IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AXON ENTERPRISE, INC.,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	No. 20-15662
	)	
FEDERAL TRADE COMMISSION, et al.,	)	
	)	
	)	
Defendants-Appellees.	)	

OPPOSITION TO AXON'S EMERGENCY MOTION
FOR AN INJUNCTION PENDING APPEAL

Plaintiff Axon Enterprise is a respondent in an ongoing administrative proceeding before the Federal Trade Commission (FTC). Axon moves for an emergency injunction of that administrative proceeding pending a resolution of its appeal to this Court. That motion should be denied because Axon fails to satisfy any of the factors that could support such an injunction.

BACKGROUND

The applicable statutory framework and procedural history of this case are detailed in our answering brief on the merits (at 2-9), and we summarize them here. The FTC can initiate an administrative proceeding to determine if someone has violated the antitrust laws; if the FTC determines that there has been a violation and imposes an adverse order, the respondent may seek judicial review exclusively in the

court of appeals. 15 U.S.C. § 45. The initial stages of those proceedings are often assigned to an administrative law judge (ALJ).

Axon is a respondent in such an FTC proceeding, and has argued that (1) it has not violated the antitrust laws; (2) the proceedings violate due process; (3) the FTC Commissioners' statutory restrictions on removal are unconstitutional; and (4) the ALJs' statutory restrictions on removal are unconstitutional. Amended Answer and Defenses at 20-23, *In re Axon* (FTC Mar. 2, 2020), https://go.usa.gov/xveZ8 (First, Fourteenth, Fifteenth, Seventeenth, and Eighteenth affirmative defenses). Axon sued in district court to enjoin the administrative proceeding based on these same claims. ER149-51, ¶¶ 58-69. The district court dismissed Axon's complaint for lack of jurisdiction, holding in a well-reasoned opinion that the comprehensive statutory scheme for judicial review of FTC proceedings divested the district court of jurisdiction to entertain Axon's claims, which sought to enjoin that ongoing proceeding. ER13-32.

Axon filed a notice of appeal from that decision on April 13, 2020. ER1-2. The parties completed merits briefing in this Court by June 15, 2020, and the Court heard argument on July 17, 2020. Now, more than five months after the district court's decision and more than three months after the completion of briefing, Axon has filed an emergency motion to enjoin the administrative proceeding "pending [the Court's] threshold jurisdictional ruling." Mot. 6.

STANDARD OF REVIEW

Axon seeks an order to enjoin an ongoing proceeding within the Executive Branch, pending a decision on whether the district court properly dismissed Axon's complaint. That kind of extraordinary relief is an "intrusion into the ordinary processes of administration and judicial review, and accordingly is not a matter of right, even if irreparable injury might otherwise result to the appellant." *Nken v. Holder*, 556 U.S. 418, 427 (2009) (citation and quotation marks omitted). In evaluating a request for an injunction pending appeal, the Court considers: "(1) whether the [] applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Sierra Club v. Trump*, 929 F.3d 670, 687 (9th Cir. 2019). Axon bears the burden of demonstrating that these factors have been satisfied. *Id.* at 688. "The first factor—likelihood of success on the merits—is the most important factor" and "[i]f a movant fails to establish likelihood of success on the merits, we need not consider the other factors." *California v. Azar*, 950 F.3d 1067, 1083 (9th Cir. 2020) (quotation marks omitted).

DISCUSSION

1. Axon has failed to establish any of the factors that might support an injunction pending appeal. Most importantly, nowhere in its motion has Axon attempted to demonstrate a likelihood of success on the merits—the motion does not

discuss this "most important factor" that is necessary to obtain the requested injunction. *California*, 950 F.3d at 1083. On that basis alone, the Court may appropriately deny Axon's motion. Axon is seeking extraordinary relief, asking this Court to act on an expedited basis to grant emergency relief and enjoin an evidentiary hearing that was scheduled months ago. *See* Third Order Regarding Scheduling, https://go.usa.gov/xGf9P (FTC June 3, 2020) (scheduling hearing to begin on October 13, 2020). Yet Axon has chosen to make no argument that it is likely to succeed in its appeal to this Court.

