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)

PETITION FOR REHEARING EN BANC

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

FRAP 35 STATEMENT

The Petition raises an issue of exceptional importance: whether federal antitrust laws implicitly bar federal district courts from hearing constitutional challenges to the Federal Trade Commission's (FTC) structure or procedures that are substantively unrelated to any individual agency merits determination.

A divided panel held that Congress impliedly stripped the district court of jurisdiction over Petitioner's "serious" and "substantial" constitutional challenges to the way the FTC operates, including (1) the uncodified, non-public "clearance" process used by the FTC and the Department of Justice (DOJ) to divvy up merger investigations—thereby arbitrarily subjecting similarly situated companies to vastly different rights, standards, and consequences—in violation of Fifth Amendment due process and equal protection guarantees; and (2) the authority of the FTC's administrative law judge (ALJ) to preside over its administrative proceedings in the first instance based on impermissible dual-layer for-cause removal protections, in violation of Article II separation-of-powers principles.[1]

[1] The issues on appeal also include jurisdiction over challenges to the FTC's "combin[ation of] investigatory, prosecutorial, adjudicative, and appellate functions within a single agency," *Axon Enterprise, Inc. v. FTC*, 986 F.3d 1173, 1180 (9th Cir. 2021) (reproduced in Addendum, hereinafter "Add."), and to the for-cause removal protections for FTC Commissioners (OB55, n.23). "OB" refers to Axon's Corrected Opening Brief (Dkt.18). Cited pages are to the Court's electronic page numbering. "ER" refers to Axon's Excerpts of Record (Dkt.14). "Doc." references are to the district court's docket.

The majority decision conflicts with at least two Supreme Court decisions—*Free Enterprise Fund v. PCAOB*, 561 U.S. 477 (2010) and *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994)—which, when properly applied, compel a different result. *Free Enterprise* unanimously found no implied congressional jurisdiction-stripping intent over an equivalent structural constitutional challenge to the PCAOB under a statutory review scheme "almost identical" to the FTC's. And *Thunder Basin* requires meaningful, not illusory, judicial review *in addition to* agency expertise on an issue not wholly collateral to the proceedings on the merits—none of which exist here.

In rejecting jurisdiction over substantively collateral constitutional claims, the majority further adopts a standard that conflicts with numerous decisions of this Court: *Mace v. Skinner*, 34 F.3d 854 (9th Cir. 1994), *Americopters, LLC v. FAA*, 441 F.3d 726 (9th Cir. 2006), *Latif v. Holder*, 686 F.3d 1122 (9th Cir. 2012), and *Recinto v. U.S. Dep't of Veteran Affairs*, 706 F.3d 1171 (9th Cir. 2013). All of these cases find jurisdiction over constitutional challenges that do not require review of individual merits decisions. En banc review is thus also warranted to maintain uniformity of this Court's decisions.

This critical jurisdictional issue has arisen with increasing frequency in federal appellate courts in light of three recent Supreme Court decisions—*Free Enterprise*, *Lucia v. SEC*, 138 S. Ct. 2044 (2018), and *Seila Law LLC v. CFPB*, 140

S. Ct. 2183 (2020). These precedents call into serious question the constitutionality of multiple-layer removal restrictions and make clear that when an executive act allegedly exceeds the official's authority, an affected party sustains a "here-and-now" injury that can be remedied by a court. Just as the Fifth Circuit has recently done in *Cochran v. SEC*, 969 F.3d 507 (5th Cir. Aug. 11, 2020) (split-panel decision on same Art. II jurisdiction issue), *reh'g granted* Oct. 30, 2020 (No. 19-10396), this Court should grant the en banc Petition here.

INTRODUCTION

Petitioner Axon Enterprise, Inc. (Axon) has raised "substantial" structural constitutional challenges that even the majority agrees are substantively collateral to the antitrust merits in the subsequently filed administrative enforcement proceedings. Indeed, the divided panel decision (with the two judges of this Court splitting) expressly found that Axon's "due process and Appointments Clause claims *do not turn on the antitrust merits*," that there are "*no threshold questions* that need to be addressed before reviewing Axon's constitutional claims," and that the "FTC *lacks agency expertise* to resolve the constitutional claims," which are "more like the 'standard questions of administrative law' that the *Free Enterprise* Court addressed." Add.1186-87. On these points, Axon agrees.

Still, the panel ultimately held that FTC targets like Axon must first endure the very proceedings they contend are unconstitutional before having their

objections heard, making it virtually impossible for these important constitutional claims to ever reach an Article III court. In the past quarter-century, only *two* parties survived the FTC's inherently biased internal process to reach a court of appeals (OB50-51, n.20). The vast majority settle or simply abandon their mergers rather than suffer the futility of defending the merits against an agency that *always* wins on its home turf (*Id.*; OB49 & n.19; ER94, 99-100, 116-123). *See also* Add.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"). Yet, the panel held that the *possibility* of *eventual* review by an appellate court at the end of the administrative process, *if* the party outlasts it *and loses*, is all that Supreme Court precedent requires. Add.1183. But regarding "challenges to an agency's *structure, procedures*, or *existence*, rather than to an agency's adjudication of the merits on an individual case" (Add.1191, Bumatay, J., dissenting), the Supreme Court requires no such thing. In fact, *Free Enterprise*, consistent with this Court's own precedents, compels the opposite result.

STATEMENT OF FACTS AND CASE DISPOSITION

In 2018, the FTC began an 18-month investigation of Axon's acquisition of an essentially insolvent competitor, Vievu LLC, for approximately $13 million (ER133). Axon and Vievu both sold body-worn cameras (BWC) and digital evidence management systems (DEMS) to law enforcement.

Axon was subjected to a civil investigatory demand (CID) and numerous investigational depositions of its executives at substantial cost and disruption to its business (ER133-34; Doc.15-2, ¶¶ 4-5). In December 2019, to avoid further burdens, Axon offered to divest all Vievu assets and infuse a divestiture buyer with millions in working capital (ER125-26). But the FTC demanded more—a "blank check" license to all of Axon's independently created BWC and DEMS intellectual property and technology, to stand up a virtual "clone" of Axon far stronger than Vievu ever could have become. (ER125, 134). That unprecedented ultimatum and impermissible flex of government power resulted in this lawsuit.

In January 2020, Axon brought the underlying action against the FTC in the District of Arizona (ER124-152). The Complaint sought declaratory and injunctive relief regarding the FTC's uncodified, black-box "clearance" process by which the FTC and DOJ sort merger investigations into administrative or district court enforcement tracks. These outcome-determinative decisions are "arbitrary," without "rational basis," and "secretly negotiated between the agencies themselves" without public insight, comment or congressional scrutiny, and result in stark differences in procedures and protections afforded private parties (ER124-39, ¶¶ 6, 30, 32, 35). The Complaint further challenged the impermissible dual-layer for-cause removal protections afforded the FTC ALJ in violation of Article II (ER149-50, Counts 1-2).

In response, after hours the same day, the FTC filed its administrative enforcement action, FTC Docket 9389, challenging the Vievu acquisition as anticompetitive.[2]

Axon moved for a preliminary injunction in the district court to enjoin the administrative proceedings pending resolution of Axon's constitutional claims (Doc.15). The FTC opposed the motion solely on jurisdictional grounds (Doc.19). Following oral argument limited to its jurisdiction (ER37-92), the district court dismissed Axon's Complaint, without prejudice, for lack of subject matter jurisdiction, and denied the preliminary injunction motion as moot (ER4, 33). Axon promptly appealed (ER1).

This Court granted Axon's motion for expedited appeal (Dkt.12). Oral argument was heard in July 2020 by Ninth Circuit Judges Lee and Bumatay, and Senior Judge Siler of the Sixth Circuit sitting by designation (Dkt.32). On October 2, the Court 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 2-1 decision affirming the district

[2] Axon's Complaint also included a merits-based declaratory judgment claim that the Vievu acquisition did not violate antitrust laws (ER150-51). After the FTC filed its administrative case separately challenging the antitrust merits, Axon agreed its federal merits claim should be severed and dismissed (ER38-41). Public versions of the parties' pleadings in the administrative case may be found at https://www.ftc.gov/enforcement/cases-proceedings/1810162/axonvievu-matter.

court's dismissal with Judge Lee writing for the majority and Judge Bumatay dissenting (Dkt.42-1).

The majority agreed "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," and stated that "if we were writing on a clean slate, we would agree with the dissent." Add.1183-84. The panel felt constrained, however, by a misreading of *Free Enterprise* and essentially invited the Supreme Court to "clarify and extend the holding of *Free Enterprise* to include any constitutional challenge to any agency's structure, procedure, or existence." Add.1185. That invitation was unnecessary. Properly construed, *Free Enterprise* already compels this result.

ARGUMENT

I. THE PANEL DECISION CONFLICTS WITH CONTROLLING SUPREME COURT PRECEDENT—THE UNANIMOUS *FREE ENTERPRISE* JURISDICTIONAL DECISION.

Congress has granted federal district courts original jurisdiction over "all civil actions" arising under the U.S. Constitution. 28 U.S.C. § 1331 The panel held, however, that Congress impliedly stripped district courts of jurisdiction over constitutional challenges to FTC enforcement actions when it adopted 15 U.S.C. § 45(c), which allows a party to petition for appellate review only of a Commission *cease-and-desist order*. Even though the statute is silent regarding the rights of

parties like Axon who are aggrieved by ongoing, unconstitutional FTC investigations or proceedings, the panel held it was "fairly discernible" that Congress intended to preclude district court jurisdiction over all such claims. Add.1180.

This ruling conflicts with *Free Enterprise*, which unanimously held that a review statute—"almost identical" to § 45 here (Add.1180)—does not expressly *or implicitly* limit a district court's federal question jurisdiction over structural constitutional claims or otherwise provide "an exclusive route to review." 561 U.S. at 489. Indeed, the Supreme Court held that a presumption *against* jurisdiction-stripping exists if claims do not fall within the agency's competence or expertise, are "collateral" to the subject matter of the enforcement action, and preclusion would deny meaningful judicial review. *Id*. All three factors weigh against jurisdiction-stripping here. Add.1195-97 (dissent).

Free Enterprise is indistinguishable and controlling. The accounting firm there and Axon here each brought structural constitutional challenges to the Board and ALJ respectively, based on an impermissible dual-layer of insulation from Presidential accountability. The Supreme Court found (and the majority here agreed) that such a challenge was "outside the Commission's competence and expertise." *Id*. at 491; Add.1186-88. Axon "objects to the [ALJ's] *existence*" as an unconstitutional infringement on the President's removal powers, just as the *Free Enterprise* plaintiffs objected to the Board's very "existence." 561 U.S. at 490. In both cases,

the regulatory body had "beg[un] a formal investigation"—the Board into the firm's accounting practices and the FTC into Axon's methods of competition—but neither had initiated an enforcement proceeding at the time of the federal court filing. *Id*. at 487. Moreover, neither case challenged a *Commission* order or action reviewable under the agency's statutory review scheme. *Id*. at 490 (review statute "provides only for judicial review of *Commission* action, and not every Board [or FTC] action is encapsulated in a final order").

