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, A FEDERAL ADMINISTRATIVE AGENCY, *ET AL.*,

Defendants-Appellees.

On Appeal from the United States District
Court for the District of Arizona
(Case No. 2:20-cv-00014-DWL)
(District Judge Dominic W. Lanza)

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* SUPPORTING REHEARING *EN BANC*

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INTEREST OF *AMICUS CURIAE*[*]

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It often appears as *amicus* opposing the accumulation of power in any one governmental branch, which violates the Constitution's careful separation of powers. *See, e.g.*, *Lucia v. SEC*, 138 S. Ct. 2044 (2018); *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477 (2010).

INTRODUCTION

Litigation is not cheap. Whether it occurs before an arbiter, an agency, or a federal court, litigation comes with a high price tag. And antitrust litigation higher still. Unlike the Federal Government—which continues to print money—private companies have scarce resources to risk. The panel's decision here, however, pretends that Axon has an unlimited litigation budget to pursue its meritorious constitutional challenges to the Federal Trade Commission's administrative process.

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[*] No party's counsel authored any part of this brief. No one, apart from WLF and its counsel, contributed money intended to fund the brief's preparation or submission. All parties consented to WLF's filing this brief.

Axon makes body-worn cameras and digital evidence management systems for law enforcement. It acquired a failing competitor for around $13 million. ER 133. But no good deed goes unpunished. The FTC soon began investigating the deal. Axon spent over $1.6 million satisfying the FTC's onerous investigatory demands. *Id.* at 6.

Seeing its legal bills mount, Axon agreed to sell the assets it acquired from the competitor. It also offered to provide the purchaser with $5 million. ER 126. Yet this was not enough for the FTC, which wanted the buyer to have a license to use Axon's pre-acquisition intellectual property. ER 134. Axon demurred and then sued the FTC seeking a declaratory judgment.

The suit raised three constitutional challenges to the FTC's enforcement procedures. It also argued that Axon did not violate the antitrust laws by acquiring the competitor. Later that day, the FTC began administrative proceedings against Axon. Given that action, Axon agreed to dismiss its request for merits-based declaratory relief.

The District Court, however, concluded that it lacked jurisdiction over the entire suit because Congress wanted companies like Axon to first

pursue any constitutional claim before the FTC. A panel of this Court affirmed the dismissal.

The panel's decision extends a trend by lower federal courts to refuse to decide important constitutional questions. These courts are allowing administrative agencies to decide cases and controversies under the guise of following Congress's command. Neither Congress nor the President may transfer that authority to Article II agencies. *See* U.S. Const. art. III, §§ 1 and 2 (giving only Article III courts the power to decide cases and controversies). Yet that is what the panel did here. This Court should review the case *en banc* to vindicate basic separation-of-powers principles supporting federal-court jurisdiction over cases and controversies.

ARGUMENT

The Constitution grants federal courts jurisdiction over nine types of cases or controversies. U.S. Const. art. III, § 2 cl. 1; *see* Erwin Chemerinsky, *Federal Jurisdiction* 260 (4th ed. 2003). To exercise federal jurisdiction, district courts must have both constitutional and statutory jurisdiction. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998). When both prerequisites are satisfied, "federal courts" have a

"general duty to exercise the jurisdiction that is conferred upon them." *Hamdan v. Rumsfeld*, 548 U.S. 557, 589 (2006) (cleaned up).

Here, the parties agree that the district court could exercise constitutional jurisdiction over Axon's complaint. The real question is whether Congress stripped the District Court of statutory jurisdiction to hear this case. As this is a pre-enforcement challenge, the panel examined whether Congress's intent to deprive district courts of jurisdiction is "fairly discernible in the statutory scheme." *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 351 (1984) (quoting *Assoc. of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 157 (1970)).

