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.

On Appeal from the United States District Court
for the District of Arizona,
Case No. 2:20-cv-00014-PHX-DWL (Hon. Dominic W. Lanza)

BRIEF AMICI CURIAE OF THE NEW CIVIL LIBERTIES ALLIANCE AND TECHFREEDOM IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT AND FED. R. APP. P. 29(a)(4)(E) STATEMENT

The New Civil Liberties Alliance is a 501(c)(3) nonprofit organization organized under the laws of the District of Columbia. It has no parent corporation and no publicly held corporation owns ten percent or more of its stock.

TechFreedom is a 501(c)(3) nonprofit organization organized under the laws of the District of Columbia. It has no parent corporation and no publicly held corporation owns ten percent or more of its stock.

All parties were timely notified and consented to the filing of this brief. No counsel for a party authored any part of this brief. No one other than amicus curiae, its members, or its counsel financed the preparation or submission of this brief.

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INTEREST OF AMICUS CURIAE

The New Civil Liberties Alliance (NCLA) is a nonprofit, nonpartisan civil rights organization founded by Philip Hamburger to defend constitutional freedoms from unlawful administrative power. NCLA challenges constitutional defects in the modern administrative state by initiating original litigation, defending Americans from administrative actions, filing *amicus curiae* briefs, and with other advocacy. NCLA views the administrative state as an especially serious threat to civil liberties because agencies too often refuse to play by the rules—and courts too often let them. Although we still enjoy the shell of our Republic, a very different sort of government has developed within it—a type, in fact, that our Constitution was designed to prevent.

TechFreedom is a nonprofit, nonpartisan public policy think tank based in Washington, DC. Its work on information technology policy issues rests on a belief that technology enhances freedom and freedom enhances technology. TechFreedom believes that FTC is gradually becoming the Federal *Technology* Commission, the *de facto* regulator of a wide range of rapidly evolving issues across the economy. Since 2012, TechFreedom has studied the lack of meaningful safeguards in FTC's investigative and enforcement processes, and the way FTC routinely uses a protracted, expensive and wildly one-sided process to coerce defendants to accede to FTC's demands, thus creating *de facto* regulations through settlements. TechFreedom has proposed reforms for Congress and FTC to consider, and raised its concerns in multiple *amicus* briefs.

Amici are particularly disturbed by the District Court's decision below that federal courts lack jurisdiction to evaluate facial challenges brought under the U.S. Constitution. Almost no antitrust cases escape FTC's maw once deposited there, yet no

vindication of Constitutional rights is possible beforehand. Plaintiff-Appellant acknowledges the antitrust aspects of the case should go through FTC's process, and it merely requests the opportunity to vindicate rights secured by the Constitution before an Article III court.

Amici believe this case is of utmost importance to the issue of unlawful administrative power.

THE DECISION BELOW

On March 10, 2020 the District Court issued its tentative order in this case. *Axon Enterprise Incorporated v. Federal Trade Commission, et al.*, No. 20-cv-00014-PHX-DWL, at ECF No. 29 (D. Ariz. 2020) ("Tentative Ruling"). It provided the court's preliminary view that it lacked jurisdiction. The Tentative Ruling did not address the implications of *Lucia v. SEC*, 138 S. Ct. 2044 (2018), and *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991), or their progeny, on the issue of jurisdiction. It also largely failed to grapple with this Circuit's decision in *Veterans for Common Sense v. Shinseki*, 678 F.3d 1013, 1034 (2012) and similar cases. As the Tentative Ruling invited further argument and briefing, NCLA sought and was granted an *amicus* brief addressing those cases.

After further briefing and argument, the District Court on April 8, 2020 issued its Final Order in *Axon Enterprise Incorporated v. Federal Trade Commission, et al.*, No. 20-cv-00014-PHX-DWL, at ECF No. 41 (D. Ariz. 2020) ("Final Order"). This time the Court addressed *McNary*, *Lucia* and *Shinseki* but concluded that they did not change the analysis. The Court noted that Axon's constitutional claims—that FTC's structure violates Article II of the Constitution, that its role as prosecutor, judge and jury violated Due Process under the Fifth Amendment, and that the division of antitrust enforcement between the Department of Justice and FTC through a "clearance" process violated the Equal Protection Clause of the Fifth Amendment—were "significant and topical." Final Order at 2. It noted that some were being addressed by the Supreme Court this term in *Seila Law LLC v. Consumer Fin. Prot. Bureau,* No. 19-7. *Id.* Nonetheless, it ruled that it was "fairly discernible" from the FTC Act that Congress meant to foreclose

such constitutional claims in federal district court. *Id.* It dismissed the case for lack of subject-matter jurisdiction. *Id.*

The District Court primarily relied on three Supreme Court cases: *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994); *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010); and *Elgin v. Dep't of Treasury*, 567 U.S. 1 (2012). Echoing *Bennett v. SEC*, 844 F.3d 174, 178 (4th Cir. 2016), it referred to these three cases as "the trilogy."[1] The District Court correctly noted that under 28 U.S.C. § 1331 it had jurisdiction over civil actions such as this one unless Congress "impliedly" precluded that jurisdiction by creating a statutory scheme of administrative review to delay judicial review. *Id.* at 4 (citing *Bennett* at 178). The Court stated the main issue was whether the FTC Act required constitutional claims like those here to be brought first to FTC's adjudicatory process. *Id.* The District Court analyzed *Thunder Basin, Free Enterprise Fund,* and *Elgin* which dealt with the preclusive effects of the Mine Act, the Sarbanes-Oxley Act, and the Civil Service Reform Act of 1978 ("CSRA"), respectively. *Id.* at 5-9.

