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 AMERICAN ANTITRUST INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*

The American Antitrust Institute ("AAI") is an independent non-profit organization devoted to promoting competition that protects consumers, businesses, and society.[1] It serves the public through research, education, and advocacy on the benefits of competition and the use of antitrust enforcement as a vital component of national and international competition policy. AAI enjoys the input of an Advisory Board that consists of over 130 prominent antitrust lawyers, law professors, economists, and business leaders. *See* http://www.antitrustinstitute.org.

SUMMARY OF ARGUMENT

This case presents the jurisdictional question of whether, under the implied preclusion doctrine, Congress authorized district courts to hear constitutional claims seeking to enjoin administrative proceedings initiated under the Federal Trade Commission Act (FTC Act). Although the Court denied certiorari on the merits of those constitutional claims, Petitioner, Axon Enterprise, Inc. (Petitioner or Axon), now argues that the merits support district-court jurisdiction. It therefore raises numerous merits issues.

Petitioner's merits-based approach to jurisdiction would be difficult to administer because it creates an exception to the implied preclusion doctrine for "'an

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[1] Blanket consents have been lodged with the clerk. No counsel for a party has authored this brief in whole or in part, and no person other than *amicus curiae* has made a monetary contribution to fund its preparation or submission. Individual views of members of AAI's Board of Directors or Advisory Board may differ from AAI's positions.

indistinct category of constitutional claims.'" Br. of Fed. Parties at 45 (quoting *Jarkesy v. SEC*, 803 F.3d 9, 25 (D.C. Cir. 2015); *see id.* at 45–46 (discussing confusion over how to identify claims that should be carved out to allow district court jurisdiction). Unpredictable litigation over the scope of an exception would be especially problematic in constitutional challenges to administrative proceedings against consummated mergers, like the proceedings in this case.

One of the many problems with Petitioner's approach is that, when the FTC brings administrative challenges against consummated mergers, respondents like Axon have every incentive to initiate constitutional litigation in district court no matter how far fetched the theory of injury. By simply arguing to a court that even a dubious claim is within the boundaries of the indistinct category, the merged firms can delay enforcement proceedings and perpetuate what is an ongoing injury to the public but an ongoing profit center for the firms. Litigating the scope of the exception not only maintains the flow of supracompetitive profits but also helps solidify and entrench the merged firms' market power by making meaningful remedies increasingly less viable and less likely to effectively restore lost market competition. Even if their request to litigate in district court and stay administrative proceedings is denied, the merged firms can win for losing.

This case may well be a preview of the boundary-testing to come. Petitioner's merits claims are extraordinary. It alleges that the FTC is a rigged agency that has been systemically biased for a period spanning 25 years and 26 Senate-confirmed, bipartisan Commissioners. It argues that the

Commission's entire voting record during that time is a product of bias and unfairness.

Petitioner would rely on its merits accusations to confer district-court jurisdiction notwithstanding that its accusations have undergone no scrutiny. The merits of Petitioner's claims were neither meaningfully briefed nor decided below, and Petitioner raises them on a badly distorted record. Moreover, they are premised on dubious or demonstrably false evidentiary allegations.

A. Several of Petitioner's and its *amici*'s merits claims rest on accusations that are irreconcilable with empirical facts. They claim that the two federal antitrust agencies apply substantively different standards and procedures in reviewing and challenging mergers, and that merging parties are better off if their deal is reviewed by the DOJ rather than the FTC. Yet published empirical data falsify that hypothesis.

First, any theoretical differences in FTC and DOJ standards or procedures do not reach the overwhelming majority of mergers. In the two decades from 2001-2020, 97% of merger filings were approved without a Request for Additional Information (Second Request) at the conclusion of the minimum statutory 30-day waiting period under the Hart-Scott-Rodino Act (HSR Act). That means 97% of merging parties were able to consummate their transactions without ever becoming meaningfully subject to either agency's standards or procedures.

Second, Petitioner's and its *amici*'s binary framing of a "'DOJ track'…in federal district court" and an "administrative-enforcement 'FTC track'" is badly misleading. Pet.'s Br. at 9. The tiny percentage of

merger cases that the FTC litigates are almost always litigated in federal court, not in administrative proceedings. Only consummated mergers like Axon's, which present novel and difficult remedial challenges that are better suited to the administrative setting, are typically litigated in administrative proceedings. The consummated merger challenges that make up the bulk of the FTC's administrative merger cases accounted for only 8% of the FTC's total merger challenges from 2001-2020. The remaining 92% were pre-consummation challenges that, if not settled or abandoned, were litigated in federal court under a preliminary injunction standard that is substantively indistinguishable from the DOJ's standard.

