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 OF *AMICUS CURIAE* COMMITTEE FOR JUSTICE IN SUPPORT OF PETITIONER

J. MICHAEL CONNOLLY
Counsel of Record
TIFFANY H. BATES
ANTONIN SCALIA LAW SCHOOL
SUPREME COURT CLINIC
CONSOVOY MCCARTHY PLLC
1600 Wilson Boulevard
Suite 700
Arlington, VA 22209
(703) 243-9423
mike@consovoymccarthy.com

Counsel for Amicus Curiae

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INTEREST OF *AMICUS CURIAE*[1]

Founded in 2002, the Committee for Justice (CFJ) is a nonprofit, nonpartisan legal and policy organization dedicated to promoting the rule of law and preserving the Constitution's limits on federal power, its protection of individual liberty, and its separation of powers. CFJ is particularly committed to preserving the due process rights guaranteed by the Constitution from encroachment by administrative agencies that subject companies to years-long deprivations of judicial review. The issues in this case are thus at the core of CFJ's mission. Consistent with this mission, CFJ supports constitutionalist nominees to the federal judiciary, files *amicus curiae* briefs in key cases, analyzes judicial decisions with respect to the rule of law and the relevant constitutional or statutory text, and educates the American public and policymakers about the benefits of constitutionally limited government and the proper roles of our federal courts and administrative agencies.

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[1] Under this Court's Rule 37.6, counsel for *amicus curiae* certify that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus curiae* or its counsel has made a monetary contribution to the preparation or submission of this brief. The parties have consented to its filing.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

"[I]ndependent agencies wield substantial power with no accountability to either the President or the people," and they "pose a significant threat to individual liberty and to the constitutional system of separation of powers and checks and balances." *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2212 (2020) (Thomas, J., concurring in part and dissenting in part) (internal citations omitted). Thus, regulated parties like Petitioner—with millions on the line—must have timely access to the federal courts when they are subject to an agency's unconstitutional actions.

Axon is a major manufacturer of law-enforcement equipment that sought to acquire a failing competitor. When the Federal Trade Commission exerted its enormous power to "extract from Axon everything it [could] think of," Pet. Br. 49, Axon fought back. It alleged that the FTC's opaque "clearance" process violates due process and that the agency's double layer protections for administrative law judges (ALJs) violates the Constitution. Accordingly, Axon's injury is rooted not in any FTC penalty, but in the violation of the separation of powers. Indeed, Axon's claim is a challenge to "*the very existence*" of the FTC. Pet. App. 29 (Bumatay, J., concurring in the judgment and dissenting in part) (emphasis added).

Nonetheless, the district court held, and the Ninth Circuit affirmed, that Axon could not have its day in court until the FTC—which has no expertise on these constitutional issues—produces a final agency action.

Even the panel majority admitted that its own conclusion was counterintuitive: "it seems odd to force a party to raise constitutional challenges before an agency that cannot decide them." App. 16. The lower court decisions are wrong, and this Court should correct course.

Amicus agrees with Petitioner that the FTC Act does not strip the district courts of Section 1331 jurisdiction to hear Axon's challenge to the constitutionality of the agency's structure, procedures, and existence. *See* Pet. Br. 29-45. Congress *may* limit the subject-matter jurisdiction of federal courts. But if Congress intends to statutorily limit the jurisdiction of lower federal courts, it must clearly say so.

Congress did not do so here. The FTC Act's judicial review provision does create a narrow, pragmatic exception to the normal rules of district court jurisdiction by expediting challenges to cease-and-desist orders to the courts of appeals. And that exception makes sense, since challenges to FTC cease-and-desist orders are more akin to those heard by an appellate court, especially given that administrative proceedings have already taken place. But the Act says nothing about divesting federal courts of jurisdiction over constitutional challenges to the agency's "very power to act at all." Pet. Br. 20.

