

1 Pamela B. Petersen
2 Arizona Bar No. 011512
3 **Axon Enterprise, Inc.**
4 17800 N. 85th Street
5 Scottsdale, AZ 85255-9603
6 Telephone: (623) 326-6016
7 Facsimile: (480) 905-2027
8 ppetersen@axon.com
9 Secondary: legal@axon.com

7 Garret G. Rasmussen
8 Antony P. Kim
9 Jonathan A. Direnfeld
10 Thomas Fu
11 **Orrick, Herrington & Sutcliffe LLP**
12 1152 Fifteenth Street N.W.
13 Washington D.C. 20005
14 Telephone: (202) 339-8400
15 Facsimile: (202) 339-8500
16 grasmussen@orrick.com
17 akim@orrick.com
18 jdirenfeld@orrick.com
19 tfu@orrick.com

20 *Attorneys for Plaintiff Axon Enterprise, Inc.*

21 **IN THE UNITED STATES DISTRICT COURT**
22 **DISTRICT OF ARIZONA**

23 AXON ENTERPRISE, INC., a Delaware
24 Corporation,
25 Plaintiff,

26 v.

27 FEDERAL TRADE COMMISSION, a federal
28 administrative agency,

and

JOSEPH SIMONS, NOAH PHILLIPS,
ROHIT CHOPRA, REBECCA
SLAUGHTER, and CHRISTINE WILSON,
in their official capacity as Commissioners of
the Federal Trade Commission,
Defendants.

Case No.

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

(Jury Trial Demanded)

INTRODUCTION

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3 1. Plaintiff Axon Enterprise, Inc. (“Axon”) brings this case to challenge the
4 unconstitutional structure and processes employed by Defendant, the Federal Trade Commission
5 (“FTC” or “Commission”), to prohibit lawful mergers and extract unwarranted settlements. The
6 FTC exists as a Constitutional anomaly. In one hand, it wields a mighty sword—the power to not
7 only prosecute cases, but to judge them too; in the other, a massive shield—near-total protection
8 from political accountability, with the Commissioners who direct its actions subject to neither
9 democratic election nor at-will removal by the President. For decades, the agency has leveraged
10 that power against American companies indiscriminately—including, most recently, Axon. No
11 longer.

12 2. Axon brings this case to take a stand for public safety and for technical innovation
13 and advancement—hallmarks of the company since its founding. For over 18 months, Axon has
14 cooperated in an investigation by the FTC into its acquisition of Viewu LLC (“Viewu”), a lawful
15 transaction under the antitrust laws that has had no anti-competitive effect. Axon is eager to prove
16 its case in any federal court in this country. But Axon cannot—and will not—accept the FTC’s
17 attempts to extort an irrational “settlement” through a biased adjudicative process that vests the
18 Commission with the powers of prosecutor, judge, and jury in violation of the Due Process and
19 Equal Protection guarantees of the U.S. Constitution. Instead, Axon seeks to demonstrate in a
20 neutral forum that the FTC’s accusations are baseless; that Axon’s acquisition of Viewu, a
21 significantly distressed company, benefited customers and prevented massive public safety
22 program disruptions; and that its law enforcement partners have more choices today than ever
23 before.

24 3. On December 23, 2019, two days before Christmas, the FTC unequivocally told
25 Axon, a manufacturer of non-lethal policing equipment such as body-worn cameras (“BWCs”)
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1 and digital evidence management systems (“DEMS”), that it must completely unwind its May
2 2018 acquisition of a small, struggling company named Viewu. Axon, which acquired Viewu to
3 assume a multi-year contract with the New York City Police Department (“NYPD”) that Viewu
4 could not fulfill, offered to divest all assets it acquired from Viewu, all Axon improvements to
5 Viewu’s products, and even provide the buyer with \$5 million in working capital. But the FTC
6 insisted on more: Axon must not only divest all acquired assets plus improvements, but also agree
7 to grant whomever buys those assets a license to all of Axon’s BWC and DEMS intellectual
8 property and technology—technology Axon has invested 10 years and over \$200 million in
9 building from the ground up. Indeed, the FTC itself described its demand as a “blank check” to
10 take Axon’s independently created intellectual property and customers. The FTC’s demand would
11 not return the parties to the positions they held before the acquisition, when Viewu (equipped with
12 its *own* intellectual property) was not a viable going concern or competitive constraint; to the
13 contrary, it would stand up a new company (equipped with *Axon’s* intellectual property) far
14 stronger than Viewu ever was or could have become. In other words, the FTC is seeking to deprive
15 Axon of its intellectual property without Due Process, an unprecedented ultimatum that sends a
16 chilling message to the nation’s technology-based industries.

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21 4. The FTC’s aggressive demands are not supported by the evidence. At the time of
22 acquisition, Viewu was effectively insolvent and had failed to invest in R&D for the fast-
23 approaching, next generation of products being developed by a host of new competitors. And,
24 Viewu’s most technologically-advanced product, the LE5 BWC, suffered from multiple defects
25 that created information security and officer safety risks. Viewu’s products remain viable today
26 only because Axon invested in numerous modifications at considerable expense.
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1 5. Axon’s acquisition of Viewu has had no material effect on the competitive
2 landscape. Indeed, in the year and a half post-acquisition, competition has only increased.
3 Customers continue to be able to choose from any of a field of well-funded competitors, including
4 Motorola/WatchGuard,¹ Panasonic, Coban, Mobile Vision, and BodyWorn by Utility; and because
5 of low barriers to entry, several more competitors such as Getac, Intrensic/GoPro and Visual Labs
6 have launched BWCs in recent years. All of this competition has benefited customers. The FTC’s
7 insistence that Axon surrender a “blank check” for settlement is therefore without merit.
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9 6. Instead, the FTC’s demand rests on a more fundamental calculation. The
10 Commission is confident it can strong-arm Axon into settling because, unlike the Department of
11 Justice (“DOJ”), which must pursue its merger challenges in federal court, the FTC has the option
12 of initiating proceedings within the agency itself. What is more, the question whether a given
13 merger will be reviewed by the DOJ or the FTC is arbitrary, and secretly negotiated between the
14 agencies themselves. Indeed, the FTC has told Axon that if Axon does not unconditionally
15 surrender within a matter of days, it will initiate exactly that type of proceeding in January 2020.
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17 7. The import of that threat is clear: in an administrative proceeding, the FTC will not
18 only charge and prosecute the case, but also appoint the Administrative Law Judge (“ALJ”) that
19 presides over it. And if the FTC disagrees with the ALJ’s ultimate decision on either the facts or
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23 ¹ At the time of the Viewu acquisition, Watchguard was Axon’s biggest competitor. In July 2019,
24 Motorola purchased Watchguard for \$271 million with the FTC’s blessing, despite the fact
25 Motorola was already a formidable competitor in the BWC and DEMS space with large city
26 references and whose market capitalization of \$27.6 billion dwarfs Axon’s at \$4.3 billion. The
27 Motorola/Watchguard combination now has 8 Major City Chief Association (“MCC”) agencies,
28 including Houston with more than 5,100 sworn officers, and at least 70 agencies with 100+
officers.

