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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Axon Enterprise, Inc.,

Plaintiff,

v.

Federal Trade Commission, et al.,

Defendants.

No. 2:20-cv-00014-PHX-DWL

PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

I. THIS COURT HAS JURISDICTION.

It is remarkable to suggest that a party must go through an undisputedly unconstitutional process and obtain a final agency order before entitlement to Article III review. Yet, that is exactly what the FTC argues here, having failed to address the merits of Axon's constitutional claims. Those claims must now be taken as true for the purpose of this motion. Thus, it is undisputed that the violation of Axon's constitutional rights originated with an uncodified, black box "clearance" process through which the FTC and the DOJ divvy up merger investigations thereby arbitrarily subjecting similarly situated companies to vastly different rights, standards, and consequences. And it is further undisputed that when a company loses the clearance coin toss and ends up in the FTC's biased home court, the FTC never loses—an historical statistic for more than two decades that emboldened the FTC to make its pre-suit "blank check" demand of Axon.

Still, the agency claims this Court lacks the power to do anything about it, asserting that the FTC Act strips this Court's jurisdiction in favor of an "exclusive review scheme" for *all* constitutional challenges—including a "clearance" process that is nowhere mentioned in the Act itself. Dismissing the significance of the clearance decision, the FTC insists that Axon's constitutional claims arise solely out of a 15 U.S.C. § 45 administrative enforcement action—one that did not exist at the time this suit was filed. But the due process, equal protection, and Article II consequences described in the Complaint were fully on display well before the administrative complaint was ever filed. Accordingly, all the cases cited by the FTC about suits arising solely out of enforcement actions are of little relevance here. Instead, the operative precedent is *Free Enterprise*, in which the Supreme Court confirmed district court jurisdiction and injunction authority over an agency constitutional challenge.

See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 489, 491 n.2 (2010). Accordingly, this Court has jurisdiction to decide this important issue of first impression[1]—which has never been addressed, let alone decided, by a reported federal case—on the merits and to enjoin the FTC from acting unconstitutionally in the meantime.

A. *Free Enterprise* Governs This Case.

This case is materially indistinguishable from *Free Enterprise*. That case—just like this one—involved a district court action raising constitutional challenges to an agency after it had "beg[u]n a formal investigation" of the plaintiff. 561 U.S. at 487; *see also* Compl. ¶ 25. There, as here, the government argued that a statutory review scheme—one whose provisions were, in the Commission's words, "largely the same" as the FTC Act's, Opp. 5—barred that suit.[2] *Free Enterprise*, 561 U.S. at 489. The Court rejected that argument, holding that those provisions "did not prevent the District Court" from hearing the constitutional challenge to the agency's authority to pursue the investigation in the first place. *Id.* The same result should obtain here. Indeed, as explained below, all three reasons that the Court gave for finding jurisdiction in *Free Enterprise* apply with full force to Axon.

The FTC rejects *Free Enterprise* in favor of decisions from "six courts of appeals" it claims hold that "a statute's exclusive review scheme applies to constitutional claims." Opp. 10-11 (citing *Bennett v. SEC*, 844 F.3d 174 (4th Cir. 2016); *Hill v. SEC*, 825 F.3d 1236 (11th

[1] To be clear, Axon is not challenging the mere fact of concurrent jurisdiction, *see* Opp. 14, n.12, 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.

[2] *Compare* 15 U.S.C. § 45(d) ("Upon the filing of the record with it the jurisdiction of the court of appeals of the United States to affirm, enforce, modify, or set aside order of the Commission shall be exclusive."), *with* 15 U.S.C. § 78y(a)(3) ("On the filing of the petition,