The Court noted none of these cases involved the FTC Act and that it contained no explicit bar to subject-matter jurisdiction. *Id.* at 9. The Court found that the Mine Act and the FTC Act both had a "detailed structure" and noted in "painstaking detail" how to seek review and provided the agency, but not the defendant, the choice to go to federal court, and determined they were much alike. *Id.* at 10-11. The Court bolstered its reasoning with *Bennett*, 844 F.3d at 181-82; *Hill v. SEC*, 825 F.3d 1236, 1242-1245

[1] NCLA disagrees these cases should be referred to in this way as it discounts both the importance of *Free Enterprise* and later Supreme and appellate cases but will use the term to describe the District Court's analysis.

(11th Cir. 2016); *Tilton v. SEC*, 824 F.3d 276, 282-81 (2d Cir. 2016); *Jarkesy v. SEC*, 803 F.3d 9, 16-17 (D.C. Cir. 2015) and *Bebo v. SEC,* 799 F.3d 765 (7th Cir. 2015). *Id.* at 11 n.4 (rejecting NCLA's "colorful" argument that those cases were wrongly decided). It found that the legislative history of the FTC Act supported this implied divesture of subject-matter jurisdiction. *Id.* at 12-13.

The Court then addressed whether a finding of such divesture would "foreclose all meaningful review" of the plaintiff's claims, whether the suit was "wholly collateral" to the statute's review provisions, and whether the claims fell outside the agency's expertise. *Id.* at 13. The District Court forthrightly admitted both that the trilogy left unclear whether these were "distinct factors or simply different ways of addressing the same thing" and that this Circuit has not determined how these factors interrelate, but surmised that "meaningful judicial review without access to the district courts" was the most important factor. *Id.* at 13 (citing *Bebo*, 799 F.3d at 774 and *Hill*, 825 F.3d at 1245). It found that a chance of eventual review in the Courts of Appeals meets the test of "meaningful review." *Id.* at 14 and n. 5.

The District Court addressed NCLA's analysis of the implications of *Lucia*, *McNary*, and *Shinseki*, all of which it determined were "easily distinguishable." *Id.* at 17. It found that *Lucia* supported its reasoning that review in an appellate court after administrative adjudication was meaningful review, notwithstanding the endless illegal process Mr. Lucia suffered. *Id.* at 18. It distinguished *McNary* by stating that was a case of explicit divesture of jurisdiction and was simply straight statutory construction of whether the claim fell within the divesture. *Id.* at 18-19. It also found *McNary* was decided before the "trilogy" and that the immigrants in that case would have to surrender

to deportation to pursue their claims. *Id.* at 20. In contrast, Axon, in the District Court's view would not have to "bet the farm" to get meaningful review in the appellate courts. *Id.* Finally, that the FTC Act allows the appellate court to remand for additional fact-finding was determined to make the review more "meaningful." *Id.* at 20.

Most troubling, the District Court ignored and distinguished this Circuit's direction in *Shinseki* to decide constitutional claims when possible while allowing the agency to determine those matters Congress has directed to its expertise. It did so by noting that *Shinseki* was a case of explicit jurisdiction preclusion and was simply, as in *McNary*, a matter of statutory construction.

The District Court noted that what makes a claim "wholly collateral" to the administrative review scheme is not "free from ambiguity." *Id.* at 22. It "harmonized" *Free Enterprise* and *Elgin* by determining "whether a vehicle exists (or could exist) for the plaintiff to ultimately receive judicial review of its constitutional claim." *Id.* at 23. The District Court determined that constitutional claims were no different from any others and that the "potential wrinkle" of the Article II claim also present in *Free Enterprise* was trumped by the possibility of appellate review, *someday*. *Id.* at 25-26.

The District Court then analyzed "agency expertise" and again had to note its difficulties with harmonizing *Free Enterprise* and *Elgin*, but went in the direction of *Elgin* so as to eliminate *Free Enterprise*. *Id.* at 26-28. FTC could agree with Axon, and thereby eliminate the "problem," or Axon would get appellate review with the appeals court aided by agency expertise. *Id.* at 28.

The District Court waived away FTC's extraordinary 100% win rate in its own proceedings as curable by eventual review; the possibility of later review of the Final Order equals "meaningful review."

