

ANTITRUST TRADE AND PRACTICE

‘Axon’ Challenges FTC’s Preclusion of Constitutional Claims in 9th Circuit Appeal

On July 17, the U.S. Court of Appeals for the Ninth Circuit heard argument in *Axon Enterprise v. FTC*, where the plaintiff, Axon, argued that it should not be precluded from bringing constitutional claims challenging the FTC’s structure and administrative processes in federal court. The underlying dispute stems from the FTC’s investigation of Axon after it acquired Viewu, a competitor that sold body cameras and digital evidence management systems to law enforcement. After an internal investigation, the FTC allegedly requested a “blank check” settlement that would reverse the acquisition and force Axon to give the newly independent Viewu some of its intellectual property. According to Axon, the FTC threatened to file an administrative complaint if the company refused to comply.



By
**Karen
Hoffman Lent**



And
**Kenneth
Schwartz**

On the same day the FTC issued an administrative complaint, Axon filed its own complaint in the District of Arizona, seeking to enjoin the administrative proceedings and presenting three constitutional challenges to the FTC’s structure and procedures. First, Axon argued that the “clearance” process the FTC and DOJ use to distribute merger investigations between the agencies violates the Fifth Amendment’s equal protection clause because it arbitrarily subjects similarly situated companies to different rights, standards, and consequences. Second, Axon challenged the FTC’s structure, arguing that it allows the agency to serve in investigative, prosecutorial, adjudicative and appellate

functions in violation of the Fifth Amendment’s due process clause. Finally, Axon argued that the two layers of for-cause protection afforded to the FTC’s administrative law judges (ALJs) is in violation of Article II of the Constitution.

Judge Dominic W. Lanza held that Congress intended to require challenges like Axon’s to be brought first in FTC proceedings and, on that basis, the court did not have subject matter jurisdiction. See *Axon Enterprises*, No. CV-20-00014-PHX-DWL, 2020 WL 1703624, at *1 (D. Ariz. Apr. 8, 2020), *appeal docketed*, No. 20-15662 (9th Cir. Apr. 14, 2020). Axon appealed to the Ninth Circuit, arguing that the constitutional claims are justiciable in federal court.

Subject Matter Jurisdiction Precedent

Lanza approached the jurisdictional question by analyzing a trilogy of Supreme Court cases addressing whether a statute authorizing administrative

adjudication precludes district court jurisdiction. The first case, *Thunder Basin Coal v. Reich*, 510 U.S. 200 (1994), held that a determination that Congress intended a statute's administrative scheme to preclude a district court's jurisdiction depends on three factors: "the statute's language, structure, and purpose; "legislative history; and "whether the claims can be afforded meaningful review." The other two cases, *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 561 U.S. 477 (2010), and *Elgin v. Department of Treasury*, 567 U.S. 1 (2012), subsequently clarified the meaning of "meaningful review."

In both *Free Enterprise Fund* and *Elgin*, the court's determination of whether meaningful review was satisfied depended on "whether a finding of preclusion would foreclose all meaningful judicial review; whether the suit is 'wholly collateral' to a statute's review provisions; and whether the claims are 'outside the agency's expertise,'" (quoting *Elgin*, 567 U.S. at 15-16, and *Free Enterprise Fund*, 561 U.S. at 489-90).

The District of Arizona's Analysis of the Federal Trade Commission Act

Following *Thunder Basin*, the Lanza first held that the text, structure, and purpose of the FTC Act supported preclusion. Comparing the

FTC Act to the Mine Act, which was at issue in *Thunder Basin*, the court reasoned that the detailed structure of the FTC Act, including 15 U.S.C. § 53(a)—which specifically allows the FTC to file in district court under certain circumstances—suggested that the statute precluded the court's jurisdiction over Axon's

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claims. The court further reasoned that Congress intended to preclude jurisdiction because the FTC Act was written to "bring order from chaos" created by an earlier complex system of statutes and rules.

Lanza next considered the legislative history behind the FTC Act, prefacing his examination with a recognition that it was "unclear" whether this aspect of the analysis remained relevant, given the Supreme Court's recent opinions rejecting the use of legislative history, and the lack of discussion, in both *Free Enterprise Fund* and *Elgin*. To the extent legislative history should be given any weight, Lanza held it tended to support an inference that Congress intended the FTC Act to preclude Axon's

claims because Congress debated the scope of judicial review permitted by the statute and settled on a standard which affords deference to the FTC's findings of fact, but was otherwise silent. The court also noted that it did not appear that Congress had ever considered amending the statute to allow for complaints outside of administrative proceedings.

Finally, Lanza reviewed the three elements of the "meaningful review" inquiry, noting that multiple circuits have recognized that meaningful review is the "most critical thread" of the preclusion analysis. The court began its inquiry by considering whether a finding of preclusion would foreclose all meaningful judicial review of Axon's constitutional claims. The court stated that Axon eventually would have access to judicial review because it could, and did, raise its claims in the administrative proceeding and the Ninth Circuit could consider the claims if Axon received a cease-and-desist order from the Commission and appealed it. *Id.* at *8-9.

The second part of the meaningful review inquiry required the court to consider whether Axon's claims were "wholly collateral" to the issues the FTC was reviewing. The two Supreme Court cases addressing this question took different approaches. In *Free*

Enterprise Fund, the court concluded that a claim is wholly collateral when it is not related to “any ... orders or rules from which review might be sought.” In contrast, the *Elgin* court held that claims are not wholly collateral if they are used by plaintiffs to reverse an agency decision. The court harmonized these interpretations by holding that both cases asked whether the plaintiff could *eventually* challenge the agency’s conduct. As the plaintiffs in *Free Enterprise Fund* could not, and those in *Elgin* could, Lanza held that a claim is wholly collateral only if the plaintiff cannot ultimately receive judicial review of their constitutional claim. Applying its new standard, the court held that Axon’s claims were not wholly collateral because Axon could bring its claim to the Ninth Circuit once the FTC issued an adverse final order.