Cir. 2016); *Tilton v. SEC*, 824 F.3d 276 (2d Cir. 2016); *Bebo v. SEC*, 799 F.3d 765 (7th Cir. 2015); *Jarkesy v. SEC*, 803 F.3d 9 (D.C. Cir. 2015); *Bank of La. v. FDIC*, 919 F.3d 916 (5th Cir. 2019)). But those cases do not hold, as the FTC suggests, that all "constitutional claims" must be brought within "a statute's exclusive review scheme." Nor could they: *Free Enterprise* itself reached exactly the opposite conclusion. 561 U.S. at 489. Instead, those cases hold (at most) that no district court jurisdiction exists where the plaintiff has "brought []his action after the Commission had initiated its enforcement proceeding against him, and he seeks to challenge multiple aspects of that ongoing proceeding"—while recognizing that "[t]he result might be different if," as here, "a constitutional challenge were filed in court before the initiation of any administrative proceeding." *Jarkesy*, 803 F.3d at 23; *see also Tilton*, 824 F.3d at 289; *Bebo*, 799 F.3d at 774; *Bennett*, 844 F.3d at 186; *see also* Opp. 2 (acknowledging comprehensive statutory process "springs into action" "[w]hen the Commission files an administrative complaint").[3]

What's more, the "six courts" argument is overstated. At least one of those courts, the Fifth Circuit, recently granted an injunction pending appeal where the sole question was district court jurisdiction. *Cochran v. SEC*, No. 19-10396 (5th Cir. injunction granted Sept. 24, 2019). That court thus indicated it believes there is a "strong showing that" jurisdiction is "likely" over a constitutional challenge to an administrative action pending at the time the

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the court has jurisdiction, which becomes exclusive on the filing of the record, to affirm or modify and enforce or to set aside the order in whole or in part.").

[3] This is not to suggest that all these cases necessarily turned on a race to the courthouse. The operative question remains whether the claims arise out of an administrative enforcement proceeding (as in the cases cited by the FTC) or not (as in *Free Enterprise* and here). Whether a district court lawsuit was first filed will often be an indicator as to that answer, but is not necessarily dispositive. *See Hill*, 825 F.3d at 1249 & n.6 (the "critical fact" is whether respondents "can seek full postdeprivation relief" regardless of the timing).

lawsuit was filed. *See Barber v. Bryant*, 833 F.3d 510, 511 (5th Cir. 2016); *see also* Ex. 1, *Cochran* Oral Arg. Tr. (5th Cir. argued Nov. 5, 2019). *Cf. Cirko v. Comm'r of Social Sec.*, 2020 WL 370832, at *2 (3d Cir. 2020) (plaintiff may challenge constitutionality of SSA ALJs "without having exhausted those claims before the agency").

The FTC similarly overreads *Elgin v. Department of Treasury*, 567 U.S. 1 (2012), as holding that plaintiffs are "required to follow [a statutory] review scheme even though they raise[] a constitutional claim and even though [the agency] believe[s] it lacks the authority to declare a federal statute unconstitutional." Opp. 5. Once again, a pronouncement that sweeping cannot be squared with *Free Enterprise*, which also involved a constitutional claim and an agency that lacked the power to invalidate a federal statute. Instead, *Elgin* was far more limited, holding only that a provision of the Civil Service Reform Act (CSRA) requiring an "employee against whom an action is taken" to pursue a grievance before the "Merit Systems Protection Board" (MSPB) applied to all employment-action grievances, even those alleging that an action was unconstitutional. 567 U.S. at 12-13. That decision was hardly surprising. The statutory text applied to any "employee against whom an action is taken," 5 U.S.C. § 7513(d)—and defined a "covered" action as any "removal," "suspension for more than 14 days," "reduction in grade" or "pay," or "furlough of 30 days or less," *id.* § 7512(a)—without any "exemption … for challenges" based on the Constitution. 567 U.S. at 12-13. And for good reason: Such an exception would allow any federal employee to circumvent the MSPB by alleging that the basis for an employment action was unconstitutional (an easy maneuver, given that many common bases for challenging an employment action, e.g., race or sex discrimination, have a constitutional dimension when the employer is the government). Such a reading would also have contravened the CSRA's

legislative history, which made clear that Congress was specifically trying to eliminate district court actions by employees. S. Rep. 95-969 at 63, U.S. Cong. Admin. News 1978, p.2785.

