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 a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF OF *AMICUS CURIAE* AMERICANS FOR PROSPERITY FOUNDATION IN SUPPORT OF PETITIONER

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## BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Under Supreme Court Rule 37.2, Americans for Prosperity Foundation ("AFPF") respectfully submits this *amicus curiae* brief in support of Petitioner.[1]

### INTEREST OF *AMICUS CURIAE*

*Amicus curiae* 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. As part of this mission, it appears as *amicus curiae* before federal and state courts. AFPF believes judicially created barriers to meaningful Article III review are inconsistent with the separation of powers. Those facing *ultra vires* or unconstitutional agency enforcement actions should not have to face years of potentially ruinous costs to have their day in court.

### 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 recognized as much: "it seems odd

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[1] All parties have consented to the filing of this brief after receiving timely notice. *Amicus curiae* states that no counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae* or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

to force a party to raise constitutional challenges before an agency that cannot decide them." App. 16. "[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." App. 18. Nonetheless, the divided panel mistakenly found it lacked jurisdiction, departing from the plain text of 15 U.S.C. § 45(c)–(d). Based on an all-too-common overreading of *Thunder Basin* and *Elgin*, the majority mistakenly believed itself bound to eschew review: "[I]f we were writing on a clean slate, we would agree with the dissent." App. 18.

This (mis)reading of this Court's precedent has caused hopeless confusion and intractable judicial disagreements in the lower courts across the nation on a recurring issue of immense practical importance that implicates the inhouse enforcement proceedings of an alphabet-soup of so-called "independent agencies" administering numerous statutory schemes. *See* Pet. 27 (collecting cases illustrating divergence of opinion). The decision below showcases this confusion. Even under the panel majority's weighing of the "*Thunder Basin* factors," the factors pointed in different directions. *See* App. 24. Indeed, the majority found two of the three factors were "cloaked in ambiguity." *See* App. 23. This Court's intervention is desperately needed to clarify for the lower courts the proper scope of the *Thunder Basin* line of cases.

Further delay serves no purpose. As the panel majority itself highlighted, the FTC—which acts as investigator, prosecutor, and judge—invariably finds in favor of itself. 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, and bars the 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 validity of FTC administrative proceedings, yet Axon is prevented from pursuing those claims without first subjecting itself to the very proceedings that it is challenging. Axon is left with no remedy on its constitutional claims, a situation inimical to the "settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 147 (1803).

This Court should also grant certiorari to resolve the second question presented by the Petition. Unlike petitions raising related issues *after* the petitioner already suffered the constitutional violations, this case does not require the Court to grapple with retrospective remedial doctrines. *See* Pet. 28, 33–34. Instead, FTC's inhouse prosecution of Axon has been stayed and Axon solely seeks prospective relief. *See* Pet. 18, 28, 33. Accordingly, the Petition provides an ideal vehicle to cleanly resolve this important constitutional question.

On the merits, the short answer to that constitutional question is plainly "no." The multi-tier removal protections for FTC's Chief ALJ do not pass constitutional muster; nor, in light of *Collins v. Yellen,*

141 S. Ct. 1761 (2021), does the for-cause removal protection the FTC Chair enjoys. At a minimum, the president must be able to remove FTC's "executive and administrative head"—the Chair—at will, so the People may oversee the FTC through the politically accountable president. After all, as Professor Aaron Nielson observed: "If the president must be directly responsible to the people of the United States for what the FHFA and the CFPB do, then why shouldn't the president also have to be equally responsible for what the FTC does?" Aaron L. Nielson, *Is the FTC on a Collison Course With the Unitary Executive?*, Yale Notice & Comment (July 2, 2021).[2] Worse, the combination of investigative, prosecutorial, and judicial functions in FTC's administrative process violates Axon's due process rights and Article III.