A. The Panel Sets Dangerous Precedent By Rejecting "Here-And-Now" Constitutional Injury and Requiring "Dire Risk."

As the Supreme Court held in *Free Enterprise* and reemphasized just last term in *Seila Law,* a party "sustain[s] injury" from an executive act that allegedly exceeds the official's authority. 140 S. Ct. at 2196; *see also Id.* (finding petitioner suffered "a concrete injury" when compelled to comply with CID during CFPB's investigation).[3] The Constitution's structural provisions "protect[ ] the liberty of all persons" by ensuring no government entity acts "in excess of [its] delegated governmental power." *Bond v. U.S.*, 564 U.S. 211, 222 (2011). Thus, when an agency violates this

[3] Axon was not required to defy the CID and incur a "bet-the-farm" sanction before challenging the FTC's investigational authority over it. *Free Enterprise*, 561 U.S. at 490 (party not required to take violative action before "testing the validity of the law"); Add.1195-96 (dissent recognizing constitutional harm "regardless of whether a sanction is levied by the agency"). To be sure, Axon, whose customers are law enforcement agencies, was in no position to defy a federal subpoena.

principle, "liberty is at stake," *id*., and it "create[s] a 'here-and-now' injury." *Free Enterprise*, 561 U.S. at 513; *see also Seila Law*, 140 S. Ct. at 2196 ("[W]hen [a tenure protection] provision violates the separation of powers it inflicts a 'here-and-now' injury on affected third parties *that can be remedied by a court*.") (emphasis added); *see also* Add.1195-96 (dissent). Accordingly, the majority's conclusion that "Axon has not suffered any cognizable harm" (Add.1177) conflicts with substantial Supreme Court authority.[4]

Further, the panel's suggestion that Axon must face a "dire risk" before pre-enforcement relief is justified (Add.1183), sets a dangerous precedent that extends far beyond this case and the FTC. Whenever "liberty is at stake," the risk is dire. And even beyond violations of the Constitution's structure, any constitutional harm is sufficiently "dire" if more than *de minimis*. *See Thunder Basin*, 510 U.S. at 219-20 (Scalia, J., concurring) (presuming Court's opinion viewed harm as *de minimis,* "since I know of no doctrine which lets stand unconstitutional injury that is more than *de minimis* but short of some other criterion of gravity"). Axon's constitutional injury is far from *de minimis*: As the Framers recognized, "structural protections

[4] This case is not governed by *FTC v. Standard Oil Co.*, 449 U.S. 232, 244 (1980), which involved no constitutional claim or injury at all. To be sure, the burden and expense of resisting FTC overreach is extreme. But Axon has never claimed these burdens alone as its injury. It has asserted distinct harm from being subjected to an unconstitutional process with an unconstitutional presiding officer that simply cannot be remedied after-the-fact.

against abuse of power [are] critical to preserving liberty." *Free Enterprise*, 561 U.S. at 501.

B. Delayed Review Is Neither Meaningful Nor Guaranteed.

No Supreme Court decision has ranked meaningful judicial review above the other *Thunder Basin* factors as the end-all-be-all for jurisdiction-stripping. Add.1181 (citing only out-of-circuit cases for notion that meaningful judicial review is "the most critical thread in the case law"). Indeed, *Free Enterprise* states at the outset that it is where procedures are "designed to permit *agency expertise* to be brought to bear on particular problems" that they "are to be exclusive."[5] 561 U.S. at 489 (emphasis added); *see also Elgin v. Dep't of Treasury*, 567 U.S. 1, 26 (2012) (Alito, J., dissenting) (emphasizing "agency expertise" and "wholly collateral" inquiries as "two important factors" that can "considerably reduce[ ]" any interest in unified administrative review). But after expressly finding that Axon's constitutional claims "do not turn on the antitrust merits" and that the FTC "lacks expertise" to decide them, the panel 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." Add.1183, 1187. The panel thereby excised completely two of the three *Thunder Basin* factors.

[5] Clearly, Congress never intended to channel antitrust enforcement powers exclusively to the FTC, which undisputedly shares such jurisdiction with DOJ, state attorneys general, and private parties.

In any event, there is no "guaranteed" judicial review here, as the majority acknowledges *Free Enterprise* requires. Add.1184; *see also* Add.1193 n.4 (dissent). Axon's pre-enforcement clearance-process claim is a classic example of an unconstitutional agency investigation that "may never see the light of day" because not all agency action is "encapsulated" in an appealable cease-and-desist order, *id*., which is why this claim is one of first impression in *any* federal court.[6] Despite being subjected to a "here-and-now" injury, there is no administrative right of appeal when the FTC investigates but does not file an enforcement action, or the party settles or wins on the antitrust merits. Add.1192-93 (dissent). In all of these circumstances, there is real constitutional harm but no avenue for Article III redress. And without district court jurisdiction to resolve Axon's constitutional claims as *threshold* matters, no after-the-fact appeal can remedy the pre-review harm. Once subjected to a full-blown trial before an unconstitutional officer, there is no remedy and

[6] Axon also has no opportunity to develop a factual record on the clearance claim, as the FTC deemed it "irrelevant" in the administrative case and denied all discovery (and FOIA requests) in an effort to maintain the secrecy of this process. And because there are no public facts for an appellate court to take judicial notice of, parties have little ability to make the materiality showing under § 45(c) necessary for remand for "additional evidence." Add.1183 & n.6.

accordingly there is no *meaningful* review. The constitutional violation *is* the harm, and the process *is* the penalty.[7]

The government admitted as much in its recent brief opposing certiorari in *Gibson v. SEC* (No. 20-276). The Solicitor General argued *Gibson* would be a "suboptimal vehicle" for considering the same jurisdiction question presented here because "the proceedings before the ALJ have already occurred" such that, *"[a]t this point, petitioner's request to enjoin the ALJ proceedings is moot, and it is unclear what alternative relief" is available* (Dec. 2020 SG Br.12-13, emphasis added). The government then posited that Axon's appeal here and *Cochran*'s Fifth Circuit's appeal being reheard en banc, "present better vehicles" precisely because these plaintiffs have not yet had their evidentiary hearings due to appellate stays. (*Id*.).

Accordingly, Axon's here-and-now constitutional injury simply cannot be "remedied" after-the-fact on appeal and any notion of meaningful review is illusory.

[7] The majority's suggestion that an appellate remand for a complete "do-over" of the administrative trial is somehow an "appropriate remedy," citing the Supreme Court's remand in *Lucia*, is incorrect. Add.1182 n.5. Because the administrative hearing had already occurred in *Lucia*, a remand for adjudication before a properly appointed official was the best the Court could do. 138 S. Ct. at 2055. That does not mean the constitutional harm previously sustained was erased. This Court has the opportunity to *prevent* the harm, including years-long rounds of administrative/appellate "pinball." *See Elgin*, 567 U.S. at 33-34 (Alito, J. dissenting).

If the constitutional violations are allowed to proceed in the first instance, the injury is permanent and irreversible before it ever reaches an Article III court.

II. THE MAJORITY'S CONSTRUCTION OF THE "WHOLLY COLLATERAL" FACTOR CONFLICTS WITH WELL-ESTABLISHED PRECEDENT OF BOTH THE SUPREME COURT AND THIS CIRCUIT.

The panel's choice to construe the "wholly collateral" factor *procedurally* rather than substantively conflicts with well-established precedent of the Supreme Court and this Circuit and cannot stand. The majority notes "two competing ways" to consider the second *Thunder Basin* factor—substantive vs. procedural entanglement with the administrative merits. Add.1185. Noting that this factor is "cloaked in ambiguity" and that Axon's constitutional claims "are arguably 'wholly collateral' to the enforcement proceedings" and present a "close call," the panel adopted the procedural route. Based solely on Axon's request for district court injunctive relief against the FTC administrative proceedings, the panel found the claims are the "vehicle by which" Axon "seeks to prevail at the agency level," and thus are not wholly collateral to the review scheme. Add.1185-86.

This ruling flies in the face of established Supreme Court practice "to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution," *Free Enterprise*, 561 U.S. at 491 n.2 (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)), and the Court's long-standing recognition that injunctive relief is the "proper means for preventing entities from acting unconstitutionally,"

id. (quoting *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001)). Accordingly, construing Axon's request for injunctive relief against it, thereby delaying resolution of the ALJ's authority to preside until *after* he has acted unconstitutionally, contravenes Supreme Court law.

Moreover, the panel's procedural construction of the "wholly collateral" factor effectively bars *all* district court jurisdiction of constitutional challenges to agency enforcement power, making it an issue of exceptional importance for en banc review.

A. The Jurisdictional Distinguisher In the Supreme Court "Trilogy" Is Merits-Based—Not Procedural—Entanglement.

This Court has never before analyzed or attempted to harmonize the Supreme Court's so-called "trilogy" of jurisdiction-stripping cases, and the panel's decision is far from a model of clarity for such critical standard-setting. A clear rule on merits-based entanglement is required, as articulated by Judge Bumatay: district courts retain jurisdiction over "challenges to an agency's *structure, procedures*, or *existence*, rather than to an agency's adjudication of the merits on an individual case." Add.1191.

The jurisdictional holdings in *Thunder Basin* and *Elgin* were, at bottom, merits-based. Both cases involved constitutional claims that were inextricably intertwined with the administrative merits. "[A]t root," the due process claim in *Thunder Basin* required interpretation of walk-around rights, arose under the Mine

Act, and fell "squarely" within the agency's "expertise" and "extensive experience" in interpreting such rights.[8] 510 U.S. at 214. Similarly, *Elgin* involved a "CSRA-covered employment action brought by CSRA-covered employees requesting relief that the CSRA routinely affords," including reinstatement and backpay. 567 U.S. at 22. Thus, the equal protection claim was the "vehicle" by which petitioners sought to reverse an adverse agency action *on the merits*. *Id*. at 22-23 (also noting "preliminary" constructive discharge question was "squarely within the MSPB's expertise").[9] Thus, *substantive* entanglement between the constitutional claims and the administrative merits was central to both decisions.

In sharp contrast, the panel here expressly found no entanglement with the antitrust merits, no threshold questions, and no agency expertise. Add.1186-87. Further, it is undisputed that Axon is not challenging any Commission or ALJ decision or order and does not seek any remedy under the FTC Act. *See Free Enterprise*, 561 U.S. at 491 (finding petitioners' "general challenge to the Board is

[8] *Thunder Basin* involved a due process challenge to the review statute itself, not constitutional claims wholly separate from the Mine Act. The "big takeaway" (Add.1187) from *Thunder Basin* is therefore entanglement with the agency statute, not condoning irreparable constitutional harm.

[9] Moreover, express legislative history for both the Mine Act and CSRA states Congress' intent to exclude district court actions (OB25-26 nn.6, 8). Nothing of the sort exists for the FTC Act. Nor is there any "floodgate" concern here as the FTC has only initiated 36 administrative cases in the last five years combined (OB49).

'collateral' to any Commission orders or rules from which review might be sought"). Indeed, it is undisputed that the clearance process Axon challenges is not codified in any statute, rule or regulation; it thus was never contemplated by Congress and falls completely outside the FTC Act.

Accordingly, Axon's claims align with the broad structural constitutional challenges in *Free Enterprise* over which the Supreme Court had no trouble finding district court jurisdiction. And they are easily distinguishable from the claims in *Thunder Basin* and *Elgin,* neither of which challenged the constitutional *authority* of the administrative tribunal itself or agency procedures framing the system by which merits claims are decided.

B. This Court's Precedents Consistently Focus On Separation of Constitutional Claims From Individual Merits Determinations.

The panel's procedural ruling also conflicts with significant precedent in this Circuit, which consistently focuses the jurisdictional inquiry on whether constitutional claims can be *substantively* separated from individual merits determinations. *See, e.g., Recinto*, 706 F.3d at 1176 (post-*Elgin* finding FVEC did not bar district court jurisdiction over facial equal-protection challenge distinct from assessment of individual claimants' rights to veterans benefits); *Latif,* 686 F.3d at 1129 finding no preclusion of district court jurisdiction under *Elgin* where plaintiffs raised "broad constitutional claims" regarding TSA procedures that did "not require review of the merits" of individual grievances); *Americopters,* 441 F.3d at 736

(finding district court "residual jurisdiction" when constitutional claim for damages is not "inextricably intertwined" with agency order); *Mace,* 34 F.3d at 856 (finding district court jurisdiction over broad challenges to legitimacy of FAA procedures).

As cogently argued in the dissent, because the "majority posits no irreconcilability" between applicable Supreme Court precedent and *Mace*, it remains binding law. Add.1191 & n.1. Accordingly, the rule in this Circuit is that "any examination of the constitutionality of [an agency's power]," rather than the merits of an individual action, "should logically take place in the district courts." *Id*. (quoting *Mace*, 34 F.3d at 859). It is substantive (not procedural) entanglement with the administrative merits that must control the "wholly collateral" inquiry. And in all instances, this Court favors a "narrower construction of a jurisdiction-stripping provision [ ] over the broader one." *ANA Int'l Inc. v. Way*, 393 F.3d 886, 891 (9th Cir. 2004).

