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)

AMICUS CURIAE BRIEF OF ATLANTIC LEGAL FOUNDATION IN SUPPORT OF PETITION FOR REHEARING EN BANC

LAWRENCE S. EBNER
ATLANTIC LEGAL FOUNDATION
1701 Pennsylvania Ave., NW
Washington, D.C. 20006
Tel.: (202) 729-6337
Fax: (202) 580-6559
lawrence.ebner@atlanticlegal.org

Counsel for Amicus Curiae
Atlantic Legal Foundation

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes & Rules

Other Authorities

STATEMENT

This *amicus curiae* brief in support of the Petition for Rehearing En Banc is being filed in accordance with Federal Rule of Appellate Procedure 29(b) and Circuit Rule 29-2. All parties have consented to the filing of this brief. No party's counsel authored this brief in whole or part, and no party or party's counsel, and no person other than the *amicus curiae*, its supporters, or its counsel, contributed money that was intended to fund preparing or submitting the brief.

INTEREST OF THE *AMICUS CURIAE*

Established in 1977, the Atlantic Legal Foundation is a national, nonprofit, public interest law firm whose mission is to advance the rule of law by advocating for individual liberty, free enterprise, property rights, limited and efficient government, sound science in judicial and regulatory proceedings, and school choice. With the benefit of guidance from the distinguished legal scholars, corporate legal officers, private practitioners, business executives, and prominent scientists who serve on its Board of Directors and Advisory Council, the Foundation pursues its mission by participating as *amicus curiae* in carefully selected appeals

before the Supreme Court of the United States, federal courts of appeals, and state supreme courts.

The jurisdictional question presented by this appeal is exceptionally important. Its ultimate resolution either will enable or foreclose *meaningful* judicial review of claims that challenge the structural constitutionality of administrative enforcement proceedings prosecuted and adjudicated in-house by extraordinarily powerful, independent regulatory agencies such as the Federal Trade Commission (FTC).

For any company or individual targeted by the FTC (or by the Securities and Exchange Commission (SEC), which makes extensive use of a similar administrative enforcement scheme), the issue of whether federal district courts have jurisdiction to review structural constitutional claims after an administrative enforcement proceeding has commenced is a question of whether justice delayed is justice denied. Fundamental fairness—and common sense—compel the conclusion that the respondent in an FTC administrative enforcement action should not be required to suffer the crippling cost, business disruption, reputational

harm, and adverse outcome of a fully adjudicated administrative proceeding before seeking judicial review of substantial, wholly collateral, *threshold* objections to the entire proceeding's constitutional legitimacy.

The fact that the FTC aggressively prosecutes such proceedings on its home turf, with the benefit of its own procedural rules, and before its own removal-protected administrative law judge (ALJ), makes the need for district court review even more compelling. Contrary to the tepid opinion issued by the panel majority—and as Judge Bumatay explains in his pointed dissent—the Federal Trade Commission Act's judicial review provision, 15 U.S.C. § 45(c), does not impliedly strip district courts of their federal question jurisdiction to consider structural constitutional claims like those that Plaintiff-Appellant Axon Enterprise, Inc. seeks to pursue in this case.

ARGUMENT

The Court Should Grant Rehearing En Banc

A. This appeal presents an exceptionally important jurisdictional issue

The gravamen of Axon's structural constitutional claims is that due to a secretive "clearance" process between the FTC and the Department of Justice's Antitrust Division, the company is being subjected to an administrative enforcement proceeding (rather than to a district court action), which the FTC legal staff prosecutes under the FTC's own procedural and evidentiary rules before a dual-layer, tenure-protected FTC ALJ, who virtually always decides in favor of the FTC and is upheld by the Commission itself. The question presented by this appeal is whether an enforcement respondent such as Axon can obtain judicial review of its structural constitutional claims without first having to attempt to defend itself on the FTC's sharply tilted administrative playing field.