Finally, the data show that Petitioner's claim that merging parties are better off appearing before the DOJ is wrong. The opposite is true. From 2001-2020, merging parties fared noticeably better before the FTC. Their chances of getting a Second Request nearly doubled and their chances of getting challenged increased by almost 50% if their deal was cleared to the DOJ.

B. Petitioner also rests its merits argument on a false claim that the FTC has a 25-year "winning streak" on appeal of ALJ decisions, and that this streak reflects bias and unfairness. A peer-reviewed economic study has thoroughly debunked this false claim, which is wrongly repeated by numerous *amici* who either have not read the study or ignore its unambiguous findings. The study shows that the alleged FTC winning streak, for relevant empirical purposes, boils down to eleven cases over an eight-year span from 2008-2016. Those eleven cases do not support inferences of bias and unfairness. Eight of the eleven cases were appealed to a federal circuit court,

and the Commission won all eight appeals. All eight involved legal issues reviewed *de novo*. Combining its record in the decade before, the decade during, and the years since its eleven-case winning streak, the FTC's win rate on appeal of its administrative decisions in federal court over the last 25 years is *higher* than its win rate in the administrative proceedings themselves.

C. Petitioner also ignores several features of administrative process that further undermine the inferences of bias and unfairness it seeks to draw from the FTC's record of litigation success. First, because FTC complaint counsel require Commission approval to file a complaint, they typically front-load their case preparation, which is aided by investigatory tools that yield robust pre-complaint discovery. That pre-complaint evidence, which is shared with expert economists who are employed as agency staff and can opine on whether they find it compelling, as well as with respondents during negotiations, often facilitates either pre-complaint settlements or investigation closures.

Complaint counsel also rigorously investigate before they file complaints because they cannot trust that the same commissioners who may be inclined to vote out their initial complaint will remain in office when the case is appealed after an administrative trial. In 72 percent of administrative cases from 1977-2016, the commissioners who authorized administrative litigation had either left or no longer formed a majority when the case reached the liability-dismissal stage. Indeed, that will be true here. A majority of the Republican-controlled Commission

that voted 5-0 to authorize the complaint against Axon will be out of office when Axon's case is appealed.

The upshot of these practical realities of administrative process is that the complaints that are voted out by the Commission and subsequently ripen into full administrative cases that make it all the way to final adjudication should be *expected* to be both few in number and highly meritorious. Moreover, high win rates, corroborated by frequent vindication in federal appellate courts, should also be the norm when the agency is operating exactly as Congress intended—fairly, effectively, and efficiently. Empirically, that is the norm at the FTC.

ARGUMENT

The Merits of Axon's Constitutional Claims Do Not Support Its Jurisdictional Arguments

Petitioner Axon and its supporting *amici* argue on the merits that FTC administrative process violates Due Process and the Separation of Powers. Pet.'s Br. at 13; *see id.* at 7–12. They maintain that Petitioner's constitutional claims support a carve out from the implied preclusion doctrine that would admit their claims into federal district court before the conclusion of administrative proceedings. *See, e.g.,* Pet's Br. at 21–22, 29–30.

Petitioner's merits arguments are premature and misplaced. The government has never meaningfully briefed the merits at any stage of the proceedings, and the lower courts have not decided them. Only Petitioner and its *amici* have entered the void, and they have filled it with distractions and inflammatory rhetoric while ignoring relevant empirical and procedural facts and a long history of unfavorable

precedent. A one-sided and fragmented merits record that is heavy on unfounded aspersions and light on fact and law should not be the basis for determining district-court jurisdiction.