CONCLUSION

For all these reasons, the Court should grant Axon's Petition for Rehearing En Banc.

Dated: March 15, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I am counsel for the Petitioner and certify that pursuant to Circuit Rules 35-4 and 40-1(a), this Petition for Rehearing En Banc was prepared in a format, typeface, and type style that complies with Fed. R. App. P. 32(a)(4)-(6) and contains 4140 words.

/s/ Pam Petersen

CERTIFICATE OF FILING AND SERVICE

I hereby certify that, on March 15, 2021, I electronically filed the foregoing Petition for Rehearing En Banc 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 Petitioner
Axon Enterprise, Inc.

Addendum

986 F.3d 1173
United States Court of Appeals, Ninth Circuit.

AXON ENTERPRISE, INC., a Delaware corporation, Plaintiff-Appellant,
v.
FEDERAL TRADE COMMISSION, a federal administrative agency; Joseph J. Simons; Noah Phillips; Rohit Chopra; Rebecca Slaughter; Christine Wilson, in their official capacities as Commissioners of the Federal Trade Commission, Defendants-Appellees.

No. 20-15662
|
Argued and Submitted July 17, 2020 San Francisco, California
|
Filed January 28, 2021

Synopsis

Background: Corporation that was subject to Federal Trade Commission (FTC) administrative enforcement proceeding arising from acquisition of competitor brought action against FTC, asserting that its processes and structure were unconstitutional. Corporation moved for preliminary injunction, which FTC opposed on jurisdictional grounds. The United States District Court for the District of Arizona, Dominic W. Lanza, J., 452 F.Supp.3d 882, dismissed action due to lack of subject matter jurisdiction. Corporation appealed.

Holdings: The Court of Appeals, Lee, Circuit Judge, held that:

FTC Act evinced fairly discernible intent to preclude district court jurisdiction over challenge to administrative enforcement process;

corporation would have meaningful judicial review of its structure-related claims under the statutory administrative review scheme, as factor supporting determination of implied preclusion of district court's jurisdiction;

corporation's constitutional claims related to FTC's structure were not wholly collateral to administrative review scheme, as factor supporting implied preclusion of district court's jurisdiction;

FTC lacked agency expertise to resolve constitutional claims related to structure, as factor weighing against implied preclusion;

weighing of factors demonstrated that district court was impliedly precluded from exercising jurisdiction over claims related to FTC's structure; and

district court's jurisdiction was precluded as to due process challenge related to clearance process used by FTC and Department of Justice.

Affirmed.

Bumatay, Circuit Judge, filed opinion concurring in the judgment in part and dissenting in part.

Procedural Posture(s): On Appeal; Motion to Dismiss for Lack of Subject Matter Jurisdiction.

Attorneys and Law Firms

***1176** Pamela B. Petersen (argued), Axon Enterprise Inc., Scottsdale, Arizona, for Plaintiff-Appellant.

Daniel Aguilar (argued), Mark B. Stern, Joshua M. Salzman, and Amanda L. Mundell, Appellate Staff; Civil Division, United States Department of Justice, Washington, D.C.; for Defendants-Appellees.

Appeal from the United States District Court for the District of Arizona, Dominic Lanza, District Judge, Presiding, D.C. No. 2:20-cv-00014-DWL

Before: Eugene E. Siler,* Kenneth K. Lee, and Patrick J. Bumatay, Circuit Judges.

* The Honorable Eugene E. Siler, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

Partial Concurrence and Partial Dissent by Judge Bumatay

OPINION

LEE, Circuit Judge:

Over the past century, Congress has established an array of quasi-independent executive agencies that enjoy partial insulation from presidential oversight and wield tremendous enforcement power. Instead of filing lawsuits in federal court, these agencies can commence administrative enforcement proceedings against companies and individuals, and make their cases before their own administrative law judges (ALJs). Not surprisingly, ALJs overwhelmingly rule for their own agencies.

Here, the Federal Trade Commission (FTC) investigated and filed an administrative complaint challenging Axon Enterprise, Inc.'s acquisition of a competitor. The FTC demanded that Axon spin-off its newly acquired company and provide it with Axon's own intellectual property. Axon responded by filing a lawsuit in federal district court, arguing that the FTC's administrative enforcement process violates Axon's due process rights and runs afoul of separation-of-powers principles.

The narrow question presented here is whether the district court has jurisdiction to hear Axon's constitutional challenge to the FTC's structure. The district court dismissed Axon's complaint, ruling that the FTC's statutory scheme requires Axon to ***1177** raise its constitutional challenge first in the administrative proceeding.

We affirm the district court's dismissal because the Supreme Court's *Thunder Basin* trilogy of cases mandates that result. The structure of the FTC Act suggests that Congress impliedly barred jurisdiction in district court and required parties to move forward first in the agency proceeding. And because the FTC statutory scheme ultimately allows Axon to present its constitutional challenges to a federal court of appeals after the administrative proceeding, Axon has not suffered any cognizable harm. We join every other circuit that has addressed a similar issue in ruling that Congress impliedly stripped the district court of jurisdiction.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Axon makes, among other things, body cameras for use by law enforcement. In May 2018, it acquired a competitor body camera company called Vievu LLC. About a month later, the FTC sent Axon a letter stating that the Vievu acquisition raised antitrust concerns. For about eighteen months, Axon cooperated with the FTC's investigation. In December 2019, the FTC demanded that Axon turn Vievu into a "clone" of Axon using Axon's intellectual property. If Axon refused this settlement demand, the FTC threatened to initiate an administrative proceeding to obtain this relief.

In response, Axon filed this action in the district court on January 3, 2020. [1] Axon made three substantive claims: (1) the FTC's administrative proceeding violates Axon's Fifth Amendment due process rights, (2) the FTC's structure violates Article II by providing improper insulation from the president, and (3) Axon's acquisition of Vievu did not violate antitrust law.

[1] The FTC filed an administrative complaint challenging the Vievu acquisition later that same day.

Axon argued that the FTC's administrative enforcement scheme violates its due process rights because the agency effectively acts as the prosecutor, judge, and jury, and that it is entitled to a trial in district court. Axon notes that the FTC has not lost an administrative proceeding trial in the past quarter-century. It also maintains that the FTC's ALJs impermissibly enjoy dual-layer insulation from presidential control because only the FTC commissioners can remove them for cause and the commissioners, in turn, can be removed only for cause by the President.

Axon later filed a motion for preliminary injunction. The FTC opposed the preliminary injunction motion, relying mainly on jurisdictional grounds. The district court agreed with the FTC and dismissed Axon's complaint without prejudice due to a lack of subject matter jurisdiction. It determined that Congress impliedly precluded jurisdiction over Axon's claims when it enacted the FTC administrative review scheme.

Axon timely filed its notice of appeal to this court.

STANDARD OF REVIEW

We review de novo a district court's determination of subject matter jurisdiction. *See Gingery v. City of Glendale*, 831 F.3d 1222, 1226 (9th Cir. 2016).

DISCUSSION

The FTC Act does not expressly state that a party cannot sue in federal district court to challenge the agency's administrative enforcement process. But that does not rule out that Congress may still have ***1178** impliedly precluded district court jurisdiction when it enacted a statutory scheme of administrative review. *See, e.g.*, *Bennett v. U.S. Sec. and Exch. Comm'n*, 844 F.3d 174, 181 (4th Cir. 2016); *Jarkesy v. U.S. Sec. and Exch. Comm'* 803 F.3d 9, 15 (D.C. Cir. 2015).

Courts have fashioned a two-step inquiry to determine whether Congress impliedly precluded jurisdiction. First, a court asks "whether Congress's intent to preclude district-court jurisdiction is 'fairly discernible in the statutory scheme.' " *Bennett*, 844 F.3d at 181 (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207, 114 S.Ct. 771, 127 L.Ed.2d 29 (1994)). Second, a court considers "whether plaintiffs' 'claims are of the type Congress intended to be reviewed within this statutory structure.' " *Id.* (quoting *Thunder Basin*, 510 U.S. at 212, 114 S.Ct. 771).

We conclude that, following this two-step analysis, Congress impliedly precluded district court jurisdiction over claims of the type brought by Axon when it enacted the FTC Act. We are guided and constrained by the so-called *Thunder Basin* factors set out by the Supreme Court in assessing this question.

I. The *Thunder Basin / Free Enterprise / Elgin* trilogy for determining implied preclusion of jurisdiction.

The Supreme Court set out the modern standard for implied preclusion of district court jurisdiction in three cases: *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 114 S.Ct. 771, 127 L.Ed.2d 29 (1994), *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 130 S.Ct. 3138, 177 L.Ed.2d 706 (2010), and *Elgin v. Dep't of Treasury*, 567 U.S. 1, 132 S.Ct. 2126, 183 L.Ed.2d 1 (2012). Because we apply the so-called *Thunder Basin* factors here, a closer look at each case will assist our analysis.

A. *Thunder Basin*

In *Thunder Basin*, the Supreme Court considered whether the Federal Mine Safety and Health Amendments Act of 1977, 30 U.S.C. § 801 *et seq.*, prevented a district court from exercising jurisdiction over a pre-enforcement challenge to the statute. 510 U.S. at 202, 114 S.Ct. 771. Thunder Basin Coal Company objected to an order by the Mine Safety and Health Administration (MSHA) requiring the company to post two members of a miner's union, who were not employees of the company, as representatives during a healthy and safety inspection. *See id.* at 205, 114 S.Ct. 771. Thunder Basin made two arguments: (1) the designation of nonemployee representatives violated collective bargaining principles under the National Labor Relations Act, and (2) forcing the company to challenge MSHA's regulatory interpretations through the administrative review process would violate due process because it would force the company to choose between possible penalties for violating the act or irreparable harm from complying with the agency's order. *See id.* at 205–06, 114 S.Ct. 771.

The Supreme Court concluded that the Mine Act precluded district court jurisdiction. Under the first step of the analysis, the Court held that it could discern Congress' intent to preclude district court jurisdiction based on the Mine Act's "detailed structure for reviewing violations," subject to review by the federal court of appeals. *Id.* at 207–08, 114 S.Ct. 771. Then under the second step, the Court determined that the claims were of the type Congress intended to be reviewed within this scheme. First, it concluded that the company's claims fell within the agency's expertise because they essentially required an interpretation of the parties' rights and duties under the relevant statute and regulation. *Id.* at 214–15, 114 S.Ct. 771. Second, ***1179** though the agency lacked the authority to decide constitutional issues, the court of appeals could address them after the parties concluded the administrative proceeding. *Id.* at 215, 114 S.Ct. 771. Third, the Court rejected the argument that due process required pre-enforcement action because it found that Thunder Basin would not face any serious prehearing deprivation that could not be remedied on appeal. *Id.* at 216–18, 114 S.Ct. 771.

The big takeaway from *Thunder Basin* is that an administrative review scheme can preclude district court jurisdiction, despite the possibility that the administrative process cannot address or remedy the alleged constitutional harm until a federal court of appeals reviews the case.

B. *Free Enterprise*

The second Supreme Court case, *Free Enterprise*, considered whether the structure of the Public Company Accounting Oversight Board violated Article II's vesting of executive power in the presidency. 561 U.S. at 483–84, 130 S.Ct. 3138. An accounting firm sued after the Board released a report critical of the firm's auditing procedures and began a formal

investigation. *Id.* at 487, 130 S.Ct. 3138. The firm sought a declaratory judgment that the Board's structure violated the Appointment Clause and an injunction preventing the Board from exercising its powers. *Id.* Notably, the firm did not challenge the agency's final order or rule, but rather the Board's critical report.