Such a limitation cannot be inferred from the FTC Act's silence on the matter. Nor would an exception for such claims make sense. Federal courts cannot be forced to abdicate their Article III role merely because a case is *related* to an administrative agency. Such an

abdication eschews the separation of powers and due process—especially when the constitutional challenge centers on the agency conducting the administrative proceeding. Put simply, the fundamental principle that courts should independently scrutinize the constitutionality of agencies follows from the tripartite system of government the Framers created.

Amicus writes separately to highlight the significant due process concerns with the FTC's administrative proceedings and the need for prompt and meaningful judicial review. To start, the process afforded to regulated parties is vastly different based on whether the FTC or the DOJ handles the enforcement action. And this entire process is opaque to the regulated parties and the public. Because the DOJ has no adjudicative power of its own, a case put on the "DOJ track" is pursued in a federal district court. Cases put on the "FTC track," however, are often filed through the FTC's own in-house adjudication mechanism.

And unlike federal court proceedings that are subject to rigorous due process protections and presided over by an independent Article III judge, the FTC's administrative proceedings receive fewer protections and are presided over by an ALJ—an individual directly accountable to neither the FTC nor the President. These differences lead to higher costs and non-coherent processes for the parties. And if the challenged entity happens to end up being pursued by the FTC instead of the DOJ, the already lengthy litigation process is likely to be longer.

Not only do those subject to DOJ enforcement enjoy review by district courts, but the FTC's processes and procedures are stacked in the agency's favor. While DOJ must go to federal court, the FTC has the option to act as investigator, prosecutor, and judge. And, "[a]s one might expect of a forum in which the investigator, prosecutor, trial-level judge, and appellate-level judge all work for the same agency, the FTC fares shockingly well in proceedings before its own ALJ." Pet. 9.

These due process concerns underscore the need for timely, meaningful judicial review. Meaningful judicial review is precluded by the inherently unfair nature of the FTC's administrative gauntlet, the costs of litigation, and the amount of time it takes to make it through the FTC's administrative process before reaching federal court. Indeed, as a practical matter, for the vast majority of defendants, the long and expensive delay in meaningful review means that important constitutional questions will never be adjudicated. Whether meaningful judicial review exists can make or break a company, and the FTC has broken many.

Not only can prompt and meaningful judicial review make or break a business, but timely judicial review is critical to enforce the separation of powers. Ensuring that district courts remain free to exercise the jurisdiction Congress gave them to adjudicate structural constitutional claims like the ones here is essential to preserving the separation of powers and preventing agency overreach. The Court should reverse the decision below.

ARGUMENT

I. The FTC's administrative proceedings raise significant due process concerns.

A. The process afforded to regulated parties is vastly different based on whether the DOJ or the FTC handles the enforcement action.

The Federal Trade Commission and the Department of Justice "have shared responsibility for government enforcement of federal antitrust law for decades." U.S. Antitrust Mod. Comm'n, Report and Recommendations, 129 (Apr. 2007), bit.ly/cleardispute. But this dual enforcement scheme is "hazy and often troublesome." Lauren Kearney Peay, *The Cautionary Tale of the Failed 2002 FTC/DOJ Merger Clearance Accord*, 60 Vand. L. Rev. 1307, 1308 (2007). And the process afforded to regulated parties is vastly different based on whether the DOJ or the FTC handles the enforcement action.

Among its many powers, the FTC may initiate enforcement proceedings against companies it believes may be engaged in prohibited methods, acts, or practices. *See* 15 U.S.C. §45(b); 16 C.F.R. §3.11. The agency must first work with DOJ to decide who will pursue the action. This "clearance process" determines whether companies "must answer to [] the DOJ, with the prospect of a federal lawsuit in district court," or whether they must answer to "the FTC, with its administrative proceedings." Pet. App. 35 (Bumatay, J., concurring in the judgment and dissenting in part).

