No. 21-86

In the Supreme Court of the United States

AXON ENTERPRISE, INC., PETITIONER,

v.

FEDERAL TRADE COMMISSION, ET AL., RESPONDENTS.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[*]

The Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more

[*] The parties have filed blanket letters of consent to the filing of *amicus* briefs with the Clerk's office. No counsel for any party authored this brief in whole or in part and no counsel or party—other than *amicus*, its members, or its counsel—made a monetary contribution intended to fund the preparation or submission of this brief.

than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the Nation's business community.

Here, many businesses face the prospect of unconstitutionally structured proceedings before the Federal Trade Commission (FTC). Those costly proceedings can pose an existential threat to business operations. The Chamber has a significant stake in ensuring that those businesses can challenge unconstitutional proceedings in federal district courts before the constitutional injury occurs.

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress did not force private parties challenging the constitutionality of the FTC's structure and basic procedures to first suffer the very harm they seek to avoid—enduring unconstitutional agency proceedings—as the price of later judicial review. Unless Congress clearly provides otherwise, courts can police the separation of powers and correct fundamental constitutional flaws in an agency's setup in the first instance.

For these constitutional challenges, deferring judicial review produces a Sisyphean shell game. Forcing private parties to suffer through unconstitutional agency proceedings just to challenge those proceedings later inflicts irreparable constitutional harm. Further, FTC adjudications take years of costly proceedings with ruinous penalties on the line. Faced with those bet-the-company stakes, many businesses fold early. For parties who finally manage to reach an Article III tribunal, courts then

decide whether to sever unconstitutional provisions and order a redo before the agency. This Court has long emphasized the importance of separation-of-powers challenges. But if the price of raising them is years of agency proceedings and the reward is years more, the game will rarely be worth the candle.

Worse, the more unconstitutional an agency's structure and procedures, the more the agency perversely benefits from delayed judicial review. The Constitution requires political accountability to guard against arbitrary, unchecked agency power. The Constitution also requires agencies to respect due-process and equal-protection principles and to avoid resolving significant legal questions through arbitrary or biased decision-making. And the Constitution empowers Article III courts to adjudicate disputes arising under the Constitution and laws of the United States as a backstop to agency excesses. Yet by trampling constitutional guarantees, agencies can win a home-field advantage that exerts so much pressure at the outset, few private parties will make the judicial playoffs.

Giving agencies the first crack at structural constitutional challenges produces no countervailing benefits. Such challenges have nothing to do with the merits of any case, instead implicating the agency's basic functions in *every* case. Delayed adjudication thus wastes time and resources. Agencies also lack any expertise in structural constitutional challenges, even when agencies have jurisdiction to address them.

Structural constitutional challenges are thus the paradigmatic case for immediate judicial review. And the FTC's particular constitutional flaws underscore why pre-enforcement review is imperative. The President cannot meaningfully supervise the FTC's Commissioners

or administrative law judge, all of whom are unconstitutionally insulated from removal despite exercising wide-ranging executive powers. The FTC also usurps the role of Article III courts in adjudicating private rights. And the FTC employs arbitrary and unfair procedures while doing so. Sometimes, the agency literally makes key decisions by coin toss. The FTC also initiates complaints, then adjudicates them, serving as prosecutor, judge, jury, and executioner. Unsurprisingly given this structure, no matter how strongly the administrative law judge's fact-finding favors the private party, the Commission sides with itself 100% of the time—odds that prompt most parties to settle. Meanwhile, the FTC has no relevant expertise on its own constitutionality. Requiring parties to endure these proceedings before they can someday bring the FTC's constitutional flaws to courts' attention only stacks the deck further. For most parties haled before the FTC, judicial review is now—before proceedings begin—or never.

ARGUMENT

I. District Courts Have Jurisdiction Over Constitutional Challenges to the FTC's Structure and Procedures

Congress has granted federal district courts jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. That jurisdictional grant encompasses constitutional challenges to the FTC's structure and procedures. No statute retracts that jurisdiction. Nor is this an exceptional case where the comprehensiveness of Congress' administrative-review scheme implies that Congress intended to channel structural challenges to the FTC first and courts later. Rather, this Court has repeatedly allowed litigants to go straight to court to bring analogous, cross-cutting challenges.