The Supreme Court determined that the statutory scheme did not preclude jurisdiction. *Id.* at 489, 130 S.Ct. 3138. For the second step of the analysis—whether the claims are of the type meant to be reviewed within the statutory scheme—the Court identified three factors from *Thunder Basin* to consider: (1) whether a party can obtain "meaningful judicial review" within the statutory scheme, (2) whether the suit is "wholly collateral to a statute's review provisions," and (3) whether the claims are "outside the agency's expertise." *Id.* (internal quotation marks omitted). [2]

2 Because the Court viewed these factors as originating from *Thunder Basin*, courts have sometimes called them the *Thunder Basin* factors.

In ruling that statutory scheme did not strip jurisdiction, the Court held that the firm could not obtain meaningful review of its claim under the statutory scheme because it did not challenge a final agency order or rule. Though the Board acted under SEC oversight, the SEC can review only Board rules and sanctions. *Id.* at 489, 130 S.Ct. 3138. This meant that "not every Board action is encapsulated in a final Commission order or rule." *Id.* at 490, 130 S.Ct. 3138. The accounting firm was challenging the Board's critical report, which cannot be reviewed by the agency or the appellate court. So the only way the firm could raise its constitutional claim under the statutory scheme was to either challenge a "random" Board rule or willingly incur a Board sanction by violating a discovery order. *See id.* The Court thus held that the statutory scheme did not provide a meaningful judicial review. *Id.* The Court also concluded that the constitutional claims were outside the SEC's competence and expertise because they were "standard questions of administrative law" rather than "technical considerations of agency policy." *Id.* at 491, 130 S.Ct. 3138 (alteration omitted).

Free Enterprise makes clear that if a party cannot seek judicial review for its grievances under the normal procedures of the statutory scheme, it does not have meaningful judicial review.

1180 C. *Elgin

Finally, the third Supreme Court case, *Elgin*, addressed whether the Civil Service Reform Act of 1978 (CSRA) "provides the exclusive avenue to judicial review when a qualifying employee challenges an adverse employment action by arguing that a federal statute is unconstitutional." 567 U.S. at 5, 132 S.Ct. 2126. The petitioners argued that the federal government's Selective Service registration requirement for males violated the Equal Protection Clause. *Id.* at 6–7, 132 S.Ct. 2126.

The Supreme Court found that Congress precluded district court jurisdiction over such claims. The majority opinion first concluded that there was a fairly discernible congressional intent to preclude jurisdiction because of the CSRA's detailed structure. *See id.* at 10–13, 132 S.Ct. 2126.

The Court also found that the claims were of the type Congress intended to preclude. For the first *Thunder Basin* factor, the Court found that there was meaningful review even though the agency lacked the authority to address the constitutional issues because the statute ultimately "provides review in the Federal Circuit, an Article III court fully competent to adjudicate petitioners' claims ...." *Id.* at 17, 132 S.Ct. 2126. For the second factor, the Court held that the claims were not wholly collateral to the CSRA scheme because the claims were "the vehicle by which they seek to reverse" the agency actions taken against them. *Id.* at 21–22, 132 S.Ct. 2126. Finally, for the third factor, the Court explained that the agency could bring its expertise to bear on "threshold" questions within the agency's expertise; for example, one petitioner's claim rested on an allegation of constructive discharge, which the agency could resolve in a manner that could avoid the need to reach the constitutional claim. *Id.* at 22–23, 132 S.Ct. 2126.

Elgin thus clarified that a claim is not "wholly collateral" to a statutory review scheme if it is the "vehicle by which" a party seeks to prevail at the agency. *Elgin* also shows that sometimes an agency's expertise can affect constitutional claims if there are preliminary questions apart from the merits questions at issue.

With these three cases in mind, we now turn to the implied preclusion analysis.

II. Step one: The FTC Act evinces a fairly discernible intent to preclude district court jurisdiction.

Axon appears to concede that the FTC Act impliedly precludes jurisdiction for at least some claims. The FTC

Act includes a detailed overview of how the FTC can issue complaints and carry out administrative proceedings. 15 U.S.C. § 45. This provision is almost identical to the statutory review provision in the SEC Act, which other circuits have held shows a fairly discernible intent to strip district court jurisdiction. *See*, *e.g.*, *Hill v. SEC*, 825 F.3d 1236, 1241 (11th Cir. 2016); *Tilton v. SEC*, 824 F.3d 276, 281 (2d Cir. 2016). We thus hold that the FTC Act reflects a fairly discernible intent to preclude district court jurisdiction.

III. Step two: The *Thunder Basin* factors suggest that the claims are of the type to be reviewed within the statutory scheme.

We now turn to whether Axon's claims are of the type meant to be reviewed within the FTC Act's statutory scheme. Axon argues that it has three claims for the district court to decide: (1) the clearance process used to determine whether the FTC or DOJ will review a merger violates due process, (2) the fact that the FTC combines investigatory, prosecutorial, adjudicative, and appellate functions within a single agency violates due process, and ***1181** (3) the dual-layer of protection given to FTC ALJs violates the Appointments Clause of Article II of the Constitution. [3]

3 These three claims do not line up with the three claims that Axon brought in its complaint. Rather, Axon agreed that the FTC should decide the merits of the antitrust dispute and that the clearance process claim falls within its due process claim.

Under the *Thunder Basin* factors, we must consider: (1) whether the plaintiff can obtain meaningful judicial review in the statutory scheme, (2) whether the claim is "wholly collateral" to the statutory scheme, and (3) whether the claim is outside the agency's expertise. *See Elgin*, 567 U.S. at 15, 132 S.Ct. 2126 (citing *Thunder Basin*, 510 U.S. at 215, 114 S.Ct. 771). The D.C. Circuit has explained that these three factors do not "form three distinct inputs into a strict mathematical formula," but are rather "general guideposts useful for channeling the inquiry into whether the particular claims at issue fall outside an overarching congressional design." *Jarkesy*, 803 F.3d at 17. Several courts have also concluded that "the first factor—meaningful judicial review—is 'the most critical thread in the case law.' " *See, e.g.*, *Hill*, 825 F.3d at 1245 (quoting *Bebo v. SEC*, 799 F.3d 765, 774 (7th Cir. 2015)).

In applying these *Thunder Basin* factors, we conclude that Axon's claims are of the type meant to be reviewed within the statutory scheme.

A. Axon will have meaningful judicial review of its claims.

Axon's argument on the first *Thunder Basin* factor boils down to a simple premise: eventual review by the federal appellate court is not meaningful judicial review. But Supreme Court precedent, as well as rulings from our sister circuits, rejects that premise.

First, Axon argues that the FTC Act does not provide meaningful judicial review because the administrative process itself "creates ongoing constitutional harm that simply cannot be remedied in an after-the-fact appeal." But the Supreme Court in *Thunder Basin* held that the "petitioner's statutory and constitutional claims here can be meaningfully addressed in the Court of Appeals," even though the petitioner there similarly argued that the agency process itself would violate its constitutional rights. *See Thunder Basin*, 510 U.S. at 215, 114 S.Ct. 771; *see also FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 244, 101 S.Ct. 488, 66 L.Ed.2d 416 (1980) (rejecting petitioner's argument that "the expense and disruption of defending itself in protracted adjudicatory proceedings" warrants an exception to the agency review process). [4]

4 Axon seeks to distinguish *Standard Oil* on the basis that it did not deal with an allegedly unconstitutional proceeding. Other circuits have rejected this distinction, however. *See Jarkesy*, 803 F.3d at 26 ("If the injury inflicted on the party seeking review is the burden of going through an agency proceeding ... then [*Standard Oil*] teaches that the party must patiently await the denouement of proceedings within the Article II Branch." (internal quotation marks omitted)); *Bennett*, 844 F.3d at 185 (rejecting the argument that "*Standard Oil* is inapposite because it did not involve a constitutional claim" because it "makes no material difference for assessing the meaningfulness of judicial review here, because *Thunder Basin* and *Elgin* establish that petitioners can obtain meaningful review of constitutional claims through a statutory scheme similar to the one here").

Other circuits have rejected this argument as well. As the Eleventh Circuit explained in *Hill v. SEC*, "[w]hether an injury has constitutional dimensions is not the linchpin in determining its capacity for meaningful judicial review." 825 F.3d at 1246; *see also Bennett v. U.S. Sec. and Exch. Comm'n*, 844 F.3d 174, 184 n.10 (4th Cir. 2016) ("[F]ederal courts require litigants ***1182** who unsuccessfully challenge the constitutionality of the initial tribunal—including the authority of the presiding decision maker—to endure the proceeding and await possible vindication on appeal."); *Tilton*, 824 F.3d at 285 (explaining that "post-proceeding relief, although imperfect, suffices to vindicate the litigant's constitutional claim" dealing with the legitimacy of the tribunal).

In other words, Axon has no right to avoid the administrative proceeding itself. If the proceeding might harm Axon, that harm can still be ultimately remedied by a federal court of appeals, even if it is not Axon's preferred remedy of avoiding the agency process altogether. *See Bennett*, 844 F.3d at 185 n.12 (rejecting the argument that a court could not provide "complete relief" to the Appointments Clause claim and explaining that the petitioner is not necessarily "entitled to her preferred remedy" given that "Congress may substitute remedies for illegal action"). Axon's argument also proves too much because then "[e]very person hoping to enjoin an ongoing administrative proceeding could make this argument," which would undermine the notion that it is "only in the exceptional cases ... where courts allow plaintiffs to avoid the statutory review schemes prescribed by Congress." *Bebo*, 799 F.3d at 775. [5]

5 It is telling that Axon appears disappointed that "the best Axon can hope for is a remand for a complete do-over." A "do-over," however, is exactly the type of relief the Supreme Court has ordered when it has found a constitutional violation of an agency process. *See Lucia v. SEC*, —— U.S. ——, 138 S. Ct. 2044, 2055, 201 L.Ed.2d 464 (2018) (after finding an Appointments Clause violation, concluding that "the 'appropriate' remedy for an adjudication tainted with an appointments violation is a new 'hearing before a properly appointed' official"); *see also Free Enterprise*, 561 U.S. at 508–513, 130 S.Ct. 3138 (rejecting the argument that the Appointments Clause violation rendered all of the Board's actions and authority in violation of the Constitution and instead severing the unconstitutional tenure provisions from the statute and concluding that "petitioners are not entitled to broad injunctive relief against the Board's continued operations").

Axon also complains that it can obtain judicial review only if FTC prevails in the administrative proceeding and issues a cease and desist order. 15 U.S.C. § 45(c). But that is true for any statutory review scheme that allows only for review of final agency orders. For example, the SEC review scheme allows judicial review only for "[a] person aggrieved by a final order of the Commission," 15 U.S.C. § 78y(a)(1), yet every other circuit to have addressed the SEC statutory scheme found that a party can obtain meaningful judicial review. *See Bennett*, 844 F.3d at 186; *Hill*, 825 F.3d at 1246; *Tilton*, 824 F.3d at 286–87; *Jarkesy*, 803 F.3d at 20; *Bebo*, 799 F.3d at 774. If we accepted Axon's argument, it would create a gaping loophole to the statutory scheme that Congress could not have intended. As the Fifth Circuit explained, "Congress provides meaningful judicial review by authorizing review of challenges to a final agency order by a federal circuit court." *Bank of La. v. FDIC*, 919 F.3d 916, 925 (5th Cir. 2019).

To be sure, sometimes the burden of an agency process may justify pre-enforcement relief. But that is for exceptional circumstances not relating to typical agency review. We agree with the Second Circuit's view in *Tilton*: "[T]he Supreme Court has concluded that post-proceeding judicial review would not be meaningful because the proceeding itself posed a risk of some additional and irremediable harm *beyond the burdens associated with the dispute resolution process*." 824 F.3d at 286 (emphasis added); *see also McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496, 111 S.Ct. 888, 112 L.Ed.2d 1005 (1991) (finding that petitioners' claims ***1183** were not precluded by a statutory review provision because petitioners would have had to "voluntarily surrender themselves for deportation" to obtain review); *Mathews v. Eldridge*, 424 U.S. 319, 331, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) (explaining that exhaustion was not required because petitioner faced harm arising from "his physical condition and dependency upon the disability benefits," not the alleged deprivation of due process that was the basis for his claim).

