No. 20-15662

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AXON ENTERPRISE, INC.,

Plaintiff-Appellant,

v.

FEDERAL TRADE COMMISSION, *et al.*

Defendants-Appellees.

Appeal from the U.S. District Court for the District of Arizona
Case No. CV 20-00014-DWL; Honorable Dominic W. Lanza

AMICUS CURIAE* BRIEF OF THE NEW CIVIL LIBERTIES ALLIANCE IN SUPPORT OF APPELLANT'S PETITION FOR REHEARING *EN BANC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the New Civil Liberties Alliance (NCLA) states that it is a nonpartisan, nonprofit corporation organized under § 501(c)(3) of the Internal Revenue Code. NCLA has no parent corporation, nor has it issued any stock owned by a publicly held company.

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INTERESTS OF *AMICUS CURIAE*

The New Civil Liberties Alliance (NCLA) is a nonpartisan, nonprofit organization devoted to defending constitutional freedoms from violations by the administrative state.[1] The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as jury trial, due process of law, the right to be tried in front of an impartial and independent judge, and the right to live under laws made by the nation's elected lawmakers through constitutionally prescribed channels. Yet these self-same rights are also very contemporary—and in dire need of renewed vindication—precisely because legislatures, executive branch officials, administrative agencies, and even sometimes the courts have neglected them for so long.

NCLA aims to defend civil liberties—primarily by asserting constitutional constraints on the administrative state. Although Americans still enjoy the shell of their Republic, there has developed within it a very different sort of government—a type, in fact, that the U.S. Constitution was designed to prevent. This unconstitutional administrative state within federal and state governments is the focus of NCLA's concern.

This case presents a question of exceptional importance: Does the Federal Trade Commission Act (FTCA) *impliedly* prevent federal district courts from hearing a structural

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[1] NCLA states that no counsel for a party authored this brief in whole or in part; and no one, other than NCLA and its counsel, provided money intended to fund the preparation and submission of this brief. All parties have consented to the filing.

challenge that enforcement agencies are conducting administrative proceedings before administrative law judges (ALJs) who are unconstitutionally insulated from removal by the President by multiple layers of tenure protection? Appellant contends *inter alia* that FTC is violating the Constitution's separation-of-powers requirements because the ALJ who is conducting its proceedings is insulated from control by the President by at least two layers of for-cause removal restrictions.

The question was answered by the Supreme Court in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 561 U.S. 477 (2010), which held that the nearly identical federal statute governing judicial review of securities-law claims neither explicitly nor impliedly strips federal district courts of jurisdiction to decide Article II removal questions. NCLA is concerned that the panel's misreading of *Free Enterprise Fund* creates an intra-circuit conflict and is causing substantial hardship to Appellant and other targets of enforcement actions.

INTRODUCTION AND STATEMENT OF THE CASE

When companies like Appellant Axon Enterprise, Inc. are accused of violating the FTC Act in an enforcement proceeding brought by FTC, they typically find themselves before ALJs who preside over lengthy proceedings in which, statistics show, FTC enjoys a distinct home-court—and home referee— advantage. Indeed, the panel conceded that "FTC has not lost an administrative proceeding trial in the past quarter-century." Slip op. 6; *id.* at 26-27. These proceedings impose a tremendous financial and human-

resource burden on the defendants. And when, as here, FTC is seeking to unwind a merger that (according to FTC) violates the FTC Act and the Clayton Act, most companies cannot afford to hold their futures in abeyance for the multi-year period necessary to obtain appellate review of an FTC divestiture order. The prospect of such lengthy ordeals leads virtually all defendants—even those who vigorously maintain that they have not violated the antitrust laws—with little choice but to settle with FTC before they even have an opportunity to see an Article III judge.

What makes this ordeal all the more troubling is that a glaring constitutional defect pervades the structure of these proceedings and undermines the legitimacy of FTC's use of ALJs as the primary decision-makers. As the Supreme Court has held, ALJs who exercise "extensive" authority over enforcement proceedings are full-fledged "Officers of the United States" for purposes of the Constitution's Appointments Clause. *Lucia v. SEC*, 138 S. Ct. 2044, 2049-52 (2018) (quoting U.S. Const., Art. II, § 2, cl. 2). Yet the ALJs are insulated from removal by a regime of multiple "layers of good-cause tenure" protection—a regime the Court declared "incompatible with the Constitution's separation of powers" in *Free Enterprise Fund*. 561 U.S. at 497-98. This multilayered protection is a structural constitutional defect that negates the authority of these frontline decisionmakers and all the proceedings that follow. Indeed, the panel conceded that "Axon raises substantial questions about whether the FTC's dual-layered for-cause

protection for ALJs violates the President's removal powers under Article II." Slip op. 26 (citing *Free Enterprise Fund, Lucia*, and *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020)).[2]

Yet the panel majority nonetheless held that the federal district court lacked jurisdiction to hear Axon's "substantial" constitutional challenge to the legitimacy of the administrative proceedings.[3] Although conceding that no federal statute explicitly precludes district courts from exercising federal-question jurisdiction over claims like Axon's, the panel held that Congress's preclusive intent can be inferred from the structure of the FTC Act; it held that Axon can bring its claims to federal court only in a petition for review of a final FTC order. *Id.* at 27.