1. This is not a case where an agency-specific statute expressly curbs federal courts' jurisdiction over federal questions. The only judicial-review provision specific to the FTC, 15 U.S.C. § 45(c), merely authorizes courts of appeals to review cease-and-desist orders after the FTC issues them. That provision does not mention district courts or constitutional challenges. And that provision only makes the court of appeals' jurisdiction "exclusive" "[u]pon the filing of the record" with the court of appeals—something that has not happened here. *See id.* § 45(d).

The FTC portrays section 45(c) as implicitly restricting federal jurisdiction. According to the FTC, the administrative-review scheme implicitly requires anyone subject to an FTC enforcement action to reach the end of agency proceedings before heading to court. Br. in Opp. 11.

But administrative-review statutes "do not restrict judicial review unless the 'statutory scheme' displays a 'fairly discernible' intent to limit jurisdiction, and the claims at issue 'are of the type Congress intended to be reviewed within th[e] statutory structure.'" *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 489 (2010) (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207, 212 (1994)). That inquiry focuses on the so-called *Thunder Basin* factors, i.e., (1) whether "a finding of preclusion could foreclose all meaningful judicial review"; (2) whether the suit is "wholly collateral to a statute's review provisions"; and (3) whether the claims fall "outside the agency's expertise." *Id.* (quoting *Thunder Basin*, 510 U.S. at 212-13).

Applying that framework to structural constitutional challenges yields a simple conclusion: If parties challenge an agency's structure or foundational procedures, and the administrative-review scheme does not expressly bar initial judicial review, parties can go straight to court. Pet.

Br. 22-29. That conclusion flows directly from *Free Enterprise Fund*, which held that parties could seek immediate judicial relief from unconstitutional multi-layer tenure protections at the Public Company Accounting Oversight Board (PCAOB). 561 U.S. at 484. The relevant judicial-review provision, 15 U.S.C. § 78y, did not "expressly" divest district courts of federal-question jurisdiction. 561 U.S. at 489. Section 78y merely authorized appellate courts to review certain agency orders after administrative proceedings concluded. *Id.* Nor did Congress implicitly require parties to bring all constitutional challenges to the PCAOB's structure to the agency first. Instead, the Court held, all three *Thunder Basin* factors favored immediate judicial review. *Id.* at 489-91.

First, as to meaningful judicial review, the Court held that section 78y did not offer an avenue to "meaningfully pursue . . . constitutional claims." *Id.* at 490. Section 78y only authorizes judicial review of certain final orders or rules. Were that provision exclusive, some harmful PCAOB actions could escape review. *Id.* Because the challengers objected to the PCAOB's *structure*, not a specific agency action, the only way to guarantee judicial review was to challenge a rule or to incur sanctions that could be reviewed. *Id.* The Court doubted that Congress intended such perverse procedures. *Id.* at 490-91.

Second, *Free Enterprise Fund* held that challenges to the PCAOB's tenure protections were plainly "collateral." *Id.* at 490. Structural constitutional challenges impugn "the Board's existence," not any specific action. *Id.*

Finally, the Court explained that the agency had no relevant experience to offer. Structural challenges present "standard questions of administrative law, which the courts are at no disadvantage in answering." *Id.* at 491. Unlike technical questions, agencies have no special insight into the separation of powers.

2. *Free Enterprise Fund* was no outlier. The notion that claimants need not subject themselves to unconstitutional agency proceedings just to challenge those proceedings in court runs through multiple cases. Pet. Br. 41-42. Take *Mathews v. Eldridge*, 424 U.S. 319 (1976), a social security case. The Social Security Act authorizes judicial review of only "final decision[s] of the Commissioner of Social Security made after a hearing." 42 U.S.C. § 405(g). The claimant in *Eldridge* never raised his "constitutional claim to a pretermination hearing" to the agency, much less after a hearing. 424 U.S. at 328-29. Yet the Court allowed the claimant to proceed directly to district court, reasoning that the claimant's "constitutional challenge is entirely collateral to his substantive claim of entitlement." *Id.* at 330. The claimant did not have to face the burdens of lengthy agency proceedings just to challenge the constitutionality of those proceedings in court. *Id.* at 330-31.