Axon does not face such a dire risk requiring pre-enforcement relief. *See Tilton*, 824 F.3d at 286 (concluding that "appellants have identified no such additional, irremediable harm here" because "[t]he only prospective injury that they describe is being subjected to an unconstitutional adjudicative procedure") (internal quotation marks omitted)); *Jarkesy*, 803 F.3d at 21 (finding that the petitioner's claim was not like *McNary*). Thus, Axon's alleged constitutional harm does

not prevent the FTC Act's statutory review scheme from providing meaningful judicial review.

Second, Axon argues that the agency review process cannot provide meaningful review because it cannot address Axon's constitutional claims. 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. But the Supreme Court has rejected that argument. In *Elgin*, the Court held that, even if the agency cannot decide constitutional claims, a meaningful judicial review exists as long as the party ultimately can appeal to "an Article III court fully competent to adjudicate petitioners' claims." 567 U.S. at 17, 132 S.Ct. 2126; *see also id.* (explaining that in *Thunder Basin* "we held that Congress' intent to preclude district court jurisdiction was fairly discernible in the statutory scheme '[e]ven if' the administrative body could not decide the constitutionality of a federal law" when "[t]hat issue ... could be 'meaningfully addressed in the Court of Appeals' that Congress had authorized to conduct judicial review"); *Bank of Louisiana*, 919 F.3d at 926 ("Indeed, there can be meaningful review in the circuit court even if the agency itself lacks authority to decide the constitutional question presented."); *Jarkesy*, 803 F.3d at 19 ("Because Jarkesy's constitutional claims, including his non-delegation challenge to Dodd–Frank, can eventually reach 'an Article III court fully competent to adjudicate' them, it is of no dispositive significance whether the Commission has the authority to rule on them in the first instance during the agency proceedings."). Here, Axon can present its constitutional claims to this court after the conclusion of the FTC enforcement proceedings. That is enough under Supreme Court precedent.

Third, the Supreme Court in *Elgin* rejected the premise of Axon's argument that there cannot be meaningful review if the agency process does not create an appropriate record for the federal court of appeals. It held that the court of appeals can take judicial notice of relevant facts or remand to the agency to make factual findings. *Elgin*, 567 U.S. at 19, 132 S.Ct. 2126. Here, 15 U.S.C. § 45(c) allows the court of appeals to "order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper." [6]

6 Axon's reliance on *Fashion Originators Guild of America v. FTC*, 114 F.2d 80 (2nd Cir. 1940) is inapt. That case dealt with a situation in which the petitioner asked the court to review whether it was proper for FTC to actively exclude evidence that it deemed irrelevant. *See id.* at 82–83. That does not affect whether a court can remand for further factfinding as it pertains to Axon's constitutional claims.

***1184** Finally, Axon argues—and the dissent agrees—that its claims resemble those from *Free Enterprise*. Under Axon's and the dissent's reading of *Free Enterprise*, challenges to an "agency's structure, procedures, or existence ... are not precluded from district court jurisdiction." Dissent at ——– ——. 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. [7] *Cf. Ortega v. United States*, 861 F.2d 600, 603 & n. 4 (9th Cir.1988) ("This case is squarely controlled by the Supreme Court's recent decision .... [We] agree[ ] with the dissent that [appellant] deserves better treatment from our Government. Unfortunately, legal precedent deprives us of discretion to do equity.").

7 The dissent cites *Mace v. Skinner*, 34 F.3d 854 (9th Cir. 1994), and *Latif v. Holder*, 686 F.3d 1122 (9th Cir. 2012), but neither mandates district court jurisdiction here. *Mace* did not cite or apply *Thunder Basin*. And *Latif* did not consider the *Thunder Basin* factors under the second step of the implied preclusion analysis because the court ruled under the first step that Congress' intent to preclude jurisdiction was not "fairly discernable from the statutory scheme" at issue. 686 F.3d at 1129.

But the Supreme Court in *Free Enterprise* did not carve out a broad exception for challenges to an agency's structure, procedure, or existence. Rather, the Court justified district court jurisdiction on the narrow ground that the challenged action—the Board's critical report of the auditing firm—did not amount to a final order that could be appealed to a court under the statutory scheme. *Free Enterprise*, 561 U.S. at 490-91, 130 S.Ct. 3138 ("We do not see how petitioners could meaningfully pursue their constitutional claims" because the statute "provides only for judicial review of *Commission* action, and not every Board action is encapsulated in a final Commission order or rule"). In other words, "an uncomplimentary inspection report is not subject to judicial review" under the statute. *Id.* at 490, 130 S.Ct. 3138. So the auditing firm had no way to obtain judicial review, other than selecting a "random" Board Rule to challenge or "incur a sanction (such as a sizable fine) by ignoring Board requests

for documents and testimony." *Id.* The Court held that neither option offered access to a meaningful judicial review. *Id.* at 490–91, 130 S.Ct. 3138. In other words, *Free Enterprise* does not appear to address a scenario where there is eventual judicial review, but rather speaks only to a situation of no guaranteed judicial review.

In Axon's case, though, it does not have to intentionally violate a "random" rule or incur sanctions by violating discovery orders to obtain judicial review of its claims. Under the statute, Axon has the right to seek judicial review from this court once the enforcement proceeding ends. It may not be an efficient mechanism to seek judicial review, but this court will eventually hear Axon's claims as long as it continues to oppose the FTC's actions. And any adverse order issued by the FTC would be stayed until Axon has had a chance to seek judicial review. *See* 15 U.S.C. § 45(g)(1)–(2). [8] Under Supreme Court precedent, that amounts to meaningful judicial review. *See* ***1185** *Thunder Basin*, 510 U.S. at 215, 114 S.Ct. 771 ("constitutional claims here can be meaningfully addressed in the Court of Appeals," despite petitioner's argument that the agency process itself would violate its constitutional rights); *Standard Oil Co. of Cal.*, 449 U.S. at 244, 101 S.Ct. 488. Perhaps the Supreme Court in the near future will clarify and extend the holding of *Free Enterprise* to include any constitutional challenge to any agency's structure, procedure, or existence. But based on our best reading of *Free Enterprise*, the Court has not done so yet. Thus, *Free Enterprise* does not control here. In sum, because "[t]he statutory scheme at issue in this case authorizes review of final [agency] orders in a federal circuit court," the FTC Act provides Axon meaningful judicial review under the first *Thunder Basin* factor. *Bank of Louisiana*, 919 F.3d at 926. [9]

8 The dissent notes that Axon may not have an opportunity to have a court review the structure of the FTC if the FTC drops its investigation or Axon prevails on the merits during the administrative proceeding. But under either scenario, Axon has prevailed over FTC, and that ends the dispute. Put another way, Axon is not entitled to a judicial ruling on its constitutional claim challenging the administrative proceeding if it has prevailed on the merits.

9 Though Axon repeatedly points to cases involving a court asserting jurisdiction over pattern and practice claims, those cases are inapt. None of those cases even mention the possibility that Congress can impliedly preclude district court jurisdiction, so they are not relevant. *See generally McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 111 S.Ct. 888, 112 L.Ed.2d 1005 (1991); *Gebhardt v. Nielsen*, 879 F.3d 980 (9th Cir. 2018); *Veterans for Common Sense v. Shinseki*, 678 F.3d 1013 (9th Cir. 2012). Moreover, many of these cases fit within the implied preclusion framework because they consider whether the parties could have obtained meaningful review or whether the claims at issue were collateral to the review scheme. *See McNary*, 498 U.S. at 496, 111 S.Ct. 888 (finding jurisdiction in part because, "if not allowed to pursue their claims in the District Court, respondents would not as a practical matter be able to obtain meaningful judicial review of their application denials or of their objections to INS procedures notwithstanding the review provisions"); *VCS*, 678 F.3d at 1034–35 (relying on the fact that the claim at issue could not have been raised under the statutory scheme); *City of Rialto v. W. Coast Loading Corp.*, 581 F.3d 865, 874 (9th Cir. 2009) (asking "whether the claim ... is collateral to an alien's substantive eligibility" and "stress[ing] the importance of meaningful judicial review of agency action.").

B. Axon's constitutional claims are arguably "wholly collateral" to the enforcement proceeding.

Courts have offered two competing ways to consider the second *Thunder Basin* factor of whether a claim is "wholly collateral" to the statutory review scheme.

Some district courts have held that a claim is wholly collateral to the statutory enforcement scheme if it is not *substantively* intertwined with the merits dispute in the agency proceeding. *See, e.g.*, *Hill v. SEC*, 114 F. Supp. 3d 1297 (N.D. Ga. 2015). Because Axon's constitutional challenges can be substantively separated from the underlying antitrust claim before the FTC, Axon argues that they are wholly collateral to the merits claim.

In contrast, several of our sister circuits—the D.C. Circuit, Second Circuit, and the Fourth Circuit—have applied this factor in the *procedural* sense: "a claim is not wholly collateral if it has been raised in response to, and so is procedurally intertwined with, an administrative proceeding—regardless of the claim's substantive connection to the initial merits dispute in the proceeding." *Tilton*, 824 F.3d at 287; *see also Bennett*, 844 F.3d at 187; *Jarkesy*, 803 F.3d at

22–25. [10] In other words, if the claim is the procedural vehicle that the party is using to reverse the agency action, it is not "wholly collateral" to the review scheme.

10 The Fifth, Seventh, and Eleventh Circuits have not definitively addressed this issue. *See Bank of Louisiana*, 919 F.3d at 928; *Hill*, 825 F.3d at 1251–52; *Bebo*, 799 F.3d at 773–74.

We agree that "the second reading is more faithful to the more recent Supreme Court precedent ...." *Bennett*, 844 F.3d at 187. *Elgin* found that a petitioner's constitutional claims were not wholly collateral when those claims were "the vehicle by ***1186** which they seek to reverse the removal decisions" and to obtain relief. 567 U.S. at 22, 132 S.Ct. 2126. Neither *Thunder Basin* nor *Free Enterprise* shed any light on whether "wholly collateral" should be construed procedurally or substantively. *See Free Enterprise*, 561 U.S. at 490–91, 130 S.Ct. 3138 (not addressing the nature of "wholly collateral"); *Thunder Basin*, 510 U.S. at 212–13, 114 S.Ct. 771 (same).

While it is a close call, we find that the second *Thunder Basin* factor also supports preclusion of jurisdiction. Axon's complaint seeks to avoid the FTC process and the agency's settlement demands. Indeed, Axon's requested relief includes an injunction to prevent the FTC from pursuing its administrative enforcement action. The claims are therefore the "vehicle by which" Axon seeks to prevail at the agency level and are not wholly collateral to the review scheme.

C. The FTC lacks agency expertise to resolve the constitutional claims.

The third *Thunder Basin* factor—whether the claims are outside the agency's expertise—weighs against jurisdiction-stripping.

Like the second factor, this third factor is cloaked in ambiguity. The Supreme Court in *Free Enterprise* took a straightforward approach: when an issue does not involve "technical considerations of [agency] policy" and instead involves "standard questions of administrative law, 561 U.S. at 491, 130 S.Ct. 3138 (internal quotation marks omitted), the issue lies outside the agency's expertise. On the other hand, the Court several years later in *Elgin* arguably appeared to take a more expansive view of agency expertise, stating that there may be "threshold questions that may accompany a constitutional claim and to which the [agency] can apply its expertise" or "preliminary questions unique to the employment context [that] may obviate the need to address the constitutional challenge." 567 U.S. at 22–23, 132 S.Ct. 2126. Some circuits have read *Elgin* as suggesting that if an agency can moot the constitutional claims by resolving the merits issues before the agency, then the agency can bring its expertise to bear. *See, e.g.*, *Bank of Louisiana*, 919 F.3d at 929 (citing *Jarkesy*, 803 F.3d at 29).