1 the law, the same Commissioners who voted to file the enforcement action against Axon have the
2 right to review these findings de novo *and change them*. If that procedure sounds unfair, that’s
3 because it is. Indeed, a former FTC Commissioner himself described it as an “unhealthy and biased
4 institutional process” that virtually guarantees an agency win. *See* Joshua D. Wright, Section 5
5 Revisited: Time for the FTC to Define the Scope of Its Unfair Methods of Competition Authority
6 at 6 (2015).² As observed by Wright:

8 The FTC has voted out a number of complaints in administrative adjudication that
9 have been tried by administrative law judges *in the past nearly twenty years*. In
10 each of those cases, after the administrative decision is appealed to the
11 Commission, the Commission has ruled in favor of FTC staff and found liability.
12 In other words, **in 100 percent of cases where the administrative law judge ruled
13 in favor of the FTC staff, the Commission affirmed liability; and in 100 percent
14 of the cases in which the administrative law judge [] found no liability, the
15 Commission reversed. This is a strong sign of an unhealthy and biased
16 institutional process.** By way of contrast, when the antitrust decisions of federal
17 district court judges are appealed to the federal courts of appeal, plaintiffs do not
18 come anywhere close to a 100 percent success rate—indeed, the win rate is much
19 closer to 50 percent.

16 *Id.* (emphasis added, footnote omitted).

17 8. The FTC’s Commissioners are largely unaccountable. They are not only unelected
18 by the People, but also shielded from removal by the President. And so, if they set their sights on
19 an unwarranted and coercive merger remedy, there is nothing to stop them.

21 9. Policing and public safety are, for obvious reasons, issues of significant societal
22 importance. And at a time when deep divisions exist between law enforcement agencies and the
23 communities they serve, Axon’s mission to “Protect Life – Protect Truth” has helped bridge gaps
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25 ² Available at
26 [https://www.ftc.gov/system/files/documents/public_statements/626811/150226bh_section_5_sy
27 mposium.pdf](https://www.ftc.gov/system/files/documents/public_statements/626811/150226bh_section_5_symposium.pdf)

1 and unify communities using innovative technology. The technologies Axon develops (including
2 body cameras and less-lethal weapons) help to protect both the police officers who use them and
3 the citizens who interact with them, and these technologies command broad public support. *See,*
4 *e.g.*, Cato Institute, Americans Overwhelmingly Support Equipping Police with Body Cameras
5 (reporting that 89% of Americans support requiring police to wear body cameras).³ But an FTC
6 action against Axon could have significant consequences for both the company and public safety
7 by diverting finite resources necessary for continued innovation and competitiveness.⁴

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10 10. The Constitution was designed to prevent exactly the kind of unfair, unaccountable,
11 and unchecked governmental action being exercised against Axon. The “essential constitutional
12 promise” of Due Process is the right to a “fair opportunity to rebut the Government’s factual
13 assertions before a neutral decisionmaker.” *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004). The
14 FTC would deny Axon that right, by serving as prosecutor, judge, and jury in its own
15 administrative process. Further, the promise of Equal Protection restricts the Government from
16 arbitrarily treating one person different from another. Yet the FTC would deny Axon that right by
17 subjecting it to a biased administrative proceeding with a preordained result—while other
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21 ³ Available at https://www.cato.org/policing-in-america/chapter-4/police-body-cameras#_ftnref66

22 ⁴ In addition to ongoing investments to further innovate its BWC and DEMS products, solutions
23 that scale the best and are the simplest to use, Axon is heavily investing in Records Management,
24 Computer Aided Dispatch, and Artificial Intelligence product lines that will continue to make
25 policing safer, more efficient, and more accountable. Axon is making these investments with an
26 industry-leading focus on ethical and responsible innovation through its AI and Policing
27 Technology Ethics Board. *See* <https://www.axon.com/axon-ai-and-policing-technology-ethics>.
28 This includes development of automated license plate recognition (“ALPR”) software to stay
competitive with Motorola/Watchguard, which recently acquired similar technology via a \$445
million acquisition of Vigilant Solutions.

1 companies, whose merger reviews are assigned to the DOJ, retain the right to litigate the merits of
2 mergers before a neutral arbiter in federal court. Finally, Article II's Vesting Clause mandates that
3 the federal law-enforcement power of the United States be ultimately controlled solely by the
4 President, the People's only nationwide elected representative, and not unelected bureaucrats. But
5 the FTC would deny Axon that protection as well, subjecting it to an unfair prosecution run entirely
6 by Commissioners accountable to neither the People nor the President.

8 11. Axon has filed this suit to vindicate its Viewu acquisition and its Constitutional
9 rights to Due Process and Equal Protection under the law. It seeks to prove, before a neutral arbiter,
10 that its actions were wholly lawful. And it will expose the unfair and unconstitutional procedures
11 and structures employed by the FTC to extract unjustified remedies.

13 12. This Court should end the abuses perpetrated by the FTC for far too long. It should
14 declare the FTC's structure and biased procedures unconstitutional. And it should enjoin the FTC
15 from subjecting Axon to its unfair and unconstitutional internal forum, adjudicating the legality of
16 Axon's acquisition in this Article III court instead.

18 **PARTIES**

19 13. Axon is a Delaware corporation with its principal place of business at 17800 N.
20 85th Street, Scottsdale, Arizona 85255.

