

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)

**MOTION TO STAY MANDATE
PENDING FILING OF PETITION FOR WRIT OF CERTIORARI**

**Emergency Motion Under Circuit Rule 27-3
Relief Requested by April 22, 2021**

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INTRODUCTION

Appellant Axon Enterprise, Inc. (Axon) moves this Court for an order staying the appellate mandate for 150 days pending the filing of a petition for a writ of certiorari with the U.S. Supreme Court, pursuant to Fed. R. App. P. 41(d), 28 U.S.C. § 2101(f), and Circuit Rules 27-3, 41-1. *See also* Order List: 589 U.S. (Mar. 19, 2020) (extending deadline for filing petition for writ of certiorari to 150 days from an order denying a timely petition for rehearing).¹ Relief is requested by April 22, 2021, when this Court’s mandate would ordinarily issue. FRAP 41(b) (7 days after April 15, 2021 denial of en banc petition Dkt.55). A stay of the mandate will preserve the emergency stay that this Court previously granted on October 2, 2020 (Dkt.40), staying the Federal Trade Commission’s (FTC or Commission) administrative trial of its case against Axon. Absent such relief, Axon will be irreparably injured by being subjected to a proceeding before an ALJ who lacks constitutional authority to preside over its case. Such a proceeding before an unconstitutional ALJ would create “here-and-now” constitutional harm that could not be remedied after-the-fact.

The petition for writ of certiorari that Axon intends to file will present substantial constitutional questions regarding federal district court jurisdiction over “challenges to an agency’s *structure, procedures, or existence*, rather than to an

¹ Available at:

https://www.supremecourt.gov/orders/courtorders/031920zr_d1o3.pdf

agency’s adjudication of the merits on an individual case.” *Axon Enterprise, Inc. v. FTC*, 986 F.3d 1173, 1191 (9th Cir. 2021) (Bumatay, J., dissenting) (emphasis original). Axon’s stay request far exceeds Circuit Rule 41-1’s threshold requirement that a petition “would present a substantial question,” rather than being “frivolous or filed merely for delay.” The substantiality of Axon’s position is established by Judge Bumatay’s dissenting opinion and is reinforced by the panel majority’s agreement that Axon has raised “serious,” “substantial,” and “legitimate” constitutional concerns about the FTC’s operations. *Axon*, 986 F.3d at 1187; *accord* ER6 (district court’s description of Axon’s claims as “significant and topical”).² The case’s importance has also engendered national attention, as reflected in the numerous amicus briefs filed in support of this Court’s en banc review (Dkt.44, 47, 49, 53).³

The irreparable harm that Axon would suffer from a proceeding before an unconstitutional ALJ provides far more than the “good cause” needed to grant a stay. FRAP 41(d)(1). Moreover, the government has already told the Supreme Court that

² “ER” references are to Axon’s Excerpts of Record (Dkt.14). “Doc.” references are to the district court’s docket. Public versions of filings in the administrative case are available at:

<https://www.ftc.gov/enforcement/cases-proceedings/1810162/axonvievu-matter>.

³ Amicus briefs were filed respectively by the Atlantic Legal Foundation, the Washington Legal Foundation, Americans for Prosperity Foundation with the U.S. Chamber of Commerce, and the New Civil Liberties Alliance (NCLA). TechFreedom also joined NCLA’s amicus brief filed in the underlying appeal (Dkt.21).

Axon's case presents a better vehicle for review of the jurisdiction question presented precisely because the administrative trial has not yet occurred. Contrasting this case with *Gibson v. SEC* (No. 20-276), the government suggested that completion of an ALJ proceeding moots the issue because an injunction no longer is meaningful and it is "unclear what alternative relief" is available (Dec. 2020 SG Br.12-13).⁴ Accordingly, to prevent irreparable harm to Axon and to preserve this critical threshold jurisdictional question for Supreme Court review, the Court should grant this Motion to Stay. FRAP 41(d)(1).

PROCEDURAL HISTORY

In January 2020, Axon brought the underlying action in the District of Arizona seeking declaratory and injunctive relief regarding (1) the FTC's uncodified, black-box "clearance" process (ER124-152), (2) the for-cause removal protections afforded the FTC Commissioners and ALJ in violation of Article II (ER149-50, Counts 1-2), and (3) the FTC's combination of investigatory, prosecutorial, adjudicative, and appellate functions in a single agency, resulting in an unprecedented quarter-century administrative win streak. *Axon*, 986 F.3d at 1180, 1187. Axon moved for a preliminary injunction in the district court to enjoin the

⁴ Available at: https://www.supremecourt.gov/DocketPDF/20/20-276/162740/20201204175018121_20-276%20Gibson.pdf

administrative proceedings pending resolution of its constitutional claims (Doc.15).⁵ The FTC opposed solely on jurisdictional grounds (Doc.19). On April 8, 2020, the district court dismissed Axon's Complaint without prejudice for lack of subject matter jurisdiction and denied the preliminary injunction as moot (ER4, 33). This appeal followed (ER1).

