IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Axon Enterprise Incorporated, Plaintiff, v. Federal Trade Commission, et al., Defendants.	No. CV-20-00014-PHX-DWL **ORDER**

NOTICE OF TENTATIVE RULING

A hearing limited to the issue of subject matter jurisdiction is set for April 1, 2020. (Doc. 24.) In advance of that hearing, the Court wishes to provide the parties with its tentative ruling. This is, to be clear, only a tentative ruling. The point of providing it beforehand is to allow the parties to focus their argument on the issues that seem salient to the Court and to maximize the parties' ability to address any perceived errors in the Court's logic.

Dated this 10th day of March, 2020.

Dominic W. Lanza
United States District Judge

TENTATIVE RULING

INTRODUCTION

Pending before the Court is Plaintiff Axon Enterprise, Inc.'s ("Axon") motion for preliminary injunction. (Doc. 15.)

Axon sells various technological tools, including body-worn cameras, to police departments. In May 2018, Axon acquired one of its competitors. This acquisition prompted the Federal Trade Commission (the "FTC") to conduct an antitrust investigation. In January 2020, just as the FTC was about to initiate a formal administrative proceeding to challenge the acquisition, Axon filed this lawsuit, which seeks to enjoin the administrative proceeding based on three constitutional claims: *first*, that the FTC's structure violates Article II of the Constitution because its commissioners are not subject to at-will removal by the President and its administrative law judges ("ALJs"), who are appointed by its commissioners, are also insulated from at-will removal; *second*, that the FTC's combined role of "prosecutor, judge, and jury" during administrative proceedings violates the Due Process Clause of the Fifth Amendment; and *third*, that the FTC and the Antitrust Division of the U.S. Department of Justice, which are both responsible for reviewing the antitrust implications of acquisitions but employ different procedures and substantive standards when conducting such review, utilize an arbitrary and irrational "clearance" process when deciding which agency will review a particular acquisition, in violation of the Equal Protection Clause of the Fifth Amendment. (Doc. 15 at 6-15.)[1]

The constitutional claims Axon seeks to raise in this case are significant and topical. Indeed, the Supreme Court recently held oral argument in a case that raises similar issues. *Seila Law LLC v. Consumer Fin. Protection Bureau*, No. 19-7. This Court, however, is not the appropriate forum to address Axon's claims. It is "fairly discernable" from the FTC Act that Congress intended to preclude district courts from reviewing the type of constitutional claims Axon seeks to raise here—instead, Axon must raise those claims

[1] In its reply, Axon clarifies that it "is not challenging the mere fact of concurrent jurisdiction, but rather the arbitrary way in which the agencies determine which of two vastly different (and often outcome-determinative) procedures will be applied to a particular company." (Doc. 21 at 2 n.1.)

during the administrative process and then renew them, if necessary, when seeking review in the Court of Appeals. Thus, this Court lacks subject matter jurisdiction over this action, Axon's request for a preliminary injunction must be denied, and this action must be dismissed.

BACKGROUND

I. Factual Background

Axon, which was formerly known as TASER International, Inc., is a Delaware corporation that sells various technological tools, including body-worn cameras and cloud-computing software, to police departments. (Doc. 1 ¶¶ 13, 19-21; Doc. 15-2 ¶ 2.) In May 2018, Axon acquired one of its competitors, Vievu. (Doc. 1 ¶ 24.) The next month, the FTC notified Axon that it was investigating the acquisition. (*Id.* ¶ 25.) Axon cooperated with the investigation over the next 18 months. (*Id.* ¶ 26.) Axon contends that it "spent in excess of $1.6 million responding to the FTC's investigational demands, including attorney and expert fees, ESI production and related hosting and third-party vendor fees and expenses." (Doc. 15-2 at 3 ¶ 5.)

Axon contends that, at the conclusion of the investigation, the FTC gave it a choice. First, it could agree to a "blank check" settlement that would rescind its acquisition of Vievu and transfer some of its intellectual property to the newly restored Vievu. (Doc. 1 ¶ 27.) According to Axon, the FTC's "vision" was to turn Vievu into a "clone" of Axon—"something Vievu never was nor could be without impermissible government regulation." (*Id.*) Second, if Axon declined those terms, the FTC would pursue an administrative complaint against Axon. (*Id.*)

II. Procedural History

On January 3, 2020, Axon filed this lawsuit. (Doc. 1). In its complaint, Axon outlines the factual history discussed above and alleges a violation of its Fifth Amendment rights to due process and equal protection (*id.* ¶¶ 57-60), alleges that the FTC's structure violates Article II of the Constitution (*id.* ¶¶ 61-62), and seeks a declaration that its acquisition of Vievu didn't violate any antitrust laws (*id.* ¶¶ 63-69).

Also on January 3, 2020 (but later that day), the FTC filed an administrative complaint challenging Axon's acquisition of Vievu. (Doc. 15 at 2 n.1.) An evidentiary hearing in the administrative proceeding is scheduled for May 19, 2020. (Doc. 22 at 2; FTC Doc. 9389, Administrative Law Judge's Scheduling Order, at 5.)

On January 9, 2020, Axon filed a motion for a preliminary injunction, seeking to enjoin further FTC proceedings against it. (Doc. 15.)

On January 23, 2020, the FTC filed an opposition to Axon's motion. (Doc. 19.) The FTC relegated the merits of Axon's constitutional claims to a footnote and instead focused on whether the Court possesses subject matter jurisdiction. (Doc. 19 at 1, 14 n.12).

On January 30, 2020, Axon filed a reply. (Doc. 21.) That same day, Axon filed a motion for expedited consideration. (Doc. 22.) Over the FTC's opposition (Doc. 23), the Court granted the motion and scheduled oral argument for April 1, 2020. (Doc. 24.)

On March 10, 2020 the Court issued a tentative order. (Doc. 29.)

ANALYSIS

"Subject-matter limitations on federal jurisdiction serve institutional interests. They keep the federal courts within the bounds the Constitution and Congress have prescribed." *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999). "[C]ourts have an 'independent obligation' to police their own subject matter jurisdiction." *Animal Legal Defense Fund v. U.S. Dep't of Agriculture*, 935 F.3d 858, 866 (9th Cir. 2019) (citation omitted). *See also* Fed. R. Civ. Proc. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.").

