No. 20-15662

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AXON ENTERPRISE, INC., a Delaware Corporation,

Plaintiff-Appellant,

v.

FEDERAL TRADE COMMISSION, *et al*.,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Arizona
No. 2:20-cv-00014
Hon. Dominic Lanza

BRIEF OF *AMICI CURIAE* AMERICANS FOR PROSPERITY FOUNDATION AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PLAINTIFF-APPELLANT'S PETITION FOR REHEARING *EN BANC*

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March 23, 2021

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INTEREST OF *AMICI CURIAE*[1]

Amicus curiae Americans for Prosperity Foundation ("AFPF") is a 501(c)(3) nonprofit organization committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. One of those ideas is that the separation of powers protects liberty. As part of this mission, it appears as *amicus curiae* before federal and state courts.

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[1] All parties have consented to the filing of this brief. Pursuant to FRAP 29(a)(4)(E), *amici curiae* state that no counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amici curiae*, the Chamber's members, or *amici*'s counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

It should not be the law that an agency can do whatever it wants for as long as it wants to a business—no matter how *ultra vires*, abusive, or unconstitutional—without being subject to review by a court unless and until that abusive process ends. The panel majority here recognized as much: "it seems odd to force a party to raise constitutional challenges before an agency that cannot decide them." *Axon Enterprise, Inc. v. FTC*, 986 F.3d 1173, 1183 (2021) (reproduced in Petitioner's Addendum, hereinafter "Add."). "[I]t 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." Add. 1184.

Nonetheless, the divided panel mistakenly found it lacked jurisdiction, departing from this Circuit's precedent in *Mace v. Skinner*, 34 F.3d 854 (9th Cir. 1994), which remains controlling, *see Miller v. Gammie*, 335 F.3d 889 (9th Cir. 2003), as well as the plain text of 15 U.S.C. § 45(c)–(d).

That was error for three reasons. *First*, the panel majority does not appear to have carefully analyzed the text and structure of the FTC Act, which does not impliedly preclude district court jurisdiction over Axon's claims. The panel majority should have applied all traditional tools of statutory interpretation, including canons

of construction, instead of looking to out-of-Circuit decisions involving the SEC Act to conclude otherwise.

Second, Supreme Court precedent does not compel "preclusion" here, as even under the panel majority's weighing of the so-called "*Thunder Basin* factors," the factors pointed in different directions. *See* Add. 1186–87. Indeed, the majority found two of the three factors were "cloaked in ambiguity." Add. 1186.

Third, further administrative consideration of Axon's constitutional claims serves no purpose. As the panel majority itself highlighted, the FTC—which acts as investigator, prosecutor, and adjudicator—invariably finds in favor of itself. *See* Add. 1187. The Commission has already ruled against Axon on the merits of its Article II claim. And the FTC's administrative machinery does not allow Axon to meaningfully pursue its due process and equal protection claims, including by barring discovery necessary to develop a factual record on Axon's clearance process claim.

It is a troubling state of affairs when all three judges on a merits panel seem to agree that Axon raised substantial constitutional claims about the very validity of FTC administrative proceedings, yet Axon is prevented from pursuing those claims without first subjecting itself to those proceedings. That is especially true here, where a motions panel unanimously *granted* Axon's stay motion. *See* Order, *Axon Enterprises, Inc. v. FTC*, No. 20-15662, Dkt. 40 (9th Cir. Oct. 2, 2020). That

necessarily meant that all three judges thought Axon met its burden under the stay factors. *See Nken v. Holder*, 556 U.S. 418, 433–34 (2009). It is odd to prevent Axon from pursuing its claims under these circumstances.

This Court should grant rehearing en banc to correct this result and reaffirm that the U.S. Constitution and the rule of law transcend any perceived benefits of regulatory efficiency.

ARGUMENT

I. RECENT JURISDICTION-STRIPPING PRECEDENT BREAKS WITH HISTORICAL PRACTICE.

Until fairly recently,[2] many Circuits recognized that federal district courts could exercise Article III jurisdiction to enjoin administrative enforcement actions under at least two circumstances: where agency action is (1) patently unconstitutional or egregiously *ultra vires*; or (2) causing severe hardship. *See, e.g.*, *American Gen. Ins. Co. v. FTC*, 496 F.2d 197, 200 (5th Cir. 1974) (possible jurisdiction over "gross and egregious" errors); *Coca-Cola Co. v. FTC*, 475 F.2d 299, 303 (5th Cir. 1973) (possible jurisdiction over nonfrivolous constitutional claims); *Borden, Inc. v. FTC*, 495 F.2d 785, 786–87, 789 (7th Cir. 1974); *Sterling Drug, Inc. v. Weinberger*, 509 F.2d 1236, 1239 (2d Cir. 1975) (discussing possibility