Elgin thus has little to say about whether the FTC Act strips jurisdiction here. For one thing, the FTC Act's judicial-review provisions do not resemble the CSRA's "elaborate" regime specified with "painstaking detail." 567 U.S. at 11. And far from the CSRA's facial application to all employment actions, the FTC Act's provisions apply only to a "cease and desist" order, 15 U.S.C. § 45(c), not unconstitutional precursor clearance decisions nowhere mentioned in the Act. *See Hill*, 825 F.3d at 1243 ("[A]lthough the text of §78y cover[s] all Commission *orders*, it d[oes] not cover all PCAOB *action*." (emphasis added)). Additionally, the purpose of the FTC Act differs markedly from the CSRA. Whereas the CSRA feared opening the floodgates for district court action, no similar justification exists here, both because a ruling on the constitutionality of the clearance process will decide the issue for all similarly situated companies, and because the process affects relatively few transactions. *See* Mot. Ex. 2A Chart (identifying 36 FTC enforcement actions filed in the 5-year period). Nor does the FTC point to legislative history for the FTC Act that is similar to the CSRA's.

With the FTC's irrelevant caselaw swept away, all that remains is a straightforward application of the three *Thunder Basin* factors as articulated in *Free Enterprise*. Here, the FTC Act affords no meaningful judicial review of Axon's claims outside of this lawsuit; those claims are wholly collateral to any proceeding under that Act; and they are well outside the FTC's expertise.

1. There Is No Meaningful Judicial Review Outside This Court.

In *Free Enterprise*, the Supreme Court held that the analogous statutory review provisions under the Securities Exchange Act did not provide for "meaningful" review of

the plaintiffs' constitutional claims. 561 U.S. at 489-91. That was because, under the review scheme, "not every Board action" was "encapsulated in a final … order or rule" that is "subject to judicial review." *Id.* at 490. The statute, for instance, provided no administrative mechanism for challenging the agency's "uncomplimentary inspection report" (which "damaged" the plaintiffs' "professional reputation") or its investigation into the plaintiffs (which cost them significant "legal fees"). *See id.*; *Free Enter.* Compl. ¶ 80 (Case 1:06-cv-00217-RMU, Doc. 1). So a district court action was necessary to challenge the agency's authority to engage in those activities.[4] That the plaintiffs could have, in theory, "ignor[ed] Board requests for documents," "incur[red]" an adverse order from the agency, and then raised its constitutional challenges in a subsequent appeal, was immaterial. *Id.* at 490-91. Such an "avenue" would unfairly "require plaintiffs" to "tak[e] … violative action before testing the validity of the law," and so it "d[id] not" qualify as "meaningful" judicial review. *Id.*

Axon is in exactly the same position here. As with the Exchange Act, "not every [Commission] action" is "encapsulated in a final … order or rule" that is "subject to judicial review" under the FTC Act. *Id.* at 490. That is true, most notably, of the clearance decision, which put the FTC, rather than the DOJ, in charge of the Axon/Vievu merger and resulted in the FTC's subsequent "blank-check" shakedown. Compl. ¶¶ 3, 30. Similar to the agency actions in *Free Enterprise*, the clearance decision here (and the FTC's subsequent investigation) caused Axon real harm before any administrative action was filed. Axon was subjected to unreasonable demands by the FTC, an agency whose power is subject to neither Article II (political accountability) and Article III (a neutral tribunal and the accompanying

[4] As the district court in *Free Enterprise* recognized, the harm from "being regulated by" an agency unconstitutionally gives rise to injury-in-fact for standing purposes. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 2007 WL 891675, at *3 (D.D.C. 2007).

due process guarantees associated with federal court litigation). Compl. ¶ 29-43. The lack of political accountability—with its commissioners protected from presidential removal, and its judges doubly so—made the FTC unduly aggressive in its investigation of the merger. *See* Compl. ¶¶ 8-10, 28, 36-41. The lack of due process on the back end only exacerbates that problem: The FTC knows that, as a practical matter, most of its actions will never be subject to judicial review. Instead, parties simply fold when faced with the prospect of submitting to an expensive administrative proceeding guaranteed to conclude in the FTC's favor with only highly deferential review by a court of appeals somewhere down the line. Compl. ¶¶ 6-7, 32-33. Accordingly, as in *Free Enterprise*, Axon is entitled to immediate district court review of the agency's constitutional authority to undertake those actions in the first place. *See Bennett*, 844 F.3d at 179, 182 (discussing *Free Enterprise*).