22 14. The FTC is an independent administrative agency of the United States. Among
23 other things, the FTC is empowered to initiate administrative proceedings pursuant to Section 5(b)
24 of the Federal Trade Commission Act ("Act"), and to seek injunctive relief in federal district court
25 pursuant to Section 13(b) of the Act.
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1 15. Joseph Simons, Noah Phillips, Rohit Chopra, Rebecca Slaughter, and Christine
2 Wilson (collectively “Commissioners”) are Defendants in their official capacity as Commissioners
3 of the FTC.

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5 **JURISDICTION AND VENUE**

6 16. This action arises under the Constitution and laws of the United States, and this
7 Court has federal question jurisdiction over this action pursuant to Article III of the Constitution
8 and 28 U.S.C. § 1331.

9 17. Plaintiff’s right to immediate judicial review in this Court with respect to
10 Defendants’ alleged conduct is based on the Due Process Clause of the Fifth Amendment, the
11 Administrative Procedure Act, 5 U.S.C. §§ 702, 704, and the Federal Declaratory Judgment Act,
12 28 U.S.C. § 2201.

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14 18. Venue is proper under 5 U.S.C. § 703 and 28 U.S.C. § 1391(e).

15
16 **FACTUAL BACKGROUND**

17 **A. Axon’s Acquisition of Viewu—A Failing Company.**

18 19. In 1993, Rick Smith formed the company that is now Axon to design less-lethal
19 conducted energy weapons for police departments.

20 20. Axon unveiled its first BWC, the Axon Pro, in 2008. This camera was head-
21 mounted and uploaded footage for online storage to a cloud-based evidence management software
22 now known as Evidence.com. This innovative product revolutionized digital evidence collection,
23 storage and retrieval and won the 2009 Innovation Top Software Award by the Cygnus Law
24 Enforcement Group presented at the International Association of Chiefs of Police annual
25 conference. Axon’s DEMS solution was thus developed, launched and commercially successful
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1 long before its competition, including Viewu, which did not announce its “Veripatrol” cloud-based
2 DEMS offering until February 2015. Prior to 2015, Viewu only offered local, on-premise DEMS.

3 21. Axon’s first contracts for its BWCs and DEMS were with small police
4 departments. Axon received a big boost in 2009, when a police officer involved in a lethal-force
5 incident was exonerated based on footage from an Axon camera. The company received another
6 boost in April 2013, when the Rialto, California Police Department released a study showing an
7 88% drop in complaints against police officers that coincided with the use of Axon cameras.
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9 22. Viewu was founded in 2007 by a former Axon employee and was acquired by
10 Safariland LLC in 2015. Safariland is a privately-owned reputable provider of safety and
11 survivability products for public safety such as body armor and holsters. But Safariland had no
12 experience in software development and soon determined it was in over its head without the
13 engineering expertise required to support DEMS products and keep pace with competitor
14 advancements. It therefore significantly cut back on research and engineering investments.
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16 23. Although an early leader in BWC sales, by 2016 Viewu was “teetering on
17 irrelevance among major departments,” as recognized by a market analyst at the time,⁵ having
18 failed to invest in R&D and next generation products to stay competitive. Then in October 2016,
19 Viewu threw a “Hail Mary”, offering to supply more than 20,000 BWCs and a DEMS solution on
20 unsustainable terms (at roughly one-third of Axon’s bid price). This 5-year contract, terminable at
21 will, proved to be Viewu’s downfall.
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25 _____
26 ⁵ See Craig-Hallum Capital Group LLC, Oct. 3, 2016 Institutional Research Note, opining that
27 Viewu’s pricing on its NYPD bid was “an attempt to remain relevant” but “likely results in a
28 significantly unprofitable contract for Viewu.”

1 24. On May 3, 2018, Axon announced its acquisition of Viewu for approximately \$7
2 million in guaranteed upfront cash and stock—a testament to the company’s failing status.⁶ By
3 that time, Viewu was essentially insolvent. It won its largest contract, the NYPD, at a price that
4 was driving unsustainable economic loss, and had not won any major contract thereafter because
5 the NYPD body camera rollout was consuming all its resources. Its parent company, Safariland,
6 lacked the resources to support Viewu, which was losing nearly \$1 million *per month*. Viewu’s
7 trajectory was irreversible. At the time Axon acquired it, Viewu had more than \$19 million in debt
8 owed to Safariland entities, another \$8 million in off-balance-sheet purchase commitments, and
9 the cash equivalent of less than three days’ operating expenses. And despite Safariland’s
10 exhaustive attempts to shop Viewu to other potential buyers, there were no takers. Viewu came to
11 Axon as a last resort.

14 **B. The FTC’s Excessive and Unwarranted Settlement Demand.**

15 25. On or about June 14, 2018, the FTC sent Axon a letter indicating it was
16 investigating the Viewu acquisition. At that point, Axon had not taken any material steps toward
17 transitioning Viewu’s customers to Axon, for example, by shifting them from Viewu’s products to
18 Axon’s product and technology offerings. Instead, Axon was honoring all of Viewu’s customer
19 contracts.
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21 26. Axon cooperated in the FTC’s investigation. Over the course of more than 18
22 months, Axon produced more than 262,000 documents, provided reams of data and other
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25 ⁶ Deal terms also included approximately \$6 million in additional common stock, contingent upon
26 achieving certain milestones over two years, which have been partially met, and an ancillary
27 minimum holster purchase commitment with Safariland.

