scheme of antitrust enforcement. (OB29; Amicus Br. 18).

- That no FTC Act legislative history supports congressional intent to strip district court jurisdiction over constitutional claims. (OB8-9, 28). This stands in stark contrast with express legislative history for both the Mine Act and CSRA that Congress intended to eliminate district court actions. (OB16 n.6; OB17 n.8).

- That Congress would not choose to funnel structural constitutional claims to an administrative agency without authority, competence or expertise to decide them. *See Free Enterprise*. 561 U.S. at 491; *Montana Chapter of Ass'n of Civilian Technicians, Inc. v. Young*, 514 F.2d 1165, 1167 (9th Cir. 1975).

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false. There is no mechanism for Axon to file a cross-claim against the FTC in its own administrative proceeding or to obtain affirmative injunctive relief. Asserting an affirmative defense, subject to the FTC's biased internal rules and procedures, is hardly the same thing. Moreover, by the time Axon's constitutional claims ever reach a court of appeals, its injunction request will be moot as the administrative proceeding it is challenging (and the constitutional harm it will suffer) will have already occurred.

- That silence is insufficient under Ninth Circuit jurisprudence to infer congressional intent to preclude constitutional claims. *Latif*, 686 F.3d at 1129 (finding no intent under either *Elgin* or the "fairly discernible" standard to strip district court jurisdiction over constitutional claim because, when "Congress intends to preclude judicial review of constitutional claims, its intent to do so must be clear") (quoting *Webster v. Doe*, 486 U.S. 592, 603 (1988)).[3] The FTC therefore has it backwards when it states there is no reason to conclude that Congress "intended to exempt" constitutional claims from § 45's statutory review scheme (AB28), when in fact there is no express or implied congressional intent to mandate such claims be adjudicated within that scheme and no other.

Accordingly, neither the text nor the legislative history of § 45 supports discernable jurisdiction-stripping intent for any of Axon's constitutional claims.

B. The Commission's Refusal To Conduct Claim-By-Claim Analysis Speaks Volumes.

A claim-by-claim analysis is necessary to determine whether each constitutional claim is "genuinely collateral" to an assessment of the individual merits, which is the predominate factor in this Court's analysis of district court

[3] *See also Ctr. for Biological Diversity v. Bernhardt*, 946 F.3d 553, 561 (9th Cir. 2019) (Courts "may presume that Congress will use specific language if it intends to foreclose judicial review of constitutional claims.").

jurisdiction.[4] The FTC, however—despite Axon's urging (ER38 at 5:17-20; OB23-24 & nn.12-13, OB28) and this Court's clear example in *Veterans for Common Sense v. Shinseki*, 678 F.3d 1013, 1033 (9th Cir. 2012) (en banc) ("*VCS*")—continues to lump three very different constitutional challenges together. In so doing, the FTC seeks to mask the claims' true collateral nature and blur their independence from the antitrust merits, which it concedes Axon "is no longer pressing." (AB18).

1. Clearance Process Claim Decoupled.

Axon has challenged the constitutionality of the "clearance" process by which the FTC and the DOJ divvy up merger investigations—thereby arbitrarily subjecting similarly situated companies to vastly different rights, standards, and consequences—in violation of Fifth Amendment due process and equal protection guarantees. The FTC disposes of this substantial unconstitutional practice claim of first impression in a single paragraph, arguing for the first time on appeal that Axon's

[4] The Commission's Answering Brief completely ignores substantial Ninth Circuit authority cited by Axon, including (1) *Gebhardt v. Nielsen*, 879 F.3d 980, 987 (9th Cir. 2018), and *City of Rialto v. W. Coast Loading Corp.*, 581 F.3d 865, 872 (9th Cir. 2009), explaining that the Court retains jurisdiction over broad challenges to an agency's unconstitutional "practices" or "procedures" not based on individual merits decisions; and (2) *Recinto v. U.S. Dept. of Veteran Affairs*, 706 F.3d 1171 (9th Cir. 2013) and *Latif*, 686 F.3d at 1129, finding jurisdiction over constitutional claims, post-*Elgin*, that did not require assessment of individual merits. (OB12, 20-24). Nowhere does the FTC address Axon's "trilogy"-harmonizing standard, consistent with this Court's precedents: whether the substance of the constitutional claim presented is inextricably intertwined with the administrative merits. (OB14).

complaint "does not challenge the constitutionality of this pre-enforcement process, nor does it request any relief related to it." (AB23). This contention is belied by the extensive allegations in Axon's complaint concerning this uncodified "black box" process and its unconstitutional consequences for merging parties.[5] All of these allegations are expressly incorporated in Axon's Count 1 Fifth Amendment due process and equal protection claim (ER149, ¶ 57) and encompassed in its prayer for declaratory relief that the FTC's administrative procedure is unconstitutional. (ER151, b).