When deciding this question, courts must consider three factors. First, will a litigant "as a practical matter be able to obtain meaningful judicial review" of its claim? *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 213 (1994) (quoting *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991)). Second, can the agency use its expertise when deciding the issue? *See id.* at 212 (citation omitted). And third, are the claims "wholly collateral" to the case's merits? *Id.* (quoting *Heckler v. Ringer*, 466 U.S. 602, 618 (1984)).

District courts and courts of appeals must often apply the *Thunder Basin* factors when determining whether federal courts can decide a pre-enforcement challenge. Unfortunately, the panel's decision here tracks a pattern of applying *Thunder Basin* in a manner that violates defendants' due-process rights. The Court should therefore grant *en banc* review to correct this error and ensure that courts in this circuit apply *Thunder Basin* in a constitutional manner.

I. LOWER COURTS' APPLICATION OF THE *THUNDER BASIN* FACTORS VIOLATES DEFENDANTS' RIGHT TO DUE PROCESS OF LAW.

A. The Fifth Amendment's Original Meaning Protects The Right To Judicial Process.

The Constitution prohibits depriving any person of "due process of law." U.S. Const. amend. V. "[A] mass of materials in the early years of the republic equated due process of law with judicial process." Gary Lawson, *Take the Fifth . . . Please!: The Original Insignificance of the Fifth Amendment's Due Process of Law Clause*, 2017 B.Y.U. L. Rev. 611, 630 (2017); *see* Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 Yale L.J. 408, 443 (2010) ("due process of law" commonly referred "to judicial process").

This continued the understanding of pre-Revolutionary colonists. The colonists thought that "an act of Parliament that purports to abrogate the procedural protections of customary law violates due process." Nathan S. Chapman & Michael W. McConnell, *Due Process As Separation of Powers*, 121 Yale L.J. 1672, 1700 (2012).

The Fifth Amendment's Due Process Clause therefore protects the right to judicial process. But the lower courts' application of *Thunder Basin* has eliminated this right. The decisions allow only administrative review of serious constitutional questions. Such rulings deprive defendants of due process of law.

B. Congress Cannot Replace Judicial Process With Administrative Process.

"The judicial Power of the United States" is "vested in one supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." U.S. Const. art. III, § 1. This power "extend[s] to all Cases, in Law and Equity, arising under the Constitution [and] the Laws of the United States." *Id.* art. III, § 2, cl. 1. Although the Constitution does not define the term, the judicial power is "the power to bind parties and to authorize the deprivation of private rights." William

Baude, *Adjudication Outside Article III*, 133 Harv. L. Rev. 1511, 1513-14 (2020).

The "Constitution assigns" "the responsibility for deciding" cases and controversies to "Article III judges in Article III courts." *Stern v. Marshall*, 564 U.S. 462, 484 (2011). This includes "the mundane as well as the glamorous, matters of common law and statute as well as constitutional law, issues of fact as well as issues of law." *Id.* (quoting *N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 86-87 n.12 (1982) (plurality)).

"The judicial Power of the United States" thus cannot "be shared" with another branch just as the President cannot "share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto." *United States v. Nixon*, 418 U.S. 683, 704 (1974) (cleaned up). So Congress "cannot vest any portion of the judicial power of the United States, except in courts [it] ordained and established." *Martin v. Hunter's Lessee*, 14 U.S. 304, 330 (1816). Thus, administrative agencies cannot exercise the judicial power of the United States because they are not Article III courts. *See* Baude, 133 Harv. L. Rev. at 1539.

C. Lower Courts Mistakenly Allow Congress To Replace Judicial Process With Administrative Process.

Lower courts, however, have replaced judicial process with administrative process. They have applied all three *Thunder Basin* factors to avoid judicial review. This turns the proper analysis on its head.