We, however, disagree with the expansive reading of *Elgin*. Such an approach is hard to reconcile with *Free Enterprise* unless we assume that *Elgin* somehow overruled *Free Enterprise* sub silentio. *See Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18, 120 S. Ct. 1084, 1096, 146 L. Ed. 2d 1 (2000) ("This Court does not normally overturn, or so dramatically limit, earlier authority *sub silentio.*"); *see also United States v. Obaid*, 971 F.3d 1095, 1102 (9th Cir. 2020) (citing *Shalala*, 529 U.S. at 18, 120 S.Ct. 1084) ("We should not assume that the Supreme Court has implicitly overruled its precedent."). Indeed, such an interpretation renders this third factor virtually meaningless because any challenge to an administrative process can be mooted if a party prevails on the substantive merits.

A narrower reading of *Elgin* reconciles it with *Free Enterprise*. The constitutional challenges in *Elgin* required the determination of certain "*threshold*" questions that were directly within the agency's expertise. For example, one petitioner's claim relied on the preliminary issue of whether he was subject to a constructive discharge. *See Elgin*, 567 U.S. at 23, 132 S.Ct. 2126. In other words, *Elgin* stands for the unremarkable proposition that an agency's expertise can sometimes help decide an issue and thus obviate the need to resolve a constitutional claim. It does not establish a broad rule that an agency can always moot a claim by simply ruling for the party.

***1187** Here, there are no threshold questions that need to be addressed before reviewing Axon's constitutional claims. The due process and Appointments Clause claims do not turn on the antitrust merits of the case, so there is little room for the FTC to bring its expertise to bear. Rather, Axon's claims are more like the "standard questions of administrative law" that the *Free Enterprise* Court addressed.

Thus, the third factor weighs against preclusion.

* * *

The *Thunder Basin* factors point in different directions here. Axon will have meaningful judicial review of its claims

from within the statutory review scheme, which points to jurisdiction preclusion. The "wholly collateral" factor also likely favors preclusion, though that is far from clear. On the other hand, the agency expertise factor weighs against preclusion.

We agree with the other circuits, however, that under Supreme Court precedent the presence of meaningful judicial review is enough to find that Congress precluded district court jurisdiction over the type of claims that Axon brings. *See Bennett*, 844 F.3d at 183 n.7; *Bebo*, 799 F.3d at 774.

This is not to minimize Axon's serious concerns about how the FTC operates. For one, Axon raises substantial questions about whether the FTC's dual-layered for-cause protection for ALJs violates the President's removal powers under Article II. *See*, *e.g.*, *Free Enterprise*, 561 U.S. at 484, 130 S.Ct. 3138 (ruling that dual for-cause limitations of Board members violates separation-of-powers); *Lucia v. SEC*, —— U.S. ——, 138 S. Ct. 2044, 201 L.Ed.2d 464 (2018) (holding that SEC ALJs are "Officers" subject to the Appointments Clause); *Seila Law LLC v. CFPB*, —— U.S. ——, 140 S. Ct. 2183, 2192, 207 L.Ed.2d 494 (2020) (finding that the removal restrictions on the director of the CFPB violated Article II of the Constitution).

This case implicates one of the inherent tensions in the modern administrative state: Congress wanted to insulate ALJs from political interference, but ALJs wield tremendous power and still remain a part of the executive branch—even if Congress bestowed them with the title "judge"—and they should thus theoretically remain accountable to the President and the people. As the Supreme Court cautioned in *Free Enterprise*, the "growth of the Executive Branch, which now wields vast power and touches almost every aspect of daily life, heightens the concern that it may slip from the Executive's control, and thus from that of the people." 561 U.S. at 499, 130 S.Ct. 3138. *See also, e.g.*, Linda D. Jellum, *"You're Fired!" Why the Alj Multi-Track Dual Removal Provisions Violate the Constitution and Possible Fixes*, 26 Geo. Mason L. Rev. 705, 743 (2019) (arguing that, in light of *Free Enterprise*, ALJs' dual-layers of protection violate the Constitution).

Further, Axon raises legitimate questions about whether the FTC has stacked the deck in its favor in its administrative proceedings. Axon claims—and FTC does not appear to dispute—that FTC has not lost a single case in the past quarter-century. Even the 1972 Miami Dolphins would envy that type of record. Indeed, a former FTC commissioner acknowledged that the FTC adjudication process might unfairly favor the FTC given the agency's stunning win rate. Axon essentially argues that the FTC administrative proceeding amounts to a legal version of the Thunderdome in which the FTC has rigged the rules to emerge as the victor every time. But we cannot move beyond the *Thunder Basin* factors, which mandate our conclusion that Axon cannot bring a claim in district court. Axon can have its day in court—but only after it first completes the FTC administrative proceeding.

*1188 IV. Axon's Clearance Process Claim

Finally, we address separately Axon's novel and superficially appealing argument that it lacks a meaningful judicial review of the government's "clearance process" claim.

Before deciding whether to move forward with an enforcement action, the FTC and the U.S. Department of Justice confer and decide which agency will bring the action, according to Axon. This alleged "black box" decision process has a significant impact on Axon and other targets of investigation: They may avail themselves of the procedural protections offered at a trial in district court (if the Department of Justice files a complaint), or they may be shunted to an administrative proceeding (if the FTC pursues the matter). Axon argues that it has no meaningful judicial review of this "clearance process" decision under the FTC statutory scheme, and thus should be able to raise it in district court.

But a closer look at this claim shows that it is really not about pre-investigation or pre-enforcement decisions, but rather about the procedures the FTC will use. Axon takes issue with the fact that, when the FTC takes the case, companies are deprived "of the substantive or procedural protections enjoyed by litigants in federal district court." In other words, the clearance process falls within Axon's due process claim because it is arguing that it will face an unfair proceeding before the FTC. Indeed, Axon admitted as much.

But Axon will eventually have meaningful judicial review of its due process claim because it can raise it before a federal court of appeals after the administrative proceeding. If the court of appeals rules that the FTC administrative proceeding violates Axon's due process rights, it will presumably be then entitled to a trial in district court. On the other hand, if the FTC proceeding does not run afoul of due process, then Axon's complaint is ultimately that it prefers the Department of Justice over the FTC to lead the enforcement action. But

the executive branch enjoys latitude in deciding what type of enforcement action to pursue and which agency will lead it. *Cf. Heckler v. Chaney*, 470 U.S. 821, 832, 105 S.Ct. 1649, 84 L.Ed.2d 714 (1985) (agency's decision not to pursue enforcement is unreviewable under the APA); *Standard Oil*, 449 U.S. at 242-45, 101 S.Ct. 488 (1980) (agency's decision to enforce is unreviewable). Absent any due process concerns, the target of an enforcement action cannot dictate the choices of the executive branch.

And under the *Thunder Basin* factors, Axon's clearance process claim—which is a due process claim—falls within the statutory review scheme. First, Axon has an opportunity for judicial review at the end of the process. *See supra* pp. ——, —— – ——. Even though Axon asserts that the harm from the clearance process occurred before the enforcement action began, what matters is that Axon is currently in an administrative proceeding that ultimately leads to judicial review. [11] Second, Axon's challenge to the FTC's adjudicative procedures is not "wholly collateral" to the statutory scheme because it is the "vehicle by which" it seeks to succeed at the agency proceeding. Finally, there is a stronger argument that the agency expertise factor warrants preclusion of the clearance process claim than for Axon's other claims. The FTC might have valuable insight into how the clearance process works and demonstrate that the process does in fact comport with due process, which makes such questions ***1189** more like the "threshold" issues addressed in *Elgin* than allowing the agency to avoid constitutional issues be deciding the case on the substantive merits.

11 Had Axon brought its clearance process claim early in the investigation, before the enforcement proceeding began, though, Axon might have had a stronger case for district court jurisdiction, but that issue is not properly before us.

Thus, we find that Axon's clearance process claim, just like its other claims, is of the type Congress intended to be reviewed under the FTC Act's statutory review scheme.

CONCLUSION

We hold that Supreme Court precedent compels the preclusion of district court jurisdiction over Axon's claims. The FTC Act reflects a fairly discernible intent to preclude district court jurisdiction, and Axon can ultimately obtain meaningful judicial review of its claims before this court once the FTC administrative proceeding concludes. We **AFFIRM** the district court's dismissal for lack of subject matter jurisdiction.

BUMATAY, Circuit Judge, concurring in the judgment in part and dissenting in part:

Axon Enterprise, Inc., a major manufacturer of law-enforcement equipment, challenges the very existence of the Federal Trade Commission—an independent agency created by Congress—as unconstitutional. First, Axon alleges that the "clearance process" used by the FTC and the Department of Justice to divide up antitrust investigations violates due process and equal protection guarantees. Second, the company claims that the double layer of termination protection for the FTC's administrative law judges infringes on the president's Article II authority. Finally, it challenges the constitutionality of the FTC's administrative structure, which vests it with investigative, prosecutorial, and adjudicative powers.

At first blush, this case appears to be a weighty constitutional one. Indeed, the advent of independent, administrative agencies has called on courts to test the bounds of the Constitution's defined structural limitations. But those issues are not the subject of this appeal. The district court dismissed the case for lack of jurisdiction, ruling that Axon must first raise its arguments before the FTC. So the narrow, but equally important, question before the court is whether the district court has jurisdiction to consider Axon's broad constitutional claims in the first instance.

Following Supreme Court precedent and according due respect to separation-of-powers principles, I believe the clear answer to that question—at least for some of Axon's claims—is yes. The majority holds otherwise. Although thoughtfully considering the question, my friends in the majority unfortunately rule that Axon is precluded from its day in court and instead must bring its claims to the FTC—the very agency it seeks to have declared unconstitutional. To get there, the majority misapplies Court precedent and ignores the injuries Axon is trying to vindicate. What's worse, by funneling the challenge to the FTC back to the FTC, Axon may forever be foreclosed from obtaining meaningful judicial review of its claims. For these reasons, I respectfully dissent.

I.

Congress established the FTC over 100 years ago when President Woodrow Wilson signed the Federal Trade Commission Act into law. 38 Stat. 717 (1914). The FTC is tasked with preventing the use of "unfair methods of competition" and "unfair or deceptive acts or practices" in commerce. 15 U.S.C. § 45(a)(2). The Act authorizes administrative proceedings within the agency to determine if a party is engaged in these prohibited methods, acts, or practices. *Id.* § 45(b). It also empowers the FTC to issue a "cease and desist" order against an antitrust violator. *Id.* After such ***1190** an order, review of the administrative adjudication is only permitted in the "appropriate court of appeals of the United States." *Id.* § 45(b), (d), (g).

Although the Act is silent on this question, we must decide what role district courts play when a party—like Axon—asserts broad constitutional claims against the FTC itself. To start, it is a well-settled presumption that Congress intended subject matter jurisdiction in the district courts for all claims arising under federal law. *See Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 350–51, 104 S.Ct. 2450, 81 L.Ed.2d 270 (1984); 28 U.S.C. § 1331. To be sure, there is also a narrow exception to that presumption: sometimes Congress delegates jurisdiction exclusively to an administrative agency to consider a claim in the first instance. *See Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207, 114 S.Ct. 771, 127 L.Ed.2d 29 (1994). Such action effectively strips district courts of original jurisdiction over the claim. While this jurisdiction stripping is usually explicit, it may also come implicitly. *See id.* In all cases, we should favor a "narrower construction" of jurisdiction stripping over a "broader one." *ANA Int'l Inc. v. Way*, 393 F.3d 886, 891 (9th Cir. 2004).

The Supreme Court has established a two-step framework for discerning whether Congress impliedly precluded district court jurisdiction over a party's claim. *See Thunder Basin*, 510 U.S. 200, 114 S.Ct. 771. Under that precedent, district courts are impliedly precluded from exercising jurisdiction when (1) Congress's intent to make an administrative process exclusive is "fairly discernible" from the statutory scheme, and (2) the claims at issue "are of the type Congress intended to be reviewed within th[at] statutory structure." *Id.* at 207, 212, 114 S.Ct. 771 (simplified). At the second step, we consider what's known as the *Thunder Basin* factors: (1) whether the claims can be afforded "meaningful judicial review" without district court jurisdiction; (2) whether the claim is "wholly collateral" to the agency's review provisions; and (3) whether the claims are "outside the agency's expertise." *Id.* at 212–13, 114 S.Ct. 771.

