

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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

**OPPOSITION TO AXON’S EMERGENCY MOTION
FOR A STAY OF THE MANDATE**

Plaintiff Axon Enterprise sued in district court to enjoin a Federal Trade Commission (FTC) enforcement proceeding in which it is a respondent. After the district court dismissed the complaint for lack of jurisdiction, a panel of this Court initially granted “a temporary stay of” the FTC’s proceeding “to preserve the status quo pending consideration of the appeal on the merits.” Order at 2, *Axon Enterprise, Inc. v. FTC*, No. 20-15662 (9th Cir. Oct. 2, 2020). This Court has now completed that consideration. It affirmed the district court’s judgment and denied Axon’s petition to rehear the case en banc, with no Judge requesting a vote on that petition.

Axon now seeks to extend that stay pending the Supreme Court’s action on its petition, although it mistakenly styles its request as one to stay the Court’s mandate. For the reasons set out in this Court’s decision, Axon has no likelihood of success. The enforcement proceeding have already been stayed for several months, and

granting Axon's request will stay it for many months more until the Supreme Court acts on its petition. Axon alleges no injury other than that it will be involved in an administrative proceeding, and the Supreme Court has long since made clear that such an injury is not properly the basis for injunctive relief. And, in the event that Axon receives an adverse determination before the agency, that ruling will be immediately appealable to this Court.

Discussion

1. Axon is a respondent in an administrative enforcement proceeding before the FTC, which concerns Axon's acquisition of its principal rival in the market for body-worn police cameras. The FTC has assigned an administrative law judge to conduct an evidentiary hearing to determine whether that acquisition violated the antitrust laws. In that proceeding, Axon has argued that its due process rights are being violated, and that the statutory restrictions on the removal of the FTC Commissioners and the administrative law judge 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). The FTC has not yet had an opportunity to consider all of those arguments, nor has it yet been able to determine whether Axon violated the antitrust laws in the first instance.

Axon sued the FTC in district court, seeking to enjoin the administrative proceeding based on the same constitutional claims it has raised in the FTC

proceeding. The district court dismissed Axon’s complaint for lack of jurisdiction, explaining that Axon must continue to press its claims before the FTC and then, if ultimately aggrieved by an adverse order, seek judicial review in the court of appeals—not the district court. *Axon Enterprise Inc. v. FTC*, 452 F. Supp. 3d 882, 886 (D. Ariz. 2020). A panel of this Court initially granted “a temporary stay of” the FTC’s proceeding “to preserve the status quo pending consideration of the appeal on the merits.” Order at 2, *Axon Enterprise, Inc. v. FTC*, No. 20-15662 (9th Cir. Oct. 2, 2020). After considering those merits, the panel agreed with the district court and affirmed the judgment of dismissal, holding that the district court lacked jurisdiction over Axon’s complaint. *Axon Enterprise, Inc. v. FTC*, 986 F.3d 1173, 1176-77 (9th Cir. 2021). Axon petitioned for rehearing en banc and “no judge has requested a vote on whether to rehear the matter en banc.” Order at 2, *Axon Enterprise, Inc. v. FTC*, No. 20-15662 (9th Cir. Apr. 15, 2021).

2. Axon now asks the Court to extend that stay while it seeks Supreme Court review. Axon mistakenly characterizes its request as one to stay the mandate. The district court dismissed its complaint for lack of jurisdiction and entered judgment. This Court affirmed that dismissal. The mandate, when issued, will not alter the district court’s judgment of dismissal or require further district court proceedings. *See* Wright & Miller, 16AA Federal Practice and Procedure Jurisdiction § 3987 (5th ed. 2021) (“The mandate is directed to the court below, which upon receipt of the

mandate can take whatever further proceedings are appropriate.”). Staying the mandate here would have no effect on the pending FTC administrative proceeding.

The Court should decline to extend its temporary stay. The Court has considered Axon’s appeal on the merits and held that Axon may not bring suit in district court—it must instead present its constitutional challenges to the administrative proceeding in the administrative proceeding, and then to the court of appeals on judicial review if necessary. That holding is consistent with the Supreme Court precedent thoroughly analyzed in this Court’s decision, *Axon*, 986 F.3d at 1178-80, and it is consistent with every other court of appeals that has considered the question, *id.* at 1181-82 (collecting cases). *See also Tilton v. SEC*, 824 F.3d 276, 279 (2d Cir. 2016) (holding that the district court lacked jurisdiction over constitutional challenges to ongoing administrative proceeding where Congress vested judicial review of those proceedings in the court of appeals); *Bennett v. SEC*, 844 F.3d 174 (4th Cir. 2016) (same); *Bebo v. SEC*, 799 F.3d 765 (7th Cir. 2015) (same); *Hill v. SEC*, 825 F.3d 1236 (11th Cir. 2016) (same); *Gibson v. SEC*, 795 F. App’x 753 (11th Cir. 2019) (same); *Jarkesy v. SEC*, 803 F.3d 9 (D.C. Cir. 2015) (same). In the absence of a conflict among the courts of appeals, the Supreme Court is not likely to grant review on this issue, and has repeatedly denied petitions for certiorari that have sought to reverse the unanimous decisions of the courts of appeals. *Bebo v. SEC*, *cert. denied*, 136 S. Ct. 1500 (2016); *Tilton v. SEC*, *cert. denied*, 137 S. Ct. 2187 (2017); *Gibson v. SEC*, *cert. denied*, 141 S. Ct. 1125 (2021).

