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WLF Urges Supreme Court To Clarify When Parties May Challenge Agencies' Structures

(Axon v. FTC)

“Lower courts continue to rubber-stamp agencies’ choice of venue rather than allowing federal courts to consider the constitutionality of the agencies’ structures.”

—John Masslon, WLF Senior Litigation Counsel

WASHINGTON, DC—Washington Legal Foundation (WLF) today urged the U.S. Supreme Court to hear an appeal from an order dismissing an important separation-of-powers case. WLF argues that the U.S. Court of Appeals for the Ninth Circuit erred in holding that federal courts lack statutory jurisdiction to consider Axon’s claims.

The case arises from Axon’s acquisition of a failing competitor. The Federal Trade Commission alleges that the acquisition was anticompetitive and violated the antitrust laws. Axon sued in federal court, arguing that the FTC’s structure and procedures are unconstitutional. Later that day, the FTC began administrative proceedings. The District Court held that it lacked subject-matter jurisdiction over Axon’s claims because Congress intended for the FTC to decide those issues and the Ninth Circuit affirmed.

In its *amicus* brief supporting Axon, WLF argues that defendants have a right to have their constitutional challenges to an agency’s structure adjudicated by an Article III tribunal. In *Thunder Basin*, the Supreme Court announced three factors that courts must consider when analyzing whether Congress stripped district courts of jurisdiction to hear pre-enforcement challenges. But lower courts have ignored two of those factors—whether a claim is wholly collateral to the merits of a case and whether the agency has expertise on the question—and focused solely on whether the defendant can obtain meaningful judicial review of an adverse agency decision. Lower courts have then impermissibly allowed illusory review to satisfy the meaningful-judicial-review factor.

WLF’s brief also explains why the Ninth Circuit’s decision continues the trend of improperly applying the *Thunder Basin* factors. It held that Axon could seek meaningful judicial review of the FTC’s decision despite such review occurring only twice over the past twenty-five years. The ruling also glossed over the harm that could not be remedied by a petition for review. Finally, the Ninth Circuit improperly ignored the FTC’s lack of expertise in constitutional law. The case thus offers the Supreme Court a chance to give proper guidance on applying *Thunder Basin*.

Celebrating its 44th year, WLF is America’s premier public-interest law firm and policy center advocating for free-market principles, limited government, individual liberty, and the rule of law.

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