1. Whether a defendant receives initial judicial review turns on the administrative agency's choice of forum. Many agencies can choose to enforce laws through administrative proceedings or suits in district court. *See, e.g.*, 15 U.S.C. §§ 45(b) and 53(b) (FTC); 78u(d) and 78u-2 (Securities and Exchange Commission). If the agency decides to proceed in district court, then the defendant gets immediate judicial review of its constitutional claims. But if the agency opens an administrative enforcement action, the lower courts have held that the defendant may not access Article III courts until the administrative proceeding concludes. This rule extends not only to merits issues but also to challenges to the agency itself, or to administrative proceedings themselves.

Circuit courts' application of the meaningful-judicial-review factor rubber stamps the agency's choice of forum. For example, the Seventh

Circuit held that the SEC's decision to pursue administrative proceedings foreclosed judicial review of constitutional claims. *See Bebo v. SEC*, 799 F.3d 765, 769-72 (7th Cir. 2015). But as the court acknowledged, this created tension with *Free Enterprise Fund*. *See id.* at 770-71. Similarly, the Fourth Circuit rubber-stamped the agency's choice of forum by paying lip service to the meaningful-judicial-review factor. *Bennett v. SEC*, 844 F.3d 174, 184-86 (4th Cir. 2016). These decisions show that lower courts are ignoring the Fifth Amendment when considering *Thunder Basin*'s meaningful-judicial-review factor. *See* Caleb Nelson, *Adjudication in the Political Branches*, 107 Colum. L. Rev. 559, 590 (2007) (explaining how courts cannot provide meaningful judicial review in these cases).

2. The justification for allowing administrative agencies to decide issues "is that the tribunal has specialized knowledge and expertise." *In re Sang Su Lee*, 277 F.3d 1338, 1344 (Fed. Cir. 2002); *Dow Chem. Co. v. EPA*, 605 F.2d 673, 681 (3d Cir. 1979). So under *Thunder Basin*, courts must consider whether the issues presented in the pre-enforcement challenge fall in an agency's area of expertise. But again, the lower courts have misapplied this factor.

The Fifth Circuit, for example, held that agency expertise is "assessed by looking at the overall case." *Cochran v. SEC*, 969 F.3d 507, 516 (5th Cir. 2020), *reh'g granted*, 978 F.3d 975 (5th Cir. 2020) (*en banc*). This analysis again gives agencies the final say on where a defendant must litigate its constitutional claims. Any case that the FTC brings must include issues and claims within its expertise. Otherwise, it would lack statutory authority to hold the administrative hearing.

But that does not mean that collateral issues—like the constitutionality of the agency's structure—are within the agency's expertise. Decisions like *Cochran*, however, mean that every pre-enforcement challenge that a defendant brings in federal court is within the agency's expertise. Not only does this violate *Thunder Basin*'s plain language, it also violates defendants' due-process rights.

3. Finally, lower courts have applied the "wholly collateral" factor to deny defendants due process of law. Lower courts have applied the factor in a way that always supports punting to administrative agencies. But as explained above, Article III doesn't permit such delegation of the judicial power.

The Fourth Circuit's *Bennett* decision provides a good example. There, the defendant argued that her constitutional claim was collateral to the agency proceeding "because it challenge[d] the legality of the forum itself and [did] not seek to affect the merits." *Bennett*, 844 F.3d at 187 (quotation omitted). "[T]his makes conceptual sense" because "[e]ven if she [wa]s successful in" her constitutional challenges, the agency "could still bring a civil enforcement action in district court on the same substantive charges." *Id.*

But the Fourth Circuit ultimately held that this factor weighed against immediate judicial review. It held that "claims are not wholly collateral when they are the vehicle by which [defendants] seek to reverse" agency action. *Bennett*, 844 F.3d at 186 (cleaned up). In other words, a claim is never collateral.

The Fourth Circuit is not alone in this misapplication of *Thunder Basin*'s wholly collateral factor. Both the Second and D.C. Circuits have also erroneously held that—as a practical matter—claims are never collateral. *See Tilton v. SEC*, 824 F.3d 276, 287-88 (2d Cir. 2016); *Jarkesy v. SEC*, 803 F.3d 9, 22-28 (D.C. Cir. 2015). This violates defendants' due-process rights.

