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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

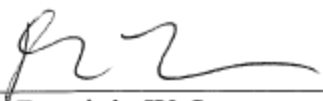
Axon Enterprise Incorporated,
Plaintiff,
v.
Federal Trade Commission, et al.,
Defendants.

No. CV-20-00014-PHX-DWL
ORDER

NOTICE OF TENTATIVE RULING

A hearing limited to the issue of subject matter jurisdiction is set for April 1, 2020. (Doc. 24.) In advance of that hearing, the Court wishes to provide the parties with its tentative ruling. This is, to be clear, only a tentative ruling. The point of providing it beforehand is to allow the parties to focus their argument on the issues that seem salient to the Court and to maximize the parties' ability to address any perceived errors in the Court's logic.

Dated this 10th day of March, 2020.



Dominic W. Lanza
United States District Judge

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TENTATIVE RULING

INTRODUCTION

1
2 Pending before the Court is Plaintiff Axon Enterprise, Inc.’s (“Axon”) motion for
3 preliminary injunction. (Doc. 15.)

4 Axon sells various technological tools, including body-worn cameras, to police
5 departments. In May 2018, Axon acquired one of its competitors. This acquisition
6 prompted the Federal Trade Commission (the “FTC”) to conduct an antitrust investigation.
7 In January 2020, just as the FTC was about to initiate a formal administrative proceeding
8 to challenge the acquisition, Axon filed this lawsuit, which seeks to enjoin the
9 administrative proceeding based on three constitutional claims: *first*, that the FTC’s
10 structure violates Article II of the Constitution because its commissioners are not subject
11 to at-will removal by the President and its administrative law judges (“ALJs”), who are
12 appointed by its commissioners, are also insulated from at-will removal; *second*, that the
13 FTC’s combined role of “prosecutor, judge, and jury” during administrative proceedings
14 violates the Due Process Clause of the Fifth Amendment; and *third*, that the FTC and the
15 Antitrust Division of the U.S. Department of Justice, which are both responsible for
16 reviewing the antitrust implications of acquisitions but employ different procedures and
17 substantive standards when conducting such review, utilize an arbitrary and irrational
18 “clearance” process when deciding which agency will review a particular acquisition, in
19 violation of the Equal Protection Clause of the Fifth Amendment. (Doc. 15 at 6-15.)¹

20 The constitutional claims Axon seeks to raise in this case are significant and topical.
21 Indeed, the Supreme Court recently held oral argument in a case that raises similar issues.
22 *Seila Law LLC v. Consumer Fin. Protection Bureau*, No. 19-7. This Court, however, is
23 not the appropriate forum to address Axon’s claims. It is “fairly discernable” from the FTC
24 Act that Congress intended to preclude district courts from reviewing the type of
25 constitutional claims Axon seeks to raise here—instead, Axon must raise those claims

26
27 ¹ In its reply, Axon clarifies that it “is not challenging the mere fact of concurrent
28 jurisdiction, but rather the arbitrary way in which the agencies determine which of two
vastly different (and often outcome-determinative) procedures will be applied to a
particular company.” (Doc. 21 at 2 n.1.)

1 during the administrative process and then renew them, if necessary, when seeking review
2 in the Court of Appeals. Thus, this Court lacks subject matter jurisdiction over this action,
3 Axon’s request for a preliminary injunction must be denied, and this action must be
4 dismissed.

5 **BACKGROUND**

6 I. Factual Background

7 Axon, which was formerly known as TASER International, Inc., is a Delaware
8 corporation that sells various technological tools, including body-worn cameras and cloud-
9 computing software, to police departments. (Doc. 1 ¶¶ 13, 19-21; Doc. 15-2 ¶ 2.) In May
10 2018, Axon acquired one of its competitors, Viewu. (Doc. 1 ¶ 24.) The next month, the
11 FTC notified Axon that it was investigating the acquisition. (*Id.* ¶ 25.) Axon cooperated
12 with the investigation over the next 18 months. (*Id.* ¶ 26.) Axon contends that it “spent in
13 excess of \$1.6 million responding to the FTC’s investigational demands, including attorney
14 and expert fees, ESI production and related hosting and third-party vendor fees and
15 expenses.” (Doc. 15-2 at 3 ¶ 5.)

16 Axon contends that, at the conclusion of the investigation, the FTC gave it a choice.
17 First, it could agree to a “blank check” settlement that would rescind its acquisition of
18 Viewu and transfer some of its intellectual property to the newly restored Viewu. (Doc. 1 ¶
19 27.) According to Axon, the FTC’s “vision” was to turn Viewu into a “clone” of Axon—
20 “something Viewu never was nor could be without impermissible government regulation.”
21 (*Id.*) Second, if Axon declined those terms, the FTC would pursue an administrative
22 complaint against Axon. (*Id.*)

23 II. Procedural History

24 On January 3, 2020, Axon filed this lawsuit. (Doc. 1). In its complaint, Axon
25 outlines the factual history discussed above and alleges a violation of its Fifth Amendment
26 rights to due process and equal protection (*id.* ¶¶ 57-60), alleges that the FTC’s structure
27 violates Article II of the Constitution (*id.* ¶¶ 61-62), and seeks a declaration that its
28 acquisition of Viewu didn’t violate any antitrust laws (*id.* ¶¶ 63-69).

1 Also on January 3, 2020 (but later that day), the FTC filed an administrative
2 complaint challenging Axon’s acquisition of Viewu. (Doc. 15 at 2 n.1.) An evidentiary
3 hearing in the administrative proceeding is scheduled for May 19, 2020. (Doc. 22 at 2;
4 FTC Doc. 9389, Administrative Law Judge’s Scheduling Order, at 5.)

5 On January 9, 2020, Axon filed a motion for a preliminary injunction, seeking to
6 enjoin further FTC proceedings against it. (Doc. 15.)

7 On January 23, 2020, the FTC filed an opposition to Axon’s motion. (Doc. 19.)
8 The FTC relegated the merits of Axon’s constitutional claims to a footnote and instead
9 focused on whether the Court possesses subject matter jurisdiction. (Doc. 19 at 1, 14 n.12).

10 On January 30, 2020, Axon filed a reply. (Doc. 21.) That same day, Axon filed a
11 motion for expedited consideration. (Doc. 22.) Over the FTC’s opposition (Doc. 23), the
12 Court granted the motion and scheduled oral argument for April 1, 2020. (Doc. 24.)

13 On March 10, 2020 the Court issued a tentative order. (Doc. 29.)

14 ANALYSIS

15 “Subject-matter limitations on federal jurisdiction serve institutional interests. They
16 keep the federal courts within the bounds the Constitution and Congress have prescribed.”
17 *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999). “[C]ourts have an
18 ‘independent obligation’ to police their own subject matter jurisdiction.” *Animal Legal*
19 *Defense Fund v. U.S. Dep’t of Agriculture*, 935 F.3d 858, 866 (9th Cir. 2019) (citation
20 omitted). *See also* Fed. R. Civ. Proc. 12(h)(3) (“If the court determines at any time that it
21 lacks subject-matter jurisdiction, the court must dismiss the action.”).