The FTC's decision to treat Axon's clearance claim with such short shrift leaves all of the following jurisdiction determinative facts undisputed:

- Axon is not challenging any Commission or ALJ decision or order and does not seek any remedy under the FTC Act.
- The clearance process is not codified in any statute, rule or regulation, and therefore falls outside the FTC Act.
- Such an extra-statutory process was never contemplated by Congress.
- Because no relevant statute or rule exists, no agency interpretation or expertise is required.

[5] *See* OB29-30; ER124-39, ¶¶ 6, 30, 32, 35, alleging clearance criteria and procedures are "arbitrary," without "rational basis," and "secretly negotiated between the agencies themselves" without public insight, comment or congressional scrutiny, and detailing the stark differences in procedures and protections afforded private parties in DOJ and FTC cases.

- FTC and DOJ *staff* conduct the clearance process, which does not involve any *Commission* action or order and thus is not subject to judicial review under § 45, which is limited on its face to "cease and desist" orders issued *by the Commission*. *See Free Enterprise*, 561 U.S. at 490 (§ 78y provides "only for judicial review of *Commission* action") (emphasis in original); *Latif*, 686 F.3d at 1127-28 (district court jurisdiction only preempted "as to those classes of claims reviewable under § [45]"); *see also Sierra Club*, 929 F.3d at 697 ("[O]nly if the statute *actually* permits the action can it *even possibly* give authority for that action.") (emphasis in original).

- Axon's clearance claim applies equally to all Part 3 merger respondents sorted by the FTC/DOJ secret process, and does not depend on the individual antitrust merits in the administrative proceeding.

- The legality of the Vievu acquisition is "irrelevant" to the constitutionality of the clearance process, as FTC Complaint Counsel has admitted in the administrative case. (OB33).[6]

[6] Further, the FTC failed to address *Fashion Originators Guild of Am. v. FTC*, 114 F.2d 80, 82-83 (2d Cir. 1940) (OB36-37), which interpreted the "additional evidence" provision in 15 U.S.C. § 45(c) as limiting appellate remand to *newly discovered*—not excluded or rejected—evidence. That holding severely limits any ability of a court of appeals to order fact discovery on issues the FTC concludes are irrelevant during the administrative hearing. This precedent seriously undermines the FTC's meaningful judicial review contention, as does the undisputed fact that no

For all these reasons, the district court has federal question jurisdiction over Axon's wholly collateral clearance process claim. This uncodified, system-wide practice exists outside of the FTC Act and thus does not fall within its statutory review scheme.

2. Biased Tribunal Laid Bare.

Axon also challenges the constitutionality of the FTC's structure—combining investigative, prosecutorial, adjudicative, and appellate functions—together with its undisputed 25-year win streak in its own administrative forum, as a Fifth Amendment due process violation. The FTC's response is again dismissive, stating in a single paragraph only that the "high odds of a cease-and-desist order coming from the FTC" do not alter the contours of a court's jurisdiction. (AB25, quoting *LabMD, Inc. v. FTC*, 776 F.3d 1275 (11th Cir. 2015)).[7] A 100% win rate is not "high odds"—it is virtual certainty.

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publicly available clearance information exists for a court of appeals to take judicial notice of.

[7] It is ironic that the FTC would cite *LabMD*—a poster child for a party's inability to ever achieve meaningful judicial review of a non-merits-based constitutional claim in an FTC administrative action. LabMD's multi-year, multi-appeal saga is laid out in detail by amici (Amicus Br. 24-25), whom the FTC ignores altogether. Despite destroying the company with a position so frivolous that the FTC was ultimately sanctioned by the Eleventh Circuit with a substantial attorney fee award, no ruling on LabMD's unfair tribunal constitutional claim was ever obtained. (*Id.*).

The FTC fails to address the Supreme Court's decision in *Withrow v. Larkin,* 421 U.S. 35 (1975), which held that while a federal administrative agency does not violate due process simply by combining investigative and adjudicative functions "without more," "special facts and circumstances present in the case" may demonstrate "that the risk of unfairness is intolerably high." *Id*. at 58. Here, Axon has alleged something "more"—an incestuous structure that has produced an inherently "biased institutional process" resulting in an undisputed 100% win rate in the FTC's administrative home court for the past quarter century, and an unprecedented "blank check" settlement ultimatum by a regulator which has clearly prejudged the case. (OB40-42).