* * *

Lower courts have therefore refused to give effect to two of the three *Thunder Basin* factors. Rather, they have relied on only one factor—whether meaningful judicial review is available. But the common misapplication of that factor means that lower courts are allowing Congress to delegate the judicial power of the United States to administrative agencies.

When litigants must litigate two adjudications before reaching an Article III court, they are denied their right to due process of law. Even if lower courts' application of *Thunder Basin* were more efficient—which it is not—that would be irrelevant. "The doctrine of the separation of powers was adopted by the convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power." *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

Yet lower courts consistently prioritize alleged efficiency over preventing the exercise of arbitrary power. This they may not do. The Court should hear this case *en banc* to provide much-needed guidance for district courts applying *Thunder Basin*.

II. THE PANEL'S APPLICATION OF THE *THUNDER BASIN* FACTORS VIOLATES AXON'S RIGHT TO DUE PROCESS OF LAW.

The panel's decision here continues the trend of applying the *Thunder Basin* factors in a manner that violates the Fifth Amendment's Due Process Clause. This misapplication encourages district courts to avoid deciding pre-enforcement challenges to the constitutional structure of administrative agencies. The Court should grant the rehearing petition to provide correct guidance to future panels and district courts.

A. Axon Cannot Receive Meaningful Judicial Review.

The panel incorrectly held that Axon could receive meaningful judicial review of the FTC's decision. There is a substantial difference between having meaningful review and having illusory review. *Cf. O'Connor v. Uber Techs., Inc.*, 904 F.3d 1087, 1092 (9th Cir. 2018) (recognizing difference between something that is meaningful and illusory (citing *Mohamed v. Uber Techs., Inc.*, 848 F.3d 1201, 1207-12 (9th Cir. 2016))). Here, the judicial review cited by the panel is merely illusory.

1. Over the past twenty-five years, only two companies have managed to obtain judicial review of an FTC merger decision. *See* Axon's Panel-Stage Br. 41-42 n.20. Once-a-decade review is anything but "meaningful." Rather, it is merely illusory. It is theoretically possible but

unrealistic. *Thunder Basin* requires more. It mandates that lower courts consider pre-enforcement challenges when no opportunity exists for meaningful judicial review. And no review is meaningful if it is not realistic.

An example proves the point. Aleksei Navalny was convicted of stealing money from two Russian firms. *See* RadioFreeEurope, *Russian Supreme Court Upholds Conviction Of Navalny Brothers' In 'Yves Rocher Case'*, (Apr. 25, 2018), https://bit.ly/38x7yEx. Navalny could appeal to the Russian Supreme Court. But was this review meaningful? It was not. Rather, it was merely illusory. Russia's singular goal was to show the international community that it was not incarcerating Navalny for opposing President Vladimir Putin.

The panel majority relied on similarly illusory review when applying the *Thunder Basin* factors. In the past twenty-five years only two companies have obtained judicial review of an FTC decision—both lost. Axon could therefore theoretically obtain judicial review of an adverse FTC decision. Yet once-a-decade review falls well short of what the Due Process Clause requires when applying *Thunder Basin*.

2. There is a second reason why Axon cannot receive meaningful judicial review of the FTC's decision here. Axon challenges the FTC's administrative procedures. These constitutionally flawed procedures harm Axon here and now. Even if the FTC—for the first time in twenty-five years—were to rule in Axon's favor, that would not remedy the harm. Similarly, even if Axon became the third company in the past three decades to obtain judicial review and succeeded before this Court—unlike the two prior companies—that would not remedy Axon's injury.

Under the panel's decision, once the stay expires Axon must again respond to the FTC's discovery demands. If a hearing before the ALJ starts, Axon must spend an exorbitant amount on attorneys' fees and litigation costs. Then if it loses before the ALJ, Axon must spend money to litigate before the full commission. All this before it can ask an Article III court to decide whether the administrative proceedings are constitutional.