In *Thunder Basin*, the Court considered whether a statutory scheme of administrative review followed by judicial review in a federal appellate court precluded district court jurisdiction over a plaintiff's statutory and constitutional claims. *Id.* at 206, 114 S.Ct. 771. The Court noted that the plaintiff's claims could be "meaningfully addressed in the Court of Appeals" and that the case therefore did "not present the 'serious constitutional question' that would arise if an agency statute were construed to preclude all judicial review of a constitutional claim." *Id.* at 215 n.20, 114 S.Ct. 771. Notably, the Court explained that an agency's statutory framework will generally not serve as a bar to district court jurisdiction over a constitutional challenge to the agency's procedures, when Congress only allows appellate review of individual determinations. *Id.* at 213, 114 S.Ct. 771 (describing *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 111 S.Ct. 888, 112 L.Ed.2d 1005 (1991)).

The Court demonstrated how to apply the *Thunder Basin* factors in two subsequent cases: *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477, 130 S.Ct. 3138, 177 L.Ed.2d 706 (2010), and *Elgin v. Department of Treasury*, 567 U.S. 1, 132 S.Ct. 2126, 183 L.Ed.2d 1 (2012).

In *Free Enterprise Fund*, the Court found concurrent district court jurisdiction for a claim challenging the constitutionality of an independent board's existence. 561 U.S. at 490, 130 S.Ct. 3138. In that case, a plaintiff was able to bring its constitutional claim in district court because the board's statutory scheme only guaranteed judicial ***1191** review of a board sanction or rule. *Id.* Such cramped judicial review wasn't enough to divest the district court's jurisdiction in the Court's view because "not every Board action is encapsulated in" an appealable order. *Id.*

Two years later, in *Elgin*, the Court determined another independent board had exclusive jurisdiction to review claims dealing with the constitutionality of—not the board itself—but of federal statutes bearing on its merits determinations. 567 U.S. at 5–6, 132 S.Ct. 2126. The Court concluded the board's administrative procedures provided ample review since any merits determination was reviewed by the Federal Circuit and, thus, the constitutional issue would ultimately be adjudicated by an Article III court. *Id.* at 17, 132 S.Ct. 2126.

Our circuit has also considered the dividing line between exclusive agency jurisdiction and concurrent district court jurisdiction. In a case challenging an executive agency's

authority, we have held that "any examination of the constitutionality of [an agency's power]," rather than the merits of an individual action, "should logically take place in the district courts, as such an examination is neither peculiarly within the agency's 'special expertise' nor an integral part of its 'institutional competence.' " *Mace v. Skinner*, 34 F.3d 854, 859 (9th Cir. 1994). We later concluded that plaintiffs raising "broad constitutional claims that do not require review of the merits of their individual [agency] grievances" are not precluded from bringing their challenge in the district court. *Latif v. Holder*, 686 F.3d 1122, 1129 (9th Cir. 2012) (applying *Elgin* to a Department of Homeland Security challenge); *see also Americopters, LLC v. FAA*, 441 F.3d 726, 736 (9th Cir. 2006) (allowing for district court "residual jurisdiction" when a constitutional claim for damages is not "inextricably intertwined" with an agency order). [1]

[1] The majority wrongly discards these precedents. First, I disagree that *Mace* is not controlling in light of *Thunder Basin*. Maj. Op. at —— n.7. The majority posits no irreconcilability between the cases and so *Mace* remains binding law. *See Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (holding that precedent of this court remains binding unless it is "clearly irreconcilable" with intervening Court decisions). Second, while it is contestable whether *Latif* was a *Thunder Basin* step one or two case, I fail to see why its guidance should be ignored here.

While jurisdictional questions are often complex, the lesson of these cases is straightforward: Absent legislative language to the contrary, challenges to an agency's *structure, procedures,* or *existence*, rather than to an agency's adjudication of the merits on an individual case, may be heard by a district court. On the other hand, complaints regarding the agency's application of substantive law to the merits of an individual case are exclusively relegated to the agency's administrative process. Accordingly, our duty should be to scrutinize each claim to determine whether it's merely an attack on a merits determination or something more existential to the agency.

The demarcation of jurisdiction along these lines most respects the separation of powers. Congress created the agency adjudicatory process precisely to apply agency expertise to the merits of individual claims. Having district court proceedings parallel to an agency's administrative proceeding amounts to a collateral attack on agency decision-making and would undermine its congressionally mandated role. *See Elgin*, 567 U.S. at 14, 132 S.Ct. 2126. Thus, preserving exclusive agency jurisdiction over individualized claims furthers Congress's intent. But to the extent the claims target the agency's existence, structure, or procedures under the Constitution, rather than its merits decisions, the ***1192** district court remains an appropriate forum for such action. After all, pronouncing the constitutionality of a government function is precisely the business of Article III courts.

II.

Applying the foregoing principles, Axon was entitled to bring some of its claims before the district court. The *Thunder Basin* factors demonstrate that Axon's clearance process and ALJ challenges represent "broad constitutional claims" not requiring review of the "merits of individual" agency actions. *Latif*, 686 F.3d at 1129. The district court was thus wrong to dismiss them at the outset. In contrast, Axon's claim against the FTC's adjudicatory structure, at bottom, contests the agency's antitrust determinations and must be brought before the FTC.

A. Axon's Due Process and Equal Protection Challenge to the Clearance Process

Axon's first constitutional challenge targets the clearance process used by the FTC and the DOJ to divide their overlapping jurisdictions to review mergers and enforce antitrust laws. According to Axon, the clearance process decides if companies must answer to either the DOJ, with the prospect of a federal lawsuit in district court, or the FTC, with its administrative proceedings. Which agency has purview over an industry can mean a world of difference for the companies involved. For example, unlike federal court proceedings, the FTC's administrative hearings do not trigger the protections of the Federal Rules of Civil Procedure or Evidence. Furthermore, the FTC administrative hearings are presided over by an FTC Commissioner or ALJ rather than an impartial Article III judge. Despite the importance of the DOJ–FTC split, the clearance process is, according to Axon, a "black box" that isn't codified in any statute, rule, or regulation. Axon alleges that the clearance decision appears to be made "by a coin flip." Such an arbitrary process, Axon asserts, violates due process and equal protection under the Fifth Amendment.

Under the *Thunder Basin* factors, I would conclude that the district court has jurisdiction over this claim. [2]

2 I limit my analysis to the second step of the *Thunder Basin* inquiry since Axon acknowledges that the FTC Act provides for exclusive agency jurisdiction over some claims.

1. Meaningful Review

Most fundamentally, the FTC Act provides insufficient meaningful review of Axon's clearance process claim. Not all actions the FTC takes are subject to Article III scrutiny. Indeed, the Act only provides for court of appeals review of an FTC "cease and desist" order. 15 U.S.C. § 45(c). Accordingly, without a cease-and-desist order, the FTC's actions are largely immune from judicial review. Moreover, the Act limits available relief, allowing courts to grant only a "decree affirming, modifying, or setting aside [an FTC] order[.]" *Id.*

Under this statutory scheme, Axon's claim might never make it to an Article III judge. Axon challenges the very process by which cases arrive at the FTC's doorstep rather than the DOJ's. In other words, as Axon sees it, the FTC and DOJ's joint decision to subject the company to the FTC's jurisdiction is the harm in and of itself. *Cf. Seila Law LLC v. Consumer Fin. Prot. Bureau*, —— U.S. ——, 140 S. Ct. 2183, 2196, 207 L.Ed.2d 494 (2020) (holding that a person subject to an unconstitutional agency's power suffers from a "here-and-now" injury). Under that theory ***1193** of injury, Axon may not be able to meaningfully pursue its constitutional claim.

The Supreme Court has already told us that judicial review is insufficient when a statutory scheme only permits appeal of limited agency actions because not every agency action is "encapsulated" in an appealable order. *Free Enterprise Fund*, 561 U.S. at 490, 130 S.Ct. 3138. Here, the interagency clearance process is similarly not necessarily "encapsulated" in a cease-and-desist order. The FTC, for instance, may decide to drop its investigation of Axon, or Axon may settle or prevail on the merits in the administrative proceedings. In such circumstances, Axon will still have been injured by the clearance process but have no cease-and-desist order to appeal its claim. [3] Thus, exclusive agency jurisdiction here means that Axon's constitutional claim may never see the light of day.

3 The majority concludes that if Axon prevails on the antitrust merits, "that ends the dispute." Maj. Op. —— n.8. I respectfully disagree. Winning on the antitrust merits does nothing to remedy Axon's *independent* injury of being subject to an unconstitutional structure or procedure. In *Free Enterprise Fund*, the agency's investigation of the plaintiff "produced no sanction;" nevertheless, the Court held that the firm was permitted to bring its constitutional challenge against the PCAOB in district court. 561 U.S. at 490, 130 S.Ct. 3138. That is because "a separation-of-powers violation may create a 'here-and-now' injury" that is *independent* on the agency's merits determinations. *Id.* at 513, 130 S.Ct. 3138; *see also Seila Law*, 140 S. Ct. at 2196 (recognizing the longstanding ability of "private parties aggrieved by an official's exercise of executive power to challenge the official's authority to wield that power").

Without a guaranteed vehicle for court review, Axon's only recourse is to intentionally lose before the FTC to receive any assurance of Article III adjudication of its clearance process claim. But, as the Court has said, conditioning judicial review on incursion of a harm is "tantamount to a complete denial of [judicial] review." *McNary*, 498 U.S. at 496, 111 S.Ct. 888. Indeed, parties shouldn't have to risk "severe punishment" "before testing the validity of [a] law." *Free Enterprise Fund*, 561 U.S. at 490, 130 S.Ct. 3138 (simplified). As a result, I see no reason why Axon must "bet the farm" to get its day in court. *Id.* [4]

4 The majority recognizes that *Free Enterprise Fund* requires a "guaranteed" right of appeal to receive meaningful review. Maj. Op. ——. But the majority doesn't explain how Axon obtains such review if the FTC chooses not to place Axon in administrative proceedings or issue a cease-and-desist order as is required for judicial review under the FTC Act. In such cases, the majority must concede no judicial review is possible. I believe this violates the holding of *Free Enterprise Fund*.

Furthermore, adequate relief is a hallmark of meaningful review. *See Elgin*, 567 U.S. at 22, 132 S.Ct. 2126. Here, even if Axon's claim reaches a court, the only relief afforded under the FTC Act is modification or setting aside of an FTC cease-and-desist order. 15 U.S.C. § 45(c). Such relief would not be adequate to address the alleged harms of an unconstitutional clearance process. If Axon raises

a valid constitutional infringement, it is entitled to relief appropriate to remedy the violation, such as injunctive or declaratory relief. *See, e.g.*, *Free Enterprise Fund*, 561 U.S. at 513, 130 S.Ct. 3138 (holding that the firm was entitled to declaratory relief to ensure that it would be subject only to "a constitutional agency"). And since appellate courts "have no jurisdiction to grant ... remedies" other than those provided by Congress, *Latif*, 686 F.3d at 1128, Axon could not obtain necessary relief under the Act. The Act's complete lack of appropriate remedies for Axon cuts strongly against an implied congressional intent to displace district court jurisdiction. *See Americopters*, 441 F.3d at 735 (holding that ***1194** district courts have "residual jurisdiction" to hear claims against an agency when the law does not grant the court of appeals jurisdiction over the appropriate form of relief).