Additionally, it is irrelevant that Axon could, in theory, raise its constitutional claims on appeal from an adverse Commission order. It does not matter that instead of producing "more than 262,000 documents" and making "multiple executives [available] for investigational depositions," Compl. ¶ 10, 26, Axon could have "ignor[ed] Board requests for documents and testimony," "incur[red]" an adverse order from the agency, and then raised its constitutional challenges in an appeal from that order. 561 U.S. at 490-91. After all, the same was true in *Free Enterprise*. Nor is it relevant (*contra* Opp. 7) that Axon did, eventually, refuse the FTC's particularly egregious demand for a "blank check" to create a new competitor with Axon's own IP.[5] Compl. ¶ 27. As *Free Enterprise* explained, the kind of

[5] Although under *Free Enterprise*, Axon could have filed its lawsuit as soon as the FTC began investigating it, it did not enter into such a decision lightly. Instead, it cooperated with the Commission for 18 months, reasoning that a mutually agreeable resolution, even with an agency unconstitutionally regulating it, was preferable to litigation. But when an emboldened

delayed review that comes only after drawing an unfavorable agency action is too little, too late, to count as "meaningful." 561 U.S. at 491. That demand, also, put Axon in the same position as the *Free Enterprise* plaintiffs: comply with the agency's command, or ignore them, draw an unfavorable agency order, and hope to prevail on appeal years down the line. That is not meaningful review, much less something contemplated by Congress when it enacted the FTC Act.

In fact, that kind of review would be even less meaningful here than in *Free Enterprise*. That is because Axon's equal-protection claim, for instance, involves details of the clearance progress—how and why the process originated, how it operates, what the FTC and DOJ believe to be its legal basis, etc.—and a factual record the Commission's administrative process is ill equipped to discover. Indeed, the Commission rules do not allow Axon to depose the DOJ officials who participated in the clearance process without first getting the permission of the FTC-appointed ALJ. *See* 16 C.F.R. § 3.36. As a result, there will be no guarantee of an administrative record that will allow a reviewing court to decide those claims. Whatever review Axon may ultimately obtain, it would not be "meaningful" as the Court used that term in *Free Enterprise*.

2. Axon's Claims Are "Wholly Collateral" To the FTC Act.

In *Free Enterprise*, the Court held that because the plaintiffs' constitutional challenge was to the agency's authority, it was "collateral" to any specific "orders or rules from which review might be sought." 561 U.S. at 490. So, too, here. The FTC does not dispute that

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FTC that never loses in its administrative forum refused a substantial divestiture remedy that would have restored allegedly missing competition to the market years sooner and demanded instead an outrageous "blank check," Axon was forced to file this suit to protect its own intellectual property (with development costs in excess of 10 years and $200 million dollars) from an unconstitutional government taking.

Axon's constitutional claims "are unrelated to the merits of the merger." Opp. 10. Instead, those claims (just like those in *Free Enterprise*) go to the agency's constitutional authority.

Nevertheless, the FTC insists that Axon's claims are not collateral because they "arise[] out of the enforcement proceeding and provide[] an affirmative defense in that proceeding." Opp. 10 (quoting *Bennett*, 844 F.3d at 187). This Court need not decide whether Axon's constitutional claims could be raised as affirmative defenses, because the FTC's argument fails the first requirement: Axon's claims do not "arise[] out of" an enforcement proceeding; instead, they arise out of the unconstitutional clearance decision, which made Axon subject to the FTC's regulation, not the DOJ's.

The FTC's argument to the contrary is all based on a single assertion: that "the sole object of [Axon's] constitutional claim is to stop the Commission's enforcement proceedings." Opp. 9. But the very thing the FTC cites for support, the Complaint's Prayer for Relief, shows the opposite. Indeed, the Complaint lists no fewer than six forms of relief—leading off with a declaration that "the FTC's structure [is] unconstitutional"—with injunctive relief from any agency administrative enforcement action coming in fourth. Compl. at 28. In any event, the fact that Axon's complaint seeks such relief is hardly remarkable. After all, the complaint in *Free Enterprise* sought an "order and judgment enjoining the Board and its Members from carrying out any of the powers delegated to them," "from taking any further action against Plaintiff[s]," and "nullifying and voiding any prior adverse action against" Plaintiffs—which obviously would have blocked any enforcement proceedings. *Free Enter.* Compl. 23. Thus, the FTC identifies no basis for distinguishing this case from the Supreme Court's controlling *Free Enterprise* precedent.