If Axon were to become the first company in twenty-five years to prevail before this Court, it would still lose. It could not recover the millions of dollars expended before the FTC. The hearing before the ALJ

would have also proceeded despite the unconstitutional appointment. It is impossible to unring that bell.

This misapplication of the meaningful-judicial-review factor violated Axon's due-process rights. The decision bars meaningful judicial review of Axon's meritorious constitutional claims. Rather, it allows a non-Article III tribunal—the FTC—to decide this issue. That violates Article III's clear command.

B. The FTC Has No Expertise In Constitutional Law.

The panel correctly held that "[t]he FTC lacks agency expertise to resolve [Axon's] constitutional claims." *Axon Enter., Inc. v. FTC*, 986 F.3d 1173, 1186 (9th Cir. 2021). Federal courts—not the FTC—are constitutional law experts. This is even truer today given a non-lawyer FTC commissioner.

But the panel then erred by disregarding its own holding. In the panel's view, two of the three *Thunder Basin* factors are mere surplusage. *See id.* at 1187 ("the presence of meaningful judicial review [alone] is enough to find that Congress precluded district court jurisdiction over the type of claims that Axon brings" (citation omitted)). Allowing non-

attorneys to go outside their expertise and decide important constitutional questions is a quintessential Article III violation.

C. Axon's Constitutional Claims Are Wholly Collateral To The Merits Of The Administrative Action.

The panel incorrectly held that Axon's constitutional challenges are not wholly collateral to the merits of the administrative hearing. *Axon*, 986 F.3d at 1185-86. This holding defies logic.

A federal court could decide all of Axon's constitutional challenges without even knowing the merits question. Whether the FTC's and Department of Justice's process for determining which agency pursues certain antitrust claims violates equal-protection guarantees does not depend on the specifics of Axon's acquisition of a failing competitor. Rather, it is a mixed question of fact and law independent of the acquisition. The only facts that a court needs to decide the issue are the agencies' procedures for dividing cases—procedures the FTC will not disclose. In other words, nothing about the transaction the FTC challenges is relevant.

Axon's challenge to the dual-layer for-cause removal protection afforded FTC ALJs is also wholly collateral to the merits. This question is a pure question of law that does not involve any factual inquiries. A

federal court could decide this issue solely based on the relevant statutes and regulations without looking at what the FTC is alleging in the administrative proceeding.

So this is not "a close call." *Axon*, 986 F.3d at 1186. Rather, it is an easy call. It is hard to imagine how claims could be more collateral to the merits than Axon's are here. The panel, however, followed incorrect decisions by other lower courts. It should have looked to the Supreme Court's decision in *Free Enterprise Fund* and to the Constitution. *Cf. CSX Transp., Inc. v. McBride*, 564 U.S. 685, 715 (2011) (Roberts, C.J., dissenting) (courts should not use a "show of hands" to decide cases (citations omitted)). They show that allowing a federal administrative agency to decide these constitutional claims while precluding immediate judicial review violates Axon's due-process rights.

* * *

The panel was not alone in misapplying the *Thunder Basin* factors. But applying those factors in a constitutional manner is straightforward. "[T]o the extent" Axon's claims "target the [FTC]'s existence, structure, or procedures under the Constitution"—not the merits—"the district court remains an appropriate forum for such action." *Axon*, 986 F.3d at

1191-92 (Bumatay, J., dissenting). This Court should grant the rehearing petition and adopt this proper application of the *Thunder Basin* factors.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limits of Ninth Circuit Rule 29-2(c)(2) because it contains 3,361 words, excluding the parts exempted by Federal Rule of Appellate Procedure 32(f).

I also certify that this brief complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5) and (6) because it uses 14-point Century Schoolbook font.

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