In general, district courts "have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. This includes the authority to "declare the rights and other legal relations of any interested party seeking such a declaration." *Id.* § 2201. "This grant of jurisdiction, however, is not absolute." *Kerr v. Jewell*, 836 F.3d 1048, 1057 (9th Cir. 2016). Among other things, Congress can "preclude[] district court jurisdiction" over claims pertaining to the conduct of a regulatory agency by enacting an administrative-review framework that evinces a "fairly discernable"

intent to require such claims "to proceed exclusively through the statutory review scheme." *Id.* at 1057-58 (citation omitted). *See also Bennett v. SEC*, 844 F.3d 174, 178 (4th Cir. 2016) ("Congress can . . . impliedly preclude jurisdiction by creating a statutory scheme of administrative adjudication and delayed judicial review in a particular court.").

The issue here is whether Congress, by enacting the FTC Act, intended to require constitutional challenges to the FTC's structure and processes to be brought via the FTC Act's adjudicatory framework. If so, this Court lacks subject matter jurisdiction to entertain Axon's claims.

I. Background Law

On three occasions between 1994 and 2012, the Supreme Court addressed whether Congress's enactment of a scheme of administrative adjudication should be interpreted as an implicit decision by Congress to preclude district court jurisdiction. Although none of those decisions involved the FTC Act, they control the analysis here. Thus, it is necessary to begin by summarizing them. *Cf. Bennett*, 844 F.3d at 178-81 (identifying these cases as "the trilogy").

The first decision, *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), addressed the preclusive effect of the Federal Mine Safety and Health Amendments Act of 1977 ("Mine Act"). Thunder Basin, a coal company, objected to a Mine Act regulation that required it to post the names of certain union representatives. *Id.* at 203-04. Rather than seek review of the regulation through the Mine Act's judicial-review scheme, which contemplates that "[c]hallenges to enforcement [will be] reviewed by the Federal Mine Safety and Health Review Commission . . . and by the appropriate United States court of appeals," Thunder Basin filed a lawsuit in federal district court in which it argued that the Mine Act's review scheme violated its due process rights under the Fifth Amendment. *Id.* at 204-06. The district court issued an injunction in Thunder Basin's favor but the Supreme Court reversed, concluding that the district court lacked subject matter jurisdiction over the action. *Id.* at 205-07.

The Court held that when a statutory scheme, such as the Mine Act, "allocate[s]

initial review to an administrative body" and authorizes only "delayed judicial review," courts must analyze three factors—(1) "the statute's language, structure, and purpose," (2) "its legislative history," and (3) "whether the claims can be afforded meaningful review"—when assessing whether Congress's intent to "preclude initial judicial review" can be "fairly," if impliedly, "discerned" from the statutory scheme. *Id.* at 207. The Court then analyzed these factors and concluded that all three supported a finding of preclusion.

First, the Court noted that the Mine Act creates a "detailed structure" for regulated parties to seek review of enforcement activity under the Act—a mine operator is entitled to challenge an adverse agency order before an ALJ, then seek review of the ALJ's order before the Federal Mine Safety and Health Review Commission, and then, if necessary, seek review of any adverse decision by the Commission in a federal Court of Appeals. *Id.* at 207-08. This structure, the Court concluded, "demonstrates that Congress intended to preclude challenges such as the present one." *Id.* at 208. The Court also noted that the Mine Act contains provisions that enable the Secretary of Labor (who is responsible for enforcing the Mine Act) to file an action in district court when seeking certain types of relief. *Id.* at 209. Because "[m]ine operators enjoy no corresponding right," the Court concluded these provisions served as further proof of Congress's intent to preclude. *Id.*

Second, the Court stated that "[t]he legislative history of the Mine Act confirms this interpretation." *Id.* at 209-11.

Third, the Court addressed whether a finding of preclusion would result, "as a practical matter," in the elimination of Thunder Basin's ability "to obtain meaningful judicial review" of its claims. *Id.* at 213 (quotation omitted). The Court concluded that no such risk was present because Thunder Basin's "statutory and constitutional claims . . . can be meaningfully addressed in the Court of Appeals." *Id.* at 215. In reaching this conclusion, the Court observed that "[t]he Commission has addressed constitutional questions in previous enforcement proceedings" but clarified that, "[e]ven if this were not the case," the availability of eventual review by a federal appellate court was sufficient. *Id.*

The second component of the trilogy, *Free Enterprise Fund v. Public Co. Accounting Oversight Bd*, 561 U.S. 477 (2010), addressed the preclusive effect of the Sarbanes-Oxley Act of 2002 ("the Sarbanes–Oxley Act") and its interaction with the Securities Exchange Act. Among other things, the Sarbanes–Oxley Act created an entity called the Public Company Accounting Oversight Board ("PCAOB"), which was tasked with providing "tighter regulation of the accounting industry." *Id.* at 484. The PCAOB was composed of five members who were appointed by the Securities and Exchange Commission ("the Commission"). *Id.* The PCAOB's broad regulatory authority included enforcing not only the Commission's rules, but also "its own rules," and it possessed the authority to "issue severe sanctions in its disciplinary proceedings, up to and including the permanent revocation of a firm's registration, a permanent ban on a person's associating with any registered firm, and money penalties of $15 million." *Id.* at 485.

The plaintiff in *Free Enterprise Fund* was a Nevada accounting firm that been investigated by the PCAOB and then criticized in a report issued by the PCAOB. *Id.* at 487. In a lawsuit filed in federal district court, the accounting firm argued—similar to one of Axon's arguments here—that the PCAOB's structure was unconstitutional because its board members, as well as the Commission members who appointed them, were shielded from Presidential control. *Id.* The district court concluded it had subject matter jurisdiction over the lawsuit but rejected the accounting firm's constitutional claim on the merits. *Id.* at 488. The Supreme Court reversed, agreeing with the district court's jurisdictional analysis but concluding that, on the merits, the PCAOB's structure was unconstitutional.