22 In general, district courts “have original jurisdiction of all civil actions arising under
23 the Constitution, laws, or treaties of the United States.” 28 U.S.C. § 1331. This includes
24 the authority to “declare the rights and other legal relations of any interested party seeking
25 such a declaration.” *Id.* § 2201. “This grant of jurisdiction, however, is not absolute.”
26 *Kerr v. Jewell*, 836 F.3d 1048, 1057 (9th Cir. 2016). Among other things, Congress can
27 “preclude[] district court jurisdiction” over claims pertaining to the conduct of a regulatory
28 agency by enacting an administrative-review framework that evinces a “fairly discernable”

1 intent to require such claims “to proceed exclusively through the statutory review scheme.”
2 *Id.* at 1057-58 (citation omitted). *See also Bennett v. SEC*, 844 F.3d 174, 178 (4th Cir.
3 2016) (“Congress can . . . impliedly preclude jurisdiction by creating a statutory scheme of
4 administrative adjudication and delayed judicial review in a particular court.”).

5 The issue here is whether Congress, by enacting the FTC Act, intended to require
6 constitutional challenges to the FTC’s structure and processes to be brought via the FTC
7 Act’s adjudicatory framework. If so, this Court lacks subject matter jurisdiction to
8 entertain Axon’s claims.

9 I. Background Law

10 On three occasions between 1994 and 2012, the Supreme Court addressed whether
11 Congress’s enactment of a scheme of administrative adjudication should be interpreted as
12 an implicit decision by Congress to preclude district court jurisdiction. Although none of
13 those decisions involved the FTC Act, they control the analysis here. Thus, it is necessary
14 to begin by summarizing them. *Cf. Bennett*, 844 F.3d at 178-81 (identifying these cases as
15 “the trilogy”).

16 The first decision, *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), addressed
17 the preclusive effect of the Federal Mine Safety and Health Amendments Act of 1977
18 (“Mine Act”). Thunder Basin, a coal company, objected to a Mine Act regulation that
19 required it to post the names of certain union representatives. *Id.* at 203-04. Rather than
20 seek review of the regulation through the Mine Act’s judicial-review scheme, which
21 contemplates that “[c]hallenges to enforcement [will be] reviewed by the Federal Mine
22 Safety and Health Review Commission . . . and by the appropriate United States court of
23 appeals,” Thunder Basin filed a lawsuit in federal district court in which it argued that the
24 Mine Act’s review scheme violated its due process rights under the Fifth Amendment. *Id.*
25 at 204-06. The district court issued an injunction in Thunder Basin’s favor but the Supreme
26 Court reversed, concluding that the district court lacked subject matter jurisdiction over the
27 action. *Id.* at 205-07.

28 The Court held that when a statutory scheme, such as the Mine Act, “allocate[s]

1 initial review to an administrative body” and authorizes only “delayed judicial review,”
2 courts must analyze three factors—(1) “the statute’s language, structure, and purpose,” (2)
3 “its legislative history,” and (3) “whether the claims can be afforded meaningful review”—
4 when assessing whether Congress’s intent to “preclude initial judicial review” can be
5 “fairly,” if impliedly, “discerned” from the statutory scheme. *Id.* at 207. The Court then
6 analyzed these factors and concluded that all three supported a finding of preclusion.

7 First, the Court noted that the Mine Act creates a “detailed structure” for regulated
8 parties to seek review of enforcement activity under the Act—a mine operator is entitled
9 to challenge an adverse agency order before an ALJ, then seek review of the ALJ’s order
10 before the Federal Mine Safety and Health Review Commission, and then, if necessary,
11 seek review of any adverse decision by the Commission in a federal Court of Appeals. *Id.*
12 at 207-08. This structure, the Court concluded, “demonstrates that Congress intended to
13 preclude challenges such as the present one.” *Id.* at 208. The Court also noted that the
14 Mine Act contains provisions that enable the Secretary of Labor (who is responsible for
15 enforcing the Mine Act) to file an action in district court when seeking certain types of
16 relief. *Id.* at 209. Because “[m]ine operators enjoy no corresponding right,” the Court
17 concluded these provisions served as further proof of Congress’s intent to preclude. *Id.*

18 Second, the Court stated that “[t]he legislative history of the Mine Act confirms this
19 interpretation.” *Id.* at 209-11.

20 Third, the Court addressed whether a finding of preclusion would result, “as a
21 practical matter,” in the elimination of Thunder Basin’s ability “to obtain meaningful
22 judicial review” of its claims. *Id.* at 213 (quotation omitted). The Court concluded that no
23 such risk was present because Thunder Basin’s “statutory and constitutional claims . . . can
24 be meaningfully addressed in the Court of Appeals.” *Id.* at 215. In reaching this
25 conclusion, the Court observed that “[t]he Commission has addressed constitutional
26 questions in previous enforcement proceedings” but clarified that, “[e]ven if this were not
27 the case,” the availability of eventual review by a federal appellate court was sufficient.
28 *Id.*

1 The second component of the trilogy, *Free Enterprise Fund v. Public Co.*
2 *Accounting Oversight Bd*, 561 U.S. 477 (2010), addressed the preclusive effect of the
3 Sarbanes-Oxley Act of 2002 (“the Sarbanes–Oxley Act”) and its interaction with the
4 Securities Exchange Act. Among other things, the Sarbanes–Oxley Act created an entity
5 called the Public Company Accounting Oversight Board (“PCAOB”), which was tasked
6 with providing “tighter regulation of the accounting industry.” *Id.* at 484. The PCAOB
7 was composed of five members who were appointed by the Securities and Exchange
8 Commission (“the Commission”). *Id.* The PCAOB’s broad regulatory authority included
9 enforcing not only the Commission’s rules, but also “its own rules,” and it possessed the
10 authority to “issue severe sanctions in its disciplinary proceedings, up to and including the
11 permanent revocation of a firm’s registration, a permanent ban on a person’s associating
12 with any registered firm, and money penalties of \$15 million.” *Id.* at 485.

13 The plaintiff in *Free Enterprise Fund* was a Nevada accounting firm that been
14 investigated by the PCAOB and then criticized in a report issued by the PCAOB. *Id.* at
15 487. In a lawsuit filed in federal district court, the accounting firm argued—similar to one
16 of Axon’s arguments here—that the PCAOB’s structure was unconstitutional because its
17 board members, as well as the Commission members who appointed them, were shielded
18 from Presidential control. *Id.* The district court concluded it had subject matter jurisdiction
19 over the lawsuit but rejected the accounting firm’s constitutional claim on the merits. *Id.*
20 at 488. The Supreme Court reversed, agreeing with the district court’s jurisdictional
21 analysis but concluding that, on the merits, the PCAOB’s structure was unconstitutional.