More fundamentally, to demonstrate entitlement to an injunction, Axon bears the burden of showing not only that it is likely to prevail on the threshold jurisdictional question at issue in this appeal, but also on the underlying merits of its constitutional claim. *Munaf v. Geren*, 553 U.S. 674, 690-91 (2008) ("[W]e hold that it was an abuse of discretion for the District Court to grant a preliminary injunction on the view that the 'jurisdictional issues' in Omar's case were tough, without even considering the merits of the underlying habeas petition."). The district court did not reach the merits of Axon's constitutional claims, they are not before the Court on appeal, and Axon has not demonstrated that it would be likely to succeed on those claims, particularly given the Supreme Court's decisions in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), and *Withrow v. Larkin*, 421 U.S. 35 (1975).[1]

[1] The United States has explained elsewhere how the statutory removal restrictions in 5 U.S.C. § 7521 that apply to ALJs (like the ALJ assigned to Axon's

Even if the Court were to consider the arguments Axon set forth separately in its merits briefing, and limits its consideration solely to the jurisdictional issues, Axon has still failed to demonstrate that it is likely to succeed. The Supreme Court has explained that district courts lack jurisdiction over constitutional claims when, by statute, Congress has implicitly channeled those claims through administrative proceedings with judicial review in the courts of appeal. *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 214-15 (1994); *Elgin v. U.S. Dep't of Treasury*, 567 U.S. 1, 15-23 (2012). Accordingly, the courts of appeals have uniformly held that district courts lack jurisdiction to consider claims like Axon's, which seek to enjoin ongoing administrative proceedings where the respondent can obtain judicial review in the courts of appeals. *Jarkesy v. SEC*, 803 F.3d 8, 12 (D.C. Cir. 2015); *Tilton v. SEC*, 824 F.3d 276, 278-79 (2d Cir. 2016); *Bennett v. SEC*, 844 F.3d 174, 188 (4th Cir. 2016); *Cochran v. SEC*, 969 F.3d 507, 510 (5th Cir. 2020); *Bebo v. SEC*, 799 F.3d 765, 766-67 (7th Cir. 2015); *Hill v. SEC*, 825 F.3d 1236 , 1237-38 (11th Cir. 2016); *LabMD, Inc. v. FTC*, 776 F.3d 1275, 1279 (11th Cir. 2015).

In its merits briefing, Axon mistakenly argued that the district court could exercise jurisdiction because Axon had brought a separation-of-powers challenge to statutory removal restrictions, citing *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010). But in *Free Enterprise*, the plaintiffs were not subject to any

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evidentiary hearing) are constitutional as properly construed. Resp. Supp. Br. 13-36, *Fleming v. USDA*, No. 17-1246 (D.C. Cir. Feb. 27, 2020).

ongoing administrative proceeding that could culminate in judicial review under a statutory scheme. As six other courts of appeals have explained, *supra*, when a plaintiff is subject to such an administrative proceeding, the district courts lack jurisdiction over claims that can and must be raised in that proceeding and meaningfully addressed in the courts of appeals.

Moreover, Axon has not challenged final agency action because the FTC has not issued a final decision in Axon's administrative proceeding. Unless and until the FTC issues an adverse final order, Axon has no cause of action under the Administrative Procedure Act. 5 U.S.C. §§ 702-04. As the Supreme Court and this Court have explained, respondents in FTC proceedings may not sue in district court when all the FTC has done is merely initiate an administrative proceeding. *FTC v. Standard Oil Co.*, 449 U.S. 232, 241-45 (1980); *Ukiah Valley Med. Ctr. v. FTC*, 911 F.2d 261, 265 (9th Cir. 1990) ("Should the FTC, at the conclusion of the administrative proceedings, issue a final order, [plaintiffs] can at that time obtain judicial review and challenge the issuance of the complaint as well as the agency's jurisdiction.").