1 information, and produced multiple executives for investigational depositions. At no point did the
2 FTC request (or even suggest) that Axon “hold separate” the Viewu business or assets. At no point
3 did the FTC request (or even suggest) that Axon avoid transitioning Viewu’s customers to Axon’s
4 superior products and technology platform.
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6 27. Rather, after more than 18 months, the FTC threatened to sue Axon in an internal
7 administrative hearing where the outcome is all but guaranteed. The FTC made clear, in at least
8 three face-to-face meetings, that Axon’s only hope for avoiding litigation was to surrender a “blank
9 check” divestiture. The FTC told Axon it would unilaterally dictate the terms of settlement from a
10 “menu” of all Axon’s customers and contracts (not just those won post-acquisition), Axon’s
11 intellectual property and technology, Axon employees, and any ancillary services and support
12 functions the FTC deemed necessary. Remarkably, the FTC described its vision of “re-creating”
13 Viewu into a virtual “clone” of Axon armed with Axon’s own intellectual property—something
14 that Viewu never was nor could be without impermissible government regulation of, and
15 unwarranted interference in, a highly-competitive marketplace.
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18 28. The FTC’s arbitrary take-it-or-leave-it demand is possible only because this
19 governmental agency lacks any real accountability to the Constitution’s requirements of Due
20 Process or Equal Protection, or to the tenets of antitrust merger law.
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22 **C. The Government Merger Review Process.**

23 29. The FTC and the DOJ Antitrust Division have dual jurisdiction for reviewing
24 mergers and acquisitions that may present substantive antitrust concerns. Section 7 of the Clayton
25 Act, codified at 15 U.S.C. § 18, prohibits mergers and acquisitions where the “effect . . . may be
26 substantially to lessen competition” or “tend to create a monopoly.” Both the DOJ and FTC have
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1 authority to file suit to block a proposed transaction on antitrust grounds. The DOJ's authority to
2 sue is rooted in Section 15 of the Clayton Act, and the FTC's authority is based on Section 13(b)
3 of the FTC Act.

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5 30. Because the DOJ and FTC have dual-jurisdiction to review mergers, the agencies
6 have created a "clearance" process to decide which agency will investigate a merger. Over the
7 years, the agencies have reached a series of informal, non-public understandings as to how they
8 will divvy up merger investigations. Clearance is an opaque, black-box process. The agencies
9 maintain complete control over the structure and implementation of the clearance process and have
10 total discretion to decide which agency will undertake a particular merger investigation. Merging
11 parties have no insight or input into which agency will investigate their merger. Moreover,
12 clearance rules and procedures are not mandated by statute, subject to Congressional scrutiny, or
13 promulgated through notice-and-comment rulemaking.

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16 31. Which agency reviews a consummated transaction is critical. The DOJ's only
17 means of unwinding a consummated merger is to sue in federal court. *See United States v. Parker-*
18 *Hannifin Corporation*, No. 1:17-cv-01354-UNA (Sept. 26, 2017) (DOJ lawsuit brought to
19 "unwind" transaction "by means of an order requiring defendant . . . to divest" the defendant's
20 assets or the acquired entity's assets). The FTC, on the other hand, has the option to sue in federal
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1 court under Section 13(b) of the Act,⁷ or to commence an internal administrative hearing before
2 either a single Commissioner or an ALJ on the FTC’s payroll.

3 32. The FTC’s internal administrative hearing provides none of the substantive or
4 procedural protections enjoyed by litigants in federal district court. These proceedings are, instead,
5 fraught with Due Process and Equal Protection deficiencies.
6

- 7 ▪ Federal district court judges are Article III impartial fact-finders who owe no
8 allegiances to the DOJ. In contrast, any FTC Commissioner (including one who voted
9 to sue the defendant) is permitted to preside over the administrative hearing; and, at
10 best, an ALJ appointed by the FTC and on the FTC’s payroll will preside.
- 11 ▪ Federal court proceedings are governed by the Federal Rules of Evidence and Federal
12 Rules of Civil Procedure. Neither apply in FTC administrative proceedings.
- 13 ▪ The DOJ must satisfy a more rigorous standard of finding that a merger or acquisition
14 “substantially lessens competition,” whereas the FTC can satisfy a less onerous
15 “unfair competition” standard in the administrative context.
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22 ⁷ Section 13(b) of the FTC Act provides, in relevant part, that “[w]henver the Commission has
23 reason to believe that any person, partnership, or corporation is violating, or is about to violate,
24 any provision of law enforced by the Federal Trade Commission, and that the enjoining thereof
25 pending the issuance of a complaint by the Commission and until such complaint is dismissed by
26 the Commission or set aside by the court on review . . . would be in the interest of the public—the
27 Commission by any of its attorneys designated by it for such purpose may bring suit in a district
28 court of the United States to enjoin any such act or practices. . . and in proper cases the
Commission may seek, and after proper proof, the court may issue, a permanent injunction.” 15
U.S.C. § 53(b) (emphasis added).

- 1 ▪ Litigants in federal court can appeal adverse decisions to impartial circuit court
2 judges. Decisions rendered in FTC administrative proceedings must first be appealed
3 to the same FTC Commissioners who voted to sue the defendant at the outset.
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5 ▪ The DOJ cannot change the findings made by the district court when appealing a
6 decision to the circuit court. However, the FTC Commissioners, on appeal, can ignore
7 and completely change the merits decision rendered in the administrative proceedings
8 *before* the defendant appeals to the circuit court.
9
10 ▪ Different appellate standards of review also apply depending on where the case
11 originated. The district court’s factual findings in a DOJ case are reviewed for “clear
12 error,” whereas “[t]he findings of the Commission as to the facts, if supported by
13 evidence, shall be *conclusive*.” 15 U.S.C. § 45(c) (emphasis added).

14 33. Given the inherently biased and unfair nature of administrative hearings at the FTC
15 and the limited review of its factual findings on appeal, it is no surprise that the agency believes
16 itself to be virtually untouchable in its internal arena. Indeed, that belief was on full display when
17 the FTC insisted that Axon not only divest the assets it actually acquired in the Viewu merger, but
18 also provide the FTC with “a blank check” to create a new competitor far stronger than Viewu ever
19 was (or could have been) by forcing Axon to license its own intellectual property developed over
20 21 10 years at significant investment expense. The agency will not accept anything less. In a
22 December 2019 face-to-face meeting with Axon’s counsel, the FTC specifically threatened to
23 extract its extraordinary relief from Axon one way or another—either voluntarily through
24 25 settlement, or forcibly through its internal administrative process. Such an aggressive demand
26 27 reflects a negotiating posture taken only by a party that believes it cannot lose. But because the
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1 FTC intends (if no settlement is reached) to litigate, not before a neutral arbiter, but in an
2 administrative proceeding over which it has ultimate control and which has proven futile for
3 defendants, it has no reason to temper its demands.