22 When addressing the jurisdictional issue, the Court cited *Thunder Basin* as
23 supplying the relevant standards but concluded that, under those standards, jurisdiction was
24 not precluded. *Id.* at 489-91. Central to the Court’s analysis was the fact that the relevant
25 adjudicatory framework didn’t provide for judicial review over all of the PCAOB’s
26 activities. Specifically, the Commission was only empowered “to review any [PCAOB]
27 rule or sanction.” *Id.* at 489. Commission action, in turn, could receive judicial review
28 under 15 U.S.C. § 78y. *Id.* This structure was underinclusive, the Court stated, because it

1 “provides only for judicial review of *Commission* action, and not every Board action is
2 encapsulated in a final Commission order or rule.” *Id.* Put another way, the Court did “not
3 see how [the accounting firm] could meaningfully pursue [its] constitutional claims”
4 because the particular PCAOB conduct it wished to challenge (*e.g.*, the release of the
5 critical report) “is not subject to judicial review.” *Id.* at 489-90. Thus, the Court concluded
6 that Congress did not intend to “strip the District Court of jurisdiction over these claims.”
7 *Id.* at 491.

8 The final component of the trilogy, *Elgin v. Dep’t of Treasury*, 567 U.S. 1 (2012),
9 addressed the preclusive effect of the Civil Service Reform Act of 1978 (“CSRA”). The
10 CSRA is a “comprehensive system for reviewing personnel action taken against federal
11 employees.” *Id.* at 5 (quotation omitted). Under the CSRA, an employer seeking to
12 terminate (or pursue certain other adverse employment actions against) a covered employee
13 must provide notice, representation, an opportunity to respond, and a reasoned decision.
14 *Id.* at 5-6. An employee who disagrees with the agency’s decision may seek review by the
15 Merit Systems Protection Board (“MSPB”). *Id.* at 6. And an employee who disagrees with
16 the MSPB’s decision may seek judicial review in the Federal Circuit. *Id.*

17 In *Elgin*, a male employee was terminated because he hadn’t registered with the
18 Selective Service. *Id.* at 6-7. The employee appealed to the MPSB, arguing that the statute
19 requiring men (but not women) to register with the Selective Service is unconstitutional,
20 but the employee didn’t seek further review in the Federal Circuit after the MSPB rejected
21 his claim—instead, he filed a lawsuit in federal district court in which he raised the same
22 constitutional challenge and requested various forms of equitable relief, including
23 reinstatement. *Id.* The district court concluded it had jurisdiction to resolve the
24 constitutional claim but the Supreme Court reversed, holding that “the CSRA precludes
25 district court jurisdiction over petitioners’ claims even though they are constitutional
26 claims for equitable relief.” *Id.* at 8.

27 The Court began by reaffirming that, under *Thunder Basin*, “the appropriate
28 inquiry” when evaluating whether Congress intended to preclude district court jurisdiction

1 “is whether it is ‘fairly discernible’ from the [statute] that Congress intended [litigants] to
2 proceed exclusively through the statutory review scheme, even in cases in which the
3 [litigants] raise constitutional challenges to federal statutes.” *Id.* at 8-10. Next, the Court
4 “examined the CSRA’s text, structure, and purpose.” *Id.* at 10-11. After discussing the
5 various forms of review available under the statute, the Court concluded that “[g]iven the
6 painstaking detail with which the CSRA sets out the method for covered employees to
7 obtain review of adverse employment actions, it is fairly discernible that Congress intended
8 to deny such employees an additional avenue of review in district court.” *Id.* at 11-12. The
9 Court also noted that the CSRA expressly allows employees to assert one particular type
10 of claim in federal district court. *Id.* at 13 (citing 5 U.S.C. § 7702(b)(2)). The existence of
11 this provision, the Court stated, “demonstrates that Congress knew how to provide
12 alternative forums for judicial review based on the nature of an employee’s claim. That
13 Congress declined to include an exemption . . . for challenges to a statute’s constitutionality
14 indicates that Congress intended no such exception.” *Id.*

15 The Court also addressed whether a preclusion finding would effectively “foreclose
16 all meaningful judicial review” of the plaintiff’s constitutional claims. *Id.* at 15-21 (citing
17 *Free Enterprise Fund*, 561 U.S. at 489). The Court concluded that such a risk was not
18 present, even though “the MSPB has repeatedly refused to pass upon the constitutionality
19 of legislation,” because the Federal Circuit, “an Article III court fully competent to
20 adjudicate [constitutional] claims,” could address those constitutional claims during the
21 final stage of the statutory review process. *Id.* at 16-18. The Court also rejected the notion
22 that the Federal Circuit would be hamstrung by an inadequately developed record when
23 conducting such review, explaining that “[e]ven without factfinding capabilities, the
24 Federal Circuit may take judicial notice of facts relevant to the constitutional question” and
25 noting that “we see nothing extraordinary in a statutory scheme that vests reviewable
26 factfinding authority in a non-Article III entity that has jurisdiction over an action but
27 cannot finally decide the legal question to which the facts pertain.” *Id.* at 19-21.

28 ...

1 II. Whether It Is “Fairly Discernable” From The FTC Act That Congress Intended To
2 Preclude District Court Jurisdiction Over Axon’s Constitutional Challenges

3 With this backdrop in mind, the Court will turn to the FTC Act. Nothing in the FTC
4 Act expressly divests district courts of jurisdiction to entertain constitutional claims of the
5 sort raised by Axon in this action, but *Thunder Basin*, *Free Enterprise Fund*, and *Elgin* all
6 recognize that Congress may implicitly preclude such jurisdiction through the enactment
7 of an administrative review scheme. The Court’s task, then, is to determine whether such
8 intent is “fairly discernable” from the FTC Act. *Thunder Basin*, 510 U.S. at 207 (citation
9 omitted).

10 A. **Text, Structure, And Purpose Of The FTC Act**

11 Under *Thunder Basin* and its progeny, the first factor to consider when assessing
12 “[w]hether a statute is intended to preclude initial judicial review” is “the statute’s
13 language, structure, and purpose.” *Thunder Basin*, 510 U.S. at 207. This factor strongly
14 supports a finding of preclusion in this case.