[2] *Cf. LabMD, Inc. v. FTC*, No. 1:14-cv-00810-WSD, 2014 U.S. Dist. LEXIS 65090 (N.D. Ga. May 12, 2014) (not citing *Thunder Basin* or *Elgin*), *aff'd* 776 F.3d 1275 (11th Cir. 2015); *LabMD, Inc. v. FTC*, No. 13-15267, 2014 U.S. App. LEXIS 9802 (11th Cir. Feb. 18, 2014) (unpublished) (same).

of *Leedom* jurisdiction).[3] These decisions set a high bar but recognize that courts do not abdicate their Article III role merely because a case is related to administrative proceedings.

This approach makes sense. As Judge Jed Rakoff explained in finding jurisdiction over an equal-protection clause challenge to an SEC enforcement action, frivolous claims can be screened out at the motion to dismiss stage. *See Gupta v. SEC*, 796 F. Supp. 2d 503, 514 (S.D.N.Y. 2011). And respondent-plaintiffs cannot derail ongoing administrative proceedings by obtaining an injunction unless they can show they are "likely to succeed on the merits." *See Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008). At the least, the district courts should look at the *merits* of constitutional or non-statutory *ultra vires* claims before dismissing them.

Here, the motions panel unanimously recognized the possibility that Axon's claims are meritorious, and that it is facing irreparable harm. *See* Order, *Axon Enterprises, Inc. v. FTC*, No. 20-15662, Dkt. 40 (9th Cir. Oct. 2, 2020). And the merits panel seemed to agree that at least some of Axon's claims presented serious constitutional questions. *See* Add. 1187. But it erred by holding that the district court lacked jurisdiction to adjudicate these claims on the merits. *See Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 561 U.S. 477, 489–91

[3] This Circuit, too, does not appear to have foreclosed the possibility of district court jurisdiction. *See Ukiah Valley Med. Ctr. v. FTC*, 911 F.2d 261, 266 n.5 (9th Cir. 1990); *Lone Star Cement Corp. v. FTC*, 339 F.2d 505, 510 (9th Cir. 1964).

(2010); *Bell v. Hood*, 327 U.S. 678, 684 (1946) ("[I]t is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution[.]").

II. COURTS HAVE JURISDICTION OVER CONSTITUTIONAL AND *ULTRA VIRES* CHALLENGES TO ADMINISTRATIVE ENFORCEMENT ACTIONS.

The panel decision warrants review because it shuts the courthouse doors to claims over which district courts have express federal-question jurisdiction. Section 1331 states that "district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331; *see also id.* § 1361 (mandamus). The Declaratory Judgment Act authorizes declaratory and injunctive relief.[4] *See* 28 U.S.C. §§ 2201, 2202. To be sure, Congress may statutorily limit the subject-matter jurisdiction of federal courts. *See* U.S. Const. Art. III, § 2; *see also* 5 U.S.C. § 703. But if Congress wants to do that, it must clearly say so. *See Arbaugh v. Y & H Corp.*, 546 U.S. 500, 510 (2006). Without a clear statement by Congress that a statute bars the courthouse doors, "courts should treat the restriction as nonjurisdictional in character." *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013) (cleaned up).

[4] In addition, under the All Writs Act, courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a).

Here, Congress has not clearly stated an intent to shut the courthouse doors to all of Axon's claims. The FTC Act's judicial review provision creates only a limited exception to the general rule of district-court jurisdiction by providing jurisdiction in the Courts of Appeals to review "an order of the Commission to cease and desist from using any method of competition or act or practice." 15 U.S.C. § 45(c). "Upon the filing of the record," that jurisdiction "to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive." 15 U.S.C. § 45(d). No other straight-to-the-Court-of-Appeals process is provided to transfer jurisdiction away from the district court when the case presents itself in another posture.

No exception to ordinary jurisdiction of the federal courts can be inferred from this narrow exclusive jurisdiction provision in the FTC Act. *See* Antonin Scalia & Bryan Garner, *Reading Law* 107 (2012). As a federal district court explained:

> Section 45(d) does not grant to courts of appeals any jurisdiction exclusive or otherwise . . . until a cease and desist order has issued. Consequently, that section cannot be interpreted to deprive this Court of jurisdiction to review any orders issued or actions taken by the FTC when a cease and desist order has not yet been issued.