Accordingly, Axon has presented a colorable constitutional due process claim. Axon need not establish an actual constitutional violation to establish federal question jurisdiction. *Foster v. Tourtellotte*, 704 F.2d 1109, 1111 n.2 (9th Cir. 1983). Rather, federal courts will exercise jurisdiction unless the constitutional claim "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous." *Id.* (quoting *Bell v. Hood,* 327 U.S. 678, 682-83 (1946)). The FTC makes no such allegation here, and the district court expressly found Axon's constitutional claims "significant and topical." (ER6).

Moreover, it is clear that the FTC Commissioners and ALJ are precluded from deciding whether the Commission's own multifunction structure, in practice, creates inherent institutional bias in violation of due process. The FTC fails to address Axon's substantial Supreme Court and Ninth Circuit authorities (OB43-44) that these officials with a vested interest in the outcome of the claim are disqualified from deciding it. District court jurisdiction is thus necessary and appropriate.

The FTC contends this structural due process claim is "coextensive with [the] merits claims" in the ongoing administrative proceeding (AB30) and, at bottom, are "essentially objections to forthcoming [FTC] orders." (AB27). This argument is itself a tacit admission that Axon's complaint does not challenge any FTC order. Moreover, the FTC never alleges that Axon's constitutional claims are "inextricably intertwined" with the antitrust merits in the administrative case, and it identifies no threshold merits-based finding necessary to a determination of Axon's constitutional claims. *See Elgin v. Dep't of Treasury*, 567 U.S. 1, 22-23 (2012) (finding petitioner's constitutional claim required deciding the "threshold question" of whether to treat his resignation as a constructive discharge—an assessment "squarely within the MSPB's expertise"); *LabMD,* 776 F.3d at 1277, 1280 (finding due process claim "inescapably intertwined" with LabMD's APA fair notice claim). The FTC has not, and cannot, identify *any* threshold antitrust questions requiring Commission resolution. There are none.

The only threshold claim requiring resolution is Axon's. No party should be subjected to a tribunal it contends, colorably, is unconstitutionally structured and inherently biased before its constitutional challenge is resolved. The district court has jurisdiction to do so.

3. Separation of Powers Considered Separately.

There can be no doubt that Axon's dual-layer removal challenge to the FTC's ALJs presents a substantial Article II constitutional claim. *Free Enterprise,* 561 U.S. at 495-96 (finding nearly identical dual-layer protection impermissibly restricts executive action and violates Article II); *Lucia v. S.E.C.,* 138 S. Ct. 2044, 2051 (2018) (finding SEC ALJs are "Officers of the United States" whose appointments must comply with Art. II, § 2, cl. 2);[8] *see also Seila Law LLC v. Consumer Financial Protection Bureau,* S.Ct. No. 19-7 (current challenge to single-layer constraint on Presidential removal power). It is also clear that if Axon's Article II challenge to the ALJ's authority is not decided on the merits as a threshold issue, Axon will be subjected to an unconstitutional proceeding that will require a complete do-over. *Lucia*, 138 S. Ct. at 2055 (ordering remand following successful Article II challenge

[8] The flip side of this ruling must also be true. *See Lucia*, 138 S. Ct. at 2060 (Breyer, J., concurring in part) (noting Congress has also provided ALJs with two levels of protection from removal without cause—"just what *Free Enterprise Fund* interpreted the Constitution to forbid in the case of the Board members").

for second administrative trial before a constitutionally appointed ALJ).[9] Certainly Congress had no intent to funnel such threshold constitutional questions to an administrative agency without authority, competence or expertise to decide them, virtually assuring an agency / appellate court ping-pong to the significant detriment (and often outright destruction) of litigants. *See Cirko v. Comm'r of Soc. Sec.*, 948 F.3d 148, 153, 158 (3d Cir. 2020) (finding agency exhaustion "generally inappropriate where a claim serves to vindicate structural constitutional claims like Appointments Clause challenges," and rejecting any notion that "claimants must exhaust constitutional challenges even if the agency lacks authority to decide them" as a "patent misreading" of *Elgin* and inconsistent with *Free Enterprise*).