15 The text and structure of the FTC Act closely resemble those of the Mine Act, which
16 was the statutory scheme at issue in *Thunder Basin*. The FTC Act sets out a detailed
17 scheme for preventing the use of unfair methods of competition. 15 U.S.C. § 45(a)-(b).
18 Additionally, the FTC Act’s enforcement provisions create timelines and mechanisms for
19 adjudicating alleged violations that are similar to those outlined in the Mine Act. *Compare*
20 15 U.S.C. § 45(b) *with* 30 U.S.C. § 815. Finally, and most important, the FTC Act’s
21 judicial review process is similar to the Mine Act’s, up to and including conferring
22 “exclusive jurisdiction” upon the relevant Court of Appeals to affirm, modify, or set aside
23 final agency orders. *Compare* 15 U.S.C. § 45(c)-(d) *with* 30 U.S.C. § 816(a). In *Thunder*
24 *Basin*, the Supreme Court held that this type of “detailed structure” suggested “that
25 Congress intended to preclude challenges such as the present one.” 510 U.S. at 208.
26 Similarly, in *Elgin*, the Supreme Court held when a statutory scheme sets out in
27 “painstaking detail” the process for aggrieved parties to obtain review of adverse decisions,
28 “it is fairly discernible that Congress intended to deny such employees an additional avenue

1 of review in district court.” 567 U.S. at 11-12. The FTC Act has a “detailed structure” that
2 includes “painstaking detail” concerning how to seek review, so the same inference arises
3 here. *Cf. Hill v. SEC*, 825 F.3d 1236, 1242 (11th Cir. 2016) (concluding that a review
4 scheme “materially indistinguishable” from that in *Thunder Basin* demonstrated
5 congressional intent to preclude district court jurisdiction).²

6 The FTC Act also contains a provision authorizing the FTC (but not regulated
7 parties) to file a lawsuit in federal district court. *See* 15 U.S.C. § 53(a) (authorizing the
8 FTC to “bring suit in a district court of the United States” when certain conditions are
9 satisfied). In *Thunder Basin*, the Supreme Court stated that an inference of preclusive
10 effect arose because the Mine Act allowed the Secretary of Labor to file certain claims in
11 district court but “[m]ine operators enjoy no corresponding right.” 510 U.S. at 209. *See*
12 *also Elgin*, 567 U.S. at 13 (provision allowing employees to file certain type of claims in
13 district court showed that “Congress knew how to provide alternative forums for judicial
14 review based on the nature of an employee’s claim. That Congress declined to include an
15 exemption . . . for challenges to a statute’s constitutionality indicates that Congress
16 intended no such exception.”). So, too, here.³

17 Finally, the purpose of the FTC Act suggests that Congress intended to preclude
18 district court jurisdiction. Congress intended the FTC to act as a successor to the Interstate
19 Commerce Commission and enforce “its broad mandate to police unfair business conduct.”
20 *FTC v. AT&T Mobility LLC*, 883 F.3d 848, 854 (9th Cir. 2018). To that end, “Congress
21 deliberately gave the FTC broad enforcement powers.” *Id.* This is similar to the Mine
22 Act’s purpose of “strengthen[ing] and streamlin[ing] health and safety enforcement

23 ² In its reply, Axon points out several ways in which the text, structure, and purpose
24 of the FTC Act arguably differ from the text, structure, and purpose of the CSRA. (Doc.
25 21 at 4-5.) However, Axon does not attempt to make such a showing with respect to the
Mine Act.

26 ³ This conclusion is bolstered by the slate of recent cases (all from outside the Ninth
27 Circuit) concluding that the SEC’s authorizing legislation precludes district court
28 jurisdiction. *See, e.g., Bennett*, 844 F.3d at 181-82; *Hill*, 825 F.3d at 1242-1245; *Tilton v.*
SEC, 824 F.3d 276, 282-81 (2d Cir. 2016); *Jarkesy v. SEC*, 803 F.3d 9, 16-17 (D.C. Cir.
2015). The review provisions of the FTC Act are “materially indistinguishable,” *Hill*, 825
F.3d at 1242, and “nearly identical,” *Jarkesy*, 803 F.3d at 16, to those contained in 15
U.S.C. § 78y, which itself resembles the review provisions in the Mine Act.

1 requirements,” *Thunder Basin*, 510 U.S. 221, as well as the CSRA’s purpose of introducing
2 an “integrated scheme of administrative and judicial review” to “replace an outdated
3 patchwork of statutes and rules,” *Elgin*, 567 U.S. at 13-14 (citation omitted). In other
4 words, where Congress acts to introduce a statutory scheme that brings order from chaos,
5 it indicates that Congress intended to preclude district court jurisdiction. The FTC Act was
6 such an attempt.

7 **B. Legislative History Of The FTC Act**

8 *Thunder Basin* suggests the second relevant preclusion factor is the underlying
9 statute’s “legislative history.” 510 U.S. at 207. However, Justice Scalia, joined by Justice
10 Thomas, issued a concurring opinion in *Thunder Basin* objecting to the consideration of
11 legislative history as part of the preclusion analysis, stating that such consideration only
12 “serve[d] to maintain the illusion that legislative history is an important factor in this
13 Court’s deciding of cases, as opposed to an omnipresent makeweight for decisions arrived
14 at on other grounds.” *Id.* at 219 (Scalia, J., concurring).

15 The Supreme Court’s subsequent decisions in this area, *Free Enterprise Fund* and
16 *Elgin*, did not address (much less focus on) legislative history, and the Supreme Court has
17 issued subsequent opinions in other contexts that reject the use of legislative history as a
18 legitimate interpretative tool. *See, e.g., Epic Sys. Corp. v. Lewis*, 138 S.Ct. 1612, 1631
19 (2018) (“[L]egislative history is not the law. It is the business of Congress to sum up its
20 own debates in its legislation, and once it enacts a statute [w]e do not inquire what the
21 legislature meant; we ask only what the statute means.”) (citations and internal quotation
22 marks omitted). Thus, it is unclear whether this portion of *Thunder Basin* retains validity.
23 Indeed, the FTC does not mention legislative history in its response brief (Doc. 19) and
24 Axon barely mentions it its reply (Doc. 21 at 4 [criticizing the FTC for failing to “point to
25 legislative history for the FTC Act that is similar to the CSRA’s”]).

26 In any event, to the extent legislative history remains a relevant consideration, and
27 to the extent it is possible to draw any meaningful conclusions from the FTC Act’s
28 legislative history, *but see Thunder Basin*, 510 U.S. at 219 (Scalia, J., concurring), it tends

1 to support the inference that Congress sought to preclude district court jurisdiction over the
2 type of claims presented here. Judicial review of final, and only final, FTC actions was a
3 component of the FTC Act from its earliest iterations. *See* Marc Winerman, *The Origins*
4 *of the FTC: Concentration, Cooperation, Control, and Competition*, 71 Antitrust L. J. 1, 4
5 (2003). The debate focused on the breadth of judicial review and settled on the standard
6 contained in § 45 to this day: deference to the FTC’s findings of fact, but otherwise silent.
7 *Id.* at 5, 76-77, 80 (discussing the FTC Act’s proponents’ “essential faith in the workings
8 of a commission”), 90-92. It does not appear Congress ever considered amending the FTC
9 Act to route complaints through any process other than administrative proceedings. *Id.*

10 C. Availability Of Meaningful Review And Associated Considerations

11 In *Thunder Basin*, the Supreme Court identified the third preclusion factor as
12 “whether the claims can be afforded meaningful review” and then addressed—in the
13 portion of the opinion concerning this factor—whether the claims were “wholly collateral”
14 to the statute’s review provisions and whether the claims fell outside the agency’s
15 expertise. 510 U.S. at 207, 212-15. However, in both *Elgin* and *Free Enterprise Fund*, the
16 Supreme Court seemed to frame the third factor as a conjunctive, three-part test involving
17 consideration of (1) whether a finding of preclusion could foreclose all meaningful judicial
18 review; (2) whether the suit is “wholly collateral” to a statute’s review provisions; and (3)
19 whether the claims are “outside the agency’s expertise.” *Elgin*, 567 U.S. at 15-16; *Free*
20 *Enterprise Fund*, 561 U.S. at 489-90. It is therefore unclear whether these are distinct
21 factors or simply different ways of addressing the same thing.