2. Axon also cannot demonstrate irreparable injury, because it can receive judicial review of any adverse FTC decision and, if successful, can secure vacatur of that decision. Indeed, in considering a jurisdictionally proper challenge to an official's statutory removal restrictions, the Supreme Court granted relief by vacating the adverse decision and remanding for further proceedings. *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2211 (2020); *see also Lucia v. SEC*, 138 S. Ct. 2044, 2055-56 (2018)

(granting relief on a jurisdictionally proper Appointments Clause challenge by remanding for a new proceeding). And more to the point, Axon may prevail in the administrative proceeding and thereby eliminate the need for judicial review of its constitutional claims. *See Elgin*, 567 U.S. at 22-23 (agency resolution of other issues in plaintiff's favor "might fully dispose of the case" and "obviate the need to address the constitutional challenge").

Axon contends that it will suffer irreparable injury by participating in allegedly unconstitutional administrative proceedings. Mot. 4-6. Axon's theory proves too much—any plaintiff could allege that an administrative proceeding has some aspect that violates due process, equal protection, or some other constitutional provision. It cannot be that such allegations, without more, mean that plaintiffs always satisfy the irreparable injury prong necessary to secure injunctive relief. As the Supreme Court made clear in *Standard Oil*, participation in administrative proceedings does not rise to the level of irreparable injury, and the availability of later judicial review in the courts of appeals will ensure that any alleged injuries incurred may be reviewed and, if necessary, rectified. 449 U.S. at 244-45.

Axon's contrary argument—that any allegation of a constitutional violation always satisfied the irreparable injury analysis—is not supported, and is largely limited to alleged First Amendment violations. The Wright & Miller treatise that Axon quotes (Mot. 5), states that "[w]hen an alleged deprivation of a constitutional right is involved, *such as the right to free speech, or freedom of religion*, most courts" find irreparable

injury. 11A Wright & Miller, Federal Practice & Proc. § 2948.1 (emphasis added). This Court and the Supreme Court have similarly focused on First Amendment rights in finding irreparable injury. *See Doe v. Harris*, 772 F.3d 563, 583 (9th Cir. 2014); *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Although Axon attempts to rely on *Goldie's Bookstore, Inc. v. Superior Court of State of California*, 739 F.2d 466 (9th Cir. 1984), that case emphasized that the alleged "constitutional claim [was] too tenuous to support" a preliminary injunction, *id.* at 472

Axon cites one decision that, in passing, extrapolates from these First Amendment cases to hold that, in the context of alleged Fourth Amendment violations, plaintiffs had sufficiently alleged irreparable injury. Mot. 5 (quoting *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting *Elrod*, 427 U.S. at 373)). But Axon fails to demonstrate that its due process and separation-of-powers claims automatically satisfy its burden to show irreparable injury. And several courts have rejected the broad form of Axon's argument and explained that an alleged violation of constitutional rights does not constitute *per se* irreparable injury. *See Siegel v. LePore*, 234 F.3d 1163, 1177-78 (11th Cir. 2000) (en banc) (per curiam) (rejecting proposition that a "violation of constitutional rights always constitutes irreparable harm"); *In re Al-Nashiri*, 791 F.3d 71, 79-80 (D.C. Cir. 2015) (similar); *see also CTIA – The Wireless Association v. City of Berkley*, 928 F.3d 832, 851 (9th Cir. 2019) ("[T]he mere assertion of First Amendment rights does not automatically require a finding of irreparable injury.").