A. Axon's Merits Allegations Are Empirically Deficient

Petitioner argues that the FTC is "unconstitutional and unaccountable." Pet.'s Br. at 32. It questions the constitutionality of ALJ tenure protections, and it claims a grievance in having been made subject to unfair administrative process, pointing to the FTC's success rate in in-house administrative proceedings over the last 25 years. It disagrees with Congress's decision to entrust the FTC to serve as "investigator, prosecutor, and trial-level judge," where "the appellate-level judges are the same people who vote out the complaint in the first instance," Pet.'s Br. at 10, notwithstanding that Congress made the agency's actions subject to judicial review in a federal circuit court of the respondent's choosing and its officers removable for cause. Petitioner's most fanatical *amici* call this 100-year-old arrangement, which had passed every previous constitutional test, a "rigged administrative Thunderdome" and "Kafkaesque nightmare." Br. of Americans for Prosperity Found'n at 30.

Petitioner's and its *amici*'s claims of systemic, uninterrupted bias and unfair, overzealous prosecution spanning 25 years lack substantive integrity and are belied by empirical facts. Since at least the turn of the century, empirical data contradict Petitioner's and its *amici*'s core premise, namely that, as between the FTC and DOJ, merging parties who are "put on the administrative-enforcement 'FTC track'

are not so lucky." Pet.'s Br. at 9. The data show that the identity of the reviewing agency never affects the overwhelming majority of mergers, but to the extent it does, Petitioner's premise is backwards.

First, the chance that any merger will be affected by any difference in the procedures and standards used by the two federal antitrust agencies is trivial. During the two decades from 2001-2020, 97% of HSR-reportable mergers were approved annually without so much as a Second Request under 15 U.S.C § 18a(e), which is necessary to trigger an investigation lasting beyond the initial 30-day waiting period, and 98% were approved without being challenged. *See* Fed. Trade Comm'n & U.S. Dept. of Just., Annual Reports to Congress Pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 24th-43rd Reports (FY 2001-2020) [hereinafter "HSR Reports FY 2001-2020"], *available at* https://www.ftc.gov/policy/reports/annual-competition-reports.

Over 84% of merger filings during those decades—26,609 out of a combined 31,530—were not even "cleared" to one agency or the other for a preliminary 30-day review; the merging parties were simply permitted to close their transactions after the minimum statutory 30-day waiting period expired. *Id.* Out of the small subset of mergers that did receive clearance to one agency or the other for preliminary review (4,921 out of 31,530), 80% of those mergers were also approved without a Second Request, and 85% without a challenge. *Id.* The vast majority of mergers thus are approved without ever getting cleared to either agency, and the vast majority of those that get cleared get approved after only a preliminary

30-day review, without a Second Request. Second Requests and challenges—the threshold steps that meaningfully subject merging parties to one agency's procedures and standards or the other's—are exceedingly rare.

Second, Petitioner's binary framing of a "'DOJ track'…in federal district court" and an "administrative-enforcement 'FTC track'" is disingenuous. Pet.'s Br. at 9. Petitioner and its *amici* fail to acknowledge that, in the even rarer instances where the FTC actually litigates a merger challenge, the overwhelming majority of cases are litigated in federal court, *not* in administrative proceedings. That is because the FTC is required to obtain preliminary injunctive relief from a federal court to prevent the merging parties from consummating their transaction during the pendency of its administrative case. If the agency loses its bid for preliminary relief in court and the parties consummate the transaction, the FTC nominally retains the ability to pursue permanent relief in administrative proceedings, but as a practical matter it has never done so since it first articulated a written policy statement addressing that option in 1995. *See* Fed. Trade Comm'n, Commission Statement of Policy, Administrative Litigation Following the Denial of a Preliminary Injunction, 60 Fed. Reg. 39,741 (Aug. 3, 1995).

The tiny fraction of merger cases the FTC does litigate in administrative proceedings almost always involve consummated mergers like Axon's, which present novel and difficult remedial challenges that, by Congressional design, are better suited to the administrative setting than to courtrooms. *See* Antitrust Division Manual IV-18 (5th ed. 2015),

available *at* https://www.pbwt.com/content/uploads/2016/09/chapter4.pdf ("Many courts have recognized the substantial problems involved in unscrambling an accomplished merger and reconstituting the acquired company as a viable competitive entity."). The consummated merger challenges that make up the bulk of the FTC's administrative merger cases accounted for only 8% of the FTC's total merger challenges from 2001-2020.[2] The remaining 92% were pre-consummation challenges that, if not settled or abandoned, had to be litigated in federal court under a preliminary injunction standard.[3]

More fundamentally, the workload data do *not* support Petitioner's core argument that merging parties are unfairly prejudiced when their deals are cleared to the FTC rather than DOJ. If anything, the

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[2] From 2001-2020, the FTC challenged 417 total mergers, HSR Reports FY 2001-2020, of which 35 were consummated mergers. Consummated Mergers Enforcement Chart, Westlaw: Practical Law Antitrust (2022).