When addressing the jurisdictional issue, the Court cited *Thunder Basin* as supplying the relevant standards but concluded that, under those standards, jurisdiction was not precluded. *Id.* at 489-91. Central to the Court's analysis was the fact that the relevant adjudicatory framework didn't provide for judicial review over all of the PCAOB's activities. Specifically, the Commission was only empowered "to review any [PCAOB] rule or sanction." *Id.* at 489. Commission action, in turn, could receive judicial review under 15 U.S.C. § 78y. *Id.* This structure was underinclusive, the Court stated, because it

"provides only for judicial review of *Commission* action, and not every Board action is encapsulated in a final Commission order or rule." *Id.* Put another way, the Court did "not see how [the accounting firm] could meaningfully pursue [its] constitutional claims" because the particular PCAOB conduct it wished to challenge (*e.g.*, the release of the critical report) "is not subject to judicial review." *Id.* at 489-90. Thus, the Court concluded that Congress did not intend to "strip the District Court of jurisdiction over these claims." *Id.* at 491.

The final component of the trilogy, *Elgin v. Dep't of Treasury*, 567 U.S. 1 (2012), addressed the preclusive effect of the Civil Service Reform Act of 1978 ("CSRA"). The CSRA is a "comprehensive system for reviewing personnel action taken against federal employees." *Id.* at 5 (quotation omitted). Under the CSRA, an employer seeking to terminate (or pursue certain other adverse employment actions against) a covered employee must provide notice, representation, an opportunity to respond, and a reasoned decision. *Id.* at 5-6. An employee who disagrees with the agency's decision may seek review by the Merit Systems Protection Board ("MSPB"). *Id.* at 6. And an employee who disagrees with the MSPB's decision may seek judicial review in the Federal Circuit. *Id.*

In *Elgin*, a male employee was terminated because he hadn't registered with the Selective Service. *Id.* at 6-7. The employee appealed to the MPSB, arguing that the statute requiring men (but not women) to register with the Selective Service is unconstitutional, but the employee didn't seek further review in the Federal Circuit after the MSPB rejected his claim—instead, he filed a lawsuit in federal district court in which he raised the same constitutional challenge and requested various forms of equitable relief, including reinstatement. *Id.* The district court concluded it had jurisdiction to resolve the constitutional claim but the Supreme Court reversed, holding that "the CSRA precludes district court jurisdiction over petitioners' claims even though they are constitutional claims for equitable relief." *Id.* at 8.

The Court began by reaffirming that, under *Thunder Basin*, "the appropriate inquiry" when evaluating whether Congress intended to preclude district court jurisdiction

"is whether it is 'fairly discernible' from the [statute] that Congress intended [litigants] to proceed exclusively through the statutory review scheme, even in cases in which the [litigants] raise constitutional challenges to federal statutes." *Id.* at 8-10. Next, the Court "examined the CSRA's text, structure, and purpose." *Id.* at 10-11. After discussing the various forms of review available under the statute, the Court concluded that "[g]iven the painstaking detail with which the CSRA sets out the method for covered employees to obtain review of adverse employment actions, it is fairly discernible that Congress intended to deny such employees an additional avenue of review in district court." *Id.* at 11-12. The Court also noted that the CSRA expressly allows employees to assert one particular type of claim in federal district court. *Id.* at 13 (citing 5 U.S.C. § 7702(b)(2)). The existence of this provision, the Court stated, "demonstrates that Congress knew how to provide alternative forums for judicial review based on the nature of an employee's claim. That Congress declined to include an exemption . . . for challenges to a statute's constitutionality indicates that Congress intended no such exception." *Id.*

The Court also addressed whether a preclusion finding would effectively "foreclose all meaningful judicial review" of the plaintiff's constitutional claims. *Id.* at 15-21 (citing *Free Enterprise Fund*, 561 U.S. at 489). The Court concluded that such a risk was not present, even though "the MSPB has repeatedly refused to pass upon the constitutionality of legislation," because the Federal Circuit, "an Article III court fully competent to adjudicate [constitutional] claims," could address those constitutional claims during the final stage of the statutory review process. *Id.* at 16-18. The Court also rejected the notion that the Federal Circuit would be hamstrung by an inadequately developed record when conducting such review, explaining that "[e]ven without factfinding capabilities, the Federal Circuit may take judicial notice of facts relevant to the constitutional question" and noting that "we see nothing extraordinary in a statutory scheme that vests reviewable factfinding authority in a non-Article III entity that has jurisdiction over an action but cannot finally decide the legal question to which the facts pertain." *Id.* at 19-21.

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II. Whether It Is "Fairly Discernable" From The FTC Act That Congress Intended To Preclude District Court Jurisdiction Over Axon's Constitutional Challenges

With this backdrop in mind, the Court will turn to the FTC Act. Nothing in the FTC Act expressly divests district courts of jurisdiction to entertain constitutional claims of the sort raised by Axon in this action, but *Thunder Basin*, *Free Enterprise Fund*, and *Elgin* all recognize that Congress may implicitly preclude such jurisdiction through the enactment of an administrative review scheme. The Court's task, then, is to determine whether such intent is "fairly discernable" from the FTC Act. *Thunder Basin*, 510 U.S. at 207 (citation omitted).

A. **Text, Structure, And Purpose Of The FTC Act**

Under *Thunder Basin* and its progeny, the first factor to consider when assessing "[w]hether a statute is intended to preclude initial judicial review" is "the statute's language, structure, and purpose." *Thunder Basin*, 510 U.S. at 207. This factor strongly supports a finding of preclusion in this case.