3. The FTC Will Not "Apply Its Expertise" To Axon's Claims.

As *Free Enterprise* explained, claims generally fall "outside the Commission's competence and expertise" when they "do not require technical considerations of agency policy." 561 U.S. at 491. That is exactly the case here: The FTC concedes that Axon's "constitutional claims do not concern the industry-specific issues that the FTC typically addresses." Opp. 10. The FTC nevertheless maintains that it can still "apply its expertise" to resolve Axon's claims, since it is expert on "other" issues (i.e., the merits of the merger), which if resolved "'in [Axon's] favor might fully dispose of the case.'" Opp. 10. (quoting *Elgin*, 567 U.S. at 22-23). "[B]ecause [Axon] could prevail on the underlying claims and thereby moot the constitutional claim[s]," the FTC argues, "the latter f[a]ll within [its] expertise." *Id.* But it is simply not true that Axon "could prevail on the merits." As explained in Axon's motion—and as the FTC does not contest, *see* Opp. 12—the agency enjoys a 100% win rate in its biased administrative proceedings. The possibility that existed in *Elgin* and in the SEC cases on which the FTC relies—that the agency could apply its expertise to other issues to dispose of the constitutional ones—does not exist here.

B. There Is No "Finality" Problem.

The FTC asserts that this Court separately lacks jurisdiction because there is no "final agency action" within the meaning of the APA. 5 U.S.C. § 704. Opp. 12-14. According to the FTC, § 704 is essential here because it provides (1) Axon's cause of action; and (2) Axon's sovereign immunity waiver. Opp. 13-14. The FTC is wrong on both counts. First, the Constitution itself provides the cause of action, *see Free Enter.*, 561 U.S. 477 at 491 n.2, so § 704 is unnecessary. Second, the APA's sovereign immunity waiver applies to any case seeking injunctive relief from a federal agency, and thus this is not limited to those brought

under § 704. *E.V. v. Robinson*, 906 F.3d 1082, 1094 (9th Cir. 2018) ("waiver applies even where there is not 'final agency action' under APA section 704").

II. ALL INJUNCTION FACTORS ARE SATISFIED.

Because the FTC failed to address the merits of Axon's constitutional claims, they are uncontested thereby conclusively establishing a likelihood of success on this motion. Moreover, it is "well established" that "deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). The FTC concedes that is true of First and Second Amendment rights, but claims that Axon's due process, equal protection, and separation of powers rights somehow count less. Courts have said otherwise. *See, e.g.*, *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013) (due-process and equal-protection case holding that "a prospective violation of a constitutional right constitutes irreparable injury"); 11A Wright & Miller Federal Practice & Proc. § 2948.1 n.26 (3d ed. 2019) (collecting cases).

The FTC further asserts that the public's interest in lower prices outweigh due process and equal protection deprivations borne out of an uncodified clearance process. Opp. 24. But once again, the law is to the contrary: It is "always in the public interest to prevent the violation of a party's constitutional rights." *E.g., Am. Bev. Assoc. v. City and County of San Francisco*, 916 F.3d 749, 758 (9th Cir. 2019). Indeed, "the Constitution is the ultimate expression of the public interest." *Gordon*, 721 F.3d at 653.

For all these reasons and those stated in Axon's motion, the Court should accept jurisdiction and grant the requested preliminary injunction.

Dated: January 30, 2020

Respectfully submitted,

/s/ Pam Petersen
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CERTIFICATE OF SERVICE

I hereby certify that on January 30, 2020, the foregoing was filed electronically with the Clerk of Court to be served by operation of the Court's CM/ECF system upon all counsel of record in the above-captioned case.

/s/ Pam Petersen