This "clearance" system, however, "isn't codified in any statute, rule, or regulation." *Id.* And the entire

process is opaque to the regulated parties and the public. While the agencies have (on numerous occasions) attempted to reach agreements about how to divide oversight responsibilities, *see, e.g.*, Lauren Feiner, *Here's Why the Top Two Antitrust Enforcers in the US are Squabbling Over Who Gets to Regulate Big Tech*, CNBC (Sep. 18, 2019), cnb.cx/3Mxbir1, the process remains "an ad hoc system of inter-agency liaison agreements." Kimberly H. Anker, *Best Frenemies: Evaluating the Dual Jurisdiction of the Federal Antitrust Agencies*, 63 B.C. L. Rev. 255, 256 (2022). One former DOJ official has referred to this "loose framework for delegating responsibilities," *id.*, as "a flip of the merger agency coin," Hearing on H.R. 2745: The Standard Merger and Acquisition Reviews Through Equal Rules (SMARTER) Act of 2015, at 2 (2015) (statement of Deborah A. Garza). And the clearance process is sometimes more of a "clearance battle," *see* John O. McGinnis & Linda Sun, *Unifying Antitrust Enforcement for the Digital Age*, 78 Wash. & Lee L. Rev. 305, 345 (2021), that can "sometimes exceed[] thirty days." Antitrust Mod. Comm'n, *supra*, 130. Parties are simply left to guess who will win any given "[t]urf battle." McGinnis & Sun, *supra,* 333. And such "delays impose significant burdens on companies with time-sensitive transactions" that can "provide great value to consumers and shareholders alike." Antitrust Mod. Comm'n, *supra*, 130.

Importantly, "[w]hich agency has purview over an industry can mean a world of difference for the companies involved." Pet. App. 35 (Bumatay, J.). Because DOJ is a "law enforcement agency that has no adjudicative power on its own," a case put on the "DOJ track" is pursued in a federal district court. *The*

Standard of Review by Courts in Competition Cases, OECD (June 4, 2019), bit.ly/ftcoecd. Appearing in federal court allows a defendant to receive significant due process protections. *See id.*; *see also* J. Robert Robertson, *Administrative Trials at the Federal Trade Commission in Competition Cases*, 14 Sedona Conf. J. 101, 103-05 (2013). For example, in federal court, parties receive, among other things, "an impartial fact-finder who owes no allegiance to the prosecuting entity, and the protections of the Federal Rules of Evidence and Civil Procedure." Pet. 8.

Unlike the DOJ, the FTC has its own internal adjudicative authority, and cases put on the "FTC track" are typically handled in house. But unlike Article III proceedings, the FTC's administrative hearings are presided over by an ALJ—an individual directly accountable to neither the FTC nor the President—"rather than an impartial Article III judge." Pet. App. 35. (Bumatay, J.). And those hearings "do not trigger the protections of the Federal Rules of Civil Procedure or Evidence." *Id.* These in-house proceedings are often "cumbersome and tedious" compared to federal court. Robertson, *supra*, 101. And despite the agency implementing revised rules to help speed up the process, "[t]he schedule is still much longer than schedules typically used by federal courts in similar cases." *Id.* at 102.

After the ALJ issues his decision, either side may appeal the case. But the FTC Commissioners themselves—the ones who voted to initiate the action—hear the appeal. Malcolm B. Coate & Andrew N. Kleit, *Does It Matter That the Prosecutor Is Also the Judge? The Administrative Complaint Process at the*

Federal Trade Commission, 19 Managerial & Decision Econ. 1, 2 (1998). Unsurprisingly, "the agency has not lost a fight on its home turf in 25 years." Pet. Br. 47. Indeed, the Commission's win rate on appeal to the FTC is 100% for every case not dismissed before the Commission rules on the appeal. *See* Joshua D. Wright, *Recalibrating Section 5: A Response to the CPI Symposium*, CPI Antitrust Chronicle 4 (Nov. 2013), bit.ly/recalibwright.