Indeed, the FTC here does not claim any authority, competence or expertise to decide this Article II challenge, arguing only that the claim may be "mooted" if Axon is ultimately successful in the administrative case. (AB28-29). But aside from the fact that the FTC never loses in its own administrative forum, this Court's precedent is clear: deprivation of constitutional rights "unquestionably constitutes irreparable injury." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). The FTC does not dispute this. (AB22). Accordingly, the constitutional *injury* is not mooted by an administrative

[9] *See* Amicus Br. 25-26, detailing Lucia's "eight-year odyssey" through an administrative process so wrong that the DOJ confessed error before the Supreme Court.

win on the merits. That harm has already occurred and the hypothetical prevailing party has no remedy whatsoever. And, if the party loses, the constitutional injury inherent in the proceeding itself cannot be remedied after-the-fact on appeal. That injury has already occurred and becomes permanent and irreversible.

Importantly, the FTC also does not allege any actual entanglement between Axon's Article II claim and the antitrust merits to be determined in the administrative case. There is none. It is undisputed that Axon is not challenging any order or decision of the ALJ, but his authority to preside over the case at all. This challenge is not unique to Axon and applies to all merger respondents in Part 3 cases. And critically, resolution of the Article II claim will have absolutely no bearing on the individual merits determination regarding Axon's acquisition of Vievu. The FTC does not argue otherwise and in fact ignores completely this essential inquiry for determining district court jurisdiction, that is, whether the *substance* of the constitutional claim is inextricably intertwined with the administrative merits. This inquiry distinguishes *Free Enterprise* from *Thunder Basin* and *Elgin*, and it harmonizes the cases' different outcomes. (OB14-20).[10]

[10] *Compare Elgin*, 567 U.S. at 22 (no jurisdiction where, "[f]ar from a suit wholly collateral to the CSRA scheme, the case before us is a challenge to CSRA-covered employment action brought by CSRA-covered employees requesting relief that the CSRA routinely affords"), and *Thunder Basin Coal Co. v. Reich,* 510 U.S. 200, 207, 214 (1994) (no jurisdiction where "[p]etitioner's statutory claims *at root* require interpretation of the parties' rights and duties under § 813(f) and 30 CFR pt. 40, and

a. Misplaced Reliance on SEC ALJ Cases Post-*Elgin*.[11]

The FTC relies heavily on non-binding cases from other jurisdictions (AB16, 20-21, 27-29), all pre-*Lucia*, erroneously finding SEC ALJ challenges must await administrative review. These decisions are based on *Elgin*'s alleged refusal to carve out facial constitutional challenges from administrative review schemes. Like the FTC and the district court here, these cases fail to acknowledge the fact that the facial constitutional challenge in *Elgin* was inextricably intertwined with the administrative merits. That fact is especially significant given this Court's statutory review decisions in other contexts, finding district court jurisdiction over facial constitutional claims not requiring assessment of individual merits. In any event, this Court should not resolve important constitutional questions "by a show of hands," *see CSX Transp., Inc. v. McBride*, 564 U.S. 685, 715 (2011) (Roberts, CJ., dissenting), particular when Axon's Article II claim presents a significant issue of first impression in this Circuit.

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as such arise under the Mine Act and fall squarely within the Commission's expertise") (emphasis added), *with Free Enterprise*, 561 U.S. at 490 (jurisdiction found where accounting firm's Article II claim constituted a "general challenge" to the Board's *existence* "'collateral' to any Commission orders or rules from which review might be sought").

[11] The SEC ALJ cases only apply, if at all, to Axon's Article II removal claim, not its Fifth Amendment due process and equal protection claims, further supporting the necessity of a claim-by-claim analysis as conducted in *VCS*.

Elgin did not hold that *all* facial constitutional challenges are barred under the CSRA or any other agency review scheme,[12] and this Court has in fact found district court jurisdiction over facial constitutional challenges in other agency contexts. *Recinto*, 706 F.3d at 1175-76 (finding jurisdiction over facial equal protection challenge); *VCS,* 678 F.3d at 1033 (finding jurisdiction over facial due process challenge). Both of these cases separately analyzed multiple constitutional claims and found jurisdiction over some, but not all, claims based on an assessment of whether individual merits decisions were implicated. In *Recinto*, post-*Elgin*, this Court stated:

> In *Veterans for Common Sense,* we held that the VJRA did not bar jurisdiction over a facial challenge to the constitutionality of a statute **because review of that challenge would not require consideration of "'decisions' affecting the provision of benefits to any individual claimant[ ]."** For the same reasons, we conclude that we have jurisdiction over Plaintiffs' facial equal-protection claim. **Evaluation of that claim only requires us to look at the text of the statute** establishing the FVEC, nothing more. To assess this claim **we need not assess whether individual claimants have a right to veterans benefits.**

[12] The FTC's citation to *Kerr v. Jewell*, 836 F.3d 1048 (9th Cir. 2016) (AB6, 15) is inapposite. The plaintiff in *Kerr* challenged an adverse employment action under the Whistleblower Protection Act, 5 U.S.C. § 2302(b)(8). That challenge was intertwined with the merits of the employment action and thus clearly was governed by *Elgin*, which held that CSRA exclusivity "does not turn on the constitutional nature of an employee's claim, but rather on the type of employee and the challenged employment action." 567 U.S. at 15.

706 F.3d at 1176 (emphasis added, internal citation omitted). *See also Latif,* 686 F.3d at 1129 (post-*Elgin* finding that review statute did not divest district court jurisdiction over substantive and procedural due process claims that did "not require review of the merits" of individual grievances).

Similarly here, evaluation of Axon's Article II separation-of-powers claim only requires this Court to look at the plain and undisputed text of the ALJ and MSPB removal statutes establishing an impermissible dual-layer of good-cause removal protection under *Free Enterprise* and *Lucia*. *See* 5 U.S.C. § 7521(a) (requiring MSPB establish "good cause" before Commission ALJ may be removed); 5 U.S.C. § 1202(d) (establishing limited circumstances in which MSPB members may be removed). This purely legal exercise requires no statutory interpretation, factfinding, agency expertise, or assessment of the individual antitrust merits of the Vievu acquisition. Accordingly, the district court retains jurisdiction to decide it.

b. Attempted Claim Preclusion Distinction.

The Commission attempts to distinguish *VCS* and the Supreme Court's decision in *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991), by arguing that plaintiffs' "pattern and practice" claims in those cases could not be brought under the applicable agency review schemes. (AB21-22). It then postulates that because "Axon can and has raised [its] challenges in the FTC proceeding" (AB23), § 45(c) provides the exclusive path to review. Not so.

First, the FTC fails to acknowledge that when Axon filed its complaint in this case, there was no administrative proceeding. The Commission cites no authority for the proposition that its *subsequent* filing of the administrative complaint somehow stripped the district court of jurisdiction it otherwise had. The Commission also fails to cite any authority supporting the notion that Axon's subsequent assertion of certain affirmative defenses in the administrative case, under protest and so as not to waive them, somehow divested the district court of jurisdiction. Neither the FTC nor Axon's actions are relevant in this regard. The only thing that can divest the district court of jurisdiction over Axon's constitutional claims is Congress' "fairly discernible" intent to do so, which, as discussed above, is non-existent and in direct conflict with *Free Enterprise*.

Moreover, in *VCS*, the ability of the "organizational plaintiffs" to bring their constitutional claims in Veterans Court was mentioned as a secondary factor and was not dispositive. (AB22). 678 F.3d 1034-35 (noting no VJRA mechanism for system-wide due process claim by organizational plaintiffs). Indeed, while this Court held that the district court had jurisdiction over certain due process claims, it also found jurisdiction lacking over other due process claims based on system-wide service and processing delays, even though the VJRA did not provide VCS a mechanism to bring those claims in Veterans Court. The difference in treatment for these claims thus was not *access* to the Veterans Court. Instead, jurisdiction turned

on whether the evidence necessary to support the claim required "review [of] the circumstances surrounding the VA's provision of benefits to individual veterans." *Id*. at 1027 (finding reasonableness of the delays required assessment of individual cases).

In contrast, the claim over which the district court had jurisdiction was a claim challenging VA *procedures* in the filing and handling of benefits claims at the Regional Offices—*i.e.*, the fairness of the agency itself. This claim did not suffer from the same entanglement with individual merits or require "review [of] 'decisions' affecting the provision of benefits to any individual claimants." *Id*. at 1034. Thus, in finding jurisdiction as to this claim, the Court clearly stated the key distinction: The constitutionality of agency procedures "which frame the system" by which a party presents its claims "is different than a consideration of the decisions that emanate through the course of the presentation of those claims." *Id*. Here, Axon's constitutional challenges are to the FTC's "system," its procedures and practices—not any Commission decision that may issue. The district court therefore has jurisdiction over Axon's structural constitutional claims.