Finally, Lanza examined whether the claims are within the FTC’s expertise. As with the wholly collateral analysis, *Free Enterprise Fund* and *Elgin* took different approaches and the court found a way to reconcile them. In *Free Enterprise Fund*, the court held that plaintiff’s constitutional claims were outside the agency’s expertise because the claims were not fact-bound and did not require considerations of agency policy. The *Elgin* court departed

from *Free Enterprise Fund*, holding that agency expertise could be brought on threshold questions surrounding the final constitutional question. The court applied the *Elgin* rule on the grounds that Axon and the *Free Enterprise Fund* plaintiff were distinguishable because, unlike the

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plaintiff in *Free Enterprise Fund*, which would have had to break a rule before it could present its claims before the SEC, Axon was already involved in FTC proceedings and had substantive defenses to the agency’s antitrust claims. The court held that an FTC resolution that Axon had not violated antitrust law would obviate the need to reach Axon’s constitutional claims, and therefore Axon’s claims were not outside of the FTC’s expertise.

Arguments on Appeal To the Ninth Circuit

The key issue on appeal to the Ninth Circuit is whether the district

court erred in its approach to the “meaningful review” and “wholly collateral” analyses.

Axon’s core argument on appeal is that Lanza should have applied a standard that centered around “whether the substance of the claims presented was inextricably intertwined with the administrative merits.” See plaintiff-appellant’s opening brief at 14, *Axon Enter. Inc. v. FTC*, No. 20-15662 (9th Cir. filed May 1, 2020). Axon claims *Free Enterprise Fund* is distinct from *Elgin* and *Thunder Basin* because the claim in *Free Enterprise Fund* went directly to the constitutionality of the administrative structure, and not the constitutionality of a specific agency action. When asked during oral argument where this case lay on the spectrum between *Elgin* and *Free Enterprise Fund*, counsel for Axon responded that *Free Enterprise Fund* controlled, because both Axon’s claim and the claim in *Free Enterprise Fund* were structural and, therefore, genuinely collateral. Oral Argument at 5:53, *Axon Enter. Inc. v. FTC*, No. 20-15662 (9th Cir. July 17, 2020). This position was also articulated in an amicus brief submitted jointly by the New Civil Liberties Alliance and TechFreedom, which argued that the “FTC’s process is the punishment,” Brief Amici Curiae of the New Civil Liberties

Alliance and TechFreedom in Support of Plaintiff-Appellant and Reversal at 23, *Axon Enter. Inc. v. FTC*, No. 20-15662 (9th Cir. filed May 8, 2020), and that Judge Lanza's approach to meaningful review was contrary to law. In response, the FTC maintained that Judge Lanza properly harmonized existing precedent and correctly held as nonjusticiable Axon's constitutional claims.

Judge Patrick J. Bumatay asked a number of questions during oral argument about the harm and relief available to Axon. He first asked whether Axon's harm materialized when the FTC's ALJ ruled against it. Axon's response was that the real harm was being subjected to an unconstitutional structure and process, which began when the clearance process put it into the FTC's "bin." Bumatay next questioned how Axon could bring its constitutional claims if it prevailed with the FTC. Under the current structure, Axon responded, there was no route for the company to bring its claims before a court of appeals if the FTC were to find in its favor, an interpretation with which the FTC concurred when asked the same question.

Potential Outcomes

The Ninth Circuit may agree with the lower court and require

Axon to complete FTC adjudication before raising its constitutional claims again, resulting in few—if any—changes to current FTC procedure. But if the Ninth Circuit allows Axon to bring some or all of its constitutional claims before a district court, there could be significant repercussions.

Of particular note is Axon's Article II ALJ claim, which disputes the legitimacy of the FTC's ALJs due to their multi-level for-cause protection. The Supreme Court's recent decision in *Lucia v. SEC* held that SEC ALJs were officers of the United States for purposes of the Appointments Clause. 138 S. Ct. 2044, 2055 (2018). Justice Stephen Breyer, dissenting in part, wrote cautiously about the implications of the majority's holding. (Breyer, J., concurring in part and dissenting in part). The court's opinion, Breyer wrote, could potentially lead to a subsequent decision that ALJs were unconstitutional because they were officers of the United States subject to two layers of for cause removal protections, which the Court held in *Free Enterprise Fund* could be a violation of Article II. (Breyer, J., concurring in part and dissenting in part). Together, these cases could turn ALJs into "dependent" decision-makers, something Breyer opined the Administrative Procedure Act directly tried to prevent when it

gave ALJs for-cause protection from removal.

A Ninth Circuit decision holding that the FTC and DOJ clearance process violated due process and equal protection could potentially result in a legislative or regulatory scheme outlining the contours of the clearance process. Similar agreements, such as a 2002 accord between the FTC and DOJ that allocated specific industries to each agency, have been unsuccessful, but a determination that the procedure was unconstitutional could result in a more permanent change. Memorandum of Agreement Between the Federal Trade Commission and The Antitrust Division of the United States Department of Justice Concerning Clearance Procedures for Investigations (Mar. 5, 2002); Statement by Charles A. James Regarding DOJ/FTC Clearance Agreement (May 20, 2002) (withdrawing from the agreement).

More broadly, a decision allowing for constitutional review of the FTC's structure could impact *all* agencies that currently serve an adjudicatory function, especially when parties' complaints are channeled through agency adjudication before appeal to a federal court is available.