The far-reaching significance of whether district courts have been impliedly stripped of federal question jurisdiction to address the structural constitutionality of FTC administrative enforcement

proceedings is underscored by the fact that the FTC, along with the SEC, are widely regarded as the two most aggressive independent regulatory agencies in the federal government. In view of its expansive authority to prevent unfair methods of competition and unfair or deceptive acts or practices, *see* 15 U.S.C. § 45(a)(1), virtually every business and industry in the United States is a potential target of FTC scrutiny.

As to alleged anti-competitive mergers and acquisitions, the FTC engages in continual investigatory, regulatory, and enforcement activity. *See* FTC, Guide to Antitrust Laws, Mergers;[1] FTC Bureau of Competition & Dep't of Justice Antitrust Div., *Hart-Scott-Rodino Annual Report, Fiscal Year 2019*, at 13 (indicating that during FY 2019, the FTC challenged 21 mergers, 9 were abandoned after the FTC raised concerns, and 2 were subjected to administrative litigation);[2] *see also* Michael B.

---

[1] https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers (last visited March 10, 2021).

[2] Available at https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino/p110014hsrannualreportfy2019_0.pdf.

Bernstein et al. (Arnold & Porter), *What To Expect In 2020 Merger Enforcement: Trends and Developments From 2019*, at 4 ("aggressive antitrust enforcement is likely to continue").[3]

The FTC's aggressive enforcement policies have attracted the Supreme Court's attention. For example, earlier this year the Court granted certiorari from a Ninth Circuit decision holding (as have other circuits) that § 13(b) of the FTC Act, 15 U.S.C. § 53(b), which authorizes the FTC to seek injunctions, also allows the FTC to demand monetary relief, such as restitution. *See FTC v. AMG Cap. Mgmt., LLC*, 910 F.3d 417 (9th Cir. 2018), *cert. granted* July 9, 2020 (No. 19-508) (consolidated for briefing and argument with *FTC v. Credit Bureau Ctr., LLC*, 937 Fed. 3d 764 (7th Cir. 2019), *cert. granted* July 9, 2020 (No. 19-825)) (holding that the FTC does not have authority to seek monetary relief); *see also* Angel Reyes & Benjamin Hunter, Note, *Does the FTC Have Blood On Its*

[3] Available at https://www.arnoldporter.com/-/media/files/perspectives/publications/2020/02/ap-merger-enforcement-year-in-review-2020.pdf.

Hands? An Analysis of FTC Overreach and Abuse of Power After Liu, 68 Buff. L. Rev. 1481 (2020) (discussing *AMG* and *Credit Bureau Center*).

Last year the Supreme Court in *Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183, 2191 (2020), described the Consumer Financial Protection Bureau (CFPB) as an independent regulatory agency that "wields vast rulemaking, enforcement, and adjudicatory authority over a significant portion of the U. S. economy." The FTC not only falls into the same category, but also long has been one of the federal administrative state's most visible and ardent regulators. As the panel majority acknowledged here, the FTC is among "an array of quasi-independent executive agencies that . . . wield tremendous enforcement power." *Axon Enterprise, Inc. v. FTC,* 986 F.3d 1173, 1176 (9th Cir. 2021). "[T]hese 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." *Id.* at 1176; *see also* Bernstein, *supra* at 5 ("FTC's Continued Preference for

Administrative Proceedings"); *id.* at 9 ("FTC Found Success In Administrative Actions").

In *Seila Law*—an appeal arising from a district court action that the CFPB brought to enforce a civil investigative demand—the Supreme Court held that the independent regulatory agency's single Director, for-cause-only removal "structure . . . violates the separation of powers." *Seila* Law, 140 S. Ct. at 2192; *see also Free Enterprise Fund v. PCAOB*, 561 U.S. 477, 484 (2010) (holding that the structure of the SEC-appointed Public Company Accounting Oversight Board (PCAOB) was unconstitutional because "multilevel protection from removal is contrary to Article II's vesting of executive power in the President"). Appellant Axon contends, *inter alia*, that the FTC's lone ALJ, who single-handedly adjudicates all FTC administrative enforcement complaints, enjoys the same type of multilayer, removal-from-office protection that the Supreme Court held unconstitutional in *Seila Law*.