The text and structure of the FTC Act closely resemble those of the Mine Act, which was the statutory scheme at issue in *Thunder Basin*. The FTC Act sets out a detailed scheme for preventing the use of unfair methods of competition. 15 U.S.C. § 45(a)-(b). Additionally, the FTC Act's enforcement provisions create timelines and mechanisms for adjudicating alleged violations that are similar to those outlined in the Mine Act. *Compare* 15 U.S.C. § 45(b) *with* 30 U.S.C. § 815. Finally, and most important, the FTC Act's judicial review process is similar to the Mine Act's, up to and including conferring "exclusive jurisdiction" upon the relevant Court of Appeals to affirm, modify, or set aside final agency orders. *Compare* 15 U.S.C. § 45(c)-(d) *with* 30 U.S.C. § 816(a). In *Thunder Basin*, the Supreme Court held that this type of "detailed structure" suggested "that Congress intended to preclude challenges such as the present one." 510 U.S. at 208. Similarly, in *Elgin*, the Supreme Court held when a statutory scheme sets out in "painstaking detail" the process for aggrieved parties to obtain review of adverse decisions, "it is fairly discernible that Congress intended to deny such employees an additional avenue

of review in district court." 567 U.S. at 11-12. The FTC Act has a "detailed structure" that includes "painstaking detail" concerning how to seek review, so the same inference arises here. *Cf. Hill v. SEC*, 825 F.3d 1236, 1242 (11th Cir. 2016) (concluding that a review scheme "materially indistinguishable" from that in *Thunder Basin* demonstrated congressional intent to preclude district court jurisdiction).[2]

The FTC Act also contains a provision authorizing the FTC (but not regulated parties) to file a lawsuit in federal district court. *See* 15 U.S.C. § 53(a) (authorizing the FTC to "bring suit in a district court of the United States" when certain conditions are satisfied). In *Thunder Basin*, the Supreme Court stated that an inference of preclusive effect arose because the Mine Act allowed the Secretary of Labor to file certain claims in district court but "[m]ine operators enjoy no corresponding right." 510 U.S. at 209. *See also Elgin*, 567 U.S. at 13 (provision allowing employees to file certain type of claims in district court showed that "Congress knew how to provide alternative forums for judicial review based on the nature of an employee's claim. That Congress declined to include an exemption . . . for challenges to a statute's constitutionality indicates that Congress intended no such exception."). So, too, here.[3]

Finally, the purpose of the FTC Act suggests that Congress intended to preclude district court jurisdiction. Congress intended the FTC to act as a successor to the Interstate Commerce Commission and enforce "its broad mandate to police unfair business conduct." *FTC v. AT&T Mobility LLC*, 883 F.3d 848, 854 (9th Cir. 2018). To that end, "Congress deliberately gave the FTC broad enforcement powers." *Id.* This is similar to the Mine Act's purpose of "strengthen[ing] and streamlin[ing] health and safety enforcement

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[2] In its reply, Axon points out several ways in which the text, structure, and purpose of the FTC Act arguably differ from the text, structure, and purpose of the CSRA. (Doc. 21 at 4-5.) However, Axon does not attempt to make such a showing with respect to the Mine Act.

[3] This conclusion is bolstered by the slate of recent cases (all from outside the Ninth Circuit) concluding that the SEC's authorizing legislation precludes district court jurisdiction. *See, e.g., Bennett*, 844 F.3d at 181-82; *Hill*, 825 F.3d at 1242-1245; *Tilton v. SEC*, 824 F.3d 276, 282-81 (2d Cir. 2016); *Jarkesy v. SEC*, 803 F.3d 9, 16-17 (D.C. Cir. 2015). The review provisions of the FTC Act are "materially indistinguishable," *Hill*, 825 F.3d at 1242, and "nearly identical," *Jarkesy*, 803 F.3d at 16, to those contained in 15 U.S.C. § 78y, which itself resembles the review provisions in the Mine Act.

requirements," *Thunder Basin*, 510 U.S. 221, as well as the CSRA's purpose of introducing an "integrated scheme of administrative and judicial review" to "replace an outdated patchwork of statutes and rules," *Elgin*, 567 U.S. at 13-14 (citation omitted). In other words, where Congress acts to introduce a statutory scheme that brings order from chaos, it indicates that Congress intended to preclude district court jurisdiction. The FTC Act was such an attempt.

B. **Legislative History Of The FTC Act**

Thunder Basin suggests the second relevant preclusion factor is the underlying statute's "legislative history." 510 U.S. at 207. However, Justice Scalia, joined by Justice Thomas, issued a concurring opinion in *Thunder Basin* objecting to the consideration of legislative history as part of the preclusion analysis, stating that such consideration only "serve[d] to maintain the illusion that legislative history is an important factor in this Court's deciding of cases, as opposed to an omnipresent makeweight for decisions arrived at on other grounds." *Id.* at 219 (Scalia, J., concurring).

The Supreme Court's subsequent decisions in this area, *Free Enterprise Fund* and *Elgin*, did not address (much less focus on) legislative history, and the Supreme Court has issued subsequent opinions in other contexts that reject the use of legislative history as a legitimate interpretative tool. *See, e.g., Epic Sys. Corp. v. Lewis*, 138 S.Ct. 1612, 1631 (2018) ("[L]egislative history is not the law. It is the business of Congress to sum up its own debates in its legislation, and once it enacts a statute [w]e do not inquire what the legislature meant; we ask only what the statute means.") (citations and internal quotation marks omitted). Thus, it is unclear whether this portion of *Thunder Basin* retains validity. Indeed, the FTC does not mention legislative history in its response brief (Doc. 19) and Axon barely mentions it its reply (Doc. 21 at 4 [criticizing the FTC for failing to "point to legislative history for the FTC Act that is similar to the CSRA's"]).

In any event, to the extent legislative history remains a relevant consideration, and to the extent it is possible to draw any meaningful conclusions from the FTC Act's legislative history, *but see Thunder Basin*, 510 U.S. at 219 (Scalia, J., concurring), it tends

to support the inference that Congress sought to preclude district court jurisdiction over the type of claims presented here. Judicial review of final, and only final, FTC actions was a component of the FTC Act from its earliest iterations. *See* Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 Antitrust L. J. 1, 4 (2003). The debate focused on the breadth of judicial review and settled on the standard contained in § 45 to this day: deference to the FTC's findings of fact, but otherwise silent. *Id.* at 5, 76-77, 80 (discussing the FTC Act's proponents' "essential faith in the workings of a commission"), 90-92. It does not appear Congress ever considered amending the FTC Act to route complaints through any process other than administrative proceedings. *Id.*

C. **Availability Of Meaningful Review And Associated Considerations**

In *Thunder Basin*, the Supreme Court identified the third preclusion factor as "whether the claims can be afforded meaningful review" and then addressed—in the portion of the opinion concerning this factor—whether the claims were "wholly collateral" to the statute's review provisions and whether the claims fell outside the agency's expertise. 510 U.S. at 207, 212-15. However, in both *Elgin* and *Free Enterprise Fund*, the Supreme Court seemed to frame the third factor as a conjunctive, three-part test involving consideration of (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 are "outside the agency's expertise." *Elgin*, 567 U.S. at 15-16; *Free Enterprise Fund*, 561 U.S. at 489-90. It is therefore unclear whether these are distinct factors or simply different ways of addressing the same thing.