3. The balance of the equities also weighs against an injunction, which would impair the FTC's ability to ensure a competitive and fair marketplace through the enforcement scheme created by Congress. Axon is the "leading manufacturer and supplier of body-worn cameras" to metropolitan police departments, and Axon's acquisition of a competitor has allegedly led to higher prices, limited supply, and "will likely entrench" Axon's "already dominant share of the relevant market" and "significantly increase market concentration." Complaint ¶¶ 1, 6-8, *In re Axon Enterprise, Inc.* (*In re Axon*) (FTC Jan. 3, 2020), https://go.usa.gov/xvMWu. The administrative proceeding will determine whether Axon's conduct has violated the antitrust laws and constitutes unfair competition. *Id.* ¶¶ 57-60.

In creating the FTC more than a century ago, Congress recognized that "an administrative tribunal [is] needed" to adjudicate violations of the antitrust laws, and that the "proper enforcement" of those laws "requires vigilant supervision," and it is "indispensable that some of the administrative functions should be lodged in a body specially competent to deal with them." S. Rep. 63-597, at 8-9 (1914). Accordingly, in "[o]ne of the most important provisions" of the FTC Act, Congress "empowere[d] the [FTC] to prevent corporations from using unfair methods of competition in commerce by orders issued after a hearing," which is precisely the kind of hearing the FTC is undertaking here. *Id.* at 13. The "most certain way to stop monopoly at the threshold is to prevent unfair competition," and Congress has vested that authority in "an administrative body of practical [people] thoroughly informed in regard to

business," who can act to "eradicate evils with the least risk of interfering with legitimate business operations." H.R. Rep. 63-1142, at 19 (1914) (Conf. Rep.).

Congress's decision to vest the FTC with the power to institute such proceedings reflects its profound concern for the public interest in ensuring fair competition in the marketplace. Axon's request for an immediate injunction of those proceedings "should not be a means of turning prosecutor into defendant before adjudication concludes." *Standard Oil*, 449 U.S. at 242-43 (noting that "every respondent to a Commission complaint could make the claim that [Standard Oil] had made").

4. Axon urges that this Court should issue an injunction pending appeal because the Fifth Circuit issued one in *Cochran v. SEC*, No. 19-10396 (5th Cir. Sept. 24, 2019). But the Fifth Circuit later dissolved that injunction because there was no basis for it—under *Thunder Basin* and *Elgin*, the district court lacked jurisdiction over the plaintiff's complaint. *Cochran*, 969 F.3d at 518. The plaintiff could "raise her removal-power claim before the ALJ and, if she loses before the agency, in a court of appeals. She may even be able to get her claim all the way to the Supreme Court as Lucia did. But Cochran cannot circumvent the statutory review scheme by litigating it now in a federal trial court." *Id.*

In similar circumstances, this Court has rejected a motion to enjoin administrative proceedings based on a separation-of-powers challenge to removal restrictions. After the Supreme Court issued its remand in *Lucia v. SEC*, 138 S. Ct. at

2056, and the SEC re-initiated the administrative proceeding, Lucia sued in district court to enjoin that proceeding, alleging that the ALJ's removal restrictions were unconstitutional. After the district court dismissed the case under *Thunder Basin* for lack of jurisdiction, *see Raymond J. Lucia Cos. v. SEC*, 2019 WL 3997332, at *2-3 (S.D. Cal. Aug. 21, 2019), Lucia sought an injunction pending appeal from this Court, making largely the same arguments Axon has raised in this appeal. *See* Mot. for Injunction Pending Appeal at 9-22, *Raymond J. Lucia Cos. v. SEC*, No. 19-56101 (9th Cir. Dec. 4, 2019). The Court correctly denied that motion. Order, *Raymond J. Lucia Cos. v. SEC*, No. 19-56101 (9th Cir. Jan. 23, 2020). Axon has presented no reason for a different result here.

CONCLUSION

The emergency motion for an injunction pending appeal should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this response to plaintiff-appellant's motion complies with the requirements of Circuit Rule 27-1(1)(d), because it does not exceed 20 pages.

/s/ Daniel Aguilar
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