22 Although the Ninth Circuit has not resolved this issue, other appellate courts have
23 recognized its “unsettled” nature and concluded that “the most critical thread in the case
24 law is . . . whether the plaintiff will be able to receive meaningful judicial review without
25 access to the district courts.” *Bebo*, 799 F.3d at 774. *See also Hill*, 825 F.3d at 1245 (“We
26 agree with the Second and Seventh Circuits that the first factor—meaningful judicial
27 review—is ‘the most critical thread in the case law.’”) (citation omitted). The Court will
28 follow the same approach here.

1 1. Availability Of Meaningful Review

2 Axon’s overarching argument is that this case “is materially indistinguishable” from
3 *Free Enterprise Fund* and that “the FTC Act affords no meaningful review of Axon’s
4 claims outside this lawsuit.” (Doc. 21 at 2-5.) This argument is unavailing.

5 As noted, *Free Enterprise Fund* focused on the fact that the PCAOB could engage
6 in some forms of regulatory activity, including the issuance of critical reports, that were
7 effectively immune from judicial review due to a mismatch in the administrative review
8 scheme—the SEC could only review a “rule or sanction” promulgated by the PCAOB,
9 “and not every Board action is encapsulated in a final Commission order or rule.” 561 U.S.
10 at 489.

11 This sort of mismatch is not present under the FTC Act, at least with respect to the
12 type of claims that Axon seeks to raise here. Fundamentally, Axon believes that its
13 acquisition of Viewu was permissible under the antitrust laws and that the FTC shouldn’t
14 be allowed to investigate or challenge that acquisition. Yet these are claims that Axon can
15 present during the pending administrative proceeding—indeed, Axon has now presented
16 them⁴—and then renew, if necessary, when seeking review of the FTC’s final cease-and-
17 desist order in a federal appellate court. Critically, Axon concedes that such review will
18 eventually be available in this case. (Doc. 21 at 8 [acknowledging that “Axon could, in
19 theory, raise its constitutional claims on appeal from an adverse Commission order” but
20 arguing that the availability of such review “is irrelevant”].) It is well settled that the
21 eventual availability of such review supports a finding of preclusive intent. *Thunder Basin*,
22 510 U.S. at 213-15 (finding of preclusion warranted because Thunder Basin’s “statutory
23 and constitutional claims . . . can be meaningfully addressed in the Court of Appeals,”
24 “[e]ven if” the agency has a track record of refusing to consider such claims during the
25 administrative proceeding); *Elgin*, 567 U.S. at 16-21 (no risk that finding of preclusion
26 would foreclose meaningful review, even though “the MSPB has repeatedly refused to pass

27
28 ⁴ See FTC Doc. No. D9389, Answer and Defenses of Respondent Axon Enter. Inc.,
at 22.

1 upon the constitutionality of legislation,” because the Federal Circuit, “an Article III court
2 fully competent to adjudicate [constitutional] claims,” could address those claims during
3 the final stage of the statutory review process).

4 Axon attempts to evade this conclusion by narrowly focusing on particular aspects
5 of the FTC’s conduct and arguing that those aspects are effectively immune from judicial
6 review. For example, Axon argues that “the clearance decision, which put the FTC, rather
7 than the DOJ, in charge of the Axon/Viewu merger,” was an effectively unreviewable
8 decision that “caused real harm before any administrative action was filed.” (Doc. 21 at
9 6.) Axon also contends in a footnote that the mere fact of “being regulated” by the FTC is
10 a cognizable injury. (*Id.* at 6 n.4.) The problem with these arguments is that they are
11 hypothetical and divorced from the facts of this case. Even assuming *arguendo* that a
12 company that was investigated by the FTC for acquiring a competitor, spent money
13 complying with the FTC’s investigative demands, and ultimately persuaded the FTC not
14 to oppose the acquisition might lack an effective mechanism for challenging the
15 constitutionality of the FTC’s investigatory effort (because there would be no
16 administrative proceeding in which to raise those claims), Axon stands in very different
17 shoes here. It didn’t file this lawsuit in mid-2018, upon the FTC’s initiation of the
18 investigation. Instead, it filed suit 18 months later, mere hours before the FTC initiated an
19 administrative proceeding against it (which Axon was apparently racing to the courthouse
20 to beat). Thus, unlike the accounting firm in *Free Enterprise Fund*, which had its
21 reputation impugned by a critical report issued by the PCAOB but could not challenge that
22 report in any subsequent administrative proceeding, here Axon will (as it concedes) have
23 every opportunity to raise its constitutional challenges during the FTC administrative
24 proceeding and then, if necessary, renew those challenges in its appeal to a federal appellate
25 court. *See* 15 U.S.C. § 45(c)-(d) (an entity dissatisfied with an FTC cease-and-desist order
26 may seek review in the court of appeals “within any circuit where the method of
27 competition or the act or practice in question was used or where such person, partnership,
28 or corporation resides or carries on business,” and the appellate court thereafter has

1 exclusive jurisdiction to “affirm, enforce, modify, or set aside orders of the Commission”).

2 Axon also contends that the absence of effective judicial review is demonstrated by
3 the fact that it (like the accounting firm in *Free Enterprise Fund*) filed this lawsuit before
4 the initiation of administrative proceedings. (Doc. 21 at 3 & n.3.) This argument overlooks
5 that the plaintiff in *Thunder Basin* also filed a pre-enforcement challenge, yet the Supreme
6 Court still concluded that conferring jurisdiction upon the district court would “be inimical
7 to the structure and purpose” of the comprehensive statutory review scheme. *Thunder*
8 *Basin*, 510 U.S. at 781. *Free Enterprise Fund* did not overrule *Thunder Basin* on this point.
9 561 U.S. at 490-91. *See also Hill*, 825 F.3d at 1249 (“[I]t makes no difference that the
10 Gray respondents filed their complaint in the face of an impending, rather than extant,
11 enforcement action. The critical fact is that the Gray respondents can seek full
12 postdeprivation relief under § 78y.”); *Great Plains Coop v. Commodity Futures Trading*
13 *Comm’n*, 205 F.3d 353, 355 (8th Cir. 2000) (holding that pre-administrative enforcement
14 suit seeking an injunction was “an impermissible attempt to make an ‘end run’ around the
15 statutory scheme”).