2. Wholly Collateral

Axon's clearance claim is also "wholly collateral" to the administrative proceedings. A claim is not wholly collateral when it is the "vehicle" by which a party "seek[s] to reverse" an agency's decision. *Elgin*, 567 U.S. at 22, 132 S.Ct. 2126. Here, Axon challenges the FTC's very jurisdiction to investigate any antitrust claims, not any particular FTC order or sanction. Indeed, as of the filing of Axon's complaint, the FTC had not established any antitrust violation by Axon or issued any cease-and-desist order. [5] But, as alleged by Axon, the clearance process itself injures its rights independent of any potential FTC sanctions for antitrust violations. Thus, the clearance process claim doesn't serve as a "vehicle" to reverse an agency decision. *Id.* As such, Axon's claim most resembles *Free Enterprise Fund*'s challenge to an independent board's "existence" and is, therefore, "collateral" to any FTC merits adjudication. 561 U.S. at 490, 130 S.Ct. 3138.

5 The majority suggests that Axon did not act quick enough. The majority contends, if Axon filed its claims "early in the investigation," then it might have had a stronger case for district court jurisdiction. Maj. Op. —— n.11. Such a malleable test for district court jurisdiction is seemingly unworkable. *See Elgin*, 567 U.S. at 15, 132 S.Ct. 2126 (rejecting jurisdictional rules that rely on "amorphous distinctions" and "hazy" lines). After all, how "early" is early enough? Is the day before the FTC files its enforcement action enough? Two weeks before? This "early enough" test ignores Court precedent which focuses not on the timing of the claim, but on the *nature* of the claim. *See, e.g.*, *Thunder Basin*, 510 U.S. at 207, 114 S.Ct. 771 (looking to the three-factor test despite the claim being "pre-enforcement"). More fundamentally, nothing in the FTC Act suggests that Congress intended such an "early-in-the-investigation" test.

Moreover, there is no danger that Axon's claim is a collateral attack on an individual agency determination in disguise. Axon may still be prosecuted for its putative violation of antitrust laws, regardless of any district court litigation casting doubt on the clearance process. In other words, whether the clearance process complies with due process is wholly collateral to whether Axon committed an antitrust violation.

3. Agency Expertise

Like in *Free Enterprise Fund*, Axon's challenge to the interagency clearance process is patently "outside the Commission's competence and expertise." 561 U.S. at 491, 130 S.Ct. 3138. While the FTC possesses substantial expertise in the antitrust field and historic experience with particular industries, Axon's claim doesn't implicate such expertise. Instead, it relies on principles of due process and equal protection, which are "standard questions" of constitutional law that "courts have no disadvantage handling." *Id.* (simplified). The FTC's expertise might illuminate the clearance process, its origins, and its justifications, but it can't shed particular light on whether the process satisfies due process and equal protection guarantees.

Axon's claim is unlike the one in *Elgin* where agency expertise could answer "threshold questions" that may "obviate the need to address the constitutional challenge." *Elgin*, 567 U.S. at 22–23, 132 S.Ct. 2126. In *Elgin*, agency expertise was only relevant for addressing "preliminary questions" which may have demonstrated that the plaintiffs suffered *no* statutory injury at all and disposed of the need to address the constitutional question. *Id.* But here, Axon's claim is a "question[ ] of administrative law," like that in ***1195** *Free Enterprise Fund*, 561 U.S. at 491, 130 S.Ct. 3138, which are left for courts to decide. Indeed, no FTC finding on an antitrust question could negate the injury Axon experienced from being subject to a putatively unconstitutional clearance process. In other words, the FTC's expertise on antitrust matters can't moot Axon's claimed injuries and so the constitutional question must be reached regardless of any agency's determination.

* * *

Given that all three *Thunder Basin* factors indicate that jurisdiction stripping would be inappropriate here, I would reverse the district court's dismissal of the clearance process claim. [6]

6 The majority contends that it is following "every other circuit that has addressed a similar issue" in finding no district court jurisdiction over any of Axon's claims. Maj. Op. ——. First, if so, those other decisions conflict with our court's precedent. *See Mace*, 34 F.3d at 858–60; *Americopters*, 441 F.3d at 735–36; *Latif*, 686 F.3d at 1128–29. Second, I am not so sure that every other circuit agrees with the majority. The Fifth Circuit has recently granted rehearing en banc in a directly analogous case and, thus, has vacated a panel decision following the majority's reasoning. *See Cochran v. SEC*, 978 F.3d 975 (5th Cir. Oct. 30, 2020). Finally, I find the dissents in several of those cases to be more persuasive. *See Cochran v. SEC*, 969 F.3d 507, 519 (5th Cir. 2020) (Haynes, J., dissenting) (distinguishing *Elgin* and *Thunder Basin* because the parties there challenged "the constitutionality of a substantive statute that gave rise to an administrative action" rather than "the constitutional grounding of the agency overseeing the proceedings."); *Tilton v. SEC*, 824 F.3d 276, 298 (2d Cir. 2016) (Droney, J., dissenting) ("Forcing the appellants to await a final Commission order before they may assert their constitutional claim in a federal court means that by the time the day for judicial review comes, they will already have suffered the injury that they are attempting to prevent.").

B. Axon's Article II Challenge to FTC's ALJs

Axon also alleges that the FTC's ALJs are unconstitutionally shielded from removal by the Executive. The FTC is headed by five Commissioners, nominated by the President and confirmed by the Senate. 15 U.S.C. § 41. The President may not remove Commissioners during their seven-year terms except for "inefficiency, neglect of duty, or malfeasance in office." *Id*. In turn, the Commissioners appoint ALJs who can only be removed for good cause. *See* 5 U.S.C. § 7521(a), (b)(1). Axon asserts this is an impermissible dual layer of protection from Executive control. *See* U.S. Const. art. II, § 1, cl. 1, 3. In this way, Axon's claim closely mimics the Article II argument made in *Free Enterprise Fund*, 561 U.S. at 495–97, 130 S.Ct. 3138 (holding that Article II forbids providing two layers of tenure protections to officers of the United States).

On initial consideration, it appears that Axon's complaint here is tied to the FTC's merits determination since it only sustains an injury upon an ALJ sanction. But on closer inspection, that's not the case. According to Axon, its injury is rooted in the violation of the separation of powers, apart from any FTC antitrust penalty. I agree that the Constitution's structural provisions "protect[ ] the liberty of all persons" by ensuring no government entity acts "in excess of [its] delegated governmental power." *Bond v. United States*, 564 U.S. 211, 222, 131 S.Ct. 2355, 180 L.Ed.2d 269 (2011). Thus, when an agency violates this principle, "liberty is at stake," *id.*, and it "create[s] a 'here-and-now' injury," *Free Enterprise Fund*, 561 U.S. at 513, 130 S.Ct. 3138. *See also Seila Law*, 140 S. Ct. at 2196 ("[W]hen [a tenure protection] provision violates the separation of powers it inflicts a 'here-and-now' injury on affected third parties that can be remedied by a court."). In other words, a government agency inflicts injury on a person whenever ***1196** it subjects that person to unconstitutional authority—regardless of whether a sanction is levied by the agency. *Free Enterprise Fund*, 561 U.S. at 513, 130 S.Ct. 3138. Thus, even without an FTC finding of an antitrust violation, Axon raises a cognizable injury by being made to appear before a putative unconstitutional officer.

With this understanding of Axon's ALJ challenge, its *Thunder Basin* analysis largely tracks that of the clearance process claim, and, thus, it should not have been precluded from district court jurisdiction. After all, to guarantee Article III review of its ALJ challenge, Axon would similarly have to incur the very harms it seeks to avoid. The firm would need to be subject to the ALJ, an officer it argues is unconstitutionally insulated from Executive control, and intentionally lose its case on the merits before the FTC. Only then could a cease-and-desist order issue, allowing Axon to litigate its constitutional injury before an Article III court. But if Axon prevails on the antitrust merits before the FTC, its ALJ claim will never reach a federal judge and will never be reviewed outside of the very agency it challenges. And even if Axon does reach a court, the company could not obtain injunctive or declaratory relief under the limited remedies of the FTC Act. *See* 15 U.S.C. § 45(c).

The constitutionality of the FTC ALJs is also wholly collateral to the merits of Axon's alleged antitrust violation —each with distinct injuries and separate remedies. For example, an Axon victory on its ALJ claim would not be dispositive on any allegation that it violated antitrust laws. Indeed, Axon could still be prosecuted for violating antitrust laws regardless of whether the ALJs' tenure protection fails to comply with the Constitution.

Finally, as with the clearance process claim, whether the ALJs' removal protections violate Article II is a "standard question[ ] of administrative law," which doesn't turn on statutory questions within the FTC's expertise. *Free Enterprise Fund*, 561 U.S. at 491, 130 S.Ct. 3138. For example, no amount of antitrust expertise can tell us whether ALJs must be directly removable by the President. Nor are there threshold statutory questions "squarely within" the FTC's expertise that "may obviate the need to address the constitutional challenge." *Elgin*, 567 U.S. at 22–23, 132 S.Ct. 2126.

I would therefore hold that all three *Thunder Basin* factors—meaningful review, wholly collateral, and agency expertise—favor district court jurisdiction on this claim. I would reverse the district court's dismissal of Axon's Article II claim against the FTC ALJs.

C. Axon's Due Process Challenge to FTC's Investigatory, Prosecutorial, and Adjudicative Functions

Axon finally contends that the FTC's administrative adjudicatory process violates due process by combining the role of investigator, prosecutor, and adjudicator within one agency. Although Axon cloaks this claim as one about an unconstitutional structure, at bottom, it is a complaint about the agency's individualized merits determination. So, I agree that this claim is precluded from district court review.

In Axon's view, the FTC's structure is "inherently biased." Under the FTC Act, the agency investigates antitrust violations, *see* 15 U.S.C. § 57b-1; it prosecutes the enforcement action, *see* 16 C.F.R. § 3.11; and then it adjudicates any appeal from an ALJ's initial decision, *id.* § 3.52. Axon asserts that its structure has granted the FTC an "undisputed 100% win rate" within the administrative process for the past 25 years. As a result, Axon believes it is a "virtual certainty" that it will lose its case before the Commission, which violates due process protections.

***1197** Although Axon maintains that the FTC is unconstitutionally structured, what it really fears is the FTC determining that it violated antitrust laws. Unlike Axon's other claims, a biased adjudicatory process only injures Axon if it results in an unfavorable order. Such a loss will necessarily be encapsulated in an FTC sanction, which is directly appealable to the circuit court and can be set aside, affording Axon meaningful review and full relief. *See* 15 U.S.C. § 45(c).

Since this claim falls squarely within the FTC's province and expertise and any injury flowing from the alleged constitutional violation will be guaranteed a court of appeals review, I would hold that all three *Thunder Basin* factors —meaningful judicial review, wholly collateral, and agency expertise—favor the FTC's exclusive jurisdiction here. I thus concur in affirming the district court's dismissal of this claim.

III.

Congress established the FTC's administrative process to adjudicate the merits of antitrust enforcement actions. But Congress did not completely eliminate the district court's role in adjudicating constitutional claims against the FTC. To be sure, for some claims, when the constitutional issue is directly intertwined with the agency's individual merits decision, the agency should resolve the matter in the first instance. As Court precedent shows, Axon's claim of unconstitutional bias is one example of such a claim. But when "[p]laintiffs raise broad constitutional claims that do not require review of the merits," our precedent clearly permits parties to select their forum. *Latif*, 686 F.3d at 1129. Such is the case with Axon's constitutional claims against the clearance process and the FTC ALJs.

By forcing Axon's claims into the FTC administrative process, we effectively shut the courtroom doors to a party seeking relief from alleged constitutional infringements. Now, Axon's only recourse is to antagonize the FTC into prosecuting the enforcement proceeding against it and then lose in that forum—all the while, further subjecting the company to the harm it seeks to avoid. The FTC Act does not mandate this unfortunate result. Both the Constitution and our precedent counsel against it, too. For that reason, I respectfully dissent from the dismissal of Axon's clearance process and ALJ claims.

All Citations

986 F.3d 1173, 2021-1 Trade Cases P 81,523, 21 Cal. Daily Op. Serv. 1045, 2021 Daily Journal D.A.R. 881

Footnotes