[3] *Amicus* the American Hospital Association argues that there is nonetheless an unfairness because there is a "different" preliminary injunction standard applied to the FTC in court proceedings under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b). Br. of AHA at 15. However, the difference is not substantive. Nominally, the DOJ's traditional equity standard requires a showing of irreparable harm and the FTCs statutory does not, but case law gives the DOJ a conclusive presumption of irreparable harm that unifies the two standards. *See* Antitrust Division Manual, *supra*, at IV-16–IV-20 (citing cases). Hence "whatever theoretical difference might exist between the FTC and DOJ standards has no practical significance." *S. 2102: the Standard Merger & Acquisition Review Through Equal Rules Act of 2015*, *Hearing Before the U.S. S. Comm. on the Judiciary Subcomm. on Antitrust, Competition Policy & Consumer Rights*, 114th Cong. 10 (2015) (Prepared Statement of Jonathan M. Jacobson).

data show that the opposite is true. Empirically, firms that have their merger cleared to the DOJ are more likely to have the merger closely scrutinized or challenged than firms whose mergers are reviewed by the FTC.

The last two decades are illustrative. Notwithstanding that nearly twice as many merger filings were cleared to the FTC than to the DOJ during that time (3,223 to 1,698), the DOJ issued Second Requests in 29% of the merger transactions cleared to it (491 of 1,698) and challenged 19% (327 of 1,698), while the FTC issued Second Requests in 15% of the merger transactions cleared to it (485 of 3,223) and challenged 13% (417 of 3,223). HSR Reports FY 2001-2020. This means that merging parties' chances of getting a Second Request and getting challenged increased by 93% and 46%, respectively, if their deal was cleared to the DOJ. These data suggest many things, but unfairness to merging parties whose deals are cleared to the FTC is not one of them.

B. Axon Relies on Disproven Evidentiary Claims and Mischaracterizes the FTC's Voting Record

Petitioner's proof that the FTC abuses its power and unscrupulously leverages unfair and unconstitutional process is a mistaken claim that the FTC "has not lost" in an in-house administrative proceeding "in 25 years." Pet.'s Br. at 47; *see id.* at 47–48 ("the agency always wins" and therefore is "emboldened"). Petitioner's "winning streak" claim was thoroughly debunked in a comprehensive empirical study published in a peer-reviewed economics journal by the Acting Chair of the FTC during the Trump Administration, Maureen

Ohlhausen. Maureen K. Ohlhausen, *Administrative Litigation at the FTC: Effective Tool for Developing the Law or Rubber Stamp?*, 12(4) J. Comp. L. & Econ. 1 (2016). The claim is not true and does not support inferences of unfairness or prejudice.

Commissioner Ohlhausen' study tracks every administrative case that produced a Commission decision from January 20, 1977, to July 31, 2016. She followed each case's development from the initial Commission decision to vote out a complaint to the disposition before the ALJ, the appeal before the Commission, and finally to the petition for review in a federal circuit court and, if applicable, this Court. The study tells a very different story than Petitioner and its *amici*.

Most immediately, the study reveals that Petitioner's statement that "the agency always wins" in administrative proceedings is flatly false. Pet.'s Br. at 48. "Far from rubber stamping complaint counsel," the Commission dismissed *40 percent* (36 of 90) of the competition matters on appeal from ALJ decisions during the study period. Ohlhausen, *supra*, at 8. Using common sense, Commissioner Ohlhausen concludes "[i]t is unlikely that the FTC has demonstrated a systemic bias if it dismisses 40 percent of antitrust cases." *Id.*

Amicus the Committee for Justice cites to Commissioner Ohlhausen's study yet still maintains that the FTC "consistently bats 1000." Comm. for Just.'s Br. at 11. It says "Olhausen" [sic] has "attempted to explain away that score but the fact remains that 'the FTC has ruled for itself in 100 percent of its cases over the past three decades.'" *Id.* (quoting Joshua D. Wright, *Supreme Court Should*

Tell FTC to Listen to Economists, Not Competitors on Antitrust, Forbes (Mar. 14, 2016)).