16 Finally, Axon contends that any attempt to litigate its constitutional claims during
17 the administrative proceeding would not be “meaningful” because “the Commission rules
18 do not allow Axon to depose the DOJ officials who participated in the clearance process
19 without first getting the permission of the FTC-appointed ALJ” and, thus, “there will be
20 no guarantee of an administrative record that will allow a reviewing court to decide those
21 claims.” (Doc. 21 at 7-8.) Yet in *Elgin*, the Supreme Court considered and rejected a
22 nearly identical argument. There, the plaintiff argued that, because the agency lacked the
23 authority to adjudicate constitutional claims, he lacked the ability to create a factual record
24 upon which an Article III court could later decide his claims. 567 U.S. at 19. The Supreme
25 Court disagreed, holding that the statutory scheme adequately ensured such a record could
26 be made and that, if the Court of Appeals concluded it needed more evidence, it was free
27 to take judicial notice of facts helpful to deciding the constitutional issue and/or remand to
28 the MSPB with instructions to receive the necessary evidence. *Id.*

1 The same is true here. If the FTC issues an adverse decision against Axon and Axon
2 appeals, the Ninth Circuit can take judicial notice of facts that would aid its decision on the
3 constitutional claims. *Singh v. Ashcroft*, 393 F.3d 903, 905 (9th Cir. 2004) (holding that,
4 even though a statute limited the Ninth Circuit to reviewing the administrative record, “it
5 is nonsense to suppose that we are so cabined and confined that we cannot exercise the
6 ordinary power of any court to take notice of facts that are beyond dispute.”). If the facts
7 the Ninth Circuit needs are beyond judicial notice, “the court may order such additional
8 evidence to be taken before the [FTC] and to be adduced upon the hearing in such manner
9 and upon such terms and conditions as to the court may seem proper.” 15 U.S.C. § 45(c).
10 In other words, “there is nothing extraordinary in a statutory scheme that vests reviewable
11 authority in a non-Article II entity that has jurisdiction over an action but cannot finally
12 decide the legal question to which the facts pertain.” *Elgin*, 567 U.S. at 19. *See also Bank*
13 *of La. v. FDIC*, 919 F.3d 916, 925-928 (5th Cir. 2019) (rejecting claim that statute did not
14 provide for meaningful judicial review because the administrative proceedings only
15 allowed “limited discovery”).

16 2. Wholly Collateral

17 The next consideration is whether the claim is “wholly collateral” to a statute’s
18 review provisions. Unfortunately, “the reference point for determining whether a claim is
19 ‘wholly collateral’ is not free from ambiguity.” *Bennett*, 844 F.3d at 186. “Neither *Elgin*
20 nor *Free Enterprise Fund* clearly defines the meaning of ‘wholly collateral.’” *Bebo*, 799
21 F.3d at 773.

22 Since *Elgin*, courts seeking to assess whether a claim is “wholly collateral” have
23 taken two approaches. *Bebo*, 799 F.3d at 773-74. First, some courts have looked to “the
24 relationship between the merits of the constitutional claim and the factual allegations
25 against the plaintiff.” *Id.* at 773. These courts have taken their cue from *Free Enterprise*
26 *Fund*, which concluded that the accounting firm’s claims were “wholly collateral” because
27 they were unrelated to “any . . . orders or rules from which review might be sought.” 561
28 U.S. at 489-491. As a result, courts relying on *Free Enterprise Fund* have concluded that

1 a claim is wholly collateral if the basis for the claim would exist regardless of the merits
2 decision of the agency. *Hill v. SEC*, 114 F. Supp. 3d 1297, 1309 (N.D. Ga. 2015) (“What
3 occurs at the administrative proceeding and the SEC’s conduct there is irrelevant to this
4 proceeding which seeks to invalidate the entire statutory scheme.”); *Duka v. SEC*, 103 F.
5 Supp. 3d 382, 391 (S.D.N.Y. 2015) (“Similarly, [plaintiff] contends that her Administrative
6 Proceeding may not constitutionally take place, and she does not attack any order that may
7 be issued in her administrative proceeding relating to the outcome of the SEC action.”)
8 (internal quotations omitted); *Gupta v. SEC*, 796 F. Supp. 2d 503, 513 (S.D.N.Y. 2011)
9 (“These allegations . . . would state a claim even if Gupta were entirely guilty of the
10 charges made against him in the OIP.”). Notably, these courts have either been directly
11 overruled or had their holdings called into serious doubt. *Hill*, 825 F.3d at 1252; *Tilton*,
12 824 F.3d at 291.

13 Second, other courts have looked to *Elgin* when evaluating the meaning of “wholly
14 collateral.” *Bebo*, 799 F.3d at 774. These courts seize on *Elgin*’s conclusion that the claims
15 in that case were not wholly collateral because they were “the vehicle by which [plaintiffs]
16 seek to reverse the removal decision, to return to federal employment, and to receive
17 compensation.” 567 U.S. at 22. The Courts of Appeals that have chosen between these
18 two approaches have unanimously favored this approach. *Bennett*, 844 F.3d at 187
19 (“However, we think the second reading is more faithful to the more recent Supreme Court
20 precedent”); *Tilton*, 824 F.3d at 288 (“The appellants’ Appointments Clause claim
21 arose directly from that enforcement action and serves as an affirmative defense within the
22 proceeding.”); *Jarkesy*, 803 F.3d at 23 (“Here, [plaintiff’s] constitutional and APA claims
23 do not arise ‘outside’ the SEC administrative enforcement scheme—they arise from actions
24 the Commission took in the course of that scheme. And they are the ‘vehicle by which’
25 Jarkesy seeks to prevail in his administrative proceeding.”) (quoting *Elgin*, 567 U.S. at 22).

26 These approaches can be viewed as two sides of the same inquiry. *Free Enterprise*
27 *Fund*’s “wholly collateral” finding turned on the fact that the accounting firm’s claims were
28 “collateral to any . . . orders or rules from which review might be sought.” 561 U.S. at 490.

1 In other words, the fact that the accounting firm was seeking to challenge agency action
2 beyond the scope of what was reviewable under the statutory scheme is what rendered its
3 claims collateral. *Id.* *Elgin* focused on whether the claims at issue were “the vehicle by
4 which [plaintiffs] seek to reverse” adverse action. 567 U.S. at 22. That is, both looked to
5 whether there was a way for a plaintiff to challenge the agency conduct at issue. No such
6 vehicle existed in *Free Enterprise Fund*—the claims which the accounting firm sought to
7 bring had no path to judicial review. In contrast, the *Elgin* plaintiffs did have a route to
8 judicial review and they could have raised their constitutional claims in the course of that
9 route.