Similarly, in *McNary,* the Supreme Court focused on the absence of clear congressional language mandating preclusion of federal jurisdiction over general collateral challenges unrelated to individual merits determinations, specifically, unconstitutional practices and policies used by the INS in processing applications

that did not require direct review of individual denials of SAW status. 498 U.S. 479, 481. Thereafter, this Court has held that it "retain[s] jurisdiction over challenges to an agency's 'pattern and practice,' … if it challenges a genuinely *collateral* action." *Gebhardt,* 879 F.3d at 987 (emphasis in original). Here too, there is an absence of congressional intent to preclude Axon's structural constitutional claims wholly collateral to the antitrust merits.

c. *Free Enterprise* Indistinguishable and Controlling.

The Commission's attempt to distinguish *Free Enterprise* lacks merit. (AB25-26). Not only is Axon on the *same* "footing" with *Free Enterprise*, it is on all fours with it. *Free Enterprise*, not *Elgin*, is controlling here.

Axon "objects to the [Commission ALJ's] *existence*" as an unconstitutional infringement on the President's removal powers, just as the *Free Enterprise* plaintiffs objected to the very "*existence*" of the Board. 561 U.S. at 490 (emphasis added). In both cases, the regulatory body had "beg[un] a formal investigation"—the Board into plaintiffs' accounting practices and the FTC into Axon's methods of competition—but neither had initiated an enforcement proceeding. *Id*. at 487. Moreover, neither case challenged a *Commission* order or action reviewable under the agency's statutory review scheme. *Id*. at 490 (review statute "provides only for judicial review of *Commission* action, and not every Board [or FTC staff] action is encapsulated in a final order").

Instead, Free Enterprise Fund and Axon each brought structural constitutional challenges to the Board and ALJ respectively, based on an impermissible dual-layer of insulation from Presidential accountability in violation of Article II separation of powers—a challenge "outside the Commission's competence and expertise" to decide. *Id*. at 491. *See also Young*, 514 F.2d at 1167 ("[F]ederal administration agencies have neither the power nor competence to pass on the constitutionality of statutes."). And they did so with "nearly identical" agency review statutes that the Supreme Court held did not provide "an exclusive route to review" and did not, expressly *or implicitly*, limit a district court's federal question jurisdiction over constitutional claims. *Id*. at 489.

The FTC again attempts to cast *Free Enterprise* as a case where plaintiffs had no statutory alternative to bring their constitutional claim, stating there was no "existing avenue to raise a separation-of-powers claim that could be heard through the statutory review scheme" because the plaintiffs "were not already in an administrative enforcement proceeding." (AB26). But the same was true of Axon when it filed its complaint, so timing cannot be the deciding factor. Moreover, while the FTC focuses on the Supreme Court's refusal to require plaintiffs to take "violative action" and potentially "bet the farm" to trigger enforcement and create a vehicle that could proceed through the statutory review scheme (*id*.), the Commission ignores the second, low-cost, no-risk option available to the *Free*

Enterprise plaintiffs to "challenge a Board rule at random" and achieve the same result. *Id*. at 490. Thus, there was in fact a vehicle through which the accounting firm *could have* raised its Article II challenge in the administrative case, but it was not *required* to do so. Such an "odd procedure" was likely not intended by Congress (and is no "odder" than requiring Axon to spend years and millions of dollars in an unconstitutional process). *Id*.

As this Court recently stated in *Sierra Club v. Trump*, 929 F.3d 670, 697 (9th Cir. 2019), "[i]t cannot be that simply by pointing to any [agency] statute, governmental defendants can foreclose a constitutional claim." Clearly, "claims challenging agency actions—*particularly constitutional claims*—may exist wholly apart from the APA." *Id*. at 699 (emphasis added). Indeed, plaintiffs either have an equitable cause of action to enjoin a constitutional violation, **or** they can proceed on their constitutional claims under the APA, **or both**. *Id*. at 676-77. "Either way, Plaintiffs have an avenue for seeking relief" from unconstitutional official conduct. *Id*. at 694.

The plaintiffs in *Free Enterprise* and Axon both chose an equitable cause of action to enjoin a substantial constitutional violation—a remedy not available in an administrative case and not within the court of appeals' limited jurisdiction "to affirm, amend, modify, or set aside" an agency's orders. 15 U.S.C. § 45(c); *Latif*, 686 F.3d at 1128. Accordingly, Axon structural constitutional challenge is both

extra-statutory and wholly collateral to the antitrust merits. Under *Free Enterprise*, properly applied, the district court has jurisdiction over Axon's Article II claim.