Or take *McNary v. Haitian Refugee Center*, 498 U.S. 479 (1991). There, the Court held that an administrative-review scheme that preconditioned judicial review on voluntary surrender for deportation did not "as a practical matter" afford "meaningful" judicial review. *Id.* at 496. The Court explained: "[T]hat price is tantamount to a complete denial of judicial review." *Id.* at 496-97.

By contrast, an administrative scheme precludes immediate judicial review only where Congress evinces a clear intent to strip district courts of jurisdiction over the specific claims at issue. *Elgin v. Department of Treasury*, 567 U.S. 1 (2012), demonstrates how high that bar is. Former federal employees challenged their termination on constitutional grounds, seeking reinstatement and backpay. *Id.* at 6-8. But this Court found it clear that the Civil Service Reform Act channeled all challenges to federal terminations first to the Merit Systems Protection Board

(MSPB), and then to the Federal Circuit. *Id.* at 11-12. Most importantly, the Act's text clearly encompassed challenges to the injury the petitioners had already suffered—termination—and directed such challenges to the MSPB, no matter their nature. *Id.* at 12. Allowing constitutional challenges to terminations to proceed in district court, while relegating other challenges to the MSPB, risked incoherent parallel litigation. *Id.* at 14.

Given the clarity of the statutory text, *Elgin* treated the *Thunder Basin* factors as ancillary points. *See id.* at 15-16. Nonetheless, the Court concluded, all three factors disfavored immediate review. First, petitioners could still obtain meaningful judicial review: Even though the MSPB only addresses non-constitutional objections to terminations, the Federal Circuit could later address constitutional objections. *Id.* at 21. Second, petitioners' constitutional objections were the vehicle for challenging their terminations, and thus were not "wholly collateral" to the agency proceeding. *Id.* at 21-22. Finally, because petitioners at heart challenged their terminations, the MSPB could potentially adjudicate those terminations on other grounds and thereby cure petitioners' injury without addressing the constitutional issue. *Id.* at 23. In sum, *Elgin* illustrates when parties have to go to the agency first: where the relevant statute unambiguously channels all challenges to the agency and the constitutional challenge is wholly wrapped up with the merits.

3. Those precedents make this an easy case. Like the statute in *Free Enterprise Fund*, 15 U.S.C. § 45(c) does not expressly foreclose jurisdiction. And all three *Thunder Basin* factors point one way: Congress did not implicitly channel constitutional challenges to the FTC's structure and procedures to the agency itself. Just as the challengers to the PCAOB's structure did not have to roll

the dice on unconstitutional administrative proceedings to obtain pre-enforcement review, challengers to the FTC's unconstitutional processes need not subject themselves to those processes first.

a. **Meaningful Judicial Review.** Forcing parties before the FTC to litigate all the way to a cease-and-desist order just to obtain judicial review of the FTC's unconstitutional structure and procedures would produce too little review, too late. Judicial review is, by definition, not "meaningful" if it comes only after the allegedly unconstitutional act "would have already taken place." *See Jennings v. Rodriguez*, 138 S. Ct. 830, 840 (2018) (plurality opinion). Parties incur irreparable harm when an unconstitutionally structured agency subjects them to unconstitutional procedures. No matter the outcome of the particular proceeding, parties have been deprived of their right to have their cases heard by constitutionally accountable decision-makers employing constitutionally adequate procedures. Only pre-enforcement review can avert those injuries. Pet. Br. 36-38, 44-45.

The FTC is incorrect that *FTC v. Standard Oil Co.*, 449 U.S. 232 (1980), treated enduring an unconstitutional process as a non-cognizable harm. Br. in Opp. 12-13. The Court's analysis there turned on the lack of final agency action, not the lack of injury. 449 U.S. at 238. Anyway, the injury here far exceeds the "expense and annoyance of litigation." *See id.* at 244 (citation omitted). Being subjected to unconstitutional proceedings before an unconstitutionally structured agency is a classic "'here-and-now' injury" for courts to adjudicate. *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2196 (2020) (citation omitted).