Indeed, in the panel majority's own words, Axon has raised "*serious concerns* about how the FTC operates," including "*substantial questions* about whether the FTC's dual-layered for-cause protection for ALJs

violates the President's removal powers under Article II." 986 F.3d at 1187 (emphasis added). The majority opinion also agrees that "Axon raises *legitimate questions* about whether the FTC has stacked the deck in its favor in its administrative proceedings" due to "the fact that the FTC combines investigatory, prosecutorial, adjudicative, and appellate functions within a single agency." *Id.* at 1180, 1187 (emphasis added).

Nonetheless, the majority opinion holds that Axon must persevere through the entire administrative enforcement proceeding that it claims is unconstitutional, and then suffer an adverse judgment, before it can seek judicial review of its threshold constitutional claims. According to the panel majority, "Axon can have its day in court—but only after it first completes the FTC administrative hearing." *Id.* at 1187. Yet, the majority *agreed* with the dissent that "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." *Id.* at 1184.

Although this case involves an FTC-compelled divestiture, the panel's broad holding is not limited to antitrust enforcement proceedings.

It also encompasses FTC administrative enforcement actions in the consumer protection arena. *See* 15 U.S.C. § 45(c). Moreover, the district court jurisdictional issue has potential implications for many federal regulatory agencies that conduct their own administrative prosecutions and adjudications of enforcement actions. Early judicial resolution of related structural constitutional issues is a matter of administrative efficiency and judicial economy, as well as fairness to respondents. And insofar as a federal agency has the authority to rule on the constitutionality of its own administrative enforcement scheme, requiring an enforcement respondent to exhaust that "remedy" before seeking judicial review is a wasteful exercise in futility.

The actively percolating circuit court jurisprudence on the same fundamental jurisdictional issue—albeit in connection with the multilayer, for-cause-only removal protection afforded to SEC ALJs—further underscores the significance of the question presented here. The majority opinion notes that the FTC Act's judicial review provision, 15 U.S.C. § 45(c), "is almost identical to the statutory review provision in the SEC Act," 15 U.S.C. § 78y, and that "other circuits have held [that

the SEC provision] shows a fairly discernible intent to strip district court jurisdiction." 986 F.3d at 1180.

In the most recent of those cases, however, the Fifth Circuit, recognizing the exceptional importance of the jurisdictional issue, has granted rehearing en banc. *See Cochran v. SEC*, 969 F.3d 507 (5th Cir. Aug. 11, 2020), *reh'g granted* Oct. 30, 2020 (No. 19-10396). As here, the three-judge panel in *Cochran* was split. Circuit Judge Haynes "disagree[d] with the majority opinion's conclusion that Cochran's removal claim is the type over which Congress intended to limit [district court] jurisdiction." *Id.* at 519 (Haynes, J., dissenting in part). She "conclude[d] that precluding district court jurisdiction would *likely foreclose all meaningful judicial review*," including because the respondent would have to "continue to participate in an adjudicative system that *well may be constitutionally illegitimate* depending on the determination of the removal claim." *Id* (emphasis added). Judge Haynes further stated, "I do not think that the law requires Cochran to be subjected to an adjudicative process in front of an officer who may not have constitutional authority to decide her case." *Id*. at 520.

This Court should follow the Fifth Circuit's path and grant rehearing en banc to consider the crucial jurisdictional question raised by this appeal.

B. The majority's ambivalent opinion cries out for further review

In *Free Enterprise Fund*, the Supreme Court indicated that courts must "presume that Congress does not intend to limit [district court] jurisdiction if 'a finding of preclusion could foreclose all meaningful judicial review'; if the suit is 'wholly collateral to a statute's review provisions'; and if the claims are 'outside the agency's expertise.'" 561 U.S. at 489 (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 212-13 (1994)). Here, the divided panel opinion holds, albeit hesitantly, that under one and possibly two of these three "*Thunder Basin*" implied jurisdiction-stripping factors, the district court lacks subject-matter jurisdiction to consider Axon's constitutional claims:

> 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.

986 F.3d at 1187. (emphasis added). This fragile conclusion, and the majority opinion's many additional expressions of ambivalence, beg for en banc review.