Once a party loses to the FTC on appeal, it may at last appeal the final decision to a federal circuit court in which the party "resides or carries on business" or in which the "violation occurred." 15 U.S.C. §21(c); 15 U.S.C. §45(c); Robertson, *supra*, at 112. By that time, however, a party in federal court could have already received a trial and a final decision on appeal. *See* Robertson *supra*, at 102; *see also United States v. H&R Block, et al.*, 833 F. Supp. 2d 36 (D.D.C. 2011) (complaint through a trial on the merits and a final opinion took less than six months). On top of that, the FTC is reversed at a rate that is four times greater than judges deciding antitrust cases, dragging the process out even longer. Joshua D. Wright, *Section 5 Revisited: Time for the FTC to Define the Scope of Its Unfair Methods of Competition Authority*, Fed. Trade Comm'n (Feb. 26, 2015), bit.ly/sec5revis; Joshua D. Wright & Angela M. Diveley, *Do Expert Agencies Outperform Generalist Judges? Some Preliminary Evidence from the Federal Trade Commission*, J. Antitrust Enforcement 1, 16 (2012). Simply put, in-house proceedings at the FTC take longer and are significantly less accurate than antitrust cases in federal court.

Moreover, this system also "results in significantly unequal power in seeking permanent injunctions during merger investigations." McGinnis & Sun, *supra*, 345. The FTC "usually only seeks a preliminary injunction" when it goes to court, "retaining the option to pursue a permanent injunction through its internal administrative litigation process." *Id.* The DOJ, on the other hand, "usually agrees with the merging parties to consolidate proceedings for preliminary and permanent injunctions, which forces it to meet a higher burden of proof." *Id.* Accordingly, the "outcome of a merger may turn on which antitrust agency is reviewing it." *Id.* And "[e]ven when the agencies follow the same procedures, they apply them differently, leading to different results based on which agency handles the case and creating inconsistencies in the enforcement of the law." *Id.* at 346. That this more onerous process is the result of an arbitrary decision by the FTC raises significant due process concerns.

At bottom, "[w]hen two agencies enforce the same laws, differences in substantive law enforcement approaches" result. William E. Kovacic, *Downsizing Antitrust: Is It Time to End Dual Federal Enforcement*, 41 Antitrust Bull. 505, 521 (1996). These differences lead to higher costs for parties. And if the challenged entity is unfortunate enough to face a challenge from the FTC instead of the DOJ, then the already lengthy litigation process may become even longer.

B. The FTC's processes and procedures are stacked in the agency's favor.

Not only do those subject to DOJ enforcement enjoy review by district courts, but the FTC's processes and procedures are stacked in the agency's

favor. As explained, the FTC consistently bats 1000 when using its in-house proceedings. *See* Wright, *Recalibrating Section 5, supra*, at 4. While at least one former FTC Commissioner has attempted to explain away that score, *see* Maureen K. Olhausen, *Administrative Litigation at the FTC: Effective Tool for Developing the Law or Rubber Stamp?*, 12 J. Comp. L. & Econ. 623 (2016), the fact remains that "the FTC has ruled for itself in 100 percent of its cases over the past three decades." Joshua D. Wright, *Supreme Court Should Tell FTC to Listen to Economists, Not Competitors on Antitrust*, Forbes (Mar. 14, 2016), bit.ly/3kZDt6f.

While DOJ must go to federal court, the FTC has the option to act as investigator, prosecutor, and judge. "Under the FTC Act, the agency investigates antitrust violations, *see* 15 U.S.C. §57b-1; it prosecutes the enforcement action, *see* 16 C.F.R. §3.11; and then it adjudicates any appeal from an ALJ's initial decision, *id.* §3.52." Pet. App. 45 (Bumatay, J.). "As one might expect of a forum in which the investigator, prosecutor, trial-level judge, and appellate-level judge all work for the same agency, the FTC fares shockingly well in proceedings before its own ALJ." Pet. 9. Indeed, the FTC "has not lost a case on its home turf in a quarter century." *Id.*; *see also* Coate & Kleit, *supra*, at 9 ("In particular, the ability of commissioners to act as both prosecutor and judge in a particular matter can significantly increase the likelihood of a merger order."). Such an accumulation of legislative, executive, and judicial power is, as James Madison wrote, "the very definition of tyranny." The Federalist No. 47. And it is especially troubling that the FTC has

"suggested that its ALJs need not be subject to *any* presidential control whatsoever." Pet. Br. 48; *see* Order Denying Respondent's Motion to Disqualify the ALJ*, In re Axon Enter., Inc.*, No. 9389, 2020 WL 5406806, at *6 (FTC Sept. 3, 2020) (noting that "the President wields a constitutionally adequate degree of control over ALJs, to the extent Presidential oversight over persons with adjudicative functions is necessary"). As Petitioner explains, those are the words "of an agency that either does not read this Court's cases … or believes itself so well insulated from Article III or even Article II oversight that it worries not a whit about abiding by them." Pet. Br. 48.