10 The best way to harmonize *Free Enterprise Fund* and *Elgin* is to conclude that the
11 “wholly collateral” consideration turns on whether a vehicle exists (or could exist) for the
12 plaintiff ultimately to receive judicial review of its constitutional claim. If there isn’t, the
13 claim is “wholly collateral” to the review scheme, and this consideration would weigh in
14 favor of a district court exercising jurisdiction. This does “reduce[] the factor’s
15 independent significance,” but it is “more faithful to the more recent Supreme Court
16 precedent,” and harmonizes seemingly discordant case law. *Bennett*, 844 F.3d at 187. *See*
17 *also Tilton*, 824 F.3d at 288. *Cf. Jarkesy*, 803 F.3d at 27 (“[T]he possibility that a[n]
18 [agency] order in [plaintiff’s] favor might moot some or all of his challenges does not make
19 those challenges ‘collateral’ and thus appropriate for review outside the administrative
20 scheme that possibility [is] a *feature* . . . not a bug.”) (citing *Standard Oil*, 449 U.S.
21 at 244 n.11).

22 Given this backdrop, there is no merit to Axon’s argument that its constitutional
23 claims are “wholly collateral” to the issues to be adjudicated during the FTC administrative
24 proceeding because its “claims (just like those in *Free Enterprise Fund*) go to the agency’s
25 constitutional authority” and “do not ‘arise[] out of’ an enforcement proceeding.” (Doc.
26 21 at 9-10.) Because Axon can assert (and already has asserted) its constitutional claims
27 during the administrative proceeding, and because Axon retains the ability to seek further
28 review of those claims in a federal appellate court, those claims are not “wholly collateral”

1 to the FTC Act’s review provisions.

2 Finally, one additional clarification is necessary with respect to the concept of
3 “wholly collateral” claims. Axon’s briefing can be interpreted as suggesting its claims are
4 wholly collateral because they are constitutional in nature. (Doc. 21 at 8-9.) But in *Elgin*,
5 the Supreme Court expressly rejected “a jurisdiction rule based on the nature of an
6 employee’s constitutional claim.” 567 U.S. at 15. Creating such a rule would “deprive the
7 aggrieved employee, the [agency], and the district court of clear guidance about the proper
8 forum for the employee’s claims at the outset of the case” because the line between
9 constitutional challenges to statutes and other types of constitutional challenges was “hazy
10 at best.” *Id.* Likewise, the *Elgin* Court rejected a rule that would have reserved “facial
11 constitutional challenges to statutes” for district courts. *Id.* At bottom, “exclusivity does
12 not turn on the constitutional nature of” a claim. *Id.* *Thunder Basin* reached a similar
13 conclusion, holding that a Due Process challenge “can be meaningfully addressed in the
14 Court of Appeals,” and, as a result, the mere fact that plaintiff had brought a constitutional
15 challenge was insufficient to establish district court jurisdiction. 510 U.S. at 215.

16 *Thunder Basin* and *Elgin*, in short, foreclose the possibility that the Court has
17 jurisdiction over Axon’s Due Process and Equal Protection claims simply because they are
18 constitutional in nature—*Thunder Basin* precluded jurisdiction over a Due Process claim,
19 510 U.S. at 215, and *Elgin* precluded jurisdiction over an Equal Protection claim, 567 U.S.
20 at 7, 16. *See also Bebo*, 799 F.3d at 768, 75 (finding district court jurisdiction precluded
21 even though plaintiff asserted a statute “is facially unconstitutional under the Fifth
22 Amendment because it provides the SEC ‘unguided’ authority to choose which respondents
23 will and which will not receive the procedural protections of a federal district court, in
24 violation of equal protection and due process guarantees”).

25 The potential wrinkle is that Axon is also asserting an Article II claim, which was
26 not raised in *Thunder Basin* or *Elgin* but was the claim at issue in *Free Enterprise Fund*.
27 Despite that wrinkle, the logic of *Elgin* extends to preclude jurisdiction over that claim.
28 *Elgin* was concerned with a lack of clarity when it came to deciding whether jurisdiction

1 was precluded and rejected “hazy” line drawing. 567 U.S. at 15. For example:

2 [P]etitioners contend that facial and as-applied constitutional challenges to
3 statutes may be brought in district court, while other constitutional challenges
4 must be heard by the [agency]. But, as we explain below, that line is hazy at
5 best and incoherent at worst. The dissent’s approach fares no better. The
6 dissent carves out for district court adjudication only facial constitutional
7 challenges to statutes, but we have previously stated that “the distinction
8 between facial and as-applied challenges is not so well defined that it has
9 some automatic effect or that it must always control the pleadings and
10 disposition in every case involving a constitutional challenge.”

11 *Id.* (citation omitted). Axon’s Article II claim, at bottom, attacks the for-cause removal
12 protection for FTC commissioners (15 U.S.C. § 41) and ALJs (5 U.S.C. § 7521). (Doc. 15
13 at 12-14.) In other words, Axon brings a facial constitutional challenge to a statute. *Elgin*
14 makes clear that that alone is not enough to establish district court jurisdiction. The weight
15 of authority from outside the Ninth Circuit supports this conclusion. *Hill*, 825 F.3d at 1246
16 (“Whether an injury has constitutional dimensions is not the linchpin in determining its
17 capacity for meaningful judicial review.”); *Jarkesy*, 803 F.3d at 403 (“In any case,
18 assuming *arguendo* that Jarkesy put forth a non-delegation doctrine challenge, he is wrong
19 to assign it talismanic significance. He seems to assume that whenever a respondent in an
20 administrative proceeding attacks a statute on its face, a district court has jurisdiction to
21 hear the challenge, whereas the agency does not. That is mistaken.”)

22 3. Agency Expertise

23 “The final consideration within the *Thunder Basin* framework” is whether Axon’s
24 claims “fall[] outside the [FTC’s] expertise.” *Tilton*, 824 F.3d at 289. *See also Elgin*, 567
25 U.S. at 22. This factor looks to “whether agency expertise could be brought to bear on the
26 questions presented.” *Hill*, 825 F.3d at 1251 (internal quotation marks and alterations
27 omitted). Like the other considerations, this consideration requires a full understanding of
28 the *Thunder Basin* trilogy.