By way of example, the majority stated—

- It not only was guided, but also "constrained" by the *Thunder Basin* factors, even though they "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." *Id.* at 1178, 1181 (internal quotation marks omitted).

- "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." *Id.* at 1183.

- "[I]f we were writing on a clean slate, we would agree with the dissent." *Id.* at 1184.

- "[S]eek[ing] judicial review from this court once the enforcement proceeding ends . . . 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." *Id.*

- "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." *Id.* at 1185.

- "Like the second [*Thunder Basin*] factor [whether the claim is wholly collateral to the statutory scheme], the third factor [whether the claim is outside the agency's expertise] is cloaked in ambiguity." *Id.* at 1186.

- "Axon's constitutional claims are arguably 'wholly collateral' to the enforcement proceeding. . . . While it is a close call, we find that the second *Thunder Basin* factor also supports preclusion of jurisdiction." *Id.* at 1185-86.

- "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." *Id.* at 1187.

- "Axon claims—and FTC does not appear to dispute—that FTC has not lost a single case in the past quarter-century. . . . Indeed, a former FTC commissioner acknowledged that the FTC adjudication process might unfairly favor the FTC given the agency's stunning win rate." *Id.*

All of the foregoing passages are from the *majority* opinion. The serious doubt that they cast upon the correctness of the majority's holding is amplified by Judge Bumatay's strong dissenting opinion. His dissent explains that although Axon's constitutional claims are not directly at issue in this appeal,

> 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.

Id. at 1189 (Bumatay, J., dissenting).

C. Contrary to the majority's conclusion, delayed judicial review of structural constitutional claims cannot be meaningful

The majority opinion "agree[s] with the other circuits . . . that under Supreme Court precedent the presence of meaningful judicial review is enough to find that Congress precluded district court jurisdiction over the types of claims that Axon brings." *Id.* at 1187 (citing *Bennett v. SEC*, 844 F.3d 174, 183 n.7 (4th Cir. 2016)). But the majority's "agreement" with "the other circuits" is misplaced since this is not what *Bennett* or other circuits have held: *Bennett* joins other circuits' conclusions that "meaningful judicial review is the most important factor in the *Thunder Basin* analysis," and then points out that "[i]n *Thunder Basin*, the [Supreme] Court noted that it would *uphold district-court jurisdiction* 'particularly where a finding of preclusion could *foreclose* all meaningful judicial review.'" *Id.* (quoting *Thunder Basin*, 510 U.S. at 212-13) (emphasis added). That is the situation here. The dissenting opinion argues that district court jurisdiction over Axon's ALJ-related and FTC/DOJ clearance process-related claims (*see* 986 F.3d at 1177) is *not* precluded because "by funneling the challenge to the FTC back to the

FTC, Axon may forever be foreclosed from obtaining meaningful judicial review of its claims." *Id.* at 1189 (Bumatay, J., dissenting).

First, judicial review cannot be meaningful if it is not available at all. The majority opinion repeatedly asserts that Axon can obtain court of appeals review of its constitutional claims after it completes FTC's administrative adjudication. *See, e.g.*, *id.* at 1182, 1184, 1188. But in pertinent part the FTC Act's judicial review provision limits a court of appeals to issuance of "a decree affirming, modifying, or setting aside" an "order of the Commission to cease and desist from using any method of competition." 15 U.S.C. § 45(c). This relatively narrow provision may not encompass structural constitutional claims which, as the majority concedes, are at least "arguably 'wholly collateral' to the enforcement proceeding." *Id.* at 1185; *see also id.* at 1187. "Under this statutory scheme, Axon's claim might never make it to an Article III judge." *Id.* at 1192 (Bumatay, J., dissenting); *see Free Enterprise Fund*, 561 U.S. at 490 (questioning whether the petitioners' ALJ-related constitutional claims fell within the scope of the SEC judicial review provision).