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5 34. This kind of sham hearing process is exactly what the Due Process Clause was
6 designed to prevent. As the Supreme Court has emphasized, the irreducible minimum of Due
7 Process is “notice of the factual basis” of the Government’s assertions “and a fair opportunity to
8 rebut the Government’s factual assertions before a neutral decisionmaker.” *Hamdi*, 542 U.S. at
9 533. Indeed, “[f]or more than a century, the central meaning of procedural due process has been
10 clear: ‘Parties whose rights are to be affected are entitled to be heard; and in order that they may
11 enjoy that right ... an opportunity to be heard must be granted at a meaningful time and in a
12 meaningful manner.’” *Id.* (quoting *Baldwin v. Hale*, 1 Wall. 223, 233 (1864)). And a “meaningful”
13 hearing, for purposes of Due Process, “requires a neutral and detached judge.” *Id.* (quoting
14 *Concrete Pipe & Prods. of Cal., Inc. v. Construction Laborers Pension Trust for S. Cal.*, 508 U.S.
15 602, 617 (1993)). “These essential constitutional promises may not be eroded.” *Id.* And yet that
16 basic protection—provided to everyone from public employees to enemy combatants—is denied
17 to companies caught up in a merger challenge pursued by the FTC.

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21 35. The fact that only some companies—namely, those that happen to have their
22 mergers investigated by the FTC and not the DOJ—are subject to those unfair procedures only
23 emphasizes their Constitutional infirmity. There is no rational basis for denying companies faced
24 with a merger challenge brought by the FTC of the basic protections they would (and other
25 companies do) enjoy in a merger challenge brought by the DOJ. That is especially so given that
26 the choice of whether a challenge is brought by the DOJ or the FTC is sorted out by the agencies
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1 themselves. The law has long been skeptical of the Government’s ability to circumvent legal
2 protections by arranging proceedings so that one entity takes an action that the other cannot. *See*
3 *Elkins v. United States*, 364 U.S. 206, 224 (1960) (ending the “silver platter doctrine”). If the
4 promise of Equal Protection means anything, it is that the Government cannot arbitrarily choose
5 which persons it deems worthy of more or fewer legal protections.
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7 **D. The FTC Lacks Any Political Accountability.**

8 36. Worse still, the FTC lacks any political check on how it exercises its unfair
9 procedures against the companies that happen to fall within its bailiwick. Although Article II
10 “vested” all “executive Power” in the President, Art. II, § 1, cl. 1, and charged the President alone
11 with “tak[ing] Care that the Laws be faithfully executed,” Art. II, § 3, the FTC enforces the
12 antitrust laws outside of Presidential control.
13

14 37. As the Supreme Court has explained, the Framers concentrated Executive power
15 solely in the President to “ensure ... accountability” in the Executive Branch. *Printz v. United*
16 *States*, 521 U.S. 898, 922 (1997). They recognized that the President could not carry out all of his
17 duties alone, and therefore, must be able to delegate some authority and responsibilities to others.
18 *See* Art. II, § 2, cl. 2 (discussing appointments of superior and inferior officers); *Myers v. United*
19 *States*, 272 U.S. 52, 117 (1926) (“the President alone and unaided could not execute the laws,” and
20 thus must “select those who [are] to act for him under his direction in the execution of the laws.”).
21

22 38. But the Framers feared the obvious mischief that could be worked by such
23 unelected individuals armed with law-enforcement power. Thus, the Framers struck a balance. On
24 the one hand, they allowed the President to delegate power; on the other, they took care to ensure
25 that the President was always the one with whom “the buck stops.” *Free Enterprise Fund v.*
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1 *PCAOB*, 561 U.S. 477, 493 (2010). Accordingly, the Supreme Court has recognized that, “as a
2 general matter,” the President must have the “power to remove” principal officers “who assist him
3 in carrying out his duties.” *Id.* at 513-14. Indeed, if “any power whatsoever is in its nature
4 Executive, it is the power of appointing, overseeing, and controlling those who execute the laws.”
5 *Id.* at 492 (quoting 1 Annals of Cong. 463 (1789) (Joseph 8 Gales ed., 1834) (Madison) (emphasis
6 added)).
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8 39. Just as the President’s ability to select administrative officers “is essential to the
9 execution of the laws by him, so must be his power of removing those for whom he cannot continue
10 to be responsible.” *Myers*, 272 U.S. at 117. That removal power is crucial to the democratic
11 legitimacy of the Executive Branch in two ways: First, it makes inferior officers less likely to
12 deviate from the President’s (and hence, the People’s) will. An officer who knows that
13 disobedience can (and will) be met with removal is less likely to take an action at odds with the
14 President’s agenda. Second, and perhaps more important, the removal power gives the People
15 political recourse if they are displeased with the actions taken by those who enforce federal law.
16 Although the People cannot vote for (or against) an Executive officer directly, they can vote for
17 (or against) the President, who bears ultimate responsibility for federal law enforcement. Those
18 two mechanisms for accountability work together to ensure that the Government officials who
19 carry out the work of the Executive Branch do so in a way that reflects the People’s will, and not
20 their own. As Alexander Hamilton wrote: If the Executive power were “subject, in whole or in
21 part, to the control and co-operation of others,” it would “deprive” the People of their “greatest
22 securities” for the “faithful exercise of any delegated power”—namely, the “restraints of public
23 opinion.” *The Federalist No. 70* at 424, 428-29 (Hamilton).
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1 40. FTC Commissioners, however, are shielded from at-will Presidential removal—
2 and hence from the key mechanism of democratic accountability—in violation of Article II. The
3 FTC is headed by five Commissioners, nominated by the President and confirmed by the Senate,
4 each serving a 7-year term. 15 U.S.C. § 41. But once appointed, the Commissioners are not subject
5 to removal by the President absent a finding of “inefficiency, neglect of duty, or malfeasance in
6 office.” *Id.* This means FTC Commissioners are not politically accountable for their actions. So
7 long as the Commissioners stop short of “malfeasance,” the President can do nothing but stand by
8 and watch, no matter how much he disagrees with them. Moreover, because the FTC-appointed
9 ALJ can also only be removed for “good cause” in accordance with statutory procedures, 5 U.S.C.
10 § 7521(a), (b)(1), an impermissible “dual-layer of protection” even further restricts Executive
11 control. *See PCAOB*, 561 U.S. at 495 (holding unconstitutional similar multi-layer tenure
12 protection where Board members appointed by SEC could only be removed by those
13 Commissioners, not the President, for cause).