Although the Ninth Circuit has not resolved this issue, other appellate courts have recognized its "unsettled" nature and concluded that "the most critical thread in the case law is . . . whether the plaintiff will be able to receive meaningful judicial review without access to the district courts." *Bebo*, 799 F.3d at 774. *See also Hill*, 825 F.3d at 1245 ("We agree with the Second and Seventh Circuits that the first factor—meaningful judicial review—is 'the most critical thread in the case law.'") (citation omitted). The Court will follow the same approach here.

1. Availability Of Meaningful Review

Axon's overarching argument is that this case "is materially indistinguishable" from *Free Enterprise Fund* and that "the FTC Act affords no meaningful review of Axon's claims outside this lawsuit." (Doc. 21 at 2-5.) This argument is unavailing.

As noted, *Free Enterprise Fund* focused on the fact that the PCAOB could engage in some forms of regulatory activity, including the issuance of critical reports, that were effectively immune from judicial review due to a mismatch in the administrative review scheme—the SEC could only review a "rule or sanction" promulgated by the PCAOB, "and not every Board action is encapsulated in a final Commission order or rule." 561 U.S. at 489.

This sort of mismatch is not present under the FTC Act, at least with respect to the type of claims that Axon seeks to raise here. Fundamentally, Axon believes that its acquisition of Vievu was permissible under the antitrust laws and that the FTC shouldn't be allowed to investigate or challenge that acquisition. Yet these are claims that Axon can present during the pending administrative proceeding—indeed, Axon has now presented them[4]—and then renew, if necessary, when seeking review of the FTC's final cease-and-desist order in a federal appellate court. Critically, Axon concedes that such review will eventually be available in this case. (Doc. 21 at 8 [acknowledging that "Axon could, in theory, raise its constitutional claims on appeal from an adverse Commission order" but arguing that the availability of such review "is irrelevant"].) It is well settled that the eventual availability of such review supports a finding of preclusive intent. *Thunder Basin*, 510 U.S. at 213-15 (finding of preclusion warranted because Thunder Basin's "statutory and constitutional claims . . . can be meaningfully addressed in the Court of Appeals," "[e]ven if" the agency has a track record of refusing to consider such claims during the administrative proceeding); *Elgin*, 567 U.S. at 16-21 (no risk that finding of preclusion would foreclose meaningful review, even though "the MSPB has repeatedly refused to pass

[4] S*ee* FTC Doc. No. D9389, Answer and Defenses of Respondent Axon Enter. Inc., at 22.

upon the constitutionality of legislation," because the Federal Circuit, "an Article III court fully competent to adjudicate [constitutional] claims," could address those claims during the final stage of the statutory review process).

Axon attempts to evade this conclusion by narrowly focusing on particular aspects of the FTC's conduct and arguing that those aspects are effectively immune from judicial review. For example, Axon argues that "the clearance decision, which put the FTC, rather than the DOJ, in charge of the Axon/Vievu merger," was an effectively unreviewable decision that "caused real harm before any administrative action was filed." (Doc. 21 at 6.) Axon also contends in a footnote that the mere fact of "being regulated" by the FTC is a cognizable injury. (*Id.* at 6 n.4.) The problem with these arguments is that they are hypothetical and divorced from the facts of this case. Even assuming *arguendo* that a company that was investigated by the FTC for acquiring a competitor, spent money complying with the FTC's investigative demands, and ultimately persuaded the FTC not to oppose the acquisition might lack an effective mechanism for challenging the constitutionality of the FTC's investigatory effort (because there would be no administrative proceeding in which to raise those claims), Axon stands in very different shoes here. It didn't file this lawsuit in mid-2018, upon the FTC's initiation of the investigation. Instead, it filed suit 18 months later, mere hours before the FTC initiated an administrative proceeding against it (which Axon was apparently racing to the courthouse to beat). Thus, unlike the accounting firm in *Free Enterprise Fund*, which had its reputation impugned by a critical report issued by the PCAOB but could not challenge that report in any subsequent administrative proceeding, here Axon will (as it concedes) have every opportunity to raise its constitutional challenges during the FTC administrative proceeding and then, if necessary, renew those challenges in its appeal to a federal appellate court. *See* 15 U.S.C. § 45(c)-(d) (an entity dissatisfied with an FTC cease-and-desist order may seek review in the court of appeals "within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business," and the appellate court thereafter has

exclusive jurisdiction to "affirm, enforce, modify, or set aside orders of the Commission").

Axon also contends that the absence of effective judicial review is demonstrated by the fact that it (like the accounting firm in *Free Enterprise Fund*) filed this lawsuit before the initiation of administrative proceedings. (Doc. 21 at 3 & n.3.) This argument overlooks that the plaintiff in *Thunder Basin* also filed a pre-enforcement challenge, yet the Supreme Court still concluded that conferring jurisdiction upon the district court would "be inimical to the structure and purpose" of the comprehensive statutory review scheme. *Thunder Basin*, 510 U.S. at 781. *Free Enterprise Fund* did not overrule *Thunder Basin* on this point. 561 U.S. at 490-91. *See also Hill*, 825 F.3d at 1249 ("[I]t makes no difference that the Gray respondents filed their complaint in the face of an impending, rather than extant, enforcement action. The critical fact is that the Gray respondents can seek full postdeprivation relief under § 78y."); *Great Plains Coop v. Commodity Futures Trading Comm'n*, 205 F.3d 353, 355 (8th Cir. 2000) (holding that pre-administrative enforcement suit seeking an injunction was "an impermissible attempt to make an 'end run' around the statutory scheme").