E. I. Du Pont de Nemours & Co. v. FTC, 488 F. Supp. 747, 750 (D. Del. 1980); *see Boise Cascade Corp. v. FTC*, 498 F. Supp. 772, 777 (D. Del. 1980) ("[N]othing in the [FTC] Act suggests that courts of appeals have exclusive jurisdiction over agency actions prior to the issuance of a cease and desist order.") (citation omitted). *Cf. La. Real Estate Appraisers Bd. v. FTC*, 917 F.3d 389, 391, 394 (5th Cir. 2019) (similar).

Rather, the FTC Act quite sensibly places exclusive jurisdiction in the Courts of Appeals when a suit involves a challenge to an FTC cease or desist order—the role of the court in such circumstances is more akin to that of an appellate court and, given the administrative proceedings that have already occurred, going straight to the court of appeals allows for more prompt completion of judicial review. But this path for exclusive review of a particular type of agency order indicates nothing about the availability of judicial review for other claims involving the agency.

The Supreme Court has explained how a textually similar judicial review provision works *with* other statutes, not against them: "[T]he text does not expressly limit the jurisdiction that other statutes confer on district courts. Nor does it do so implicitly." *Free Enter. Fund*, 561 U.S. at 489. So too here.[5] *See also Tilton v. SEC*, 824 F.3d 276, 299 n.6 (2d Cir. 2016) (Droney, J., dissenting). The FTC Act provides for jurisdiction channeling to the Courts of Appeals of claims challenging an FTC cease and desist order; it otherwise leaves in place district courts' general federal-question jurisdiction. And indeed, district courts have a "virtually unflagging" obligation to decide cases within their jurisdiction. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014).

[5] According to the panel majority, "[t]his provision [15 U.S.C. § 45] is almost identical to the statutory review provision in the SEC Act[.]" Add. 1180.

If the FTC scheme is unconstitutional, it is unconstitutional. Let the chips fall where they may. But it is no answer to "allow the agency to duck and weave its way out of meaningful judicial review" of that question. *See Fleming v. USDA*, 987 F.3d 1093, 1111 (D.C. Cir. 2021) (Rao, J., concurring in part, dissenting in part). Forcing Axon through a protracted and expensive unconstitutional administrative process "before [it] may assert [its] constitutional claim in a federal court means that by the time the day for judicial review comes, [it] will already have suffered the injury that [it is] attempting to prevent." *Tilton*, 824 F.3d at 298 (Droney, J., dissenting).

III. CASE LAW DOES NOT BAR THE COURTHOUSE DOORS.

The panel decision is rooted in a misinterpretation and expansion of *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), and *Elgin v. Department of Treasury*, 567 U.S. 1 (2012). *Thunder Basin* and *Elgin* were both rooted in implied congressional intent. The principles they announce cannot be transplanted from old soil to new without an assessment of the congressional intent embodied there. And that assessment of the FTC Act confirms that Congress did not intend to preclude Axon from raising its claims in federal district court. Nothing in *Thunder Basin* or *Elgin* compels otherwise.

The FTC Act's history and structure is significantly different from that of the statutes at issue in *Thunder Basin* and *Elgin*. In *Thunder Basin*, for example, the Mine Act's history shows Congress specifically intended to *narrow* the scope of

district court review. *See* 510 U.S. at 209–11 & n.15 (noting Congress amended the Act to eliminate district court review and finding "the legislative history and these amendments to be persuasive evidence that Congress intended to" preclude judicial review). Similarly, Congress intentionally *narrowed* the scope of district court jurisdiction when it enacted the Civil Service Reform Act ("CSRA"), the statute at issue in *Elgin*. *See* 567 U.S. at 11–12. The FTC Act's history includes no similar history. The Mine Act also allowed aggrieved mine operators to initiate actions before the Commission, not just the Secretary. *Thunder Basin*, 510 U.S. at 209. And the CSRA set forth in "painstaking detail . . . the method for covered employees to obtain review of adverse employment actions[.]" *Elgin*, 567 U.S. at 11–12. By contrast, entities like Axon have no ability to obtain review of their constitutional challenges to the FTC's authority through the FTC Act scheme unless and until the FTC issues a cease and desist order against them. Moreover, the Mine Act involved administrative proceedings before an independent commission (rather than the agency enforcing the Mine Act), *see Thunder Basin*, 510 U.S. at 204, and the CSRA involved actions by the government as an employer, rather than a regulator, *see United States v. Fausto*, 484 U.S. 439, 443–47 (1988). Those are different animals from inhouse enforcement proceedings brought by administrative agencies, particularly when those enforcement proceedings are interfering with private rights.

