

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)

**APPELLANT’S OPPOSED EMERGENCY MOTION TO STAY
ADMINISTRATIVE TRIAL PENDING RULING OF THIS COURT**

**Emergency Motion Under Circuit Rule 27-3
Relief Requested By October 8, 2020**

Pamela B. Petersen
Axon Enterprise, Inc.
17800 N. 85th Street
Scottsdale, AZ 85255
Tel. No: (623) 326-6016
Fax No: (480) 905-2027
Email: ppetersen@axon.com

Counsel for Plaintiff-Appellant

Pursuant to Circuit Rule 27-3, Appellant Axon Enterprise, Inc. (“Axon”) hereby moves for an emergency stay of the Federal Trade Commission (“FTC” or “Commission”) administrative trial now set to begin on October 13, 2020, Docket No. 9389. Relief is requested on or before October 8, 2020, the day before the final pretrial conference with Administrative Law Judge (“ALJ”) D. Michael Chappell. Emergency relief is necessary to prevent irreparable injury to Axon by having an ALJ without constitutional authority preside over its case, making his every action and ruling *ultra vires* and subject to a complete do-over. Such constitutional harm, however, can never be remedied after-the-fact.

On April 24, 2020, this Court granted Axon’s motion for expedited appeal, including an accelerated briefing and hearing schedule. (Doc. 7, 12). The appeal was fully briefed on June 15 (Doc. 28) and oral argument was heard on July 17, 2020 by the Hon. Kenneth K. Lee, Hon. Joseph Bumatay, and Hon. Eugene Siler sitting by designation. (Doc. 32). Although Axon has remained hopeful for a ruling before the administrative proceedings begin, the trial will soon be upon us and significant issues of first impression remain with this Court, thereby necessitating the instant motion to stay. Notice of Axon’s intent to file this emergency motion was provided to counsel for the FTC on September 28, 2020. The motion is opposed.

I. UPDATED PROCEDURAL HISTORY AND CASE STATUS.

On January 3, 2020, Axon brought the underlying action against the FTC in the District of Arizona seeking declaratory and injunctive relief regarding three substantial constitutional challenges to the FTC's structure and processes framing the system by which the Commission investigates and adjudicates alleged antitrust violations. Thereafter, the FTC filed its administrative enforcement action against Axon claiming the company's May 2018 acquisition of a failing body worn camera company was anticompetitive.

On January 9, 2020, Axon filed a motion for preliminary injunction in the district court to enjoin the administrative proceedings until such time as the court ruled on Axon's constitutional claims. The next day Axon also filed a motion to stay the administrative case, which the Commission denied on February 27, 2020.¹ On April 8, 2020, the district court dismissed Axon's complaint for lack of jurisdiction, denying its motion for preliminary injunction as moot. This appeal followed.

The administrative hearing originally set for May 19, 2020, was continued and then stayed by a series of Commission orders in light of the Covid-19 public health crisis. As soon as the stay lifted on July 7, 2020, Axon filed its motion to disqualify the ALJ based on an impermissible dual-layer of insulation from

¹ All Commission orders in the administrative case may be found at <https://www.ftc.gov/enforcement/cases-proceedings/1810162/axonvievu-matter>.

Presidential removal power in violation of Article II. On July 10, 2020, the ALJ certified the motion to the Commission, which denied it on September 3, 2020. Despite the Commission's lack of authority, expertise or even competence to decide such constitutional claims,² it has now weighed in on the merits in a 7-page opinion, leaving nothing further on the subject for the administrative process.³ A fully remote, multi-week trial is set to begin October 13, 2020. The threshold jurisdictional issues involved here should be resolved first.