Further, back-end judicial review is a hollow promise when the price of getting to court is to risk an FTC order imposing a company-destroying penalty. Here, for example, the FTC demanded that Axon write a "blank check"

to create a new competitor with all of Axon's intellectual property. C.A. Excerpts of Record 126; *see* Pet. Br. 47-48. Parties haled before the FTC should not have to "bet the farm" and risk that years-long FTC proceedings will end in ruinous sanctions just to argue that those FTC proceedings are inherently unconstitutional. *See Free Enter. Fund*, 561 U.S. at 490.

In short, this case shares the hallmarks of *Free Enterprise Fund*. Here as there, petitioner challenges fundamental features of the agency, and cannot appear before the agency without suffering the very constitutional harms that petitioner seeks to avoid. And here, as there, parties subjected to agency proceedings risk unacceptably high sanctions just to get to court. If anything, this is an easier case. Parties in Axon's shoes have no other road to court unless the FTC concludes its proceedings with a cease-and-desist order—a process that usually takes years. The *Free Enterprise Fund* petitioners could have at least obtained prompt judicial review by ignoring a PCAOB document request and incurring sanctions that they could challenge. But this Court did not require petitioners to suffer that "severe punishment" to obtain "meaningful" judicial review. *Id.* at 490-941.

The FTC dismisses those parallels by cabining *Free Enterprise Fund* as a one-off. On the FTC's read, regulated parties could only challenge the constitutionality of an agency's structure and basic procedures *before* the agency takes an enforcement action. *See* Br. in Opp. 11-12. But, the FTC seems to envision, once the agency raises the stakes by doing something concrete, parties must see that process through to obtain judicial review of those same cross-cutting challenges. *See id.* at 12.

That "implicit dotted line precariously positioned between investigation and enforcement . . . makes little practical sense." *Cochran v. SEC*, 20 F.4th 194, 227-28

(5th Cir. 2021) (en banc) (Oldham, J., concurring). Investigation and enforcement blend together in practice. Regardless, Axon *did* sue before the FTC brought its administrative complaint. App-3 n.1. So, at this lawsuit's outset, Axon and the *Free Enterprise Fund* petitioners were identically situated victims of overbearing agency investigations, not enforcement actions.

b. **Collateral Challenges.** When Congress prescribes a judicial-review scheme for specific agency actions, such language does not implicitly preclude immediate judicial review of structural constitutional challenges. After all, challenges to an agency's structure and foundational procedures have nothing to do with any particular agency action or case. Thus, *Free Enterprise Fund* deemed a structural constitutional objection to the PCAOB's multi-layered tenure protections collateral to review of any particular agency action because petitioners "object[ed] to the Board's existence," not to "any Commission orders or rules." 561 U.S. at 490. Challenges to the FTC's structure and cross-cutting adjudicatory procedures are equally collateral. Those challenges impugn fundamental aspects of every adjudication.

The FTC counters that structural challenges "are not wholly collateral" whenever a petitioner could raise them to prevail in specific FTC proceedings. Br. in Opp. 10 (internal quotation marks omitted). Were that view correct, *Free Enterprise Fund* would have been wrong. There, too, petitioners could have challenged the constitutionality of the PCAOB's structure to block the PCAOB from investigating or taking other actions against them. *See* 561 U.S. at 487. Yet this Court had little doubt that a "general challenge" to an agency's structure is collateral to specific orders "from which review might be sought." *Id.* at 490.

c. **Lack of Agency Expertise.** Finally, this Court routinely declines to infer that Congress implicitly designated agencies as the threshold arbiters of challenges they lack the competence or jurisdiction to resolve. *E.g.*, *Carr v. Saul*, 141 S. Ct. 1352, 1360-61 (2021); *Free Enter. Fund*, 561 U.S. at 491; *Califano v. Sanders*, 430 U.S. 99, 109 (1977). The point of administrative review is ordinarily for the agency to bring its specialized expertise to bear on substantive matters within its bailiwick. *See Weinberger v. Salfi*, 422 U.S. 749, 765 (1975).

Constitutional challenges to the agency's structure and foundational procedures fall at the opposite end of the spectrum. Agencies lack "competence and expertise" on structural constitutional law. *Free Enter. Fund*, 561 U.S. at 491. "[S]tructural constitutional challenges" are matters which "agency adjudications are generally ill suited to address." *Carr*, 141 S. Ct. at 1360. Even the Ninth Circuit below recognized that the FTC lacks any special expertise it could bring to bear on such constitutional questions. App-24. The FTC does not suggest otherwise. Br. in Opp. 10. Requiring parties to first raise challenges before an agency that is ill-equipped—or even incapable—of resolving them would be illogical and futile.