FTC's recent actions underscore why this Court's review is needed. Just last term, this Court unanimously rejected FTC's premeditated usurpation of Article I powers. *See AMG Capital Mgmt., LLC v. FTC,* 141 S. Ct. 1341 (2021). But FTC is intent on again bulldozing boundaries set by Congress and the Constitution. *See* Dissenting Statement of Comm'r Christine S. Wilson Regarding the Open Commission Meeting, 9 (July 1, 2021) ("[T]he Commission was just admonished by a unanimous Supreme Court in *AMG* regarding the interpretation of our authority. The response to that decision should not be a new concerted effort by the Commission to exceed the FTC's authority regarding the use of Section 5 of the

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[2] https://www.yalejreg.com/nc/is-the-ftc-on-a-collison-course-with-the-unitary-executive/

FTC Act.");[3] Dissenting Statement of Comm'rs Noah Joshua Phillips & Christine S. Wilson on "Statement of the Commission on the Withdrawal of the Statement of Enforcement Principles Regarding 'Unfair Methods of Competition' Under Section 5 of the FTC Act," 3 & n.6 (July 9, 2021).[4]

Members of Congress have also expressed "serious concerns about the partisan actions of" FTC in recent weeks "to consolidate agency power, unilaterally assert and expand regulatory authority, and abandon bipartisan and open processes," noting that "FTC is embarking on a rapid and concerted effort to upend long-standing bipartisan agency policy with little public notice or opportunity to participate." Letter from Ranking Members of House Judiciary, Oversight, and Energy and Commerce Committees to FTC, 1 (July 29, 2021) (partial list of actions).[5]

As FTC's post-*AMG* conduct confirms, if this Court does not act now, it may be too late to constitutionally corral FTC. *Thunder Basin* must not and does not stand in the way of that critical judicial review.

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[3]https://www.ftc.gov/system/files/documents/public_statements/1591554/p210100wilsoncommnmeetingdissent.pdf

[4]https://www.ftc.gov/system/files/documents/public_statements/1591710/p210100phillipswilsondissentsec5enforcementprinciples.pdf

[5]https://republicans-judiciary.house.gov/wp-content/uploads/2021/07/2021-07-29-JDJ-CMR-JC-to-FTC.pdf

## ARGUMENT

### I. THE FTC ACT DOES NOT IMPLIEDLY STRIP JURISDICTION OVER AXON'S CLAIMS.

#### A. Recent Jurisdiction-Stripping Precedent Breaks With Historical Practice.

Until fairly recently,[6] 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 (7th Cir. 1974); *Sterling Drug, Inc. v. Weinberger*, 509 F.2d 1236 (2d Cir. 1975). These decisions set a high bar but recognize courts do not abdicate their Article III role because a case is related to an administrative proceeding.

This approach makes sense by defending the courts' constitutional role while allowing for pretextual or frivolous claims to be dismissed. As Judge Jed Rakoff explained in finding jurisdiction

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[6] *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).

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. And the merits panel seemed to agree that at least some of Axon's claims presented serious constitutional questions. *See* App. 25–26. But it erred by holding 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 (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[.]").

### B. Courts Have Jurisdiction Over Constitutional and *Ultra Vires* Challenges to Administrative Enforcement Actions.

The panel decision warrants this Court's 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.[7] *See id.* §§ 2201, 2202. To be sure, Congress may statutorily limit the subject-matter jurisdiction of federal courts. *See* U.S. Const. Art. III, § 2; 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).

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." *Id.* § 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.

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[7] 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).

No exception to ordinary jurisdiction of the federal courts can be inferred from the narrow exclusive jurisdiction provision in the FTC Act for appeals from cease and desist orders. *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.

This 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.[8] *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. 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).

If the FTC scheme is unconstitutional, that is for the courts to decide—let the chips fall where they may. 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

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[8] 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[.]" App. 10.

to prevent." *Tilton*, 824 F.3d at 298 (Droney, J., dissenting).

### C. 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 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, not the Secretary, to initiate actions before the Commission. *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; *Sec'y of Labor v. Knight Hawk Coal, LLC,* 991 F.3d 1297, 1300 (D.C. Cir. 2021), 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 the panel's decision here 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.") (citation omitted)). Yet here, the

panel found Axon's constitutional claims precluded even though they are collateral to the enforcement proceeding, rely on superior law, and the FTC lacks expertise or authority to address these claims. *Cf. Free Enter. Fund*, 561 U.S. at 491 & n.2 (noting "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. 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 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.