On April 24, 2020, this Court granted Axon's motion for expedited appeal (Dkt.12). On October 2, 2020, the Court also granted Axon's emergency motion to stay the administrative trial set to begin October 13, to maintain the status quo pending resolution of the appeal (Dkt.40). On January 28, 2021, the Court issued its divided 2-1 decision affirming the district court's dismissal (Dkt.42-1), while at the same time questioning the wisdom of the rule and essentially inviting the Supreme Court to clarify the standard. *Axon*, 986 F.3d at 1183-85. On March 15, 2021, Axon timely submitted its petition for rehearing en banc, which this Court denied on April 15, 2021 (Dkt.55).

LEGAL STANDARD

This Court's mandate may be stayed "pending the filing of a petition for a writ of certiorari in the Supreme Court." FRAP 41(d)(1). Rule 41 motions for stay need only show "that the petition would present a substantial question and that there is

⁵ Axon also filed a motion to stay the administrative case, which the Commission denied on February 27, 2020.

good cause for a stay.” *Id.* A party seeking to stay the mandate “need not demonstrate that exceptional circumstances” are present. *U.S. v. Pete*, 525 F.3d 844, 851 n.9 (9th Cir. 2008). This Court will deny stay motions when it determines “the petition for certiorari would be frivolous or filed merely for delay.” CR 41-1.

ARGUMENT

I. SUBSTANTIAL QUESTIONS WARRANT STAYING THE MANDATE.

The district court and all panel members here recognized the merits of Axon’s constitutional challenges to the FTC’s structure as “significant and topical,” “serious,” “substantial,” “legitimate,” and “weighty.” (ER6; 986 F.3d at 1187, 1189).⁶ But as Judge Bumatay aptly stated, the jurisdiction question is “equally important.” *Id.* at 1189. Without threshold Article III review, no party can outlast the FTC’s inherently biased administrative process to ever obtain a merits determination on these critical constitutional issues. *See id.* at 1187 (majority acknowledgement of FTC’s *undisputed* “stunning win rate”—100%—as “raising legitimate questions about whether the FTC has stacked the deck in its favor”).

⁶ *See, e.g., Free Enterprise Fund v. PCAOB*, 561 U.S. 477, 484 (2010) (ruling dual for-cause limitations of Board members violates separation-of-powers); *Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018) (holding SEC ALJs are “Officers” subject to Appointments Clause); *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2192 (2020) (finding removal restrictions on director of CFPB violated Article II).

Thus, the panel’s decision presents substantial jurisdictional questions for Supreme Court review. Judge Bumatay’s compelling dissent—finding all three *Thunder Basin*⁷ factors support district court jurisdiction on both the clearance process and separation-of-powers claims—proves this. And Judge Bumatay is not alone. *See Cochran v. SEC*, 969 F.3d 507, 521 (5th Cir.) (Haynes, J., dissenting), *reh. en banc granted*,⁸ 978 F.3d 975 (5th Cir. 2020); *Tilton v. SEC*, 824 F.3d 276, 292 (2d Cir. 2016) (Droney, J., dissenting). Even the majority here concluded:

Axon’s argument makes sense from a policy perspective: it seems odd to force a party to raise constitutional challenges before an agency that cannot decide them. ... As the dissent cogently points out, it makes little sense to force a party to undergo a burdensome administrative proceeding to raise a constitutional challenge against the agency’s structure before it can seek review from the court of appeals. **And if we were writing on a clean slate, we would agree with the dissent.**

986 F.3d at 1183-84 (emphasis added). The majority then essentially invited the Supreme Court to “clarify” its holding in *Free Enterprise*, which the panel mistakenly concluded compelled this nonsensical result. *Id.* at 1185.

Importantly, the panel’s analysis and interpretation of 15 U.S.C. § 45 conflicts with binding Supreme Court precedent, which is a central consideration on review of a certiorari petition. Supreme Ct. R. 10(c). As detailed in Axon’s en banc petition

⁷ *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994).

⁸ *Cochran* was argued and submitted en banc on January 20, 2021.

(Dkt.43), the panel’s opinion is in conflict with at least *Free Enterprise* and *Thunder Basin*.

The Supreme Court in *Free Enterprise* unanimously held that a review statute “almost identical” to 15 U.S.C. § 45 here did not expressly *or implicitly* strip a district court’s federal question jurisdiction. 561 U.S. at 489. And while the panel found Axon’s constitutional claims “do not turn on the antitrust merits” and that the FTC “lacks agency expertise” to decide them, it nonetheless concluded it “is enough” under Supreme Court precedent that Axon can “present its constitutional claims to this court after the conclusion of the FTC enforcement proceedings.” *Axon*, 986 F.3d at 1183, 1187. This conclusion excised completely two of the three *Thunder Basin* factors and established an illusory possibility-of-eventual-review test that is anything but meaningful.