Finally, Axon contends that any attempt to litigate its constitutional claims during the administrative proceeding would not be "meaningful" because "the Commission rules do not allow Axon to depose the DOJ officials who participated in the clearance process without first getting the permission of the FTC-appointed ALJ" and, thus, "there will be no guarantee of an administrative record that will allow a reviewing court to decide those claims." (Doc. 21 at 7-8.) Yet in *Elgin*, the Supreme Court considered and rejected a nearly identical argument. There, the plaintiff argued that, because the agency lacked the authority to adjudicate constitutional claims, he lacked the ability to create a factual record upon which an Article III court could later decide his claims. 567 U.S. at 19. The Supreme Court disagreed, holding that the statutory scheme adequately ensured such a record could be made and that, if the Court of Appeals concluded it needed more evidence, it was free to take judicial notice of facts helpful to deciding the constitutional issue and/or remand to the MSPB with instructions to receive the necessary evidence. *Id.*

The same is true here. If the FTC issues an adverse decision against Axon and Axon appeals, the Ninth Circuit can take judicial notice of facts that would aid its decision on the constitutional claims. *Singh v. Ashcroft*, 393 F.3d 903, 905 (9th Cir. 2004) (holding that, even though a statute limited the Ninth Circuit to reviewing the administrative record, "it is nonsense to suppose that we are so cabined and confined that we cannot exercise the ordinary power of any court to take notice of facts that are beyond dispute."). If the facts the Ninth Circuit needs are beyond judicial notice, "the court may order such additional evidence to be taken before the [FTC] and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper." 15 U.S.C. § 45(c). In other words, "there is nothing extraordinary in a statutory scheme that vests reviewable authority in a non-Article II entity that has jurisdiction over an action but cannot finally decide the legal question to which the facts pertain." *Elgin*, 567 U.S. at 19. *See also Bank of La. v. FDIC*, 919 F.3d 916, 925-928 (5th Cir. 2019) (rejecting claim that statute did not provide for meaningful judicial review because the administrative proceedings only allowed "limited discovery").

2. Wholly Collateral

The next consideration is whether the claim is "wholly collateral" to a statute's review provisions. Unfortunately, "the reference point for determining whether a claim is 'wholly collateral' is not free from ambiguity." *Bennett*, 844 F.3d at 186. "Neither *Elgin* nor *Free Enterprise Fund* clearly defines the meaning of 'wholly collateral.'" *Bebo*, 799 F.3d at 773.

Since *Elgin*, courts seeking to assess whether a claim is "wholly collateral" have taken two approaches. *Bebo*, 799 F.3d at 773-74. First, some courts have looked to "the relationship between the merits of the constitutional claim and the factual allegations against the plaintiff." *Id.* at 773. These courts have taken their cue from *Free Enterprise Fund*, which concluded that the accounting firm's claims were "wholly collateral" because they were unrelated to "any . . . orders or rules from which review might be sought." 561 U.S. at 489-491. As a result, courts relying on *Free Enterprise Fund* have concluded that

a claim is wholly collateral if the basis for the claim would exist regardless of the merits decision of the agency. *Hill v. SEC*, 114 F. Supp. 3d 1297, 1309 (N.D. Ga. 2015) ("What occurs at the administrative proceeding and the SEC's conduct there is irrelevant to this proceeding which seeks to invalidate the entire statutory scheme."); *Duka v. SEC*, 103 F. Supp. 3d 382, 391 (S.D.N.Y. 2015) ("Similarly, [plaintiff] contends that her Administrative Proceeding may not constitutionally take place, and she does not attack any order that may be issued in her administrative proceeding relating to the outcome of the SEC action.") (internal quotations omitted); *Gupta v. SEC*, 796 F. Supp. 2d 503, 513 (S.D.N.Y. 2011) ("These allegations . . . would state a claim even if Gupta were entirely guilty of the charges made against him in the OIP."). Notably, these courts have either been directly overruled or had their holdings called into serious doubt. *Hill*, 825 F.3d at 1252; *Tilton*, 824 F.3d at 291.

Second, other courts have looked to *Elgin* when evaluating the meaning of "wholly collateral." *Bebo*, 799 F.3d at 774. These courts seize on *Elgin*'s conclusion that the claims in that case were not wholly collateral because they were "the vehicle by which [plaintiffs] seek to reverse the removal decision, to return to federal employment, and to receive compensation." 567 U.S. at 22. The Courts of Appeals that have chosen between these two approaches have unanimously favored this approach. *Bennett*, 844 F.3d at 187 ("However, we think the second reading is more faithful to the more recent Supreme Court precedent . . . ."); *Tilton*, 824 F.3d at 288 ("The appellants' Appointments Clause claim arose directly from that enforcement action and serves as an affirmative defense within the proceeding."); *Jarkesy*, 803 F.3d at 23 ("Here, [plaintiff's] constitutional and APA claims do not arise 'outside' the SEC administrative enforcement scheme—they arise from actions the Commission took in the course of that scheme. And they are the 'vehicle by which' Jarkesy seeks to prevail in his administrative proceeding.") (quoting *Elgin*, 567 U.S. at 22).

These approaches can be viewed as two sides of the same inquiry. *Free Enterprise Fund*'s "wholly collateral" finding turned on the fact that the accounting firm's claims were "collateral to any . . . orders or rules from which review might be sought." 561 U.S. at 490.

In other words, the fact that the accounting firm was seeking to challenge agency action beyond the scope of what was reviewable under the statutory scheme is what rendered its claims collateral. *Id.* *Elgin* focused on whether the claims at issue were "the vehicle by which [plaintiffs] seek to reverse" adverse action. 567 U.S. at 22. That is, both looked to whether there was a way for a plaintiff to challenge the agency conduct at issue. No such vehicle existed in *Free Enterprise Fund*—the claims which the accounting firm sought to bring had no path to judicial review. In contrast, the *Elgin* plaintiffs did have a route to judicial review and they could have raised their constitutional claims in the course of that route.