## II. 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." App. 26. Axon is correct. Allowing the administrative proceeding to continue without resolving Axon's constitutional 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 likewise 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:

> [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[.]

*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.

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 quarter-century. Even the 1972 Miami Dolphins would envy that type of record." Pet. App. 26. 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, Comm'r, 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.[9] This process presents additional unfairness for businesses: For unlike in federal court, where appellate courts generally give deference to district court factual

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[9] This 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).

findings, the Commission reviews the ALJ's 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 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.

## III. FTC'S UNCONSTITUTIONAL STRUCTURE THREATENS INDIVIDUAL LIBERTY.

As Justice Jackson explained long ago, "[t]he rise of administrative bodies probably has been the most significant legal trend of the last century and perhaps more values today are affected by their decisions than by those of all the courts, review of administrative decisions apart. They also have begun to have important consequences on personal rights." *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting). Justice Jackson continued: "They have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories much as the concept of a fourth dimension unsettles our three-dimensional thinking." *Id.* So too here.

As Petitioner explains, *see* Pet. 29–32 & n.4, the FTC's structure violates Article II, and no amount of creative labeling can change this.[10] "Administrative agencies have been called quasi-legislative, quasi-executive or quasi-judicial, as the occasion required, in order to validate their functions within the separation-of-powers scheme of the Constitution." *FTC v. Ruberoid Co.*, 343 U.S. at 487 (Jackson, J., dissenting). But the FTC Chief ALJ must necessarily be an executive official, who cannot exercise the judicial power.[11] *See also* U.S. Const. Art. III, § 1; *FTC v. Eastman Kodak Co.*, 274 U.S. 619, 623 (1927) (FTC does not exercise "judicial powers"). No matter how one chooses to describe the work ALJs are tasked with doing, "under our constitutional structure they *must be* exercises of—the 'executive Power.'" *City of Arlington v. FCC*, 569 U.S. 290, 304 n.4 (2013) (citing U.S. Const. Art. II, §1, cl. 1); *see also Free Enterprise Fund*, 561 U.S. at 514); *id.* at 516 (Breyer, J., dissenting). And as the panel majority explained, "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

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[10] FTC's combination of investigative, prosecutorial, and adjudicative functions is also unconstitutional, *see* Pet. 29–35; *Williams*, 136 S. Ct. at 1905, as is its "preclearance" process. If FTC wants to prosecute Axon to deprive it of private property rights, Article III and due process require FTC to do so in federal court. *See also United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1993 (2021) (Gorsuch, J., concurring in part, dissenting in part).

[11] This is no reflection on the character, competence, integrity, and impartiality of the FTC Chief ALJ, who is highly respected.

theoretically remain accountable to the President and the people." App. 25.

So too must the unelected FTC Chair, the "executive and administrative head of the agency" who recently assumed the power of "Chief Presiding Officer" at FTC rulemakings, remain accountable to the president.[12] *See* Revisions to Rules of Practice, Final Rule, 86 Fed. Reg. 38,542, 38,546 (July 22, 2021) (§ 0.8 The Chair). Indeed, the President has issued an Executive Order "encouraging" the "Chair of the FTC" to engage in a host of major regulatory activities, providing for the Chair's inclusion on a "White House Competition Council within the Executive Office of the President." *See Executive Order on Promoting Competition in the American Economy*, §§ 4(a),(f),(g), 5(b)-(i) (July 9, 2021).[13] Plainly, the Chair has assumed the mantle of FTC's top officer.[14] This recent consolidation of power in a single person makes it

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[12] *See generally* Dissenting Statement of Comm'rs Christine Wilson and Noah Phillips Regarding the Commission Statement On the Adoption of Revised Section 18 Rulemaking Procedures (July 9, 2021) (discussing Chair's arrogation of broad new powers on party-line 3-2 vote), https://www.ftc.gov/system/files/documents/public_statements/1591702/p210100_wilsonphillips_joint_statement_-_rules_of_practice.pdf