II. AXON'S CONSTITUTIONAL CLAIMS DO NOT ARISE UNDER THE APA AND DO NOT REQUIRE FINAL AGENCY ACTION.

The FTC alternatively argues that the district court lacks jurisdiction because there is no "final agency action" within the meaning of the APA, 5 U.S.C. § 704. (AB30-34). The Commission falsely claims that "[o]nly the APA provides a private right of action," that Axon's "action arises solely under the APA," and that dismissal was necessary because Axon "has not challenged final agency action, which is a prerequisite for its sole cause of action under the APA." (AB30-31). These statements misrepresent both the nature of Axon's claims and substantial controlling Supreme Court and Ninth Circuit precedent that a private right of action exists directly under the Constitution.

Axon's claims arise under the U.S. Constitution, not the APA. Axon alleges due process and equal protection claims under the Fifth Amendment and a separation-of-powers claim under Article II. (ER131, ¶ 16, "This action arises under the Constitution and laws of the United States, and this Court has federal question jurisdiction over this action pursuant to Article III of the Constitution and 28 U.S.C.

§ 1331.") (ER149-150, Counts 1-2).[13] The only claim arguably arising under the APA was Axon's Count 3 merits-based antitrust declaratory judgment claim. Axon abandoned that claim when the FTC subsequently initiated its enforcement action, and Axon expressly excluded that claim as a basis for injunctive relief. (OB6, 7 n.4, 47 n.24). The FTC, in an attempt to blur constitutional and merits-based issues that are separate and severed, ignores this fact and refuses to conduct a proper claim-by-claim analysis.

Axon's assertion of unconstitutional agency action is sufficient to confer district court jurisdiction under 28 U.S.C. § 1331. *See, e.g., Davis v. Passman*, 442 U.S. 228, 243-44 (1979) (upholding general federal question jurisdiction of district court directly under the Fifth Amendment); *Clinton v. Babbitt,* 180 F.3d 1081, 1086-87 (9th Cir. 1999) (Fifth Amendment claim gives rise to federal question jurisdiction). *See also Free Enterprise*, 561 U.S. at 491 n.2 (rejecting government's assertion that no implied private right of action exists directly under the Constitution to challenge governmental action under separation-of-powers principles, stating government offered no reason or authority why such a claim "should be treated differently than every other constitutional claim.").

[13] Axon also expressly alleged its right to immediate judicial review based on the Due Process Clause of the Fifth Amendment, the Federal Declaratory Judgment Act, 28 U.S.C. § 2201, and the APA's waiver of sovereign immunity, 5 U.S.C. § 702. (ER131, ¶ 17).

This Court's recent decision in *Sierra Club* warrants more than a footnote. (AB31 n.6). In *Sierra Club*, the Court confirmed that plaintiffs have "an equitable cause of action to enjoin" unconstitutional official conduct outside of the APA. 929 F.3d at 676-77, 699 ("claims challenging agency actions—particularly constitutional claims—may exist wholly apart from the APA"). *See also Navajo Nation v. Dep't of the Interior*, 876 F.3d 1144, 1170 (9th Cir. 2017) (Although "a court is foreclosed by [APA] § 704 from entertaining claims *brought under the APA* seeking review of non-final agency action," this limitation does not apply "to other types of claims (like ... constitutional claims).") (emphasis in original).

Likewise, in *Presbyterian Church v. United States*, 870 F.2d 518 (9th Cir. 1989), the Court allowed constitutional claims to proceed without even deciding whether an APA cause of action was available, holding that APA § 702 waived the government defendants' sovereign immunity for claims (like Axon's) seeking non-monetary relief. *Id.* at 523-24. Critically, the Court made clear that this waiver of sovereign immunity was not limited to suits involving an "agency action" as defined under the APA. *Id.* at 525. *See also E.V. v. Robinson,* 906 F.3d 1082, 1094 (9th Cir. 2018) ("waiver applies even where there is not 'final agency action' under APA section 704"); *Truckee-Carson Irr. Dist. v. Sec'y of Dep't of Interior,* 742 F.2d 527, 532 (9th Cir. 1984) (Fifth Amendment claim within district court's federal question

jurisdiction because § 702 waives sovereign immunity for suits against federal agencies where no monetary damages are sought).