The majority's assumption that court of appeals review, following a full FTC administrative adjudication, is readily available to any respondent with a structural constitutional claim also is undermined by the fact that the FTC routinely pressures enforcement targets to sign consent orders rather than attempt to defend themselves. As a former FTC Commissioner explained,

> in 100 percent of cases where the administrative law judge ruled in favor of the FTC staff, the Commission affirmed liability; and in 100 percent of the cases in which the administrative law judge . . . found no liability, the Commission reversed. *This is a strong sign of an unhealthy and biased institutional process*.
>
> * * *
>
> Significantly, the combination of institutional and procedural advantages with the vague nature of the Commission's Section 5 authority gives the agency the ability, in some cases, *to elicit a settlement even though the conduct in question very likely may not be anticompetitive*. This is because firms typically will prefer to settle a Section 5 claim rather than to go through lengthy and costly litigation in which they are both shooting at a moving target and *have the chips stacked against them*. Such settlements also perpetuate the uncertainty that exists . . . by encouraging a process by which the contours of Section 5 are drawn through settlements without any

> meaningful adversarial proceeding or substantive analysis of the Commission's authority.

Joshua D. Wright, Comm'r, Fed. Trade Comm'n, *Remarks at the [FTC] Symposium on Section 5 of the FTC Act* (Feb. 26, 2015), at 6-7 (emphasis added)[4]; *see also Axon Enter.*, 986 F.3d at 1187.

Second, even if a court of appeals has appellate jurisdiction to review—in the first instance—structural constitutional challenges to the FTC's administrative enforcement scheme, there is a difference between judicial review and judicial review that is *meaningful*. As the dissenting opinion explains, "the majority misapplies [Supreme] Court precedent and ignores the injuries Axon is trying to vindicate." 986 F.3d at 1189 (Bumatay, J., dissenting).

Free Enterprise Fund is the most pertinent example of where the respondent in an administrative proceeding "if not allowed to pursue their [constitutional] claims in the District Court . . . would not, as a practical matter, be able to obtain meaningful judicial review." *Thunder*

---

[4] Available at https://www.ftc.gov/system/files/documents/public_statements/626811/150226bh_section_5_symposium.pdf.

Basin, 510 U.S. at 213 (internal quotation marks omitted). The *Free Enterprise Fund* petitioners' structural constitutional challenge to the PCAOB was analogous to Axon's ALJ-related removal-for-cause-only separation of powers claim. *See Free Enterprise Fund*, 561 U.S. at 484. It implicated the SEC judicial review provision, 15 U.S.C. § 78y, which the majority stated here is "almost identical" to the corresponding FTC Act provision, 15 U.S.C. § 45(c). *See* 986 F.3d at 1180. Citing *Thunder Basin*, the Supreme Court explained in *Free Enterprise Fund* that it did "not see how petitioners could meaningfully pursue their constitutional claims under the Government's theory," which would have required the petitioners to incur an SEC-affirmed PCAOB sanction and then initiate court of appeals review under § 78y. *Free Enterprise Fund*, 561 U.S. at 490. Squarely rejecting this approach, the Court explained that the petitioners would suffer "severe punishment should [their constitutional] challenge fail . . . we do not consider this a 'meaningful' avenue of relief." *Id.* at 490-91.

The majority opinion here mistakenly views Axon's structural constitutional claims—which attack the pillars upon which the FTC

administrative enforcement scheme rests—as some sort of jurisprudential "can" that Congress wanted federal courts to kick down the road for as long as possible. According to the majority: "If the [administrative] 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." 986 F.3d at 1182. This is not correct.

In *Tilton v. SEC*, 824 F.3d 276 (2d Cir. 2016), Judge Droney's dissenting opinion explained that "[f]orcing 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. . . . while there may be review, it cannot be considered truly 'meaningful'* at that point." *Tilton*, 824 F.3d at 298 (Droney, J., dissenting) (emphasis added). "[W]e need look no further than *Free Enterprise* itself to understand that being forced to undergo an allegedly unconstitutional proceeding may play into the analysis of whether judicial review is 'meaningful.'" *Id.* at 299.

The majority opinion is oblivious to the real-world, real-time consequences of resisting intense pressure to accede to an FTC-dictated consent order, and instead, being subjected to an FTC administrative proceeding in which a publicly held company is accused of anti-competitive practices.