The best way to harmonize *Free Enterprise Fund* and *Elgin* is to conclude that the "wholly collateral" consideration turns on whether a vehicle exists (or could exist) for the plaintiff ultimately to receive judicial review of its constitutional claim. If there isn't, the claim is "wholly collateral" to the review scheme, and this consideration would weigh in favor of a district court exercising jurisdiction. This does "reduce[] the factor's independent significance," but it is "more faithful to the more recent Supreme Court precedent," and harmonizes seemingly discordant case law. *Bennett*, 844 F.3d at 187. *See also Tilton*, 824 F.3d at 288. *Cf. Jarkesy*, 803 F.3d at 27 ("[T]he possibility that a[n] [agency] order in [plaintiff's] favor might moot some or all of his challenges does not make those challenges 'collateral' and thus appropriate for review outside the administrative scheme . . . . that possibility [is] a *feature* . . . not a bug.") (citing *Standard Oil*, 449 U.S. at 244 n.11).

Given this backdrop, there is no merit to Axon's argument that its constitutional claims are "wholly collateral" to the issues to be adjudicated during the FTC administrative proceeding because its "claims (just like those in *Free Enterprise Fund*) go to the agency's constitutional authority" and "do not 'arise[] out of' an enforcement proceeding." (Doc. 21 at 9-10.) Because Axon can assert (and already has asserted) its constitutional claims during the administrative proceeding, and because Axon retains the ability to seek further review of those claims in a federal appellate court, those claims are not "wholly collateral"

to the FTC Act's review provisions.

Finally, one additional clarification is necessary with respect to the concept of "wholly collateral" claims. Axon's briefing can be interpreted as suggesting its claims are wholly collateral because they are constitutional in nature. (Doc. 21 at 8-9.) But in *Elgin*, the Supreme Court expressly rejected "a jurisdiction rule based on the nature of an employee's constitutional claim." 567 U.S. at 15. Creating such a rule would "deprive the aggrieved employee, the [agency], and the district court of clear guidance about the proper forum for the employee's claims at the outset of the case" because the line between constitutional challenges to statutes and other types of constitutional challenges was "hazy at best." *Id.* Likewise, the *Elgin* Court rejected a rule that would have reserved "facial constitutional challenges to statutes" for district courts. *Id.* At bottom, "exclusivity does not turn on the constitutional nature of" a claim. *Id.* *Thunder Basin* reached a similar conclusion, holding that a Due Process challenge "can be meaningfully addressed in the Court of Appeals," and, as a result, the mere fact that plaintiff had brought a constitutional challenge was insufficient to establish district court jurisdiction. 510 U.S. at 215.

Thunder Basin and *Elgin*, in short, foreclose the possibility that the Court has jurisdiction over Axon's Due Process and Equal Protection claims simply because they are constitutional in nature—*Thunder Basin* precluded jurisdiction over a Due Process claim, 510 U.S. at 215, and *Elgin* precluded jurisdiction over an Equal Protection claim, 567 U.S. at 7, 16. *See also Bebo*, 799 F.3d at 768, 75 (finding district court jurisdiction precluded even though plaintiff asserted a statute "is facially unconstitutional under the Fifth Amendment because it provides the SEC 'unguided' authority to choose which respondents will and which will not receive the procedural protections of a federal district court, in violation of equal protection and due process guarantees").

The potential wrinkle is that Axon is also asserting an Article II claim, which was not raised in *Thunder Basin* or *Elgin* but was the claim at issue in *Free Enterprise Fund*. Despite that wrinkle, the logic of *Elgin* extends to preclude jurisdiction over that claim. *Elgin* was concerned with a lack of clarity when it came to deciding whether jurisdiction

was precluded and rejected "hazy" line drawing. 567 U.S. at 15. For example:

> [P]etitioners contend that facial and as-applied constitutional challenges to statutes may be brought in district court, while other constitutional challenges must be heard by the [agency]. But, as we explain below, that line is hazy at best and incoherent at worst. The dissent's approach fares no better. The dissent carves out for district court adjudication only facial constitutional challenges to statutes, but we have previously stated that "the distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge."

Id. (citation omitted). Axon's Article II claim, at bottom, attacks the for-cause removal protection for FTC commissioners (15 U.S.C. § 41) and ALJs (5 U.S.C. § 7521). (Doc. 15 at 12-14.) In other words, Axon brings a facial constitutional challenge to a statute. *Elgin* makes clear that that alone is not enough to establish district court jurisdiction. The weight of authority from outside the Ninth Circuit supports this conclusion. *Hill*, 825 F.3d at 1246 ("Whether an injury has constitutional dimensions is not the linchpin in determining its capacity for meaningful judicial review."); *Jarkesy*, 803 F.3d at 403 ("In any case, assuming *arguendo* that Jarkesy put forth a non-delegation doctrine challenge, he is wrong to assign it talismanic significance. He seems to assume that whenever a respondent in an administrative proceeding attacks a statute on its face, a district court has jurisdiction to hear the challenge, whereas the agency does not. That is mistaken.")

3. Agency Expertise

"The final consideration within the *Thunder Basin* framework" is whether Axon's claims "fall[] outside the [FTC's] expertise." *Tilton*, 824 F.3d at 289. *See also Elgin*, 567 U.S. at 22. This factor looks to "whether agency expertise could be brought to bear on the questions presented." *Hill*, 825 F.3d at 1251 (internal quotation marks and alterations omitted). Like the other considerations, this consideration requires a full understanding of the *Thunder Basin* trilogy.