Accordingly, Axon has a direct cause of action under the Fifth Amendment and Article II and may pursue equitable relief, declaratory and injunctive, against unconstitutional FTC action in federal district court. Indeed, as stated in *Free Enterprise*, equitable relief "has long been recognized as the proper means for preventing entities from acting unconstitutionally," and "it is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution." 561 U.S. at 491 n.2 (citing *Correctional Services Corp. v. Malesko,* 534 U.S. 61, 74 (2001), and *Bell v. Hood,* 327 U.S. 678, 684 (1946)). *See also Sierra Club*, 929 F.3d at 694 (same).

The FTC's reliance on *FTC v. Standard Oil Co.,* 449 U.S. 232 (1980) and *Ukiah Valley Med. Ctr. v. FTC*, 911 F.2d 261 (9th Cir. 1990) (AB10, 31-33) is similarly misplaced. Both stand for the irrelevant proposition that the issuance of an administrative complaint is not final agency action. Axon has never challenged the mere "issuance" of the administrative complaint or the FTC's jurisdiction to do so. (ER65 at 33:15-16). Nor has Axon ever alleged *in this case* that the administrative complaint "failed to allege a violation of the FTC Act or the antitrust laws." (AB5, citing Axon's first affirmative defense in the administrative case that "[t]he Complaint fails to state a claim upon which relief can be granted"). Indeed, when

Axon filed its district court complaint there was no administrative case.[14] Here, Axon's claims are purely constitutional.

In *Ukiah*, plaintiff challenged the issuance of an FTC administrative complaint. It filed a motion to dismiss with the ALJ *challenging the FTC's interpretation of its own statute* (*i.e.,* whether the FTC had jurisdiction over "pure asset acquisitions by not-for-profit corporations") and, when unsuccessful, sought a preliminary injunction in district court. 911 F.2d at 263. The district court denied the injunction, finding the issuance of an administrative complaint is not final agency action under *Standard Oil*, and this Court affirmed. *Id*. Critically, Ukiah did not raise *any* constitutional or other systematic process challenge like Axon raises here. Nor did Standard Oil. After discussing this key distinction at oral argument (ER65-66 at 32:25-33:17), the district court deleted a long footnote on *Ukiah* contained in its

[14] The so-called "pre-enforcement" cases cited by the FTC (AB34) are inapposite. Plaintiffs in both *Ass'n of Am. Med. Colleges v. United States*, 217 F.3d 770, 773, 784 n.9 (9th Cir. 2000), and *Gen. Atomics v. U.S. Nuclear Regulatory Comm'n*, 75 F.3d 536, 540-41 (9th Cir. 1996), alleged the agencies were acting in excess of their statutory jurisdiction, an allegation not made by Axon here. *Gen. Atomics* involved no constitutional claim at all, and the due process claim in *Assn of Am. Med. Colleges* was deemed not ripe or presenting an Article III case or controversy. The FTC here has never suggested Axon lacks standing to bring its constitutional claims or that they are not ripe, and the Supreme Court had no trouble finding pre-enforcement standing in *Free Enterprise*.

tentative ruling (Doc. 29 at 24 n.5) from its final decision. The FTC, however, refuses to throw in the towel, misrepresenting Axon's claims in the process.[15]

CONCLUSION AND STATEMENT OF RELIEF SOUGHT

For all these reasons and those stated in Axon's Opening Brief, this Court should vacate the district court's judgment and remand with instructions to decide Axon's constitutional challenges and preliminary injunction motion on the merits.

Dated: June 15, 2020

Respectfully submitted,

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[15] The Commission also cites *Standard Oil* for the proposition that the burden and expense of defending the administrative case, although admittedly "substantial and unrecoupable," does not constitute irreparable injury. (AB24). This too is irrelevant. Axon has never alleged that the millions of dollars it is being forced to spend to defend the administrative case, alone, supports the declaratory and injunctive relief it seeks. (ER65 at 32:9-20, stating that the harm is not just "expense and the time," but being subjected "to an unconstitutional process with an unconstitutional presiding officer" that simply cannot be remedied after-the-fact). "The constitutional violation *is* the harm, and the process *is* the penalty." (OB35).

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of 9th Cir. Rule 32-1. This brief contains 6637 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6). This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14.

/s/ Pam Petersen

CERTIFICATE OF FILING AND SERVICE

I hereby certify that, on June 15, 2020, I electronically filed the foregoing Appellant's Reply Brief with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF System, which will send notice of such filing to all registered users.

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