[13]https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/

[14] *See also* Joshua D. Wright, *Lina Khan Is Icarus at the FTC*, WSJ (July 21, 2021) ("With the announcement of a global gag order on FTC staff, Ms. Khan has made it clear the FTC will now speak with one voice—hers."), https://www.wsj.com/articles/lina-khan-ftc-monopoly-big-tech-11626108008

even more critical that the President be able to supervise and be politically accountable for the Chair's actions. *But see* 15 U.S.C. § 41.

To be sure, "the nature and breadth of an agency's authority is not dispositive in determining whether Congress may limit the President's power to remove its head." *Collins*, 141 S. Ct. at 1768. And "the constitutionality of removal restrictions" does not "hinge[]" on "the relative importance of the regulatory and enforcement authority" of the agency. *See id.* at 1785. But it is undeniable that the FTC wields great power. And it is a constitutional imperative that, at the least, FTC Chair be removable at will. For "the Constitution prohibits even 'modest restrictions' on the President's power to remove the head of an agency with a single top officer." *Id.* at 1787; *see also Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 537 F.3d 667, 692 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) ("[T]he constitutional text and the original understanding, including the Decision of 1789, established that the President possesses the power under Article II to remove officers of the Executive Branch at will."), *overruled*, 561 U.S. 477 (2010).

That is because "[t]he entire 'executive Power' belongs to the President alone." *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2197 (2020); *see* U.S. Const. Art. II, § 1. And "[t]he buck stops with the President[.]" *Free Enter. Fund*, 561 U.S. at 493; *see id.* at 497–98. For "[w]ithout presidential responsibility there can be no democratic accountability for executive action." *Arthrex*, 141 S. Ct. at 1988 (Gorsuch, J., concurring in part, dissenting in part). After all, "agencies . . . have political accountability, because they are subject to the

supervision of the President, who in turn answers to the public." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2413 (2019). And "because the President, unlike agency officials, is elected," the President's removal power "is essential to subject Executive Branch actions to a degree of electoral accountability." *Collins,* 141 S. Ct. at 1784.

Conversely, "[i]n the case of a removal defect, a wholly unaccountable government agent asserts the power to make decisions affecting individual lives, liberty, and property. The chain of dependence between those who govern and those who endow them with power is broken." *Id.* at 1797 (Gorsuch, J., concurring in part). Indeed, "[i]f anything, removal restrictions may be a greater constitutional evil than appointment defects. . . . It is the power to supervise—and, if need be, remove—subordinate officials that allows a new President to shape his administration and respond to the electoral will that propelled him to office." *Id.* at 1796 (Gorsuch, J., concurring in part). That is because "[f]ew things could be more perilous to liberty than some 'fourth branch' that does not answer even to the one executive official who is accountable to the body politic." *Id.* at 1797 (Gorsuch, J., concurring in part) (citing *FTC v. Ruberoid Co.*, 343 U.S. at 487 (Jackson, J., dissenting)); *see also City of Arlington*, 569 U.S. at 313–14 (Roberts, C.J., dissenting). Such is the case here.

## IV. AXON'S PETITION PROVIDES AN IDEAL VEHICLE TO REPUDIATE *HUMPHREY'S EXECUTOR*.

"*Humphrey's Executor* poses a direct threat to our constitutional structure and, as a result, the liberty of the American people." *Seila Law*, 140 S. Ct. at 2211

(Thomas, J., concurring in part and dissenting in part). "Continued reliance on *Humphrey's Executor* to justify the existence of independent agencies creates a serious, ongoing threat to our Government's design. Leaving these unconstitutional agencies in place . . . subverts political accountability and threatens individual liberty." *Id.* at 2218–19 (Thomas, J., concurring in part and dissenting in part).