The FTC's response—that the agency could apply its "expertise" to "obviat[e] the need for judicial review" by ruling for Axon on the merits—misses the point. Br. in Opp. 10-11 (quoting *Elgin*, 567 U.S. at 22-23). The question is whether the agency has "competence and expertise" as to the "claims" at issue—not whether the agency could somehow sidestep those claims through other rulings. *Free Enter. Fund*, 561 U.S. at 491. Otherwise, courts would never get first crack at *any* challenge to an agency's existence. App-24. Agencies could always trot out the wait-and-see-the-merits refrain, even as they

decline to engage with the underlying constitutional problems. And regulated parties would be forced to endure the unconstitutional proceedings unless and until the agencies called them to a halt. Congress did not implicitly subject parties seeking judicial review to that cat-and-mouse game.

II. The FTC's Constitutional Flaws Make Pre-enforcement Review Critical

The FTC is a poster child for the perils of cutting off pre-enforcement review. FTC proceedings often take years and impose enormous expenses. Yet those proceedings deprive private parties of bedrock constitutional protections. The FTC's decision-makers wield an array of executive powers, but are insulated from meaningful accountability to the President. The FTC adjudicates important private rights, arrogating power reserved to Article III courts. And the FTC's operating procedures tilt the scales in its favor while depriving private parties of basic safeguards. Parties know going in that FTC Commissioners side with agency lawyers 100% of the time. Given the FTC's vast powers to break up mergers, bar business practices, and sanction companies, most parties haled before the FTC settle. Forcing parties to go to the FTC first thus rewards the agency for its prolific constitutional flaws. Precisely because the agency enjoys enormous, unchecked authority, the FTC can effectively thwart back-end judicial review.

1. **Unaccountable Decision-Makers.** The Constitution vests the whole "executive Power" in the President, U.S. Const. art. II, § 1, cl. 1, and charges the President with "tak[ing] Care that the Laws be faithfully executed," *id.* § 3. Thus, the President must be able to exercise the "power to remove—and thus supervise—those who wield executive power on his behalf." *Seila Law*, 140 S. Ct. at 2191; *accord Free Enter. Fund*, 561 U.S. at 513-14.

The FTC's structure thwarts that chain of command. FTC adjudications proceed first before an administrative law judge (ALJ). Then the Commission can review and render a final decision. But both the Commissioners and ALJ are unconstitutionally insulated from presidential control and supervision, leaving the agency unmoored from political accountability.

a. Start with the five Commissioners who head the FTC. If "an agency does important work," its leaders must be removable by the President, no matter the agency's "size or role." *Collins v. Yellen*, 141 S. Ct. 1761, 1784 (2021). The Director of the Consumer Financial Protection Bureau enjoys wide authority to "issue final regulations, oversee adjudications, set enforcement priorities, initiate prosecutions, and determine what penalties to impose"—so the Court invalidated restrictions on the President's authority to remove the Director. *Seila Law*, 140 S. Ct. at 2197, 2203-04. The Director of the Federal Housing Finance Agency also exercises executive power in the form of "broad investigative and enforcement authority"—so the Court likewise invalidated those removal restrictions. *Collins*, 141 S. Ct. at 1772, 1783.

So too here, FTC Commissioners exert quintessential executive power. The FTC interprets some 70 federal statutes, including nebulous but economically critical concepts like "[u]nfair methods of competition" and "unfair or deceptive acts" in commerce. 15 U.S.C. § 45(a)(1); *Legal Library: Statutes*, FTC, https://bit.ly/3M4ocwN. The FTC also exercises "broad investigative and enforcement authority." *See Collins*, 141 S. Ct. at 1772. FTC Commissioners "oversee adjudications, set enforcement priorities, [and] initiate prosecutions." *See Seila Law*, 140 S. Ct. at 2204; 15 U.S.C. §§ 45(m), 53; 16 C.F.R. §§ 3.52-.53; *FTC Authorizes Investigations into Key Enforcement Priorities*, FTC (July 1, 2021), https://bit.ly/3s8l23z.