SUMMARY OF THE ARGUMENT

This Court jealously guards its subject-matter jurisdiction and requires clear direction that it has been divested. The District Court used the "trilogy" to read away this Circuit's precedent on direct constitutional challenges to agency processes. *See, e.g.*, *Shinseki*, 678 F.3d 1013. The District Court dismissed the teachings of *McNary* as superseded by the trilogy even though the Supreme Court itself reaffirmed *McNary* this very term. *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062 (2020) (citing *McNary's* "well-settled" and "strong presumption" of meaningful judicial review and reversing Fifth Circuit's holding of no jurisdiction over equitable tolling claim). The Ninth Circuit's precedent supports jurisdiction over constitutional claims wholly divorced from the interests of the administrative process, and the District Court's attempts to harmonize the "trilogy" short-change this precedent. The District Court's approach would read *Free Enterprise* and other cases completely out of the law. The decision that "any review" that merely "could exist" is "meaningful review" is contrary to law. Neither the structure of the FTC Act nor circuit precedent requires this meager outcome.

It would an anomaly if constitutional claims remain actionable in court when Congress *explicitly* strips the Courts of jurisdiction (e.g., *McNary, Shinseki*), but are expelled when Congress only *impliedly* strips jurisdiction, and only because *Free Enterprise* has been judicially excised from the "trilogy." No rational legislature would choose this process for the vindication of constitutional rights, and it would certainly not do so "by implication."

ARGUMENT

I. NINTH CIRCUIT PRECEDENT REQUIRES THE RETENTION OF THE COLLATERAL CONSTITUTIONAL CLAIMS RAISED HERE

This Circuit retains jurisdiction over constitutional claims like those here while sending the agency-related questions to the agencies. *Shinseki*, *supra.* It is not alone. *Jewel Companies, Inc. v. FTC*, 432 F.2d 1155 (7th Cir. 1970) (separating and retaining constitutional claims and leaving others to the agency). That case mirrors this one, acknowledges the reality of administrative delay, and has not been overruled. *Id.* at 1160 ("On the one hand there is no longer the same violent disposition to fight the agencies willy-nilly; on the other, we have learned that agency procedures can be as long-drawn out, as wasteful, as oppressive as the worst of judicial procedures.") .

The FTC Act's purpose and design demonstrate that Congress intended to prevent delay in FTC enforcement but *not* to grant FTC exclusive jurisdiction over constitutional claims. *Id.* ("The existence of an important general question may warrant early review. Where such appeals are allowed they should be expedited lest they be used by the well-heeled to buy time."). Both goals—early review and preventing delay—are addressed by the course Axon has taken. A simple act of *dépeçage*, as used in *Jewel* and *Shinseki*, finding subject-matter jurisdiction on the constitutional claims, but not on the antitrust claims, guards this Court's important constitutional role and does no harm to legitimate administrative goals.

Here Axon has agreed the antitrust issues must go to the FTC and is appearing there. When the congressional scheme does not explicitly or implicitly touch on constitutional claims, the district courts should retain jurisdiction. *Shinseki*, 678 F.3d at 1034

("A consideration of the constitutionality of the procedures in place, which frame the system by which a veteran presents his claims to the VA, is different than a consideration of the decisions that emanate through the course of the presentation of those claims. In this respect, VCS does not ask us to review the decisions of the VA in the cases of individual veterans, but to consider, in the 'generality of cases,' the risk of erroneous deprivation inherent in the existing procedures compared to the probable value of the additional procedures requested by VCS.").

The Ninth Circuit retains jurisdiction in the district courts over constitutional due process claims against an agency even when a statute explicitly limits jurisdiction. "We conclude that we have jurisdiction over VCS's claim related to procedures affecting adjudication of claims at the Regional Office level. We are not precluded from exercising jurisdiction by either § 511 or the provisions conferring exclusive jurisdiction on the Veterans Court and the Federal Circuit." *Id.* This both aligns with *McNary* and with other circuits that allow jurisdiction over claims that strike at a tribunal's power to act at all, or to act fairly. S*ee Touche Ross & Co. v. SEC*, 609 F.2d 570, 574 (2d Cir. 1979) (noting retention of jurisdiction when claim went to SEC's right to promulgate rules and thus authority to conduct adjudications at all)[2]; *Finnerty v. Cowen*, 508 F.2d 979, 982-84 (2d Cir. 1974) (claims going to the constitutional processes of the tribunal require no exhaustion); *Jewel Companies, Inc., supra* (retaining constitutional claims, leaving the

[2] It is interesting that *Tilton v. SEC*, 824 F.3d 276 (2d. Cir. 2016), criticized aspects of *Touche Ross* in light of subsequent authority but it was not overruled and may mean in the Second Circuit the retention of jurisdiction is discretionary in cases where only delay would be served by failing to address a question of the tribunal's authority to conduct proceedings.

rest to the agency); *see also Lehigh Portland Cement Company v. Federal Trade Commission,* 291 F. Supp. 628, 630 (E.D. Va. 1968) (court had jurisdiction to determine if FTC had prejudiced tribunal against cement company but finding no such prejudice).

This situation is strikingly close to *Sunkist Growers, Inc. v. Federal Trade Commission,* 464 F. Supp. 302 (C.D. Cal. 1979). Plaintiff filed a complaint, as here, for declaratory and injunctive relief because FTC had started an antitrust administrative proceeding against it. The court, relying on Judge Friendly's opinion in *Pepsico, Inc. v. FTC*, 472 F.2d 179, 185 (2d Cir. 1972), *cert. denied*, 414 U.S. 876 (1973), found that FTC's refusal to dismiss the case was a reviewable action. The FTC Act allowing a petition to the circuit court did not strip jurisdiction from the district court prior to that. It found that it had jurisdiction under the Administrative Procedure Act because the plaintiff had exhausted the administrative procedures available, and the failure of FTC to dismiss the case was final agency action for purposes of that suit:

> Here, however, FTC assertion of jurisdiction is claimed by the plaintiff to have sweeping, extra-legal effects beyond the power of any court to correct or adequately remedy. These allegations are sufficient to enable the Court to take jurisdiction and consider whether it should issue injunctive and declaratory relief.