But that fact does not remain. Commissioner Ohlhausen literally quotes the same language from the same source that the *amicus* cites, and she explicitly shows it is false. Ohlhausen, *supra*, at 10 (quoting Wright, *supra*). The study finds, "the Commission dismissed 22 percent of its Part 3 matters (11 cases) during that period," including five dismissals on the merits. *Id*. at 10. Commissioner Ohlhausen cites the eleven cases the agency lost during those decades. *Id*. at 10, n.18.

Amicus the Pacific Legal Foundation goes further and cites Commissioner Ohlhausen's study in *support* of its bias allegations. Br. of Pacific Legal Found. at 23. The suggestion that the study supports Petitioner's and its *amici*'s bias claims is inexplicable at best. The study's core conclusion is, "In sum…[t]he data does not support the claim that the FTC has demonstrated systemic bias in favor of complaint counsel." Ohlhausen, *supra*, at 12; *see also id*. at 29 ("The merits and the appellate success of these cases do not support a narrative that the Commission blindly supports ill-conceived cases because of systemic bias."); *id*. at 34 ("Despite recurring claims that the FTC 'always' sides with complaint counsel, or rules for itself in 100 percent of cases, the record over the last four decades tells a different story."). Numerous other *amici* similarly and inexplicably cling to Petitioner's debunked claim. *See, e.g.*, Br. of Chamber of Comm. at 20; Br. of Americans for Prosperity Found. at 21.

Commissioner Ohlhausen does find that, during the decade from 2007-2016, "the FTC has found

liability in *almost* every Part 3 case that it had authorized." *Id*. at 12 (emphasis added). However, the FTC brought a total of twelve administrative cases during that time, yielding only eleven final decisions, all of which were entered between 2008 and 2016. *Id*. at 12, n.31 (citing the eleven cases). For relevant empirical purposes, that means Petitioner's and its *amici*'s vaunted "25-year winning streak" is, in reality, an *eleven-case* winning streak spanning about eight years. *See id*.[4]

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[4] Petitioner and its *amici* do not count dismissals ordered in 2001, 1999, and 1997, *after* the winning streak allegedly began, nor dismissals in 2009 and 2016, *before* it allegedly ended. *See* Ohlhausen, *supra*, at 10 n.18 (citing *In re* Summit Tech., Inc. & VISX, Inc., 2001 FTC LEXIS 11 (Feb. 7, 2001) and *In re* R.J. Reynolds Tobacco Co., 1999 FTC LEXIS 14 (Jan, 26, 1999)); *In re* Butterworth Health Corp., 124 F.T.C. 424 (Sept. 25, 1997); Ohlhausen, *supra*, at 12 n.29 (citing *In re* Gemtronics, Inc., FTC Dkt. No. 9330, Notice (Dec. 8, 2009)); *id*. at 5 n.12 (citing *In re* Cabell Huntington Hosp., Inc., 2016 FTC LEXIS 103 (July 6, 2016)). Several commentators independently declared the winning streak over in 2014, when the FTC dismissed 6 of 7 counts—including the entirety of a Sherman Act Section 1 claim—levied against McWane, Inc. *See, e.g.*, Douglas Lahnborg & Howard Ullman, *McWane Dismissal Breaks FTC's "Winning Streak," But Enforcement Implications Are Unclear*, Mondaq (April 16, 2014), https://www.mondaq.com/unitedstates/antitrust-eu-competition-/307216/mcwane-dismissal-breaks-ftcs-winning-streak-but-enforcement-implications-are-unclear; David Balto, *FTC's Winning Streak is Over* (Feb. 11, 2014, 4:00 PM ET), https://thehill.com/blogs/congress-blog/economy-budget/197969-ftcs-winning-streak-is-over/. Indeed, out of the 102 final decisions in which the Commission has imposed liability since 1977, Commissioner Ohlhausen found that the agency "struck allegations, counts, or a respondent in 21 of them, which is consistent with a careful review of the complaint allegations." Ohlhausen, *supra*, at 9.