Moreover, the majority opinion’s finding that Axon “has not suffered any cognizable harm,” coupled with its imposition of a “dire risk” requirement, fails to follow the Supreme Court’s recent *Seila Law* decision, which found a party sustains here-and-now injury from executive actions alleged to be in excess of the official’s authority. *Axon*, 986 F.3d at 1177, 1183 (suggesting Axon must face a “dire risk” before pre-enforcement relief is justified); *but see Seila Law*, 140 S. Ct. at 2196 (finding tenure protection provision inflicted a concrete “here-and-now” separation-of-powers injury remediable by a court). No one is required to “bet the farm” to

obtain review. *Free Enterprise*, 561 U.S. at 490 (party not required to take violative action before “testing the validity of the law”).

The case for Supreme Court review will be compelling. At the very least, Axon’s intended petition for certiorari will present questions that are more than substantial. As detailed in the amicus briefs filed in support of Axon’s en banc petition (Dkt.44, 47, 49, 53), any notion of eventual (let alone meaningful) judicial review of structural constitutional claims at the conclusion of the FTC’s administrative process is illusory. The FTC’s undisputed 25-year win streak in its home court speaks for itself. Thus, as aptly stated by amicus Atlantic Legal Foundation, the “jurisdictional question presented by this appeal is exceptionally important. Its ultimate resolution will enable or foreclose *meaningful* judicial review” of claims that challenge the administrative enforcement proceedings of “extraordinarily powerful, independent regulatory agencies” such as the FTC (Dkt.44 at 7).

II. GOOD CAUSE SUPPORTS THE STAY REQUEST.

Staying the mandate—and thereby preserving the stay of the administrative trial—is necessary to prevent Axon from being deprived of its constitutional rights, which “unquestionably constitutes irreparable injury.” *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012); *see also Goldie’s Bookstore, Inc. v. Sup. Ct. of State of Cal.*, 739 F.2d 466, 472 (9th Cir. 1984) (“alleged constitutional infringement will

often alone constitute irreparable harm”). This Court already recognized as much by previously granting Axon’s emergency motion to stay the administrative trial last fall (Dkt.40).

Free Enterprise and *Seila Law* both recognize that a separation-of-powers violation creates a “here-and-now” injury that can be remedied by a court. The proper remedy here is to stay this Court’s mandate to maintain the status quo until the Supreme Court has the opportunity to consider Axon’s certiorari petition. *See Free Enterprise*, 561 U.S. at 491 n.2 (injunctions are “the proper means for preventing entities from acting unconstitutionally”).

The continued stay of the administrative trial will also avoid any mootness argument by the government, which it made in opposing certiorari in *Gibson v. SEC*, where the hearing had already occurred. *See* n.4, *supra*. Clearly, the government should not be allowed to argue (as it does here) that administrative exhaustion is required even as to threshold constitutional questions the panel majority agrees it has no competence or expertise to decide, and at the same time argue (as it did in *Gibson*) that completion of the administrative trial may moot the question and leave no available remedy. Thus, there is good cause to stay the mandate to preserve substantial jurisdictional questions for Supreme Court review and prevent irreparable harm to Axon.

CONCLUSION

For all these reasons, the Court should grant this motion to stay the mandate for 150 days pending Axon's certiorari petition.

Dated: April 15, 2021

Respectfully submitted,

/s/ Pam Petersen

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that, on April 15, 2021, I electronically filed the foregoing Motion to Stay Mandate Pending Filing of Petition for Writ of Certiorari 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.

/s/ Pam Petersen _____

*Counsel for Appellant
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**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Form 16. Circuit Rule 27-3 Certificate for Emergency Motion

Instructions for this form: <http://www.ca9.uscourts.gov/forms/form16instructions.pdf>

9th Cir. Case Number(s)

Case Name

I certify the following:

The relief I request in the emergency motion that accompanies this certificate is:

Stay of appellate mandate pending Axon's petition for writ of certiorari to the U.S. Supreme Court (due 150 days from this Court's 4-15-21 denial of en banc rehearing).

Relief is needed no later than *(date)*:

The following will happen if relief is not granted within the requested time:

The appellate mandate will issue and the FTC will reset the administrative trial previously stayed by this Court. Axon will suffer irreparable injury by being subjected to an unconstitutional trial before an unconstitutional presiding officer.

I could not have filed this motion earlier because:

The Court just ruled on Axon's petition for en banc rehearing today.

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov

I requested this relief in the district court or other lower court: Yes No

If not, why not:

Axon's motion for preliminary injunction was denied as moot when the district court dismissed the case for lack of jurisdiction on 4-8-20.
Axon's motion to stay filed with the Commission was denied on 2-27-20.
This Court granted Axon's stay request 10-2-20.

I notified 9th Circuit court staff via voicemail or email about the filing of this motion: Yes No

If not, why not:

I have notified all counsel and any unrepresented party of the filing of this motion:

On *(date)*: 4-15-21

By *(method)*: Email

Position of other parties: Opposed

Name and best contact information for each counsel/party notified:

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I declare under penalty of perjury that the foregoing is true.

Signature s/ Pam Petersen

Date 4-15-21

(use "s/[typed name]" to sign electronically-filed documents)

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