That ALJ's wield this enormous power is "particularly unsettling" in our system of government. David A. Balto, *The FTC at a Crossroads: Can It Be Both Prosecutor and Judge?*, Wash. Legal Found., (Aug. 23, 2013), bit.ly/3PaZw82. And it "brings into question" whether parties are "afforded the right to due process and fundamental fairness." *Id.* at 4. If it even appears the outcome of a proceeding "is pre-determined, that may force respondents to settle even weak cases." *Id.* On top of that, "the FTC adjudicative process is tremendously expensive." *Id.* As one scholar has explained: "Fundamentally, if businesses know that they will not be able to appear before a truly independent adjudicator until they can appeal an FTC decision to a court of appeals, this will significantly raise the cost of the FTC process and often force settlement." *Id.* And that companies subject to DOJ enforcement can "have their day in court sooner" than those who are subject to the FTC is troublesome. *Id.*

Moreover, the FTC is currently embarking on a journey to upend long-standing agency policy and procedures to favor the agency. Just last year, the Commission voted 3-2 to rescind its bipartisan 1995 Policy Statement on Prior Approval and Prior Notice Provisions in merger cases. *See* Hearing on 'Transforming the FTC: Legislation to Modernize Consumer Protection' (July 28, 2021) (statement of CFJ), bit.ly/3N5M0R9. And it also rescinded its 2015 statement, "remov[ing] important guardrails that established predictability and guidance in enforcement actions." *Id.*; *see also* Comments In Re: Rescission of 1995 Policy Statement on Prior Approval and Prior Notice Provisions in Merger Cases (July 18, 2021) (statement of Ashley Baker), bit.ly/3wjyHGe. Notably, these actions (and others) were taken along party lines, with limited opportunity for public input, and without dialogue among the Commissioners. *See* Comments In Re: Rescission of 2015 Statement of Enforcement Principles on Unfair Methods of Competition Under FTC Act § 5, (June 30, 2021) (statement of Ashley Baker, et al.), bit.ly/3Pb38XJ. As a result of these rule changes, it remains entirely unclear how ALJs will proceed with pending litigation. For all the public knows, the agency is currently just improvising new procedures as it goes. And the agency often employs these procedures as a "strategic tool to invalidate legitimate business transaction and effectuate a more invasive enforcement regime." Rachel Chiu, *The FTC's Innovation Obstructionism*, Nat'l Rev. (Mar. 2, 2022), bit.ly/3yNW25R.

The recent *Illumina-Grail* merger case is illustrative. *See Illumina, Inc., and GRAIL, Inc., In the Matter of,* Federal Trade Commission (Mar. 7,

2022), bit.ly/3w2Ny8O. There, the FTC originally sought preliminary relief in federal court to block biotech company Illumina's $7.1 billion proposed acquisition of Grail, a maker of "early detection liquid biopsy test[s] that can screen for multiple types of cancer." *Id.* The agency feared that the merger would "diminish innovation in the U.S. market for multi-cancer early detection tests," even though this market "does not yet exist." Chiu, *supra.* But the FTC abruptly withdrew the complaint in federal court in order to proceed with an administrative trial instead. *See* Statement of FTC Acting Bureau of Competition Director Maribeth Petrizzi on Bureau's Motion to Dismiss Request for Preliminary Relief in Illumina/GRAIL Case, FTC (May 20, 2021), bit.ly/38jdOms. This "gamesmanship" prompted concern from antitrust scholars and members of Congress alike. *See* Letter from Reps. Jim Jordan & Darrell Issa to Lina Khan, Chair, FTC (Sept. 2, 2021), bit.ly/3yuj4yc. It indicates, the Members explained, that "the FTC took significant steps to avoid speedily resolving novel legal issues under U.S. law in a forum—federal district court—where the FTC was more likely to lose." *Id.* The Commission preferred instead to "make[] its case before an administrative law judge [given] the agency's remarkable win rate when litigating before its in-house tribunal." *Id.*; *see also* Thom Lambert, *Bad Blood at the FTC*, Truth on the Market (June 9, 2021), bit.ly/3srr2Eo. And it did so without any evidence of harm to the market.