II. A STAY IS NOW NECESSARY TO PREVENT IRREPARABLE HARM.

Axon followed what it understood was the Court's preferred method of expediting an appeal with its prior Rule 27-12 motion in lieu of requesting a stay. *See Natural Resources Defense Council, Inc. v. U.S. Dept. of Interior*, 13 Fed. Appx. 612, 620 n.11 (2001) (Pregerson, J. dissenting) (noting this Court's preference for Rule 27-12 expedited appeal procedure as alternative to a stay); *see generally Hamamoto v. Ige*, 881 F.3d 719, 723 (9th Cir. 2018) (explaining Rule 27-12 is one of many expedited review procedures available to judiciary to determine time-sensitive controversies). As time is now of the essence, Axon respectfully requests

² *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 491 (2010); *Montana Chapter of Ass'n of Civilian Technicians, Inc. v. Young*, 514 F.2d 1165, 1167 (9th Cir. 1975).

³ The merits have not yet been briefed in this case.

an administrative stay be entered, as the Fifth Circuit recently did in *Cochran v. SEC*, No. 19-10396 (5th Cir. Sep. 24, 2019) while it considered an adverse district court jurisdictional ruling regarding the same Article II constitutional defect alleged with SEC ALJs.⁴ *See also Southeast Alaska Conservation Council v. U.S. Army Corps of Engineers*, 472 F.3d 1097, 1199 (9th Cir. 2006) (granting emergency Circuit Rule 27-3 motion preventing certain U.S. Forest Service activities).

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)). Indeed, it has long been established that "[a]n alleged constitutional infringement will often alone constitute irreparable harm." *Goldie's Bookstore, Inc. v. Superior Court of State of Cal.*, 739 F.2d 466, 472 (9th Cir. 1984) (citing Wright & Miller, 11 Federal Practice & Proc. § 2948 at 440 (1973)). *Accord Ezell v. City of Chicago*, 651 F.3d 684, 699 (7th Cir. 2011) (where constitutional rights are at issue, "irreparable harm is presumed" and "no further showing of irreparable injury is necessary.") (quoting 11A Wright & Miller, Federal Practice & Proc. § 2948.1 (2d ed. 1995)). Vindication of constitutional rights is also plainly in the public interest. *Rodriguez v. Robbins*, 715 F.3d 1127, 1146 (9th Cir. 2013).

⁴ *See* Docs. 34-35, Cochran Supplemental Authority Letters.

Moreover, Axon's constitutional injury is not mooted by an administrative win on the merits. Such harm has already occurred and this hypothetical scenario provides no remedy whatsoever. And, when Axon loses (as always happens in FTC administrative cases), 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. The constitutional violation *is* the harm, and the process *is* the penalty. Accordingly, a stay should be granted.

III. RELIEF REQUESTED.

Axon respectfully requests that this Court stay the administrative proceedings pending its threshold jurisdictional ruling on Axon's constitutional claims.

Respectfully submitted this 29th day of September, 2020.

/s/ Pam Petersen

Pamela B. Petersen
Axon Enterprise, Inc.
17800 N. 85th Street
Scottsdale, AZ 85255
(623) 326-6016
ppetersen@axon.com

*Counsel for Plaintiff-Appellant
Axon Enterprise, Inc.*

CERTIFICATE OF SERVICE

I certify that counsel for the parties have been served with a true and correct copy of the foregoing via this Court's CM/EMF system to all registered users and courtesy copy emailed to the following counsel of record on September 29, 2020:

Joshua M. Salzman
Joshua.M.Salzman@usdoj.gov
Daniel Aguilar
daniel.j.aguilar@usdoj.gov
Attorney, Civil Appellate Staff
U.S Department of Justice

/s/ Pam Petersen
Pamela B. Petersen
Attorney for Plaintiff-Appellant

**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:

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

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

I could not have filed this motion earlier because:

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 April 8, 2020. Axon's motion to stay filed with the Commission was denied on February 27, 2020.

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)*: 9-28-20

By *(method)*: Email

Position of other parties: Opposed

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

Counsel for Commission Appellees
 Joshua M. Salzman, Joshua.M.Salzman@usdoj.gov
 Daniel Aguilar, daniel.j.aguilar@usdoj.gov
 (202) 514-5432
 Civil Appellate Staff, U.S Department of Justice

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

Signature /s/ Pam Petersen

Date 9-29-20

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

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