Free Enterprise Fund concluded that agency expertise played no role because the accounting firm's constitutional claims were not "fact-bound inquiries" and its statutory claims did "not require 'technical considerations of [agency] policy." 561 U.S. at 419

(citing *Johnson v. Robison*, 415 U.S. 361, 373 (1974). In contrast, *Elgin* rejected the argument that the plaintiffs' constitutional arguments were outside the statutory scope of review, because that argument "overlook[ed] the many threshold questions that may accompany a constitutional claim and to which the [agency] can apply its expertise." 567 U.S. at 22. Resolution of substantive arguments that did fall under the agency's expertise in favor of a plaintiff could "avoid the need to reach his constitutional claims." *Id.* In other words, the ability to "fully dispose of the case" before reaching the constitutional claims was an example of an agency's expertise being brought to bear. *Id.*

Again, *Free Enterprise Fund* and *Elgin* can be difficult to harmonize. The Courts of Appeals that have recognized this tension have generally opted to apply *Elgin*'s approach to the agency expertise consideration. *Bennett*, 844 F.3d at 187-88; *Hill*, 825 F.3d at 1250-51; *Tilton*, 824 F.3d at 289-290; *Jarkesy*, 803 F.3d at 28-29; *Bebo*, 799 F.3d at 772-73. Those courts reasoned that *Elgin* was the latest and more comprehensive assessment of the agency expertise factor, so its interpretation controlled. In following *Elgin*, those courts concluded that "[agency] expertise can otherwise be brought to bear" and that the plaintiffs' claims, including structural Article II claims, were subject to the statutory review scheme.

That said, *Free Enterprise Fund* and *Elgin* must be read as complementary, and thus the question isn't which standard controls, but where Axon's claims fall in the spectrum they create. The apparent conflict arises because *Elgin*, although its rule is clear, was not dealing with the sort of structural challenge that was raised in *Free Enterprise Fund*. If *Elgin*'s rule were applied as some courts have described it, agency expertise could be brought to bear in any case, which is an outcome that would conflict with *Free Enterprise Fund* and *Thunder Basin*. On the other hand, carving out a "*Free Enterprise Fund* exception" based on the content of a specific claim would run counter to *Elgin*'s reasoning, which is the Supreme Court's most recent formulation of the agency expertise consideration.

The key to harmonizing *Free Enterprise Fund* and *Elgin* is that the agency expertise

analysis in *Free Enterprise Fund* was driven by the fact that, for the accounting firm to obtain judicial review through the statutory scheme, it would have had to force the issue by willfully and intentionally violating a rule and then raising the only defense possible—that the agency was unconstitutional. Only then would the accounting firm's claims be before the SEC and subject to judicial review. 561 U.S. at 491. In contrast, in *Elgin*, the agency had several avenues through which it could obviate the need to reach a constitutional question it was not suited to addressing. 567 U.S. at 22.

The same is true here. Axon maintains it has done nothing wrong. The FTC, in applying its own expertise, may conclude the same. Thus, as in *Elgin*, there may be no need for a federal appellate court to reach Axon's constitutional claims. Were Axon forced to forego any defense other than its constitutional claims, then, and only then, would Axon be in the same position as the plaintiff in *Free Enterprise Fund*. Here, though, Axon has substantive defenses that could obviate the need to reach the constitutional question. It has not willfully broken a rule in order to vindicate its constitutional claims, nor does it need to. Thus, matters remain that would benefit from the FTC's expertise.[5]

[5] The Ninth Circuit's decision in *Ukiah Valley Med. Ctr. v. FTC*, 911 F.2d 261 (9th Cir. 1990), also supports this conclusion. In *Ukiah Valley*, a non-profit hospital filed a lawsuit in federal district court in which it sought to enjoin the FTC from pursuing an administrative proceeding to block its acquisition of a different non-profit hospital. *Id.* at 262-63. The hospital's theory, which is somewhat similar to Axon's theory here, was that the FTC's regulatory efforts were categorically impermissible because it lacked jurisdiction over "pure asset acquisitions by not-for-profit corporations." *Id.* at 263. The district court dismissed the hospital's lawsuit and the Ninth Circuit affirmed, holding that "the FTC's issuance of an administrative complaint did not constitute 'final agency action' and . . . judicial review was therefore premature." *Id.* at 263. In reaching this conclusion, the Ninth Circuit emphasized that "[t]he jurisdictional issue is still pending before the ALJ and may be resolved in favor of [the hospital]." *Id.* at 264. This was true even though the FTC had "refused three times to accept [the hospital's] arguments that jurisdiction was lacking." *Id.* at 265. And because the jurisdictional challenge—which, like Axon's claims here, turned on the FTC's authority to regulate rather than the specifics of the acquisition in question—provided a possible pathway to success during the administrative proceeding, the Ninth Circuit concluded that the hospital was required to continue litigating in the administrative forum and then renew its jurisdictional challenges, if necessary, when seeking review in a federal appellate court. *Id.* at 265 ("Should the FTC, at the conclusion of the administrative proceedings, issue a final order, [the hospital] can at that time obtain judicial review and challenge the issuance of the complaint as well as the agency's jurisdiction."). Although *Ukiah Valley* was decided before the *Thunder Basin* trilogy and did not specifically address the concepts of "agency expertise" or implicit preclusion, its logic and outcome support a finding of preclusion here.

Axon argues the FTC cannot bring its expertise to bear because there is no way Axon can win—the FTC is so hopelessly biased that any litigant is doomed to lose. (Doc. 21 at 10.) Yet even taking this as true, it doesn't change the analysis. Even if the FTC incorrectly rules against Axon, "there are precious few cases involving interpretation of statutes authorizing agency action in which [a court's] review is not aided by the agency's statutory construction." *Mitchell v. Christopher*, 996 F.3d 375, 379 (D.C. Cir. 1993). Additionally, the FTC's alleged win rate is something of a red herring—there's no assertion that, whatever the FTC's win rate in administrative proceedings, that rate controls how the Courts of Appeals would resolve the merits of Axon's claims during the final stage of the review process. *See generally* Terry Calvani & Angela M. Diveley, *The FTC at 100: A Modest Proposal for Change*, 21 GEO. MASON L. REV. 1169, 1181 (2014) (discussing studies suggesting that "FTC opinions that were appealed by losing respondents were reversed 20 percent of the time compared to a 5-percent reversal rate for such opinions appealed from district courts [in cases brought by the DOJ's Antitrust Division]").

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Accordingly, **IT IS ORDERED** that:

(1) Axon's complaint (Doc. 1) is **dismissed without prejudice** due to a lack of subject matter jurisdiction.

(2) Axon's motion for preliminary injunction (Doc. 15) is **denied as moot**.

(3) The Clerk of the Court shall enter judgment accordingly and terminate this action.