Furthermore, the Chief ALJ, at the behest of the FTC, rejected an amicus brief—the only amicus brief filed in support of Illumina—from two dozen prominent law professors and economists that called

attention to this lack of evidence. *See* Richard A. Epstein & Adam Mossoff, *FTC Enforcement Stifles Biotech Innovation*, New York Daily News (Jan. 30, 2022), bit.ly/3w3lhPx; Order Denying Mot. For Leave to File Amicus Curiae Brief, bit.ly/3MkvOM7. This fact only highlights the "inherent bias in letting an administrative agency be a judge in its own cause." *Id*. Or, as Rufus Miles famously summed it up: "Where you stand depends on where you sit." Rufus E. Miles, Jr., *The Origin and Meaning of Miles' Law*, 38 Pub. Admin. Rev. 399, 399 (1978).

At bottom, there is a troubling lack of due process in the FTC's internal administrative proceedings, which is exacerbated by allowing the agency to circumvent judicial review.

II. These due process concerns underscore the need for timely, meaningful judicial review.

A. Meaningful judicial review can make or break a company.

Meaningful judicial review is precluded by the inherently unfair nature of this administrative gauntlet, the costs of litigation, and the amount of time it takes to make it through the FTC's administrative process before reaching federal court. In this case, "by funneling the challenge to the FTC back to the FTC, Axon may forever be foreclosed from obtaining meaningful judicial review of its claims." Pet. App. 29 (Bumatay, J.). Indeed, as a practical matter, for the vast majority of defendants, the long and expensive delay in meaningful review means that important constitutional questions will never be adjudicated. FTC enforcement is often done by consent

decree, and many deals are abandoned because of threat of FTC action. Simply put, whether meaningful judicial review exists can make or break a company.

The FTC has a troubling history of subjecting companies to arduous processes, costing millions of dollars and taking years to complete. *See, e.g.*, J. Gregory Sidak, *Monopoly, Innovation, and Due Process:* FTC v. Qualcomm *and the Imperative to Destroy*; Richard A. Epstein, *Judge Koh's Monopolization Mania: Her Novel Antitrust Assault Against Qualcomm Is an Abuse of Antitrust Theory*, 98 Neb. L. Rev. 241 (2019); *LabMD, Inc. v. FTC*, 776 F.3d 1275 (11th Cir. 2015). And the FTC abuses its reputation for unfair and costly proceedings to secure exceptionally favorable settlements—settlements that one former commissioner described as "more than what the Commission would have been able to obtain, had it been forced to litigate." *See* Philip Hamburger, Purchasing Submission: Conditions, Power, and Freedom 232-33 (2021) (noting that the FTC has secured more than sixty such settlements in the past two decades and that "[s]uch demands … will not always meet the legal definition of extortion … [but] demands for extra conditions under a threat of special severity are essentially a type of extortion."). And settlements the FTC makes are exempted from judicial review. 16 C.F.R. §2.32 (2010) ("Every agreement also shall waive further procedural steps and all rights to seek judicial review or otherwise to challenge or contest the validity of the order.").

LabMD, Inc. v. FTC is illustrative of this make-or-break set up. LabMD was a "laboratory that

performed cancer-detection testing services for doctors." 776 F.3d at 1275. In 2010, the FTC opened an investigation into LabMD's data-security practices before bringing an administrative action in 2013. *Id.* at 1277. LabMD filed a motion to dismiss the administrative proceeding, and the FTC promptly denied it. *Id.* LabMD then filed for review in federal district court, alleging that the FTC's actions were *ultra vires*, unconstitutional, and violated the Administrative Procedure Act. *See id.* at 1277-78. The district court dismissed the challenge for lack of subject matter jurisdiction because the FTC proceeding was "ongoing," and the Eleventh Circuit affirmed. *Id.* at 1277.