- There is the astronomical financial cost of mounting a defense to complex antitrust allegations on a tilted, FTC-friendly playing field where the FTC's own procedural, discovery, and evidentiary rules are interpreted and applied by the FTC's own ALJ. *See* 16 C.F.R. Part 3 (FTC Rules of Practice for Adjudicative Proceedings).

- There is the business disruption, i.e., the diversion of financial and human resources necessitated by participation in ongoing enforcement proceedings. Such diversion is particularly harmful to a company like Axon, which not only competes through innovation, but also serves the public interest by providing body-worn cameras and digital evidence management software to law enforcement authorities throughout the United States.

- There is the reputational harm, especially for a publicly traded company such as Axon. The FTC is not bashful about publicizing its enforcement activities. *See, e.g.*, FTC Press Release, *FTC Challenges Consummated Merger of Companies that Market Body-Worn Camera Systems to Large Metropolitan Police Departments* (Jan. 3, 2020).[5] Reputational harm can interfere with existing and prospective business relationships, especially for a company like Axon that enters into contractual arrangements with a multitude of local and state law enforcement authorities. Further, FTC administrative adjudicatory proceedings need to be disclosed to shareholders, and also to federal and state corporate regulators.

- And of course, there is the very substantial harm flowing from the final, adverse, administrative enforcement action that the majority opinion contends an FTC target must suffer before being eligible to obtain judicial review of its threshold constitutional claims. Here, for example,

---

[5] Available at https://www.ftc.gov/news-events/press-releases/2020/01/ftc-challenges-consummated-merger-companies-market-body-worn.

Axon complains that despite its efforts to cooperate with the FTC by offering to divest all of the assets at issue and infusing the divestiture buyer with millions of dollars in working capital, the FTC is demanding that Axon be penalized by being ordered to create a formidable competitor clone, including through non-exclusive transfer of relevant intellectual property and technology.

Unless a district court can exercise its federal question jurisdiction to address the type of Supreme Court precedent-backed structural constitutional claims that Axon asserts here, much of the harm from an administrative enforcement proceeding that quite possibly is unconstitutional already will have been done before Axon, if ever, can obtain judicial review. *Cf. Ass'n of Nat'l Advertisers v. FTC*, 627 F.2d 1151, 1159 (D.C. Cir. 1979) ("Once a plaintiff has alleged a nonfrivolous constitutional claim, the district court has jurisdiction under section 1331, and dismissal for want of jurisdiction is improper . . . ."). In view of the "'here and now' injur[ies]" that delaying judicial review of structural constitutional claims are certain to impose, *Free Enterprise*

Fund, 561 U.S. at 513, any such eventual judicial review cannot be considered meaningful.

Amicus curiae Atlantic Legal Foundation believes that Judge Bumatay got it exactly right: "[T]o the extent the claims target the agency's existence, structure, or procedures under the Constitution, rather than its merits decisions, the district court remains an appropriate forum for such action." 986 F.3d at 1191-92. (Bumatay, J., dissenting).

CONCLUSION

The Court should grant the Petition for Rehearing En Banc and address the exceptionally important jurisdictional issue presented by this appeal.

Respectfully submitted,

s/ Lawrence S. Ebner
LAWRENCE S. EBNER
ATLANTIC LEGAL FOUNDATION
1701 Pennsylvania Ave., NW
Washington, D.C. 20006
Tel.: (202) 729-6337
Fax: (202) 580-6559
lawrence.ebner@atlanticlegal.org
Counsel for Amicus Curiae
Atlantic Legal Foundation

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

Instructions for this form:
http://www.ca9.uscourts.gov/forms/form08instructions.pdf

9th Cir. Case Number(s) 20-15662

I am the attorney or self-represented party.

This brief contains 4,196 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief:

[X] is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

Signature: s/Lawrence S. Ebner

Date: March 17, 2021

CERTIFICATE OF SERVICE

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

Lawrence S. Ebner

s/Lawrence S. Ebner
Attorney for *Amicus Curiae*

Dated: March 17, 2021