Significantly, 73% of these winning-streak cases (8 of the 11) were appealed to a federal circuit court. And the Commission won *every* appeal before a panel of Article III appellate judges. Ohlhausen, *supra*, at 14 (citing cases). This Court ruled in the FTC's favor in one of the eight cases and denied certiorari in two others.[5]

To be sure, appellate courts may not disturb the FTC's fact findings if they are supported by substantial evidence. 15 U.S.C. § 21(c). However, the agency's legal conclusions are "for the courts to resolve" *de novo*. *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 454–55 (1986). All of the FTC's appellate victories in these winning-streak cases turned at least in part on legal issues reviewed *de novo*.[6]

During the preceding decade, from 1997-2006, AAI is aware of twelve "wins" in addition to the three

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[5] *See N. Carolina State Bd. of Dental Examiners v. FTC*, 135 S. Ct. 1101 (2015); *McWane, Inc. v. FTC*, 783 F.3d 814 (11th Cir. 2015), *cert. denied*, 136 S. Ct. 1452 (2016); *POM Wonderful, LLC v. FTC*, 777 F.3d 478 (D.C. Cir. 2015), *cert. denied*, 136 S. Ct. 1839 (2016).

[6] *See N. Carolina State Bd. of Dental Examiners*, 135 S. Ct. 1101 (state-action doctrine); *Realcomp II, Ltd. v. FTC*, 635 F.3d 815 (6th Cir. 2011) (unreasonableness); *Fanning v. FTC*, 821 F.3d 164 (1st Cir. 2016) (misrepresentation and materiality); *McWane, Inc.*, 783 F.3d 814, *cert. denied*, 136 S. Ct. 1452 (burden of proof and presumptive illegality); *POM Wonderful, LLC*, 777 F.3d 478, *cert. denied*, 136 S. Ct. 1839 (material misrepresentation); *ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559, 567 (6th Cir. 2014) (legal sufficiency of cluster markets); *Polypore Int'l, Inc. v. FTC*, 686 F.3d 1208, 1213–16 (11th Cir. 2012) (potential-competition doctrine); *Daniel Chapter One v. FTC*, 405 F. App'x 505, 506 (D.C. Cir. 2010) (deception).

dismissals Petitioner overlooks.[7] Of the twelve victories, eleven were appealed in federal court. The FTC was vindicated by either a circuit court or this Court in ten of the eleven, with eight of the ten turning on issues reviewed *de novo*.[8] Only once was an FTC

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[7] The dismissals Petitioner does not count during this decade are *In re* Summit Tech., Inc. & VISX, Inc., *In re* R.J. Reynolds Tobacco Co., and *In re* Cabell Huntington Hosp., Inc. *See supra* note 3. The twelve victories in which the Commission ruled in favor of complaint counsel, whether or not on liability, are *In re* Rambus, Inc., 2006 FTC LEXIS 60 (Aug. 2, 2006), *rev'd*, 522 F.3d 456 (D.C. Cir. 2008); *In re* N. Tex. Specialty Physicians, 140 F.T.C. 715 (Nov. 29, 2005); *In re* Telebrands Corp., 140 F.T.C. 278 (Sept. 19, 2005); *In re* Ky. Household Goods Carriers Ass'n, 139 F.T.C. 404 (June 21, 2005); *In re* S.C. State Bd. of Dentistry, 138 F.T.C. 229 (July 28, 2004); *In re* Union Oil Co., 138 F.T.C. 1 (July 7, 2004); *In re* Schering-Plough Corp., 136 F.T.C. 956 (Dec. 8, 2003), *rev'd* 402 F.3d 1056 (11th Cir. 2005); *In re* Polygram Holding, 136 F.T.C. 310 (July 24, 2003); *In re* Trans Union Corp., 2000 FTC LEXIS 23 (Feb. 10, 2000); *In re* Toys "R" Us, Inc., 126 F.T.C. 415 (Oct.14, 1998); *In re* Automotive Breakthrough Sciences, Inc., 1998 FTC LEXIS 112 (Sept. 9, 1998); *In re* Brake Guard Products, Inc., 125 F.T.C. 293 (Jan. 27, 1998).