In 2015, LabMD returned to internal FTC proceedings, where its case languished. *LabMD, Inc. v. FTC*, 894 F.3d 1221, 1226 (11th Cir. 2018). An ALJ eventually dismissed the case, but the FTC appealed. *Id.* A year later, the full Commission reversed the ALJ, reinstated the case, and issued a cease-and-desist order compelling LabMD to institute certain unspecified security protocols. *Id.* at 1226-27.

Only then—after *six years*—was LabMD able to secure judicial review. *See id.* The Eleventh Circuit held that the FTC had acted *ultra vires*: it had not "direct[ed] LabMD to cease committing an unfair act or practice." *Id.* at 1224. Instead, the FTC had "mandate[d] a complete overhaul of LabMD's data-security program and sa[id] precious little about how this is to be accomplished." *Id.* at 1237. The Eleventh Circuit vacated the agency's final order, *id.* at 1224, but it was too late. LabMD was now a "defunct medical

laboratory that previously conducted diagnostic testing for cancer." *Id.* It did not matter that the FTC had lost not just a battle, but the war: LabMD had already starved to death.

In the end, if parties cannot bring even important constitutional claims in district court, "then eventual judicial review of such claims will depend on a host of contingent circumstances, including whether regulated parties can withstand the expense—here more than $20 million in legal fees for a $13 million acquisition—and negative publicity of litigating in the agency's own tribunal long enough to (eventually) make it to court." Pet. Br. 47.

B. Prompt judicial review is critical to enforce the separation of powers.

Not only can prompt and meaningful judicial review make or break a business, but timely judicial review is also critical to enforce the separation of powers. Axon alleges that double-for-cause removal restrictions on ALJs violate the separation of powers. Ensuring that district courts remain free to exercise the jurisdiction Congress gave them to adjudicate structural constitutional claims like Axon's is critical to preserving the separation of powers and to preventing agency overreach.

This Court must "decide what role district courts play when a party" seeks to have the FTC declare itself unconstitutional. Pet. App. 30 (Bumatay, J.). Petitioner's injury is rooted not in any FTC penalty, but in the violation of the separation of powers. As the dissent below explains, this Court's cases in *Free*

Enterprise Fund and *Elgin* both counsel in favor of allowing review of such claims. *Id.* at 32-34. Indeed, "[a]bsent legislative language to the contrary, challenges to an agency's *structure*, *procedures*, or *existence*, rather than to an agency's adjudication of the merits on an individual case, may be heard by a district court." *Id.* at 33.

This "demarcation of jurisdiction along these lines most respects the separation of powers." *Id.* at 34. "After all, pronouncing the constitutionality of a government function is precisely the business of Article III courts." *Id.* As even the Ninth Circuit recognized, "it makes little sense to force a party to undergo a burdensome administrative proceeding to raise a constitutional challenge against the agency's structure before it can seek review from the court of appeals." Pet. App. 18. When a party claims that it is facing an unconstitutional agency action, it is incoherent to make that party wait until after the unconstitutional process has run its course to go to court. "By that time, the 'here-and-now' injury will have already occurred, and no meaningful remedy will be available." Pet. Br. 46.

If parties like Axon may not bring such claims in district court, they may never get to bring those claims at all. Given the FTC's unanimous win rate, the exorbitant costs of the process, and the agency's immense power to push settlements, a company's structural constitutional claims may "never reach an Article III court." Pet. Br. 47. Just in this case, the FTC has already "tried to extract from Axon everything it can think of." *Id.* And it was no doubt

"[e]mboldened by a win streak born of unaccountable power" and the unlikelihood of prompt judicial review. *Id.* Had this Court not granted review, Axon might still be stuck before the agency, racking up business-ending costs.