Free Enterprise Fund concluded that agency expertise played no role because the
accounting firm’s constitutional claims were not “fact-bound inquiries” and its statutory
claims did “not require ‘technical considerations of [agency] policy.’” 561 U.S. at 419

1 (citing *Johnson v. Robison*, 415 U.S. 361, 373 (1974)). In contrast, *Elgin* rejected the
2 argument that the plaintiffs’ constitutional arguments were outside the statutory scope of
3 review, because that argument “overlook[ed] the many threshold questions that may
4 accompany a constitutional claim and to which the [agency] can apply its expertise.” 567
5 U.S. at 22. Resolution of substantive arguments that did fall under the agency’s expertise
6 in favor of a plaintiff could “avoid the need to reach his constitutional claims.” *Id.* In other
7 words, the ability to “fully dispose of the case” before reaching the constitutional claims
8 was an example of an agency’s expertise being brought to bear. *Id.*

9 Again, *Free Enterprise Fund* and *Elgin* can be difficult to harmonize. The Courts
10 of Appeals that have recognized this tension have generally opted to apply *Elgin*’s
11 approach to the agency expertise consideration. *Bennett*, 844 F.3d at 187-88; *Hill*, 825
12 F.3d at 1250-51; *Tilton*, 824 F.3d at 289-290; *Jarkesy*, 803 F.3d at 28-29; *Bebo*, 799 F.3d
13 at 772-73. Those courts reasoned that *Elgin* was the latest and more comprehensive
14 assessment of the agency expertise factor, so its interpretation controlled. In following
15 *Elgin*, those courts concluded that “[agency] expertise can otherwise be brought to bear”
16 and that the plaintiffs’ claims, including structural Article II claims, were subject to the
17 statutory review scheme.

18 That said, *Free Enterprise Fund* and *Elgin* must be read as complementary, and thus
19 the question isn’t which standard controls, but where Axon’s claims fall in the spectrum
20 they create. The apparent conflict arises because *Elgin*, although its rule is clear, was not
21 dealing with the sort of structural challenge that was raised in *Free Enterprise Fund*. If
22 *Elgin*’s rule were applied as some courts have described it, agency expertise could be
23 brought to bear in any case, which is an outcome that would conflict with *Free Enterprise*
24 *Fund* and *Thunder Basin*. On the other hand, carving out a “*Free Enterprise Fund*
25 exception” based on the content of a specific claim would run counter to *Elgin*’s reasoning,
26 which is the Supreme Court’s most recent formulation of the agency expertise
27 consideration.

28 The key to harmonizing *Free Enterprise Fund* and *Elgin* is that the agency expertise

1 analysis in *Free Enterprise Fund* was driven by the fact that, for the accounting firm to
2 obtain judicial review through the statutory scheme, it would have had to force the issue
3 by willfully and intentionally violating a rule and then raising the only defense possible—
4 that the agency was unconstitutional. Only then would the accounting firm’s claims be
5 before the SEC and subject to judicial review. 561 U.S. at 491. In contrast, in *Elgin*, the
6 agency had several avenues through which it could obviate the need to reach a
7 constitutional question it was not suited to addressing. 567 U.S. at 22.

8 The same is true here. Axon maintains it has done nothing wrong. The FTC, in
9 applying its own expertise, may conclude the same. Thus, as in *Elgin*, there may be no
10 need for a federal appellate court to reach Axon’s constitutional claims. Were Axon forced
11 to forego any defense other than its constitutional claims, then, and only then, would Axon
12 be in the same position as the plaintiff in *Free Enterprise Fund*. Here, though, Axon has
13 substantive defenses that could obviate the need to reach the constitutional question. It has
14 not willfully broken a rule in order to vindicate its constitutional claims, nor does it need
15 to. Thus, matters remain that would benefit from the FTC’s expertise.⁵

16 ⁵ The Ninth Circuit’s decision in *Ukiah Valley Med. Ctr. v. FTC*, 911 F.2d 261 (9th
17 Cir. 1990), also supports this conclusion. In *Ukiah Valley*, a non-profit hospital filed a
18 lawsuit in federal district court in which it sought to enjoin the FTC from pursuing an
19 administrative proceeding to block its acquisition of a different non-profit hospital. *Id.* at
20 262-63. The hospital’s theory, which is somewhat similar to Axon’s theory here, was that
21 the FTC’s regulatory efforts were categorically impermissible because it lacked
22 jurisdiction over “pure asset acquisitions by not-for-profit corporations.” *Id.* at 263. The
23 district court dismissed the hospital’s lawsuit and the Ninth Circuit affirmed, holding that
24 “the FTC’s issuance of an administrative complaint did not constitute ‘final agency action’
25 and . . . judicial review was therefore premature.” *Id.* at 263. In reaching this conclusion,
26 the Ninth Circuit emphasized that “[t]he jurisdictional issue is still pending before the ALJ
27 and may be resolved in favor of [the hospital].” *Id.* at 264. This was true even though the
28 FTC had “refused three times to accept [the hospital’s] arguments that jurisdiction was
lacking.” *Id.* at 265. And because the jurisdictional challenge—which, like Axon’s claims
here, turned on the FTC’s authority to regulate rather than the specifics of the acquisition
in question—provided a possible pathway to success during the administrative proceeding,
the Ninth Circuit concluded that the hospital was required to continue litigating in the
administrative forum and then renew its jurisdictional challenges, if necessary, when
seeking review in a federal appellate court. *Id.* at 265 (“Should the FTC, at the conclusion
of the administrative proceedings, issue a final order, [the hospital] can at that time obtain
judicial review and challenge the issuance of the complaint as well as the agency’s
jurisdiction.”). Although *Ukiah Valley* was decided before the *Thunder Basin* trilogy and
did not specifically address the concepts of “agency expertise” or implicit preclusion, its
logic and outcome support a finding of preclusion here.

1 Axon argues the FTC cannot bring its expertise to bear because there is no way
2 Axon can win—the FTC is so hopelessly biased that any litigant is doomed to lose. (Doc.
3 21 at 10.) Yet even taking this as true, it doesn’t change the analysis. Even if the FTC
4 incorrectly rules against Axon, “there are precious few cases involving interpretation of
5 statutes authorizing agency action in which [a court’s] review is not aided by the agency’s
6 statutory construction.” *Mitchell v. Christopher*, 996 F.3d 375, 379 (D.C. Cir. 1993).
7 Additionally, the FTC’s alleged win rate is something of a red herring—there’s no assertion
8 that, whatever the FTC’s win rate in administrative proceedings, that rate controls how the
9 Courts of Appeals would resolve the merits of Axon’s claims during the final stage of the
10 review process. *See generally* Terry Calvani & Angela M. Diveley, *The FTC at 100: A*
11 *Modest Proposal for Change*, 21 GEO. MASON L. REV. 1169, 1181 (2014) (discussing
12 studies suggesting that “FTC opinions that were appealed by losing respondents were
13 reversed 20 percent of the time compared to a 5-percent reversal rate for such opinions
14 appealed from district courts [in cases brought by the DOJ’s Antitrust Division]”).

15 ***

16 Accordingly, **IT IS ORDERED** that:

- 17 (1) Axon’s complaint (Doc. 1) is **dismissed without prejudice** due to a lack of
18 subject matter jurisdiction.
- 19 (2) Axon’s motion for preliminary injunction (Doc. 15) is **denied as moot**.
- 20 (3) The Clerk of the Court shall enter judgment accordingly and terminate this
21 action.