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17 41. This means that crucial law enforcement actions, sometimes with massive
18 consequences for the American economy (and here, for public safety), are currently taken by
19 individuals not elected by the People, and not controlled by the President. That runs directly
20 contrary to Article II and the democratic principles underlying the Constitution. Indeed, the U.S.
21 Government itself has acknowledged as much. In its recent merits brief filed in the U.S. Supreme
22 Court in *Selia Law LLC v. Consumer Financial Protection Bureau*, No. 19-7 (Dec. 9, 2019),⁸ the
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27 ⁸ Available at <https://www.scotusblog.com/case-files/cases/seila-law-llc-v-consumer-financial-protection-bureau/>
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1 Solicitor General stated that *Humphrey's Executor v. United States*, 295 U.S. 602 (1935)—a 1935
2 case upholding the Constitutionality of the FTC's removal structure—"should be narrowed or
3 overruled," at least in the context of an agency headed by a single director. U.S. Br. 44. Much of
4 the Government's reasoning, however, equally supports overruling *Humphrey's Executor* specific
5 to the FTC's 5-member Commission.
6

7 42. *Humphrey's Executor* was rooted on the mistaken notion that the FTC served quasi-
8 legislative and quasi-judicial functions, rather than Executive law enforcement functions. The
9 Government now concedes that "the reasoning for *Humphrey's Executor* does not withstand
10 careful analysis. Even at the time of the decision, there was little reason to conclude that the FTC
11 exercised anything other than executive authority." U.S. Br. 45. The Government further noted
12 that the Supreme Court's decision in *Humphrey's Executor* "was concededly inconsistent with the
13 exhaustive and careful reasoning of the *Myers* decision," which struck down as unconstitutional a
14 law denying the President unrestricted power to remove first class postmasters, 272 U.S. at 176,
15 and that "legal developments since *Humphrey's Executor* have only clarified that independent
16 agencies exercise executive power—particularly those agencies like the CFPB [and the FTC] that
17 have the authority to bring enforcement actions in federal court seeking civil penalties." U.S. Br.
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21 45. Indeed, according to the Solicitor General:

22 The Court's modern decisions, moreover, make crystal clear that agencies engaged
23 in rulemaking and adjudicative functions are wielding executive power in the
24 constitutional sense. Although "[a]gencies make rules * * * and conduct
25 adjudications * * * and have done so since the beginning of the Republic," and
26 "[t]hese activities take 'legislative' and 'judicial' forms," at bottom "they are
27 exercises of—indeed, under our constitutional structure they *must* be exercises of—
28 the 'executive Power' " when performed by the Executive Branch.

1 *Id.* at 31 (citing *City of Arlington v. FCC*, 569 U.S. 290, 304 n.4 (2013) (emphasis in original));
2 *see also id.* at 30 (“the exercise of rulemaking and adjudicative functions by such an agency is—
3 and must be—the exercise of *executive power*.”) (emphasis in original).

4
5 43. The Solicitor General is hardly the only one to recognize the unconstitutionality of
6 the FTC’s structure. Indeed, numerous prominent scholars, members of Congress, and even States
7 have filed briefs in the *Selia Law* case criticizing *Humphrey’s Executor*. Ilan Wurman of the Sandra
8 Day O’Connor College of Law at Arizona State University, for instance, authored a brief on behalf
9 of several separation of power scholars—including Stanford Law School professor and former
10 Tenth Circuit judge Michael W. McConnell—urging that the Court “should reconsider that
11 precedent altogether.” Br. of Separation of Powers Scholars at 23. Similarly, 27 members of the
12 House of Representatives filed an amicus brief calling the basic premise of *Humphrey’s*
13 *Executor*—that the FTC “did not exercise any executive power”—“dubious” and stated that the
14 case might come out “differently today if the same facts arose again.” Br. of Twenty-Seven
15 Members of the U.S. House of Representatives at 7, 18. And no fewer than 13 States—Texas,
16 Alabama, Arkansas, Georgia, Indiana, Kansas, Louisiana, Nebraska, Oklahoma, South Carolina,
17 South Dakota, Utah, and West Virginia—attacked *Humphrey’s Executor* as “thinly reasoned.” Br.
18 of Texas et al. at 12. There is thus a large and growing consensus emerging that the FTC’s structure
19 violates the basic tenets of Article II.

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23 **E. The FTC’s Substantive Objections to Axon’s Acquisition Are Meritless.**

24 44. The FTC’s unconstitutional structure, as well as its substantive and procedural
25 defects, have been laid bare in case after case. A particularly glaring example involves Axon’s
26 small acquisition of Viewu—a transaction intended to bolster technology and innovation in public
27

1 safety and prevent the imminent disruption of BWC programs in several major law enforcement
2 agencies, including NYPD. In addition to benefiting Viewu’s customers, this transaction presented
3 no risk of harm to competition, which is more robust today than ever before.

4
5 45. To avoid this fact, the FTC has posited in its discussions with Axon a very narrow
6 relevant market that includes only large metropolitan police departments (essentially the 69 MCC
7 member agencies⁹ out of 18,000 law enforcement agencies in the U.S.) requiring both BWCs and
8 cloud-based DEMS (but excluding local on-premise DEMS used by many agencies, including
9 MCC Nashville won by Watchguard in May 2019). The FTC has reverse-engineered an artificially
10 constrained relevant market in order to claim that Viewu had high shares, when in actuality the
11 NYPD alone skewed all of Viewu’s numbers and was central to its financial downfall.

12
13 46. Moreover, this type of gerrymandering is arbitrary and overly narrow because there
14 is no distinction—and the FTC has not articulated one to date—between BWCs and DEMS offered
15 to large police departments as compared to smaller agencies. Axon and many of its competitors
16 offer the exact same products to both large and small police departments. And while BWCs and
17 DEMS are complementary (police departments need a DEMS to offload and store footage created
18 by BWCs), they are separate and distinct products. BWCs and DEMS perform different functions,
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22 ⁹ See <https://www.majorcitieschiefs.com/>. Association members are metropolitan cities and
23 counties ranging in sworn officer size from 435 (Salt Lake City) to 36,228 (NYPD). Of course,
24 lots of non-MCC member cities and counties are of equal size and significance; for example,
25 VisioLogix won Rochester, NY with 747 officers, but is not within the FTC’s definition so is
26 ignored. The FTC’s myopic focus also excludes Major County Sheriff Association (“MCSA”) members as large as the LA County Sheriff’s Department with 9,316 sworn officers—an agency that has not yet chosen a BWC or DEMS supplier (proposals are due January 9, 2020 and there will be no competitor shortage).