Id. at 307. Axon claims that FTC's entire investigation, the outrageous "blank check" demand, and the now-certain decision to inflict a long, expensive and debilitating procedure through an unconstitutional tribunal works the same injustice that allowed jurisdiction in *Sunkist*. As in that case, "the agency's denial of discretionary review … indicates that any appeal of the jurisdictional issue following the entry of a cease-and-desist order should one emerge would not be a realistically meaningful exercise." *Id.* at n.2.

This Circuit has reaffirmed this approach to finding or not finding subject-matter jurisdiction in the district courts *after* the last case in the vaunted trilogy. *Recinto v. U.S. Dept. of Veteran Affairs*, 706 F.3d 1171 (2013). In the context of the same statute at issue in *Shinseki*, the *Recinto* court analyzed the claims of Filipino veterans of World War II. The various plaintiffs appealed two kinds of claims:

> (1) a due-process challenge to the VA's exclusive reliance on records from the NPRC to verify service history; and (2) an equal-protection challenge to the FVEC's failure to provide Filipino veterans the same benefits enjoyed by veterans of the United States Armed Forces.

Id. at 1175. The VA would only process claims if proof of service in the Filipino Army or guerilla movement was in a U.S. records facility in Missouri. Plaintiffs claimed that the refusal to accept any other proof violated due process. This Court, following *Shinseki*, declaimed jurisdiction over such claims because they would require a piecemeal review of evidence in individual claims and embroil the court in exactly the disputes Congress wanted at the agency. *Id.* at 1176.

The Court held it did have subject-matter jurisdiction over the equal-protection claim:

> 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.

Id.; *and see Latif v. Holder,* 686 F.3d 1122, 1129 (9th Cir. 2012) (post-*Elgin* it was unnecessary to determine whether Congress expressly or impliedly stripped the district court of jurisdiction "because it is neither clear nor fairly discernible from the statutory

scheme that Congress intended to strip the district court of jurisdiction over Plaintiffs' constitutional claim."). In *Latif*, 49 U.S.C. § 46110 gave exclusive jurisdiction over appeals from the actions of the Transportation Security Administration ("TSA"). Plaintiffs sued the Terrorist Screening Center ("TSC") run by the FBI to remove themselves from the "no-fly" list. The district court found the TSA was a necessary party and that it did not have jurisdiction. This Circuit reversed. Congress had not, either by explicit language *or the statutory scheme* divested the district courts of jurisdiction over constitutional claims. The case was decided *after* the trilogy. Here, Congress gave the circuit courts jurisdiction over appeals from final FTC orders *but said* nothing about constitutional claims or whether the district courts are divested of jurisdiction prior to such final orders. Under *Latif*, no such intent is discernible.

The District Court found that such decisions entail mere statutory construction in cases of explicit divesture of jurisdiction with no application to implied divesture cases. But in fact, *Recinto* determined that the equal-protection claims were "wholly collateral" to the claims Congress had excluded from its jurisdiction. *Latif* stands for the proposition that clear implicit denial of constitutional jurisdiction is required. Harmonizing Ninth Circuit and Supreme Court precedent is a simple matter of noting that the constitutional claims here are all "wholly collateral" to the antitrust matters, and no benefit of Congress's administrative scheme is achieved by sending them to near-certain doom before FTC.

II. CONSTITUTIONAL CLAIMS THAT GO TO THE EXISTENCE OF THE CHALLENGED TRIBUNAL ARE DIFFERENT, AS CASES OUTSIDE THE TRILOGY ACKNOWLEDGE

The Final Order found Axon's claims were not "wholly collateral" to FTC's review process essentially because, should Axon survive that process, it might seek appellate review. That is not the proper test. The claims are, in fact, collateral, and that is why the antitrust claims are so easily severed. Whether Axon ultimately wins or loses on the merits at the FTC administrative level—it suffers the same constitutional injury regardless of the outcome. If Axon proceeds on its claims in the district court, the administrative process would not be slowed. The constitutional harm Axon seeks to avoid is entirely distinct from any sanctions that FTC might impose on it. If Axon is right, this constitutional injury is not only very serious, but it is also occurring in dozens of other pending and future FTC administrative proceedings. Because Axon has lodged a colorable constitutional claim, federal courts have a duty to address it promptly rather than letting the injury persist until it is too late to provide meaningful relief. *Cf. New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 358-59 (1989) (citing cases back to 1821 for the proposition that where federal jurisdiction is present, courts cannot "abdicate" it in favor of another jurisdiction).