This is all made worse by the fact that the FTC has become unaccountable to Congress. "Rightly or wrongly," this Court once "viewed the FTC (as it existed in 1935) as exercising 'no part of the executive power.'" *Seila Law LLC*, 140 S. Ct. at 2198. "Instead, it was 'an administrative body' that performed "specified duties as a legislative or as a judicial aid,'" and "[i]t acted 'as a legislative agency' in 'making investigations and reports' to Congress and 'as an agency of the judiciary' in making recommendations to courts as a master in chancery." *Id.* The FTC was "designed to be 'non-partisan' and to 'act with entire impartiality.'" *Id.* And its "duties were 'neither political nor executive,'" but only "called for 'the trained judgment of a body of experts' 'informed by experience.'" *Id.*

Today, the FTC no longer represents the "'quasi-legislative' or 'quasi-judicial'" body that this Court described in *Humphrey's Executor*. *Id.* Instead, it has attempted to expand its own authority, despite admonition from this Court and from Congress. *See* Letter from Rep. Jim Jordan, et al. to Lina Khan (July 29, 2021), bit.ly/3yDMtpP; Letter from Reps. Cathy McMorris Rogers & Gus Bilirakis to Lina Khan (Dec. 8, 2021), bit.ly/3wgovPQ (explaining that members of Congress are concerned about the FTC's effort to "consolidate agency power, unilaterally assert and

expand regulatory authority, and abandon bipartisan and open processes). Moreover, it has dismantled the Hart-Scott-Rodino Act—which lays out the premerger notification process—through a series of 3-2 votes that changed longstanding agency interpretation of the premerger process. Steve Cernak & Luis Blanquez, *The FTC Continues the HSR Antitrust Process's "Death of a Thousand Cuts,"* IR Global, bit.ly/3l7yjoM. And it avoided a 2-2 deadlock for months, continuing to ram through reforms by relying on a third vote from a former commissioner who the Senate had just confirmed as director of the CFPB. S*ee* Letter: Request for Investigation of the FTC's Practice of Counting "Zombie Votes," CFJ (Dec. 2, 2021), bit.ly/3sR8D4r. Many of these reforms were announced with only a few days' notice for public input and no opportunity for discussion between members of the Commission. *See supra*, CFJ Comment for the Record at 2. Moreover, public comments at the FTC's meetings regarding these agency's actions came *after* the vote. *Id.*

On top of that, the FTC has worked closely with the White House to implement its policy agenda and carry out the Executive Order on Competition (even in the absence of a DOJ Antitrust Division AAG, who had yet to be appointed). *Id.* And in response to this Court's decision in *AMG Capital Management, LLC v. FTC*, 141 S. Ct. 1341 (2021), the agency accused the Court of "rul[ing] in favor of scam artists and dishonest corporations, leaving average Americans to pay for illegal behavior." *Statement by FTC Acting Chairwoman Rebecca Kelly Slaughter on the U.S. Supreme Court Ruling in AMG Capital Management LLC v. FTC*, FTC (Apr. 22, 2021), bit.ly/3a6V8XP. In

short, the FTC is no longer acting as an independent agency, and the rationale for having for-cause removal of Commissioners and double-for-cause removal of ALJs is no longer valid.

Given all these concerns, this Court should ensure that companies like Axon can "obtain timely judicial review of an agency's very authority to act." Pet. Br. 50. If it doesn't do so, these companies may never see an Article III Court. And even those that will eventually make it, may make it "too late to provide any meaningful relief to all the parties that have already been forced to endure the whims of an unconstitutional and unaccountable agency." Pet. Br. 50.

CONCLUSION

The Court should reverse the decision below.

Respectfully submitted,

J. MICHAEL CONNOLLY
Counsel of Record
TIFFANY H. BATES
ANTONIN SCALIA LAW SCHOOL
SUPREME COURT CLINIC
CONSOVOY MCCARTHY PLLC
1600 Wilson Boulevard
Suite 700
Arlington, VA 22209
(703) 243-9423
mike@consovoymccarthy.com

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Counsel for Amicus Curiae