1 as demonstrated by the fact that police departments mix and match BWCs and DEMS and many
2 competitors offer BWCs or DEMS, but not both. There is no void in the very crowded BWC space
3 with more than 20 camera competitors.

4
5 47. The FTC is also improperly discounting in-car video solutions commonly packaged
6 today with BWC and DEMS in police department Requests for Proposals (“RFPs”), because Viewu
7 did not have an in-car product and had no such product in development. At least 6 leading
8 BWC/DEMS competitors also offer in-car video solutions (Motorola/Watchguard, Panasonic,
9 Utility, Getac, Coban, and Digital Ally), causing Axon to launch its Fleet in-car offering in 2015
10 to stay competitive. Viewu’s failure to invest in a dashboard camera solution put it at significant
11 competitive disadvantage. But not to worry, the FTC simply excluded in-car video from its market
12 definition to artificially elevate Viewu’s relevance.

13
14 48. But even with the FTC’s cherry-picked MCC definition of the market, at least 7
15 BWC competitors offer cloud DEMS (Motorola/Watchguard, Panasonic, Getac, Utility, Coban,
16 Visual Labs/Samsung, and Digital Ally), 5 of whom have large MCC reference accounts. Indeed,
17 WatchGuard/Motorola have 8 MCC accounts, Panasonic has 3, and Utility has 2. And competitors
18 Coban and Getac have won large non-member agencies like the California Highway Patrol (7,197
19 officers) and the Florida Fish & Wildlife Commission (806 officers).

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22 49. These manufacturers not only compete against Axon, they also beat Axon. Indeed,
23 post-acquisition, Axon has lost at least 55 tenders with agencies of 100+ sworn officers to 10
24 separate companies:

- 25 • Watchguard (19 wins) – including MCC Nashville Metro PD, TN (1,398
26 officers)
- 27 • Utility (11 wins) – including St. Louis County PD, MO (880 officers)

- 1 • Panasonic (7 wins) – including Connecticut State Police (1,060 officers)
- 2 • Getac (5 wins) – including Toledo PD, OH (592 officers)
- 3 • Motorola (6 wins)
- 4 • L3/Mobile Vision (2 wins)
- 5 • Visual Labs (2 wins)
- 6 • Coban (1 win) – California Highway Patrol (7,197 officers)
- 7 • Safety Vision (1 win)
- 8 • Intrensic/GoPro (1 win)

9 And even when playing in the FTC’s MCC-only sandbox, Axon lost both Nashville and El
10 Paso to Watchguard in 2019.

11 50. As these statistics demonstrate, the markets for BWC and DEMS (however those
12 markets are defined) are also characterized by low barriers to entry. Recent entrants, including
13 Getac and Visual Labs, have quickly gained traction. These dynamics are wholly inconsistent with
14 any market power on Axon’s part—the company simply cannot exclude other companies from
15 competing, or deter entry by new players, or charge supracompetitive prices. These are not
16 hypothetical arguments, but rather, based on the actual experience of what has come to pass in the
17 more than 18 months since Axon acquired Viewu. Indeed, expansion by incumbent vendors and
18 entry by new players is likely to continue because many police departments, including large
19 metropolitan cities and counties, are open opportunities. At least half of the nation’s largest 1,200
20 police departments and thousands of the 18,000 U.S. law enforcement agencies have yet to adopt
21 BWCs and DEMS.

22 51. Moreover, BWC and DEMS trade in bid markets with the price set by individual
23 competitors in response to RFPs. And while Viewu was an early viable competitor, since at least
24 2015 customers rarely rated Axon and Viewu as each other’s next-best competitor. And expert
25 econometric analysis of opportunity data indicates that Viewu did not constrain Axon’s pricing.
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1 Axon did not discount more when Viewu was bidding, and Axon did not lose more bids when
2 Viewu was bidding. Customers could and did turn to a number of other companies to buy their
3 BWC and DEMS, including much larger vendors like Motorola and Panasonic. In 2017 alone,
4 Axon faced stiff competition on bids from the likes of Motorola (10), Panasonic (18), and
5 WatchGuard (45), demonstrating that these competitors have been and remain prominent.
6

7 52. Indeed, pre-acquisition (between 2016 and May 2018), 4 competitors won 9 MCC
8 accounts. Viewu, on the other hand, had no major city win after NYPD in 2016. At the time of
9 acquisition, Viewu had no ability to bid on new BWC or DEMS contracts. In fact, new Viewu bids
10 were essentially non-existent in 2017 and pre-acquisition in 2018. Viewu had locked itself into
11 contracts that drove negative cash flow and significant operating losses. The very NYPD contract
12 that led to the public appearance of a healthy business for Viewu had, in actuality, overwhelmed it,
13 causing the firm to cancel nearly all of its research and development activities and to forego the
14 development of cutting-edge features that its customers wanted and competitors offered. And
15 because NYPD consumed all of Viewu's resources that might have otherwise gone to create next-
16 generation products or effectively bid for other customers, Viewu had eliminated itself as a
17 competitive threat.
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20 53. The low price that Viewu bid for the NYPD deal—roughly one-third of Axon's bid
21 price—reflected the company's gamble that it could regain relevance at the expense of profit.
22 Viewu similarly won a low-price contract with Oakland in September 2016, thus taking on two
23 very large, resource-intensive obligations with very little margin for error. But Viewu could not
24 deliver. In addition to security flaws, Viewu's DEMS was prone to losing or corrupting data and
25 resulted in the Oakland Police Department losing 25% of its stored video footage during a software
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1 upgrade—data typically needed to prosecute criminal trials. And what would have been the fatal
2 blow for Viewu came only a few months after Axon’s acquisition, when a Viewu LE-5 body
3 camera’s lithium battery caught fire and exploded, prompting the NYPD to pull thousands of those
4 cameras off the street. Accordingly, pre-existing design flaws in Viewu’s products made Viewu’s
5 exit from the market imminent. Instead, Axon was able to step in and invest in improvements to
6 Viewu’s products to better serve our country’s public safety agencies, at considerable monetary
7 cost to Axon, and ensure their body camera programs did not fail.
8