The majority held that the FTC Act barred Axon's structural challenge even if (as the panel appeared to concede) FTC lacks authority to rule on the challenge. *Id.* at 17. The panel also conceded that its decision was nonsensical but nonetheless felt bound by Supreme Court case law—particularly *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), and *Elgin v. Dep't of Treasury*, 567 U.S. 1 (2012)—to deny jurisdiction:

> As the dissent cogently points out, it makes little sense to force a party to undergo a burdensome administrative proceeding to raise a constitutional challenge against the agency's structure before it can seek review from the court of appeals. And if we were writing on a clean slate, we would agree

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[2] *Seila Law* held that a statute restricting removal of the Director of the Consumer Financial Protection Bureau violated separation-of-powers principles. 140 S. Ct. at 2192.

[3] The panel separately determined that the district court lacked jurisdiction to hear Axon's claims arising under the Due Process Clause.

> with the dissent. ... "[We] agree[ ] with the dissent that [appellant] deserves better treatment from our Government. Unfortunately, legal precedent deprives us of discretion to do equity."

Slip op. at 19 (quoting *Ortega v. United States*, 861 F.2d 600, 603 n.4 (9th Cir. 1988)).

Judge Bumatay dissented in substantial part. Slip op. 30-46. He concluded (based on the same Supreme Court decisions relied on by the majority) that Congress has *not* impliedly precluded district court jurisdiction over two of Axon's constitutional claims: its separation-of-powers claim and its due-process challenge to FTC's "clearance process." *Id.* at 41-42, 44. He stated that the majority "wrongly discarded" two "controlling" Ninth Circuit decisions that upheld district court jurisdiction over constitutional challenges under factually indistinguishable circumstances. *Id.* at 34 & n.1 (citing *Latif v. Holder*, 686 F.3d 1122, 1129 (9th Cir. 2012), and *Mace v. Skinner*, 34 F.3d 854, 859 (9th Cir. 1994)).

SUMMARY OF ARGUMENT

This case presents a recurring question of exceptional importance concerning the right of individuals and entities, like Axon, to access a federal district court to vindicate a structural constitutional safeguard "critical to preserving liberty." *Free Enterprise Fund*, 561 U.S. at 501.

Rehearing *en banc* is urgently needed to resolve the intra-circuit conflict regarding the scope of district-court jurisdiction to hear such constitutional challenges. The panel majority held that although 28 U.S.C. § 1331 grants district courts jurisdiction over

federal questions, and although no statute expressly strips district courts of jurisdiction to hear constitutional challenges to the structure of FTC proceedings, the FTC Act should be understood to have impliedly precluded district courts from hearing them. But as Judge Bumatay explains in his dissent, that holding directly conflicts with at least two longstanding Ninth Circuit decisions, *Latif* and *Mace*. Slip op. 34. The majority apparently concluded that those two decisions are no longer good law in light of *Thunder Basin* and *Elgin*. But both decisions were issued after *Thunder Basin* was decided in 1994, and *Latif* (which was decided after both *Thunder Basin* and *Elgin*) explicitly cited *Elgin* in support of its conclusion that federal law did not preclude a constitutional challenge to the administrative proceedings at issue. *Latif*, 686 F.3d at 1129. Only an *en banc* rehearing can resolve the conflict between the panel decision and *Latif*/*Mace*.

Review is also warranted because of the exceptional hardship imposed on those facing sanctions from an unconstitutionally structured and thus illegitimate administrative enforcement proceeding. Federal agencies such as FTC, SEC, CFTC, and CFPB bring numerous enforcement proceedings before their ALJs each year, and the constitutional status of most of those ALJs is highly suspect because they are granted the same multiple layers of good-cause tenure protection afforded to FTC ALJs. Yet although scores if not hundreds of these defendants have objected to the constitutionally defective structure of these proceedings in the past decade, not one has obtained a judicial ruling on his or her objection. Jurisdictional rulings similar to the panel's have

prevented them from gaining access to the federal courts in advance of a final order from the agency. And the practical realities of administrative litigation, which entails huge costs, multi-year delays, and virtually guaranteed defeat at the agency level, essentially force objectors to capitulate to the agency before they can reach a federal appeals court, even when they possess meritorious defenses. Review is warranted to determine whether Congress really intended such an unjust result.