Courts have retained jurisdiction over constitutional claims striking at the heart of whether the tribunal itself is suspect. These cases have not been overruled or even questioned by subsequent precedent. For instance, the Supreme Court in *McNary*, 498 U.S. 479, ruled that the district court had jurisdiction over an immigrant's constitutional claims even though the statute at issue provided for appellate review after agency decision and explicitly *barred other kinds of federal court review*. Critically, *Elgin* did not overrule

McNary. The dissent cited it favorably and it was not questioned by the majority opinion. The Supreme Court ringingly re-affirmed *McNary* and the principle that meaningful review is required to infer jurisdiction-stripping. *Guerrero-Lasprilla v. Barr*, *supra* (citing *McNary's* "well-settled" and "strong presumption" of meaningful judicial review and reversing Fifth Circuit's holding of no jurisdiction over equitable tolling claim).

The difference between the constitutional claims in *McNary* and *Elgin* is instructive. As here, *McNary* was a facial challenge to the tribunal. *Elgin* did not attack the tribunal but the Selective Service Act under which plaintiffs were discharged. In *Elgin* the Court noted that such doctrines as "constructive discharge" might resolve constitutional issues. *Id.* at 22-23. That is not the case here. *See also Leedom v. Kyne*, 358 U.S. 184, 190 (1958) ("This Court cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers.") (and finding district court jurisdiction).

The *McNary* Court held it had jurisdiction to hear the constitutional claims. The Court stated at the outset:

> [T]he only question presented to us is whether [the relevant statute] precludes a federal district court from exercising general federal-question jurisdiction over an action alleging a pattern or practice of procedural due process violations by the [relevant federal agency]. We hold that given the absence of clear congressional language mandating preclusion of federal jurisdiction and the nature of respondents' requested relief, the District Court had jurisdiction to hear respondents' constitutional and statutory challenges … . Were we to hold otherwise and instead require respondents to avail themselves of the limited judicial review procedures set forth in [statute], meaningful judicial review of their statutory and constitutional claims would be foreclosed.

Id. at 483-84.

Despite the availability of delayed, post-agency review of final determinations under the relevant statute and explicit statutory bar against other forms of judicial review (the kind of bar *not* found in the FTC Act), the Supreme Court upheld the district court's jurisdiction to challenge the constitutionality of the "practices and policies" adopted by the agency in evaluating amnesty applications. The Court emphasized the crucial distinction between challenges to the overall manner in which an agency adjudicates claims and the individualized decisions reached on the merits of any particular claim. It held that the post-agency appellate-review provision in the relevant statute "applies only to review of denials of individual [amnesty] applications," and that because the district court complaint "[did] not seek review on the merits of a denial of a particular application, the District Court's general federal-question jurisdiction under 28 U.S.C. § 1331 to hear this action remain[ed] unimpaired by [the relevant post-agency-appellate-review statute]." *McNary*, 498 U.S. at 494. As the Court explained:

> [T]he individual respondents in this action do not seek a substantive declaration that they are entitled to [amnesty] status. Nor would the fact that they prevail on the merits of their purportedly procedural objections [in the district court] have the effect of establishing their entitlement to [amnesty] status. Rather, if allowed to prevail in this action, respondents would only be entitled to have their case reopened and their applications reconsidered in light of the newly prescribed [agency] procedures.

Id. at 495.

The Court emphasized the singular focus of the applicable statutory provision authorizing post-agency appellate review, which applied only to "a determination

respecting an [amnesty] application." *Id.* at 491-92. It held that "the reference to 'a determination' describes a single act rather than a group of decisions or a practice or procedure employed in making decisions," indicating Congress's intent that post-agency appellate review should apply only to "individual denials" of amnesty status and not to "general collateral challenges to unconstitutional practices and policies used by the agency in processing applications." *Id.* at 492.

The same logic applies here. Post-agency appellate review under the FTC Act is singularly focused on the cease-and-desist order that is issued at the conclusion of a proceeding. 15 U.S.C. §§ 45(c), (d). The statutory language implies no intent to force litigants who object to the constitutional legitimacy of the proceeding itself to await a final order. Nor does it imply any intent to bar collateral challenges to the constitutionality of the practices and procedures used by FTC to adjudicate its proceedings. By placing exclusive jurisdiction of final cease-and-desist orders in the appellate courts, Congress has impliedly left collateral constitutional challenges alone, thus leaving district-court jurisdiction intact.

McNary and a host of other never-overruled decisions point to the best way to harmonize the trilogy: when Congress creates a statute such as the FTC Act or the SEC Act, the district courts are not divested of jurisdiction to *hear challenges to the constitutionality or fairness of the tribunal.*

III. FTC ANTITRUST ENFORCEMENT IS NON-EXCLUSIVE AND MATERIALLY DIFFERENT FROM THE STATUTORY SCHEMES GOVERNING MINES OR FEDERAL EMPLOYEES

FTC's enforcement powers, as it admits, are non-exclusive. FTC, *The Enforcers*.[3] The Department of Justice, state attorneys general, private parties and even international bodies have a place in the congressional scheme of antitrust enforcement. It cannot be that the district courts alone are excluded. Congress provided for FTC either to go to federal court or to begin administrative adjudication. But *Congress knew the federal courts were open to the parties* that wanted to protect their constitutional rights. The Mine Act and CSRA may be jurisdiction-stripping for the claims in *Thunder Basin* and *Elgin*, but FTC is closer to the U.S. Securities & Exchange Commission (SEC) than to either of those other agencies or statutory schemes.