If Axon believes that the Supreme Court is likely to reach a different result in its case, it is of course free to ask the Supreme Court to issue a stay pending its consideration of its petition. That was the course pursued by the plaintiff in *Tilton*, 824 F.3d at 281, where the Second Circuit granted a temporary stay of the proceeding to consider the merits of the appeal, and, after affirming the district court's judgment, stated that "the stay is vacated, subject, however, to a continuation" of only 8 days "to permit Tilton to file a motion seeking a stay from the Supreme Court," Order, *Tilton v. SEC*, 15-2103 (2d Cir. June 28, 2016). The Supreme Court later denied the stay application. *Tilton v. SEC*, No. 16A242 (U.S. Sept. 27, 2016). At most, the Court should give Axon a similar opportunity to seek immediate relief from the Supreme Court.

3. Axon argues that it will be irreparably injured if it must participate in an administrative proceeding that it believes is unlawful. That argument has been squarely rejected by the Supreme Court, which held that respondents in FTC proceedings may not sue in district court to seek an injunction of those proceedings. *FTC v. Standard Oil Co.*, 449 U.S. 232 (1980). There, the plaintiff oil company alleged that the FTC had acted *ultra vires* in bringing an administrative proceeding against it, and that the proceeding was solely the result of impermissible political pressure. *Id.* at 235. The Court took those allegations at face value, and held that the oil company must nevertheless participate in the administrative proceeding, receive a final order, and only then seek judicial review. A contrary holding, permitting an injunction and

immediate district court review, “is likely to [] interfere[] with the proper functioning of the agency and [be] a burden for the courts.” *Id.* at 242. The Court rejected the contention that the company would be “irreparably harmed unless the issuance of the complaint is judicially reviewed immediately,” explaining instead that “the expense and annoyance of litigation is part of the social burden of living under government.” *Id.* at 244 (quotation marks omitted). *Accord Ukiah Valley Medical Ctr. v. FTC*, 911 F.2d 261, 264 (9th Cir. 1990) (participating in an allegedly unlawful FTC proceeding “has consistently been held not to constitute a ‘direct and immediate * * * effect on the day-to-day business’ of charged parties”) (quoting *Standard Oil*, 449 U.S. at 239).

To show irreparable harm, Axon must therefore point to something “*beyond the burdens associated with the dispute resolution process*” to demonstrate truly irreparable injury. *Axon*, 986 F.3d at 1182 (emphasis in original). Otherwise, Axon must—like other similarly situated parties—await a final agency decision and seek judicial review if necessary. *See Lucia v. SEC*, 138 S. Ct. 2044, 2055-56 (2018) (granting relief to a petitioner who completed administrative proceeding and prevailed on a constitutional challenge to the proceeding).

Axon contends that participating in an allegedly unconstitutional administrative proceeding is somehow different from participating in an *ultra vires* or unlawful proceeding. Mot. 9. But this Court has already rejected that claim, explaining that there is no meaningful difference between Axon’s allegations of constitutional injury and those statutory claims raised in *Standard Oil*. *Axon*, 986 F.3d at 1181 & n.4

(collecting cases and rejecting Axon’s attempt to “distinguish *Standard Oil* on the basis that it did not deal with an allegedly unconstitutional proceeding”).

Moreover, any alleged harm that Axon might incur can be remedied on direct judicial review. If the FTC issues an order adverse to Axon, Axon can press its constitutional claims in this Court and, if those claims are meritorious, secure reversal or vacatur of the FTC’s decision. *Axon*, 986 F.3d at 1181-82. And if Axon prevails outright in the administrative proceeding, then there will be no need for further judicial review. *See Elgin v. Department of Treasury*, 567 U.S. 1, 22-23 (2012) (agency resolution of other issues in plaintiff’s favor “might fully dispose of the case” and “obviate the need to address the constitutional challenge”).

4. The balance of the equities weighs against further delaying the administrative proceeding, which would impair the FTC’s ability to ensure a competitive and fair marketplace through the enforcement scheme created by Congress. Axon now seeks a stay of 150 days until September 2021 in which to file a petition for certiorari, and the Supreme Court will act on its petition only after additional months. That stay, which is not necessary to preclude injury to Axon, will injure the public by postponing a determination of the serious issues involved in the FTC proceeding. 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 “empower[ed] 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 to perpetuate the stay of those proceedings so that Axon can continue its litigation against the FTC “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”).

CONCLUSION

The emergency motion for a stay of the mandate 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 _____
Daniel Aguilar