Commissioners can also "unilaterally issue final decisions awarding legal and equitable relief in administrative adjudications" or "seek daunting monetary penalties against private parties on behalf of the United States in federal court." *See Seila Law*, 140 S. Ct. at 2200; 15 U.S.C. § 45(m); 16 C.F.R. § 3.54. By any metric, the FTC wields a superabundance of executive power. Yet Commissioners can only be removed for cause, thwarting presidential supervision. *See* 15 U.S.C. § 41 (removal only for "inefficiency, neglect of duty, or malfeasance in office").

That five Commissioners, rather than one, exercise these executive powers is no saving grace. The Court has recognized only one narrow "exception[] to the President's unrestricted removal power" over principal officers. *Seila Law*, 140 S. Ct. at 2198. Under *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), Congress may grant for-cause removal protection to multi-member agency heads—if the agency mirrors the FTC "as it existed in 1935," when the FTC "was said not to exercise any executive power." *Seila Law*, 140 S. Ct. at 2198-99. The FTC wields significantly wider authority today than it did nearly 90 years ago.

Meanwhile, even the "conclusion that the FTC did not exercise executive power has not withstood the test of time." *Id.* at 2198 n.2. The FTC's authorities to investigate private parties and initiate prosecutions are indisputably core executive powers. *See id.* at 2204. Indeed, lower courts have invalidated removal restrictions on multi-member agency heads who exercise even less executive power. *See Consumers' Res. v. CPSC*, No. 6:21-cv-256, (E.D. Tex. Mar. 18, 2022), Dkt. 44 (Consumer Product Safety Commission). The modern-day FTC is not a close case.

b. The FTC's ALJ—the frontline agency decision-maker—enjoys further insulation from presidential control. Because all executive power flows from the President, Article II requires that the President have some means to remove all subordinate officers who exercise part of the executive power. *See Free Enter. Fund*, 561 U.S. at 513-14. In particular, the President cannot constitutionally "be restricted in his ability to remove a principal officer, who is in turn restricted in his ability to remove an inferior officer." *Id.* at 484.

The FTC ALJ's tenure protections thus raise obvious constitutional concerns. That ALJ is an inferior officer who wields significant executive authority in enforcement proceedings. *See Lucia v. SEC*, 138 S. Ct. 2044, 2053-54 (2018). Yet, to remove the ALJ, the FTC itself must initiate removal proceedings. *See* 5 U.S.C. § 7521(a). Then a separate agency, the Merit Systems Protection Board, must find "good cause" for the ALJ's removal. *Id.* But, as noted, the President may only remove FTC Commissioners for cause. 15 U.S.C. § 41. And the President is equally constrained by for-cause protections in removing members of the MSPB. 5 U.S.C. § 1202(d).

That structure is unconstitutional, as "the President can neither oversee [those officers] himself nor attribute [their] failings to those whom he *can* oversee." *See United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1982 (2021) (internal quotation marks omitted). Indeed, the government has acknowledged that ALJ tenure protections present serious constitutional concerns as far back as 2017. Gov't Cert. Resp. 20-21, *Lucia*, 138 S. Ct. 2044 (No. 17-130); Gov't Br. 47-48, *Lucia*, 138 S. Ct. 2044 (No. 17-130). Today, insulating ALJs from presidential control through multiple layers of tenure protection is plainly unconstitutional.

2. **Non-Article III Adjudication of Private Rights.** It is bad enough to force private parties to make their case to constitutionally unaccountable FTC decision-makers as a prerequisite to judicial review. Worse, shunting challenges to the agency first and courts later inflicts additional constitutional harm by allowing the FTC to adjudicate classic private rights that can be abridged by the federal government only through Article III courts.

Administrative agencies might have a proper role in adjudicating public rights, i.e., "matters arising between the government and others, which from their nature do not require judicial determination." *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1373 (2018) (internal quotation marks omitted). Thus, agency adjudications of mine safety regulations or public-employment protections raise no Article III concerns. *See Thunder Basin*, 510 U.S. at 202-04; *Elgin*, 567 U.S. at 5. Those schemes exist by legislative "grace" and any relief "flow[s] from a federal statutory scheme." *Cf. Stern v. Marshall*, 564 U.S. 462, 493 (2011).