Finally, review is warranted because (as Axon has cogently explained in its Petition) the panel decision badly misreads Supreme Court case law. *Free Enterprise Fund* unanimously held that a closely analogous federal review statute[4] neither expressly nor impliedly limits a district court's § 1331 federal question jurisdiction over structural constitutional claims or otherwise provides "an exclusive route to review." 561 U.S. at 489. The panel points to nothing in 15 U.S.C. § 45(c) that would dictate a different result in cases raising identical structural constitutional claims involving FTC enforcement proceedings.

[4] At issue in *Free Enterprise Fund* was 15 U.S.C. § 78y, which governs judicial review of final SEC orders. The panel stated that § 78y is "almost identical" to the FTC judicial review provision at issue here, 15 U.S.C. § 45(c). Slip op. at 12.

ARGUMENT

I. REHEARING *EN BANC* IS WARRANTED TO RESOLVE THE INTRA-CIRCUIT CONFLICT CREATED BY THE PANEL DECISION

Anyone required by an FTC order to "cease and desist from using any method of competition or act or practice" is authorized by the FTC Act to seek review of that order in a federal appeals court. 15 U.S.C. § 45(c). The statute does *not* state that it provides the *exclusive* means by which a defendant may obtain judicial review of constitutional claims. The panel nonetheless held that the FTC Act impliedly strips federal district courts of their jurisdiction over constitutional challenges to FTC enforcement actions. It stated that its implied-preclusion holding was compelled by the Supreme Court's decisions in *Thunder Basin* and *Elgin*, neither of which involved challenges to FTC proceedings. Slip op. 19.

That holding directly conflicts with this Court's prior decisions in *Mace* and *Latif*, both of which held that plaintiffs were entitled to file district-court constitutional challenges to agency proceedings rather than seek relief in the appeals court following the conclusion of those proceedings. Review is warranted to resolve the intra-circuit conflict created by the panel decision.

The plaintiff in *Mace* was an airline mechanic whose aircraft-repair certificate was revoked by the Federal Aviation Administration (FAA). While his administrative appeal from that revocation was pending, he filed suit against several federal officials, claiming

that FAA's revocation procedures violated his constitutional rights, including his right to a jury trial. FAA challenged district-court jurisdiction, noting that the Federal Aviation Act granted the federal appeals courts jurisdiction over appeals from any final revocation order issued by the National Transportation Safety Board. This Court rejected FAA's argument that Congress thereby impliedly precluded the district court's § 1331 jurisdiction. It held that although a district court lacks jurisdiction over claims "based on the merits of any particular revocation order," the district court could hear Mace's claims because they did not focus on the certificate revocation but rather "constitute a broad challenge to allegedly unconstitutional FAA practices." 34 F.3d at 858.

Latif was a district-court challenge to the federal government's apparent decision to include the plaintiffs on a list of suspected terrorists not permitted to fly in U.S. airspace (the "No-Fly List"). The federal Transportation Security Administration (TSA) has established a "redress program" to hear grievances from anyone who believes he was improperly included on the List. The plaintiffs asserted that TSA's procedures were constitutionally deficient for failing to provide a "meaningful" opportunity to contest their inclusion. *Latif*, 686 F.3d at 1224. Had they pursued TSA grievances and been dissatisfied with the outcome, they could have filed suit under 49 U.S.C. § 46110, which grants appeals courts jurisdiction over petitions for review of final TSA orders. This Court rejected the federal government's argument that § 46110 impliedly precluded

district-court jurisdiction, stating, "it is neither clear nor fairly discernable from the statutory scheme that Congress intended to strip the district court of jurisdiction over Plaintiffs' constitutional claim." *Id.* at 1129 (citing *Elgin*, 567 U.S. at 9).

The majority's efforts to distinguish *Mace* and *Latif* are unpersuasive. Its analysis of those decisions was confined to a brief footnote responding to Judge Bumatay's contention that they mandated district court jurisdiction:

> *Mace* did not cite or apply *Thunder Basin*. And *Latif* did not consider the *Thunder Basin* factors under the second step of the implied preclusion analysis because the court ruled under the first step that Congress' intent to preclude jurisdiction was not "fairly discernable from the statutory scheme" at issue.

Slip op. 19 n.7.