It should also be noted that FTC is sometimes at loggerheads with other, more responsive, parts of the federal government on antitrust enforcement.[4] For example, the *Qualcomm* case has generated such intense interest that the Ninth Circuit has a special section on its website regarding it.[5] FTC has taken a diametrically opposite position from the Justice Department on interpretation of antitrust and patent enforcement.[6] *See also Henson v. Santander Consumer USA, Inc.*, 137 S. Ct. 1718 (2017) (rejecting FTC's

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[3] https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/enforcers

[4] Robert Teitelman, *Qualcomm's Big Setback Shows Regulators Can't Agree on Antitrust and Patents*, https://www.barrons.com/articles/qualcomm-antitrust-case-justice-department-ftc-51558661991

[5] CA9, *FTC v. Qualcomm*, No. 19-16122, https://www.ca9.uscourts.gov/content/view.php?pk_id=0000001003

[6] It is notable that here it appears that FTC is intent on stripping patent rights from Axon as part of settlement.

definition of "debt collector" under statute) (abrogating *FTC v. Check Investors, Inc.*, 502 F3d 159 (3d Cir. 2007)). In *Qualcomm*, FTC went to the district court in the first instance. Can it seriously be imagined that the district courts would have no role to play if the same assertion were to be made in an administrative hearing? Would private parties—and the Justice Department—have to wait through long, drawn-out agency hearings to get a court ruling on a constitutional matter?

Under a *non-exclusive* antitrust enforcement regime, it is highly unlikely that Congress divested the district courts of jurisdiction over constitutional claims. The Final Order ignores this key difference between the statutory schemes under which the trilogy arose. *Free Enterprise Fund* deals with Sarbanes-Oxley and the Exchange Act, which are far closer in design and purpose to the FTC Act than are the statutes dealing with mines or federal civil servants.

So close are the FTC Act and the SEC (Exchange) Act, in fact, that the precedents under one law are used by courts (and by FTC) to support rulings under the other. *See, e.g.*, *FTC v. Commerce Planet, Inc.*, 815 F.3d 593, 600-603 (9th Cir. 2016) (adopting same burden-shifting test as under SEC precedent and citing SEC cases in the opinion). SEC has no power to decide constitutional issues, nor does FTC. Neither SEC (for securities), nor FTC (for consumer goods and services) has knowledge of all the businesses they are charged with regulating. This obvious difference among the statutes at issue counts against FTC here.

The route to appellate review, Section 25 of the Exchange Act, discussed in *Free Enterprise,* codified at 15 U.S.C. § 78y, is virtually *in pari materia* with Section 5 of the FTC Act, 15 U.S.C. § 45(c). Both provisions allow petitions to the circuit court when a

party is injured by commission orders. The Supreme Court stated, regarding the former statute: "[T]he text [of Section 25] does not expressly limit the jurisdiction that other statutes confer on district courts. *See, e.g.*, 28 U.S.C § 1331. Nor does it do so implicitly." *Free Enterprise*, 561 U.S. at 489. If the text of Section 25 does not "implicitly" divest the district court of jurisdiction, neither does that of Section 5.

Free Enterprise found jurisdiction over a constitutional claim almost on all fours with Axon's claim here. *Id.* at 491-492 (jurisdiction over a separation of powers claim against the Board and holding two levels of for-cause protection of such inferior officers unconstitutional). No Justice dissented from the finding of jurisdiction in the district court to address the constitutional claim raised in *Free Enterprise*. Axon challenges the FTC ALJ's authority under a theory similar to the one upheld as to SEC ALJs in *Lucia v. SEC*, 138 S. Ct. 2044 (2018). Axon does so in reliance on a jurisdictional provision in the FTC Act analogous to an SEC statutory provision which the Supreme Court has already decided confers jurisdiction.

In the context of *Free Enterprise*, under the FTC Act, jurisdiction in the circuit courts is wholly *permissive*, not mandatory. A party subject to a cease-and-desist order (not a victorious one) *may* petition the circuit courts. Only after the record is transmitted by FTC to the circuit court is jurisdiction exclusive. 15 U.S.C. §§ 45(c), (d). This language is *in pari materia* with 15 U.S.C. § 78y(a)(1), which *Free Enterprise* discussed, as is jurisdiction being exclusive only upon SEC's filing the record with the circuit court. 15 U.S.C. § 78y(a)(3). The statute interpreted in *Free Enterprise* is, in structure, subject matter and design, far closer to the FTC Act than those examined in *Thunder Basin* or *Elgin*. Neither of those cases addressed the validity of the ALJ to preside, whereas here, under

the recent and far more salient decisions of *Free Enterprise* and *Lucia*, the Supreme Court has already provided the rule of decision on, respectively, jurisdiction and the merits.

The FTC Act, 15 U.S.C. § 45, explicitly makes the jurisdiction of the circuit court *exclusive* only upon filing of the record by FTC. 15 U.S.C. § 45(d). Congress knew how to make jurisdiction exclusive and did so. Jurisdiction could not be exclusive before then. As with SEC's jurisdictional provision in *Free Enterprise*, so too is jurisdiction here not exclusive.