Thunder Basin itself confirms that the panel's decision was erroneous. There, the Court emphasized that preclusion does not apply to claims that are "wholly collateral to a statute's review provisions and outside the agency's expertise, particularly where a finding of preclusion could foreclose all meaningful judicial review." *Thunder Basin*, 510 U.S. at 213 (cleaned up). Nor does it preclude all constitutional claims. *See id.* at 216–18; *Ironridge Global IV, Ltd. v. SEC*, 146 F. Supp. 3d 1294, 1303 n.5 (N.D. Ga. 2015) ("[S]ince *Thunder Basin*, other courts have held that the Mine Act does not preclude all constitutional claims from district court jurisdiction.") (citing *Elk Run Coal Co. v. Dep't of Labor*, 804 F. Supp. 2d 8, 19 (D.D.C. 2011) (finding the Mine Act did not preclude "broad constitutional challenges" from district court jurisdiction, and stating *Thunder Basin* supported such a finding)). Yet here, the panel found Axon's constitutional claims precluded even though they are collateral to the enforcement proceeding and the FTC lacks agency expertise or authority to address them. *Cf. Free Enter. Fund*, 561 U.S. at 491 & n.2 (noting that "Petitioners' constitutional claims are . . . outside the Commission's competence and expertise").

The panel opinion essentially read *Thunder Basin* as setting forth a one-factor test, not a three-factor test. And in doing so, it emphasized the one factor that is *least* relevant to the implied preclusion question that the factors are meant to address: Did Congress intend, by enacting this statute, to foreclose ordinary routes of judicial

review? The fact that Congress provided an opportunity for eventual judicial review through an administrative proceeding sheds little light on that question, given that Congress routinely creates duplicative routes to judicial review. The relationship between the claims, the statutory scheme, and the agency's expertise are a far better guide to congressional intent in this context. There is very little reason to believe that Congress would have intended regulated parties to be deprived of all opportunity to present constitutional claims that are collateral to a statutory scheme and do not require any agency expertise merely because those parties are regulated by an agency. The panel's overreading of *Elgin* seems to have led them astray from this basic point.

IV. EXHAUSTION BEFORE THE FTC IS FUTILE FOR AXON.

As the panel majority observed, "Axon raises legitimate questions about whether the FTC has stacked the deck in its favor in its administrative proceedings. . . . 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." *See* Add. 1187. Axon is correct. Allowing the administrative proceeding to continue without resolving Axon's claims serves no legitimate purpose.

With respect to Axon's Article II claims, the Commission lacks relevant expertise and has already decided the issue against Axon. *See* Order, *In re Axon*

Enterprise, F.T.C. No. 9389 (Sept. 3, 2020). Further administrative consideration of Axon's equal protection and due process claims would serve no purpose.

As Judge Rakoff observed in the course of finding jurisdiction over an equal-protection claim in the SEC context similar to Axon's here:

> [T]he SEC's administrative machinery does not provide a reasonable mechanism for raising or pursuing such a claim. The SEC's Rules of Practice do not permit counterclaims against the SEC, nor do they allow the kind of discovery of SEC personnel that would be necessary to elicit admissible evidence corroborative of such a claim. The Commission, having approved the OIP . . . would be inherently conflicted in assessing such a claim, and, at a minimum, Gupta would be forced to endure the very proceeding he alleges is the device by which unequal treatment is being visited upon him.

Gupta, 796 F. Supp. 2d at 513–14 (cleaned up).

So too here. FTC inhouse precedent bars inquiry into the circumstances of the pre-complaint investigation and reasons why a complaint is issued, stating these matters "will not be reviewed by the courts." *See In re Exxon Corp*., 83 F.T.C. 1759, 1974 FTC LEXIS 226, at *2–3 (June 4, 1974). This limitation on the scope of discovery, *see also* 16 C.F.R. § 3.31(c)(1)–(2), prevents respondents like Axon from obtaining evidence necessary to substantiate potentially meritorious constitutional defenses. *See* Order, *In re Axon Enter*., F.T.C. No. 9389, 2020 FTC LEXIS 124, at *4 (July 21, 2020) (denying "discovery into the decision-making process that culminated in the FTC, rather than the DOJ, taking enforcement action against Axon"); Order, *In re Axon Enter*., F.T.C. No. 9389, 2020 FTC LEXIS 127 (July 21,

2020) (denying discovery as to clearance process); *see also* Order, *In re LabMD*, F.T.C. No. 9357, 2014 FTC LEXIS 35, at *9 n.3 (Feb. 21, 2014) ("[A]pplicable precedent holds that the Commission's decision making in issuing a complaint is outside the scope of discovery in . . . administrative litigation[.]"). Thus, Axon cannot possibly obtain the information it needs to show an equal protection or due process violation until the conclusion of the administrative process.