Axon's Petition squarely presents this Court with an opportunity to "repudiate what is left of this erroneous precedent." *Id.* at 2212 (Thomas, J., concurring in part and dissenting in part). When this Court "revisits a precedent[,] this Court has traditionally considered the quality of the decision's reasoning; its consistency with related decisions; legal developments since the decision; and reliance on the decision." *Ramos v. Louisiana*, 140 S. Ct. 1390, 1405 (2020) (cleaned up). Each of these factors weigh in favor of jettisoning *Humphrey's*.

To begin with, *Humphrey's* was poorly reasoned, and its constitutional holding has only become lonelier with time. *See generally Seila Law*, 140 S. Ct. at 2211–19 (Thomas, J., concurring in part and dissenting in part). "*Humphrey's Executor* laid the foundation for a fundamental departure from our constitutional structure with nothing more than handwaving and obfuscating phrases such as 'quasi-legislative' and 'quasi-judicial.'" *Id.* at 2216 (Thomas, J., concurring in part and dissenting in part). It "relies on one key premise: the notion that there is a category of 'quasi-legislative' and 'quasi-judicial' power that is not exercised by Congress or the Judiciary, but that is also not part of 'the executive power vested by the Constitution in the President.'"

*Id.* (Thomas, J., concurring in part and dissenting in part). "The problem is that the [*Humphrey's*] Court's premise was entirely wrong." *Id.* (Thomas, J., concurring in part and dissenting in part). Under our Constitution, "Congress [cannot] create agencies that straddle multiple branches of Government"; unaccountable, "[f]ree-floating agencies" like the FTC "simply do not comport with th[e] constitutional structure." *See id.* (Thomas, J., concurring in part and dissenting in part). That alone should end the matter.

*Humphrey's* also rested on plainly erroneous factual assumptions. The *Humphrey's* Court placed great weight on its view that the FTC's "duties are neither political nor executive, but predominantly quasi-judicial and quasi-legislative." *Humphrey's Ex'r v. United States*, 295 U.S. 602, 624 (1935); *see also id.* at 628. "*Humphrey's Executor* permitted Congress to give for-cause removal protections to a multimember body, balanced along partisan lines, that performed legislative and judicial functions *and was said not to exercise any executive power*." *Seila Law*, 140 S. Ct. at 2199 (emphasis added). But *Humphrey's* "conclusion that the FTC did not exercise executive power has not withstood the test of time." *Id.* at 2198 n.2. Regardless of whether that was the case in 1935 when *Humphrey's* was decided, it certainly does not hold true today. *See* Daniel Crane, *Debunking* Humphrey's Executor, 83 Geo. Wash. L. Rev. 1835 (2015). *Cf. Morrison v. Olson*, 487 U.S. 654, 689 n.28 (1988) ("[I]t is hard to dispute that the powers of the FTC at the time of *Humphrey's Executor* would at the present time be considered 'executive,' at least to some degree."); *id.* at 706 (Scalia, J., dissenting). These assumptions become even less true

with each consolidation of power in a single person, rendering the notion of "multimember body, balanced along partisan lines" increasingly mythical.

"[I]t is not clear what is left of *Humphrey's Executor*'s rationale. But if any remnant of that decision is still standing, it certainly is not enough to justify the numerous, unaccountable independent agencies that currently exercise vast executive power outside the bounds of our constitutional structure." *Seila Law*, 140 S. Ct. at 2218 (Thomas, J., concurring in part and dissenting in part). Indeed, in *Seila Law*, this "Court . . . repudiated almost every aspect of *Humphrey's Executor*." *Id.* at 2212 (Thomas, J., concurring in part and dissenting in part). This Court should no longer "giv[e] [it] the veneer of respectability," *Gamble v. United States*, 139 S. Ct. 1960, 1981 (2019) (Thomas, J., concurring). *Humphrey's* day has come.

Both questions presented by the Petition merit this Court's review, and this case also presents a clean and timely vehicle to prune *Humphrey's Executor*. After all, "[o]ne can have a government that functions without being ruled by functionaries, and a government that benefits from expertise without being ruled by experts." *Free Enter. Fund*, 561 U.S. at 499.

## CONCLUSION

This Court should grant Axon's petition.

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