But the panel made no effort to argue that the FAA judicial-review statutes at issue in *Mace* and *Latif* are materially different from those in the FTC Act; they are not. The panel simply disagreed with the analysis of the earlier decisions. Given that *Latif* was decided after both *Thunder Basin* and *Elgin* (and cited *Elgin* in support of its holding) and that *Mace* was decided after *Thunder Basin*, there is no plausible claim that *Latif* and *Mace* were somehow overruled by later Supreme Court decisions.[5] Indeed, *Latif*'s and

[5] As Judge Bumatay explained, *"Mace* remains binding law" in this circuit because "precedent of this court remains binding unless it is 'clearly irreconcilable' with intervening Court decisions." Slip op. 34 n.1 (quoting *Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003)). Quoting from *Mace*'s holding, he stated that "[i]n a case challenging an executive agency's authority, we have held that 'any examination of the constitutionality of [an agency's power],' rather than the merits of an individual action,

Mace's jurisdictional holdings have been regularly cited by later decisions of this Court. *See, e.g., Kashem v. Barr*, 941 F.3d 358 (9th Cir. 2019).

In the absence of *en banc* review, Ninth Circuit district courts will be faced with a clear conflict between competing panel decisions. As the case law cited by the panel indicates, many targets of SEC enforcement actions have been filing district-court challenges to the constitutionality of those proceedings, citing the dual-layer tenure protection enjoyed by SEC ALJs. Slip op. 16. Faced with such challenges, district courts need guidance regarding whether to follow *Latif* and *Mace* (which held that a statutory judicial-review scheme indistinguishable from that governing SEC challenges does not preclude district court jurisdiction) or the panel decision (which reached the opposite result regarding a similarly indistinguishable judicial-review scheme).

The majority rule among federal appellate courts is that the earlier-decided of two conflicting precedents (in this case, *Latif*/*Mace*) should be followed. *See, e.g., McMellon v. United States*, 387 F.3d 329, 333 (4th 2004). But the Ninth Circuit does not appear to have a clear rule governing this issue. *See Greenhow v. Sec'y of HHS*, 863 F.2d 633, 636 (9th Cir. 1988) (stating that none of several possible approaches to choosing between conflicting precedents has "an unimpaired claim to being the law of the circuit"). The

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'should logically take place in the district courts, as such an examination is neither particularly within the agency's special expertise nor an integral part of its institutional competence.'" Slip op. 34 (quoting *Mace*, 34 F.3d at 859).

Court has held unequivocally that "the appropriate mechanism for resolving an irreconcilable [intra-circuit] conflict is an *en banc* decision." *United States v. Hardesty*, 977 F.2d 1347, 1348 (9th Cir. 1992) (*en banc*). Granting Axon's Petition and resolving the conflict will provide district courts with the guidance they need when this recurring jurisdictional issue next arises.

II. The Enormous Practical Importance of the Jurisdictional Question Underscores the Need for *En Banc* Review Now

Congress granted federal district courts "original jurisdiction of all civil actions arising under the Constitution." 28 U.S.C. § 1331. This federal-question jurisdiction "has long been recognized" as a bulwark for "protecting rights safeguarded by the Constitution." *Free Enterprise Fund*, 561 U.S. at 491 n.2. And while Congress of course can, and occasionally does, "exclud[e]" certain claims from the jurisdiction of federal district courts, it typically does so "expressly." *Verizon, Md., Inc. v. Public Service Comm'n*, 535 U.S. 635, 644 (2002). The panel held that Congress took the unusual step of excluding district-court jurisdiction over constitutional claims without saying so explicitly, thereby cutting back on this important safeguard. That holding warrants *en banc* review because it eliminates the ability of most defendants to challenge what is widely viewed as a glaring and widespread constitutional deficiency in the structure of enforcement proceedings conducted by several federal agencies.

As is true of other federal agencies, FTC conducts its administrative proceedings using ALJs who are highly insulated from oversight and removal by the President. FTC's ALJs can be removed "only for good cause established and determined by the Merit Systems Protection Board [(MSPB)]," 5 U.S.C. § 7521(a), and MSPB officials are removable by the President "only for inefficiency, neglect of duty, or malfeasance in office." *Id.* § 1202(d). This scheme thus establishes at least "dual for-cause limitations" on ALJs' removal. *Free Enterprise Fund*, 561 U.S. at 492. The Supreme Court held that such multi-layered tenure protections violate separation-of-powers requirements because they unduly impair the President's ability to execute the laws. *Id.* at 497-98. Because ALJs are "Officers of the United States" who exercise "extensive" Executive Branch authority, *Lucia*, 138 S. Ct. at 2049-52, the President's authority is acutely impaired with respect to the activities of ALJs. Yet the panel decision, and similar decisions from other courts, have forestalled for a full decade efforts by the targets of these unconstitutionally structured proceedings to raise their objections in federal district courts.[6] Denying *en banc* review here will only continue to thwart resolution of this issue, unnecessarily