[8] *See N. Tex. Specialty Physicians v. FTC*, 528 F.3d 346, 363 (5th Cir. 2008) ("quick-look" liability standard); *Ky. Household Goods Carriers Ass'n v. FTC*, 199 F. App'x 410, 410 (6th Cir. 2006) (state-action doctrine); *Telebrands Corp. v. FTC*, 457 F.3d 354, 355 (4th Cir. 2006) (reasonableness of relationship between violation and remedy); *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 39 (D.C. 2005) ("quick-look" liability standard); *Trans Union Corp. v. FTC*, 245 F.3d 809 (D.C. Cir. 2001) (interpretation of FCRA); *Toys "R" Us v. FTC*, 221 F.3d 928, 937 (7th Cir. 2000) (legal sufficiency of competitive effects evidence). In *Schering-Plough Corp. v. FTC*, 402 F.3d 1056, 1076 (11th Cir. 2005), the Eleventh Circuit set aside the Commission's opinion and vacated its order, but this Court subsequently abrogated the Eleventh Circuit's analysis and sided with the Commission in *FTC v. Actavis, Inc*., 133 S. Ct. 2223 (2013) (liability standard for reverse-payment settlements); *see* Ohlhausen, *supra*, at 30. In *Jones v. FTC*, 194 F.3d 1317 (9th Cir. 1999), the panel unanimously found the case suitable for

administrative liability determination finally reversed on appeal in federal court. *See Rambus Inc. v. FTC*, 522 F.3d 456, 469 (D.C. Cir. 2008). And many leading experts have criticized the reversal.[9]

In the six years since the conclusion of Commissioner Ohlhausen's 2016 study, we are aware of four more administrative cases in which the Commission issued a liability decision in favor of complaint counsel that was finally resolved on appeal in federal court. In *Impax Lab's., Inc. v. FTC*, the FTC again prevailed on appeal after *de novo* review. 994 F.3d 484 (5th Cir. 2021), *cert. denied*, 142 S. Ct. 712 (2021) ("less-restrictive-alternative" standard). It did the same in *ECM Biofilms, Inc. v. FTC*, 851 F.3d 599, 617 (6th Cir. 2017) (adequacy of notice). In *LabMD, Inc. v. FTC*, the Eleventh Circuit vacated a Commission cease-and-desist order for being difficult to administer and insufficiently specific, but it left the Commission's liability determination undisturbed. 894 F.3d 1221 (11th Cir. 2018).[10] In *1-800 Contacts,*

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decision without oral argument and affirmed the Commission without issuing an opinion. In *S.C. State Bd. of Dentistry v. FTC*, 455 F.3d 436, 447 (4th Cir. 2006), the Fourth Circuit held that it lacked jurisdiction to hear a collateral appeal of the Commission's denial of state-action immunity.

[9] Jorge L. Contreras, *Implementing Procedural Safeguards for the Development of Bioinformatics Interoperability Standards*, 39 N. Ky. L. Rev. 87, 105 (2012); *see* Ohlhausen, *supra*, at 31 ("*Rambus* is not a liability decision that plausibly indicates bias or prejudgment.").

[10] An *amicus* calls the FTC's action against LabMD "meritless" but cites a news article predating both the Commission's liability determination and the Eleventh Circuit's decision preserving it. Br. of Americans for Prosperity Found. at 21 n.16.

Inc. v. FTC, the FTC was reversed on appeal for only the second time in 25 years. 1 F.4th 102 (2d Cir. 2021).

Petitioner's winning-streak argument is a lesson in how "[s]tatistics can be misleading when one disregards the actual phenomena being studied." Ohlhausen, *supra*, at 35. The foregoing shows that, for the 25-year period from 1997-2022, the Commission ruled in favor of FTC complaint counsel in 27 of 30 administrative cases, and when a petition for review in federal court was filed, complaint counsel were vindicated before a panel of federal appellate judges or this Court in 21 of 23 appeals, almost always after *de novo* review. That means the FTC's win rate on appeal in federal court (91%) was technically *higher* than its win rate in in-house proceedings (90%). Hardly the record of a rigged, Kafkaesque Thunderdome.

C. Axon Ignores Practical Realities of Administrative Process

The FTC's enviable track record on *de novo* review of its administrative decisions in federal circuit courts should obviate any need to further justify the agency's success, but Commissioner Ohlhausen's study does identify a more plausible explanation for the agency's propensity to win cases. She concludes that improved win rates in recent decades are more likely attributable to the agency having grown increasingly cautious in choosing to litigate administrative cases only when the law and facts easily warrant antitrust liability, like the case against Axon. *See* Ohlhausen, *supra*, at 13 (Examination of merits and appellate record suggests "more likely explanation" is "fewer and better cases.").