But, "in general, Congress may not withdraw from judicial cognizance" the adjudication of private rights, including "any matter which, from its nature, is the subject of a suit at the common law." *Id.* at 484 (internal quotation marks omitted). The adjudication of private rights is at the heart of the "judicial Power," which the Constitution assigns to "Article III judges in Article III courts." *Id.*

FTC enforcement actions involve "the stuff ... of Westminster in 1789": They adjudicate private rights. *See id.* (citation omitted). While antitrust law today is statutory, the Sherman Act emerged out of "common-law prohibitions of combinations contracts, and conspiracies in restraint of trade." Donald Dewey, *The Common-Law Background of Antitrust Policy*, 41 Va. L. Rev. 759, 759

(1955); *see also United States v. Trans-Mo. Freight Ass'n*, 166 U.S. 290, 327 (1897). Antitrust law involves questions about how private parties operate in the marketplace—a classic issue the Constitution assigns to courts, not agencies.

Compounding the problem, the FTC's statutory scheme deprives courts of de novo review at the back end. Federal courts must treat FTC factual findings as "conclusive" "if supported by evidence." 15 U.S.C. § 45(c). Thus, federal courts cannot truly render "the ultimate decision" on private rights as required by Article III. *See United States v. Raddatz*, 447 U.S. 667, 683 (1980); *see also B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 173 (2015) (Thomas, J., dissenting).

3. **Due-Process and Equal-Protection Violations.** Every FTC adjudication also relies upon inherently arbitrary and unfair procedures.

a. Start with the FTC's process for determining which antitrust cases proceed before the agency, instead of in federal court. That threshold decision carries critical consequences for the rest of the proceedings. The Department of Justice (DOJ) and the FTC share jurisdiction for enforcing the Nation's antitrust laws. If DOJ takes the lead, the case proceeds in federal court. The Federal Rules of Evidence and Civil Procedure apply; private parties enjoy full cross-examination rights; Article III judges develop the record; and courts of appeals review fact-findings for clear error.

But if the FTC takes charge and opts for agency proceedings, an FTC ALJ presides over hearings that need not comply with the Federal Rules of Evidence. *See* 16 C.F.R. § 3.43. That ALJ, not courts, makes initial factual and legal findings. *Id.* § 3.51. FTC Commissioners then review ALJ findings without taking new evidence. *Id.*

§ 3.54. And federal courts review that decision only with deference to agency findings. 15 U.S.C. § 45(c).

Given the immense consequences of this decision, one would think DOJ and the FTC would offer reasoned explanations for sending some cases to FTC adjudications and others to federal court. After all, the federal government must have a "rational basis" for treating similarly situated parties differently. *United States v. Vaello Madero*, 2022 WL 1177499, at *4 (U.S. Apr. 21, 2022).

Yet the government appears to often make this key decision arbitrarily. According to the former Assistant Attorney General for the Antitrust Division, sometimes the agencies literally flip a coin. Bryan Koenig, *For DOJ and FTC, Clearing Deals Remains a Gray Area*, Law360 (Mar. 20, 2020), https://bit.ly/3rmx5K9. In that official's words, this "horrendous" process "is the worst of government. It should not happen." *Id.*

For premerger review, the arbitrary results are especially pernicious. While the FTC has the option to proceed in federal court, 15 U.S.C. § 53(b), the FTC always picks administrative complaints for pending mergers. *See Premerger Notification and the Merger Review Process*, FTC, https://bit.ly/3svDhQF. Because mergers are time sensitive, parties as a practical matter cannot bide their time for judicial review on the merits. A loss at the FTC is the end of the road.

b. If the FTC wins the jurisdictional contest and hales parties before the agency, its procedures inflict additional constitutional harms. "[A] fair trial in a fair tribunal is a basic requirement of due process." *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009) (citation omitted). Yet at the FTC, the playing field is tilted from kickoff to the final whistle. A single agency serves as investigator,

grand jury, prosecutor, judge, and jury. Agency staff investigate potential violations. 16 C.F.R. §§ 0.16-.17. The Commission begins adjudicative proceedings by voting to issue a complaint. *Id.* § 3.11(a). An FTC ALJ adjudicates the complaint in an adversarial proceeding between FTC prosecutors and the private party. *See id.* §§ 3.1, 3.51. The Commission then circles back and acts as the final judge of whether the party has violated any laws. *See id.* § 3.52.

