No. 21-86

In The
Supreme Court of the United States

AXON ENTERPRISE, INC.,

Petitioner,

v.

FEDERAL TRADE COMMISSION, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF ATLANTIC LEGAL FOUNDATION AND CATO INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

ILYA SHAPIRO
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org

LAWRENCE S. EBNER
Counsel of Record
ATLANTIC LEGAL FOUNDATION
1701 Penn. Ave., N.W.
Washington, DC 20006
(202) 729-6337
lawrence.ebner@atlanticlegal.org

Counsel for Amici Curiae

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INTEREST OF THE *AMICI CURIAE* [1]

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[1] Petitioner's and Respondents' counsel of record were provided timely notice in accordance with Supreme Court Rule 37.2(a), and have consented to the filing of this brief. In accordance with Supreme Court Rule 37.6, *amici* certify that no counsel for a party authored this brief in whole or part, and that no party or counsel other than the *amici* and their counsel made a monetary contribution intended to fund its preparation or submission.

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* * *

This case is important to *amici* because it involves core separation-of-powers issues, the democratic accountability of executive officers, and threats to federal court access when citizens have legitimate complaints about unconstitutional government action. More specifically, this brief focuses on the important question of district court subject-matter jurisdiction over structural constitutional claims. The ultimate resolution of the question presented either will enable or foreclose all *meaningful* judicial review of structural constitutional claims that challenge administrative enforcement proceedings prosecuted and adjudicated in-house by extraordinarily powerful, independent regulatory agencies such as the Federal Trade Commission (FTC). It is a question that goes to the heart of free enterprise, limited and efficient government, and civil justice.

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 prior to completion of an administrative enforcement proceeding 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 Ninth Circuit panel majority—and as Circuit Judge Patrick J. 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 Axon seeks to pursue in this case.

SUMMARY OF ARGUMENT

The FTC, like the SEC and other independent federal regulatory agencies, has expansive enforcement authority over American businesses and industries. This authority includes not only the FTC's broad enforcement powers in the antitrust and consumer protection areas, but also its ability to initiate and prosecute civil enforcement actions inside its home arena—where FTC attorneys play ball under the Commission's own government-friendly rules, and the umpire is an FTC administrative law judge (ALJ)

who enjoys unconstitutional for-cause-only removal protection. Not surprisingly, the FTC wins every game. *See* App-26.

After Petitioner Axon Enterprise, Inc. found itself in the FTC's investigatory grasp, the company filed a district court action seeking judicial review of its claims that the FTC's administrative enforcement scheme is structurally unconstitutional. In light of this Court's recent decisions, there can be no doubt that Axon's constitutional challenge to the removal protections afforded to the FTC ALJ is on solid footing. *See Collins v. Yellen*, 141 S. Ct. 1761 (2021); *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020); *Free Enterprise Fund v. PCAOB*, 561 U.S. 477, 484 (2010). Yet, the Ninth Circuit panel majority, relying on a line of SEC cases involving essentially the same jurisdictional issue, *see* App-10, ruled that Axon is not yet entitled to its day in an Article III court.

Instead, according to the majority opinion, Axon first must subject itself to an entire FTC administrative enforcement proceeding, including the virtually inevitable adverse judgment that the Commission imposes on respondents who choose to endure the burdens, costs, and risks of an in-house adjudication. The majority asserts that *only then* can Axon obtain judicial review, by attempting to mount, in a court of appeals with limited appellate jurisdiction over FTC adjudications, a constitutional challenge to the structure of an administrative regime that very likely is unconstitutional under this Court's precedents. Indeed, the wisdom of the panel majority's

jurisdictional ruling is belied by its own indisputably equivocal, almost apologetic, opinion, and by the sharp dissent. This case begs for Supreme Court review.

ARGUMENT

The Reasons For Granting Review Are Compelling

A. The jurisdictional issue is exceptionally important

The crucial jurisdictional question presented by this appeal is whether an enforcement target such as Axon can bring a district court action seeking review of its structural constitutional claims without first having to attempt to defend itself on the FTC's sharply tilted administrative playing field.

Axon contends that due to a secretive "clearance" process between the FTC and the Department of Justice's Antitrust Division, the company is being subjected to a structurally unconstitutional 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 if challenged, virtually always is upheld by the Commission itself.

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 the FTC's expansive authority to prevent unfair methods of competition and unfair or deceptive acts or practices, *see* 15 U.S.C. § 45(a)(1), and to initiate administrative enforcement actions, *id.* § 45(b), 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;[2] FTC Bureau of Competition & Dep't of Justice Antitrust Div., *Hart-Scott-Rodino Annual Report, Fiscal Year 2019* (July 2020), 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);[3] *see also* Michael B. Bernstein et al. (Arnold & Porter), *What To Expect In 2021 Merger Enforcement: Trends and Developments From 2020*, at 3 ("US antitrust enforcement officials continued to be aggressive in

[2] https://tinyurl.com/y52bxaje (last visited July 16, 2021).

[3] Available at https://tinyurl.com/2s9u5bw7.