9 54. Axon’s acquisition of Viewu falls squarely within the “failing firm” safe harbor.
10 Viewu was unable to meet its financial obligations in the near term and was effectively insolvent.
11 And there were no viable buyers for Viewu. Safariland made substantial good faith efforts to sell
12 Viewu, but no one was willing to make an offer let alone consummate a deal. Notably, Safariland
13 approached Axon, not the other way around. The sale to Axon was its last and only option.
14

15 55. Still, the FTC caused Axon to spend at least \$1.5 million in legal fees (not to
16 mention substantial internal resources and mission distraction) during an 18+ month investigation,
17 before now threatening the company with a forceful unwinding of its Viewu acquisition. Even
18 worse, the FTC insists on creating a new competitor with capabilities well beyond anything Viewu
19 would have developed in the absence of the merger, by cloning Axon’s independently-developed
20 intellectual property and handing it to a third party—a strongarm demand wholly unsupported by
21 viable antitrust theories of merger harm. This extreme remedy bears no relation to the Viewu that
22 actually existed in May 2018 or could ever have existed today.
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24 56. The basic claim underlying all of the FTC’s actions against Axon is thus without
25 merit. Accordingly, the FTC seeks to hide behind its own biased procedures instead of meeting
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1 Axon's arguments before a neutral arbiter. This Court should prohibit the agency from doing so.
2 If the FTC wishes to challenge and unwind the Viewu consummated merger, it should do so in the
3 same way the DOJ does: on the merits, in the open, in a federal court. Here, Axon will demonstrate
4 that its acquisition of Viewu was lawful and not anti-competitive.
5

6 **COUNT I**

7 **(Violation of Axon's Fifth Amendment Rights)**

8 57. Plaintiff restates and incorporates by reference each and every allegation of the
9 preceding paragraphs.
10

11 58. The imminent administrative proceeding, in which the FTC will act as prosecutor,
12 judge, and jury, violates Axon's Due Process rights, including but not limited to depriving Axon
13 of the ability to make its case before a neutral arbiter.

14 59. By arbitrarily subjecting Axon to unfair procedures before an administrative body,
15 rather than to a fair trial before a neutral judge appointed in accordance with Article III of the
16 Constitution with the procedural protections of a federal court, the FTC has violated Axon's Equal
17 Protection rights.
18

19 60. The Commission's conduct has caused and will continue to cause Axon to suffer
20 immediate and irreparable harm to its Constitutional rights to Due Process and Equal Protection.
21 No money damages can remedy this harm, and Axon has no legal avenue by which to recover any
22 money damages against the Commission. Moreover, the FTC's administrative proceeding is not
23 speculative. It will happen and happen imminently. The FTC has assured Axon of this fact.
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COUNT II

(The FTC’s Structure Violates Article II)

61. Plaintiff restates and incorporates by reference each and every allegation of the preceding paragraphs.

62. The FTC’s actions separately violate Axon’s Constitutional rights because the agency’s structure, on its face, is unconstitutional under Article II. In particular, Article II requires that Executive officials exercising law-enforcement power be removable at will by the President. Although the FTC clearly exercises law-enforcement power—including but not limited to Axon’s case—its Commissioners are shielded from at-will removal. Moreover, ALJs appointed by the FTC, who also can only be removed for cause, create an impermissible dual-layer of insulation. Because the agency’s structure violates Article II, any actions taken against Axon under its present structure are invalid.

COUNT III

(Declaratory Judgment that Axon’s Acquisition Did Not Violate Antitrust Laws)

63. Plaintiff restates and incorporates by reference each and every allegation of the preceding paragraphs.

64. Axon’s acquisition of Viewu did not violate Clayton Act § 7 or any other antitrust law. The acquisition was not likely to substantially lessen competition and in fact has not done so.

65. At all relevant times, barriers to entry have been low, and the market for BWCs and the separate market for DEMs (however defined) was and remains highly competitive and subject to rapid change. A considerable number of police departments of all sizes have yet to adopt body camera technologies, creating endless opportunity for existing and new entrants.

1 66. Both before and after Axon’s acquisition of Viewu, there were and have been strong
2 competitors and new entrants. These competitors and entrants have enhanced competition in the
3 marketplace.

4 67. At no time has Axon engaged in supracompetitive pricing, nor could it.

5 68. At the time of the acquisition, Viewu was a failing company.

6 69. In sum, for all the foregoing reasons, Axon’s acquisition of Viewu was and remains
7
8 lawful.

9
PRAYER FOR RELIEF

10
11 WHEREFORE, Axon respectfully requests that this Court enter judgment in its favor and
12 against the FTC as follows:

- 13 a. Declare the FTC’s structure unconstitutional;
- 14 b. Declare the FTC’s administrative procedures unconstitutional;
- 15 c. Declare that Axon’s acquisition of Viewu was lawful;
- 16 d. Enjoin the FTC and its Commissioners from pursuing an administrative
17 enforcement action against Axon.
- 18 e. Award Axon its reasonable costs incurred in bringing this action; and
- 19 f. Award such other and further relief the Court deems just and proper.
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23 Dated: January 3, 2020

Respectfully Submitted,

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25
26 /s/ Pam Petersen
Pamela B. Petersen
27 Arizona Bar No. 011512
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Axon Enterprise, Inc.
17800 N. 85th Street
Scottsdale, AZ 85255-9603
Telephone: (623) 326-6016
Facsimile: (480) 905-2027
ppetersen@axon.com
Secondary: legal@axon.com

Garret G. Rasmussen (*pro hac vice* pending)
Antony P. Kim (*pro hac vice* pending)
Jonathan A. Direnfeld (*pro hac vice* pending)
Thomas Fu (*pro hac vice* pending)
Orrick, Herrington & Sutcliffe LLP
1152 Fifteenth Street N.W.
Washington, D.C. 2005
Telephone: (202) 339-8400
Facsimile: (202) 339-8500
grasmussen@orrick.com
akim@orrick.com
jdirenfeld@orrick.com
tfu@orrick.com

Attorneys for Plaintiff Axon Enterprise, Inc.