Under the Final Order, review of the constitutional issues by the circuit court could be easily circumvented by FTC. Axon is not given appellate redress if the Commission's hearing fails to issue a cease-and-desist order. *Id.* ("Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States."). The injury is being hauled before an unjust and unconstitutionally constituted tribunal. No meaningful review and redress of that injury is possible if it is not addressed as a threshold question. This is why *Free Enterprise* said:

> We do not see how petitioners could meaningfully pursue their constitutional claims under the Government's theory. Section 78y provides only for judicial review of *Commission* action, and not every Board action is encapsulated in a final Commission order or rule. The Government suggests that petitioners could first have sought Commission review of the Board's "auditing standards, registration requirements, or other rules." … But petitioners object to the Board's existence, not to any of its auditing standards. Petitioners' general challenge to the Board is "collateral" to any Commission orders or rules from which review might be sought.

Id. 561 U.S. at 489 (emphasis added; citing *McNary*, 498 U.S. at 491-92). If no cease-and-desist order issues, Axon would be subject to an unconstitutional proceeding, vindicated on the merits, yet never heard on the constitutional violation.

Amicus frankly acknowledge that FTC's ruling against itself is unlikely, but it is not impossible. FTC retains the full ability to withhold a cease-and-desist order. No court should sanction agency power, by disclaiming jurisdiction in the district courts, to remove an individual's ability to vindicate his constitutional rights. Judicial review must be meaningful. *Guerrero-Lasprilla v. Barr*, *supra*. *Possible* eventual review at the agency's whim does not suffice.

Like SEC, FTC requires all settling parties to waive any right to petition the circuit court on their constitutional claims. *See, e.g.*, Stipulated Order for Civil Penalty, Monetary Judgment and Injunctive Relief ¶ 7, *United States of America v. Facebook, Inc.*, Civ. No. 19-cv-2184 (D.D.C. July 24, 2019). The Court should take judicial notice of this practice. The agency does not rule on constitutional issues, requires settling defendants to waive subsequent federal-court review of constitutional issues, and can moot any petition for review by failing to rule for itself. Coupled with the *in terrorem* effects of an agency demanding divestment of an acquisition and the transfer of intellectual property on pain of administrative proceedings that favors FTC, the lack of meaningful review is plain. If the constitutional claims proceed in the district court, *neither side can delay*. FTC's interest in antitrust regulation is unharmed, and Axon's constitutional claims remain unsullied by FTC gamesmanship in its own forum.

As the Final Order notes, the presence of jurisdiction for district courts to hear the exact Article II question presented here is not beyond doubt. The circuits and the

Supreme Court are analyzing such questions right now. There are vigorous dissents where the agencies have won and lost; the situation is fluid.[7] Yet FTC retains the power to put a company through the administrative ringer and then either force settlement or, if not, drop the matter without ruling completely, avoiding the constitutional issues raised. This is outrageous. This Court should not deny jurisdiction over a claim regarding the very constitutionality of the tribunal. The blithe invocation of appellate review ignores the reality of administrative punishment.

Ultimately, FTC's process *is* the punishment. Consider *Wyndham* and *LabMD*, the only two cases involving challenges to FTC's broad conception of its powers in consumer protection cases out of hundreds of cases in which parties have been subjected to the unconstitutional exercise by FTC of its authority to investigate and coerce settlements by companies for purportedly violating unarticulated and unknowable standards of conduct. Unlike this case, FTC chose to sue Wyndham in federal district court, bypassing its Part III administrative process. But even in the investigative stage of that case, Wyndham spent over $5 million responding to 47 separate document requests from FTC.[8] Wyndham was finally able to present its constitutional arguments to the Third Circuit in an interlocutory appeal from the district court's denial of Wyndham's motion to dismiss FTC's complaint, but the Third Circuit carefully sidestepped the constitutional question. The court agreed with Wyndham that FTC's cybersecurity

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7 The Supreme Court will decide *Seila Law* by the end of June.

8 Brief of Amici Curiae TechFreedom, Int'l Center for Law & Econ. & Consumer Protection Scholars at 15, *FTC v. Wyndham Worldwide Corp.*, 10 F. Supp. 3d 602 (D.N.J. 2014), *aff'd* 799 F.3d 236 (3d Cir. 2015) (No. 2:13-cv-01887), 2013 WL 3739729 ("Wyndham, for example, has already received 47 document requests in this case and spent $5 million responding to these requests.").

practices "guidebook could not, on its own, provide 'ascertainable certainty' of FTC's interpretation of what specific cybersecurity practices fail § 45(n)." *FTC v. Wyndham Worldwide Corp.*, 799 F.3d 236, 256 n.21 (3d Cir. 2015). But the court left unresolved the key question: whether FTC Act Section 5 itself provided constitutionally adequate fair notice. Wyndham, exhausted by five years of investigation and litigation and *still* without a decision on the merits, settled the case