2020 in what the FTC itself described as 'an unprecedented' number of merger challenges").[4]

The FTC's aggressive enforcement policies have attracted the Supreme Court's attention. *See, e.g.*, *AMG Cap. Mgmt., LLC v. FTC*, 141 S. Ct. 1341 (2021) (holding that § 13(b) of the FTC Act, 15 U.S.C. § 53(b), which authorizes the FTC to seek injunctions, does not also authorize the FTC to seek, or courts to award, equitable monetary relief such as restitution or disgorgement of profits).

Last year in *Seila Law*, the Court described another independent federal regulatory agency, the Consumer Financial Protection Bureau (CFPB), as one that "wields vast rulemaking, enforcement, and adjudicatory authority over a significant portion of the U. S. economy." 140 S. Ct. at 1291. 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 Ninth Circuit panel majority acknowledged here, the FTC is among "an array of quasi-independent executive agencies that . . . wield tremendous enforcement power." App-1–App-2. "[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." App-2; *see also* Bernstein, *supra*, at 5

[4] Available at https://tinyurl.com/fe5ssfd3.

("FTC's Continued Preference for Administrative Proceedings"); *id.* at 9 ("FTC Found Success In Administrative Actions"); Angel Reyes & Benjamin Hunter, *Does the FTC Have Blood On Its Hands? An Analysis of FTC Overreach and Abuse of Power After Liu*, 68 Buff. L. Rev. 1481, 1512 (2020) ("The FTC's power has grown to an unacceptable and lethal level. . . . The damage that has been caused to businesses and private citizens . . . has been far too high of a cost for the benefit that the country has received in return.").

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." 140 S. Ct. at 2192; *see also Collins*, 141 S. Ct. at 1784 (holding that "a straightforward application of our reasoning in *Seila Law* dictates" the conclusion that the Housing and Economic Recovery Act's restriction on the President's power to remove the single Director of the Federal Housing Finance Agency is unconstitutional); *Free Enterprise Fund*, 561 U.S. at 484 (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"). In *Collins* the Court explained that describing a federal agency as "'independent' . . . does not necessarily connote

independence from Presidential control." 141 S. Ct. at 1783.

As Axon's petition indicates, the jurisdictional issue raised by this appeal is tethered to the underlying threshold question of whether 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 Court held unconstitutional in *Seila Law*, and more recently, in *Collins*. 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." App-25 (emphasis added). The majority 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." App-11, App-26 (emphasis added).

Nonetheless, the panel majority opinion held 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." App-26. 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." App-18.

Although this case involves an FTC-compelled divestiture, the panel's broad holding is not limited to antitrust-related enforcement proceedings. It also encompasses FTC administrative enforcement actions in the consumer protection area. *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 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." App-10.

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. 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.

B. The Ninth Circuit panel majority's strikingly ambivalent opinion cries out for further review

In *Free Enterprise Fund*, this 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.

App-25 (emphasis added). This fragile conclusion, and the majority opinion's many additional expressions of ambivalence, beg for this Court's 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." App-5, App-11–App-12 (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." App-16.

- "[I]f we were writing on a clean slate, we would agree with the dissent." App-18.

- "[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." App-19.

- "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." App-20.

- "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." App-23.

- "Axon's constitutional claims are arguably 'wholly collateral' to the enforcement proceeding." App-21.

- "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." App-25.

- "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." App-26.

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 explained that although "this case appears to be a weighty constitutional one,"

> 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.

App-29 (Bumatay, J., dissenting).

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

The majority opinion purports to "agree 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." App-25 (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: Instead, *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.'" *Bennett*, 844 F.3d at 183 n.7 (quoting *Thunder Basin*, 510 U.S. at 212-13) (emphasis added). This 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* App-3) 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." App-29 (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* App-13-App-14, App-19, App-27. 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." App-21; *see also* App-25. "Under this statutory scheme, Axon's claim might never make it to an Article III judge." App-36 (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, *Remarks at the [FTC] Symposium on Section 5 of the FTC Act* (Feb. 26, 2015), at 6-7 (emphasis added);[5] *see also* App-37 (Bumatay, J., dissenting) (if Axon settles, it "will still have been injured by the clearance process but have no cease-and-desist order to appeal its claim").

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 *meaningful* judicial review. As the dissenting opinion explains, "the majority misapplies [Supreme] Court precedent and ignores the injuries Axon is trying to vindicate." App-29.

Free Enterprise Fund is an apt example of a case 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 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

[5] Available at https://tinyurl.com/3ubckwyh.

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* App-10. 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 because 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 tin 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." App-13–App14. 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. . . . [W]hile 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).[6] 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

[6] Available at https://tinyurl.com/srvybp56.

claims. Here, for example, 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 structural constitutional claims that Axon asserts here—claims which are backed by this Court's precedent—much of the harm from an administrative enforcement proceeding that almost certainly 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.

Amici believe 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." App-34 (Bumatay, J., dissenting).

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

ILYA SHAPIRO
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, D.C. 20001
(202) 842-0200
ishapiro@cato.org

LAWRENCE S. EBNER
Counsel of Record
ATLANTIC LEGAL FOUNDATION
1701 Penn. Ave., N.W.
Washington, D.C. 20006
(202) 729-6337
lawrence.ebner@atlanticlegal.org

Counsel for Amici Curiae

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