At that stage, the Commission empowers itself to "exercise all the powers which it could have exercised if it had made the initial decision." *Id.* § 3.54(a). The Commission can even revisit factual findings and inferences de novo. *E.g.*, *Impax Labs., Inc.*, 2019 WL 1552939, at *14 (F.T.C. Mar. 28, 2019). That ability to rewrite credibility and factual determinations without hearing testimony raises serious due-process questions. As then-Judge Kavanaugh described this practice in the SEC context, "[s]o much for a fair trial." *Lorenzo v. SEC*, 872 F.3d 578, 599 (D.C. Cir. 2017) (Kavanaugh, J., dissenting).

The upshot: In the past 25 years, "in 100 percent of the cases where the administrative law judge ruled" in the FTC's favor, "the Commission affirmed liability; and in 100 percent of the cases in which the administrative law judge . . . found no liability, the Commission reversed." Joshua D. Wright, Section 5 Revisited: Time for the FTC to Define the Scope of Its Unfair Methods of Competition Authority 6 (Feb. 26, 2015), https://bit.ly/3E8daDC. As the Ninth Circuit observed, "[e]ven the 1972 Miami Dolphins would envy that type of record." App-26. Such heads-I-win-tails-you-lose agency outcomes raise serious due-process concerns.

The FTC's unblemished record of self-managed success deters parties from proceeding to court. Parties

frequently succumb to intense settlement pressures rather than bear the expense of administrative proceedings where the home team and the referees wear the same uniforms. As a former FTC Commissioner has explained, the FTC elicits "cheap settlements" due to "the perception that administrative litigation at the FTC is biased strongly in favor of the Commission and that the definition of what constitutes an unfair method of competition is so hopelessly vague that it can be manipulated to fit nearly any set of facts." Jan M. Rybnicek & Joshua D. Wright, *Defining Section 5 of the FTC Act: The Failure of the Common Law Method and the Case for Formal Agency Guidelines*, 21 Geo. Mason L. Rev. 1287, 1307 (2014). "[S]hooting at a moving target" and with "the chips stacked against them," many targets of FTC actions opt for settlement over "lengthy and costly litigation" in which they are virtually certain to lose before the agency. Wright, *supra*, at 7.

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These constitutional injuries are set to grow as the FTC seeks to subject yet more parties to its extraordinary powers. Last year, the FTC rushed ahead with enforcement actions—despite a 2-2 deadlock between Democrats and Republicans—by counting "zombie votes" cast by ex-Commissioner Rohit Chopra on his last day in office. *See* Letter from Daryl Joseffer, U.S. Chamber Litig. Ctr., to Chair Lina Khan, FTC (Nov. 19, 2021), https://bit.ly/3rlMQRw. Yet the FTC refuses to reveal key information about those votes, including any explanation of how this practice comports with the norm that votes of former officials do not count. *Cf. Yovino v. Rizo*, 139 S. Ct. 706, 710 (2019). The FTC intends to accelerate antitrust enforcement efforts further. *E.g.*, John D. McKinnon, *FTC Vote to Broaden Agency's Mandate Seen as Targeting Tech Industry*, Wall St. J. (July 1, 2021),

https://on.wsj.com/3FI0BzV. And the FTC is preparing to unleash "an avalanche of rulemakings" that could further expand the scope of its enforcement actions. Dissenting Statement of Comm'r Christine S. Wilson to the Annual Regulatory Plan and Semi-Annual Regulatory Agenda 2 (Dec. 10, 2021), https://bit.ly/3773ehX.

Insulated from democratic accountability, the FTC has usurped substantial power—investigating, adjudicating, and operating in unconstitutional ways. Yet, most parties haled before the FTC have no meaningful prospect of judicial review. Faced with the threat of serious sanctions and odds loaded in the FTC's favor, few private parties persevere through administrative proceedings in hope of vindicating their rights in court down the line. Pre-enforcement judicial review is often the only means of protecting constitutional rights. It defies credulity that Congress foreclosed that vital check just by providing for judicial review of one type of FTC action—a cease-and-desist order—in the courts of appeals.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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