Nor do FTC's Rules even obligate complaint counsel to provide exculpatory evidence to Axon. This is because FTC, unlike other agencies, has resisted incorporating the *Brady* rule into its administrative adjudication scheme.[6] *See, e.g.*, *Amrep Corp.*, 102 F.T.C. 1362, 1371 (1983); *see also* Justin Goetz, Note, *Hold Fast the Keys to the Kingdom: Federal Administrative Agencies and the Need for* Brady *Disclosure*, 95 Minn. L. Rev. 1424, 1433 & n.63 (2011).

Unsurprisingly, then, as the panel majority recognized: "Axon claims—and FTC does not appear to dispute—that FTC has not lost a single case in the past

[6] In 2009, FTC amended its Rules of Practice to grab powers that had been previously exercised by the independent ALJ. 74 Fed. Reg. 1,804, 1,808–11 (Jan. 13, 2009). Under these changes, the same Commission that votes out the Complaint (not the ALJ) decides dispositive motions, *see* 16 C.F.R. § 3.22(a), and has greater case-management authority. *See* Initial Decision, *In re LabMD, Inc.*, F.T.C. No. 9357, 2015 FTC LEXIS 272, at *6 n.1 (Nov. 13, 2015). The FTC Rules now allow so-called "reliable" hearsay, including from "investigational hearings" that a respondent may not have been represented at or known of. *See* 16 C.F.R. § 3.43.

quarter-century. Even the 1972 Miami Dolphins would envy that type of record." *See* Add. 1187. As a former FTC Commissioner has explained:

> The FTC has voted out a number of complaints in administrative adjudication that have been tried by administrative law judges in the past nearly twenty years. In each of those cases, after the administrative decision is appealed to the Commission, the Commission has ruled in favor of FTC staff and found liability. In other words, 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 ruled found no liability, the Commission reversed.

Joshua D. Wright, Commissioner, FTC, *Section 5 Revisited: Time for the FTC to Define the Scope of Its Unfair Methods of Competition Authority*, 6 (Feb. 26, 2015), *available at* http://bit.ly/2c3FSYZ. He concluded, "This is a strong sign of an unhealthy and biased institutional process. . . . Even bank robbery prosecutions have less predictable outcomes than administrative adjudication at the FTC." *Id.*

And while the ALJ may find in favor of respondents from time to time, it is the Commission—the same body that votes out the complaint—that always seems to find in favor of FTC staff.[7] This process presents additional unfairness for businesses: For unlike in federal court, where appellate courts generally give deference to district court factual findings, the Commission reviews the ALJ's

[7] The Supreme Court has held that "an unconstitutional potential for bias exists when the same person serves as both accuser and adjudicator in a case." *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1905 (2016).

factual findings and "inferences drawn from those facts" *de novo*, *see McWane, Inc.*, F.T.C. No. 9351, 2014 FTC LEXIS 28, at *30 (Jan. 30, 2014); 16 C.F.R. § 3.54, and it is the *Commission's* factual findings that are then subject to deference in the Court of Appeals, s*ee generally Schering-Plough Corp. v. FTC*, 402 F.3d 1056, 1062–63 (11th Cir. 2005).

Requiring Axon to proceed through this process before it can obtain a ruling on its constitutional claims—which numerous federal judges have already recognized as substantial—is neither fair nor required by law. This Court should grant Axon's petition to make clear that the federal courts remain open for business to protect constitutional rights and that Axon need not spend millions of dollars going through FTC's rigged Thunderdome just to get its day in court.

CONCLUSION

This Court should grant Axon's petition.

Respectfully submitted,

/s/ Michael Pepson

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CERTIFICATE OF COMPLIANCE

This brief contains 3,911 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) because it was prepared using Microsoft Word 2013 in Times New Roman 14-point font.

I certify that this brief is an amicus brief and complies with the word limit of Cir. R. 29-2(c)(2).

/s/ Michael Pepson
Michael Pepson

Dated: March 23, 2021

CERTIFICATE OF SERVICE

I hereby certify that on March 23, 2021, I electronically filed the above Brief of Amici Curiae Americans for Prosperity Foundation and the Chamber of Commerce of the United States of America in Support of Plaintiff-Appellants and Reversal on Rehearing En Banc with the Clerk of the Court by using the appellate CM/ECF system. I further certify that service will be accomplished by the appellate CM/ECF system.

/s/ Michael Pepson
Michael Pepson

Dated: March 23, 2021