"[A] potentially crucial trend is apparent" if, instead of looking myopically at win rates in isolation,

one examines win rates, appellate performance, and case counts dynamically over time, as Commissioner Ohlhausen does. *Id.* at 14. "What is…striking from the data is that, as time went on, the FTC brings fewer Part 3 cases, is less likely to dismiss, and is also more likely to prevail on appeal." *Id.* at 35. The fact that these three trends not only emerge simultaneously, but steadily accrete in unison, suggests to Commissioner Ohlhausen that "the emerging picture is largely one of improved case selection, likely in response to changes in antitrust law that demanded more economic rigor." *Id.*

That explanation is also more plausible than Petitioner's systemic-bias explanation given several practical realities of administrative process. Unlike private attorneys seeking to file complaints in federal court, who can simply deliver their filings to the courthouse, FTC complaint counsel must front-load their case preparation to persuade a majority of bipartisan Commissioners they have identified valid reasons to believe a violation has occurred and enforcement would be in the public interest. 15 U.S.C. § 45(b). If they fail and the majority does not approve the complaint, the case is abandoned before the complaint is ever filed or revealed to the public (such that it can be counted in "streaks").[11]

[11] Absent the exceedingly rare dissent or closing statement, complaints that are not approved and investigations that are closed are not publicly reported. *See* Ohlhausen, *supra*, at 26 ("[A]n evaluation of the FTC's propensity to impose liability in Part 3 is incomplete without also considering the fact that the Commission frequently closes investigations rather than pursue litigation[.]").

To avoid being disqualified at the starting gate, complaint counsel must and do address any potential shortcomings in their case before the complaint is put up for a vote. Unlike private attorneys, they can and do test their putative complaints using investigatory tools that yield robust pre-complaint discovery from compulsory process that produces documentary evidence, depositions, and formal statements under oath. Both sides get to see witness statements under oath prior to the vote on the complaint, which often leads to either pre-complaint settlements or investigation closures. In addition, expert economists employed as agency staff have the chance to review the mountain of evidence and are asked to opine on whether they find it compelling. Consequently, complaint counsel have every opportunity to carefully vet every facet of the case before an administrative complaint is ever put up for a vote (or shelved).

At the same time, complaint counsel cannot trust that the same commissioners who may vote out their initial complaint will remain in office when the case is appealed to the Commission after an administrative trial. "[I]n 72 percent of Part 3 cases, the commissioners who authorized the administrative litigation had either left or no longer formed a majority at the liability-dismissal stage." Ohlhausen, *supra*, at 5. That means from 1977-2016, "the same commissioners rarely voted out and later decided [the same] Part 3 matter." *Id.*

The administrative complaint against Axon is a case in point. Pursuant to a unanimous 5-0 vote, the complaint was filed on Jan. 3, 2020, when the Chairman of the Commission was Republican-appointee Joseph Simons, the remaining majority

Commissioners were Noah Phillips and Christine Wilson, and the two minority Commissioners were Rohit Chopra and Rebecca Slaughter. At least a majority of those five Commissioners, and likely four of the five (if not all five), will not decide Axon's appeal.[12]

The upshot of these practical realities is twofold. First, those complaints that are voted out by the Commission and subsequently ripen into full administrative cases that make it all the way to final adjudication should be *expected* to be both few in number and meritorious. High counts of unmeritorious cases would signal inattention or inefficiency at the front-loaded investigation-and-complaint stage. Second, high win rates in such cases, corroborated by frequent vindication in federal appellate courts, should also be the norm when the agency is operating exactly as Congress intended—fairly, effectively, and efficiently.

In their zeal to impugn the agency with self-serving misrepresentations that further their strategic litigation objectives, Petitioner and its *amici* do not bother to consider whether they are asking the Court to punish success in the Congressional design for protecting competition and consumers under the federal antitrust laws. Indeed, that paramount public interest is altogether absent from their calculus. The result is a deficient and incomplete merits record that does not counsel in favor of permitting Petitioner to enjoin administrative enforcement proceedings and

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[12] Chairman Simons and Commissioner Chopra have already left the Commission. Commissioner Slaughter's term expires on September 25, 2022. Commissioner Phillips has indicated to President Biden that he will resign this fall.

delay redress to the police departments and other customers of Axon who are eagerly awaiting the return of competition.

CONCLUSION

For the foregoing reasons, the Court should not rely on the merits of Petitioner's constitutional claims to determine district-court jurisdiction under Petitioner's proposed exception to the implied preclusion doctrine.

Respectfully submitted,

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