LabMD v. FTC even more clearly demonstrates the lack of "meaningful review." FTC brought its action before its own ALJ, and the defendant filed in district court (similarly to Axon here), which found that it did not have jurisdiction. *LabMD v. FTC*, 776 F.3d 1275 (11th Cir. 2015) (affirming district court's finding of no jurisdiction). LabMD suffered years of administrative process. It ceased business and was completely shut down. The ALJ found *mirabile dictu* for LabMD on far notice grounds. The Commission, true to form, voided the ALJ's decision and issued its cease-and-desist order. LabMD, destroyed but represented *pro bono,* appealed to the Eleventh Circuit. The only issue decided by the court was the specificity of FTC's injunction. LabMD won. *LabMD v. FTC*, 894 F.3d 1221 (11th Cir. 2018). FTC, having lost, did not seek *certiorari* and LabMD, having won, after FTC destroyed the company, could not reasonably do so. Yet the original constitutional concerns raised by LabMD were never addressed. FTC's position was so unjustified that attorney's fees were awarded. *See* Order Awarding Attorney's Fees, CA11 Docket No. 16-16270 (11th Cir. Dec. 23, 2019). FTC avoided a ruling on the constitutional issues (other than the unconstitutionality of vague injunctions). In particular, the Eleventh Circuit never ruled on the fair notice question left unresolved by the Third Circuit. Thus, the *only* defendant ever to make it through FTC's

torturous process, despite its bankruptcy, *still* did not have opportunity for "meaningful review." This lays bare the constitutional flaws inherent in FTC's process.

The same Sword of Damocles lingers over Axon. If a cease-and-desist order does not issue, there will be no review of the claims that the very prosecution and adjudication by the agency is the injury. This circumstance makes the instant case far closer to *Free Enterprise* where the aggrieved party could not get its reputation back than to *Thunder Basin* or *Elgin*. *LabMD* is not unique.

NCLA now represents Ray Lucia. *Lucia v. SEC*, 138 S. Ct. 2044 (2018). It has filed on his and his company's behalf a suit in California, currently on appeal before this Circuit. *See Raymond J. Lucia Companies, Inc. v. SEC*, No. 18-cv-2692 DMS (JLB), 2019 WL 3997332 (S.D. Cal. Aug. 21, 2019), *on appeal* No. 19-56101 (9th Cir. Sep. 18, 2019). Mr. Lucia's eight-year odyssey belies blithe statements that eventual, possible appellate review is "meaningful review" for the type of injury—a defect in the tribunal itself—rather than any of its acts here alleged. His first unconstitutional proceeding began in 2012. SEC lawfully could have brought that action in the district court. Instead, it hauled Mr. Lucia before an unconstitutionally appointed ALJ. He and his company endured a six-week trial before that ALJ and an appeal to the Commission. Two dissenting Commissioners correctly noted, three years later, that the ALJ who heard the case, had levied hundreds of thousands of dollars in fines, revoked Mr. Lucia's licensure, and issued a lifetime bar for violation of a rule the ALJ had "made up out of whole cloth." They also correctly noted that constitutional questions could only be addressed by Article III courts. An appeal to the D.C. Circuit in 2015 was unavailing, and an evenly split *en banc* decision in 2016 tacitly affirmed that injustice. The Supreme Court agreed

with Mr. Lucia on the ALJ's wrongful appointment, but he was sent back to the SEC, which failed to follow the Court's admonitions.

From 2012 to 2018, SEC maintained a position so wrong the Department of Justice confessed error before the Supreme Court. The Supreme Court ordered that Mr. Lucia should be afforded a hearing before a new, properly appointed ALJ or the Commission itself. *Lucia v. SEC*, 138 S. Ct 2044, 2054-55 (2018). Nonetheless, SEC persisted in prosecuting Mr. Lucia before an ALJ as unconstitutional as the first one. This is not meaningful review or redress. A similarly Kafkaesque fate awaits Axon. The Final Order bizarrely found comfort in the *Lucia* case that eventual review is "meaningful review." That is not the holding of *Lucia.* As noted by Axon, in the antitrust area only two FTC cases have ever achieved appellate review. It cannot be "implied" that Congress meant to deny jurisdiction over constitutional claims whenever FTC decides to proceed administratively. The Supreme Court has not so held and neither should this Court. These claims are "outside the commission's competence and expertise," and the court should retain jurisdiction. *Free Enterprise*, 561 U.S. at 491.

CONCLUSION

This Court should vindicate its strong preference to retain jurisdiction of constitutional claims unless foreclosed by clear Congressional intent, find no such intent here, reverse the Final Order, and find subject-matter jurisdiction over Axon's constitutional claims.

Respectfully submitted, on May 8, 2020.

/s/ Aditya Dynar

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CERTIFICATE OF SERVICE

I certify that this brief was filed using the Case Management / Electronic Case Filing (CM/ECF) system of the U.S. Court of Appeals for the Ninth Circuit. Counsel for all parties are registered CM/ECF users. Service is accomplished by the CM/ECF system.

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Dated: May 8, 2020

CERTIFICATE OF COMPLIANCE

This brief contains **6,933** words (not exceeding 7,000), excluding the items exempted by Fed. R. App. P. 32(f). The brief's type style and typeface comply with Fed. R. App. P. 32(a)(5) and (6) because it is proportionally spaced, includes serifs, and is 14-point.

I certify that this brief is an amicus brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 32-1, Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

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