[6] Even the Government has acknowledged the constitutional concerns created by ALJs' dual-layered protections from removal and has lamented that the lack of a resolution on this "critica[l]" issue has produced "uncertainty and turmoil" for administrative agencies and litigants. Gov't Cert. Resp. 20-21, *Lucia*, 138 S. Ct. 2044 (No. 17-130).

perpetuating FTC's systematic violation of a structural safeguard that "[t]he Framers recognized" as "critical to preserving liberty." *Free Enterprise Fund*, 561 U.S. at 501.

The panel observed that defendants are entitled to press their separation-of-powers claim in a petition for review of an adverse FTC judgment. But the roadblocks confronting the vast majority of defendants in administrative adjudications make it very difficult for them to continue litigating long enough to reach the appeals courts. Litigating such cases involves huge costs and many years, inducing almost all defendants to abandon meritorious structural constitutional claims and agree to settlements, rather than expend the resources necessary to continue litigating and thereby preserve the right to raise those claims in a federal court many years in the future. As an FTC Commissioner noted in 2015:

> [T]he combination of [FTC's] institutional and procedural advantages with the vague nature of the Commission's Section 5 authority gives the agency the ability, in some cases, to elicit a settlement even though the conduct in question very likely might not be anticompetitive. This is because firms typically will prefer to settle a Section 5 claim rather than go through lengthy and costly litigation in which they are both shooting at a moving target and have the chips stacked against them.

Joshua D. Wright, *Section 5 Revisited: Time for the FTC to Define the Scope of Its Unfair Methods of Competition Authority* (2015), ER94, 100.

To say that "the chips are stacked against" FTC defendants is an understatement. For the past 20 years, FTC has ruled in its own favor in *100%* of the cases appealed from an ALJ to the full Commission. *Id.*, ER99. When FTC initiates proceedings to overturn

a corporate merger, companies have recognized the futility of attempting to persuade the Commission to rule against itself.[7] And the economic inadvisability of continuing to litigate so that one can mount an in-the-distant-future constitutional challenge to FTC's structure is self-evident when one considers that the relief one could obtain from an appeals court is a remand to FTC for yet another multi-year hearing before a restructured agency. That is, under the panel's approach, even if the defendant might at great cost and delay eventually remedy the constitutional violation, it will still face renewed proceedings before an agency that always rules in its own favor.

Granting rehearing *en banc* will permit the Court to determine whether Congress really intended to impose severe limitations on federal-court jurisdiction that effectively prevent judicial consideration of an unresolved, "critical" separation-of-powers issue that even the Government concedes has produced "uncertainty and turmoil."

III. THE PANEL'S IMPLIED PRECLUSION HOLDING IS INCORRECT

Rehearing is also warranted because the panel has misapplied relevant Supreme Court case law. The panel held that, under *Thunder Basin*'s multifactor test, Congress *impliedly* stripped district courts of jurisdiction over structural constitutional challenges

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[7] The record demonstrates that FTC has challenged 36 mergers in the past five years. A majority of those companies either abandoned their mergers immediately or entered into settlements. The Commission ruled in its own favor in every other case. Only two of the 36 defendants survived long enough for their cases to reach a federal court. ER119-123.

merely by creating an administrative review scheme for resolving individual FTC enforcement proceedings. But *Free Enterprise Fund* squarely rejected such a sweeping application of *Thunder Basin*. The Supreme Court held that the SEC review scheme—a scheme "almost identical" to the FTC review scheme at issue here, Slip op. at 12—did *not* impliedly strip federal district courts of their usual jurisdiction to adjudicate "an Appointments Clause or separation-of-powers" claim in the first instance. *Free Enterprise Fund*, 561 U.S. at 489-91 & n.2.

The Supreme Court has held that, in certain instances, the provisions of an administrative review scheme may demonstrate that "Congress intended" for that scheme to be "exclusive," even if it does not "facially" eliminate federal question jurisdiction. *Thunder Basin*, 510 U.S. at 208, 212-16. But that kind of "implied" jurisdiction-stripping, *Elgin*, 567 U.S. at 12, is "[g]enerally" confined to instances in which "agency expertise [will] be brought to bear on particular problems." *Free Enterprise Fund*, 561 U.S. at 489. And every case in which the Court has found such implied jurisdiction-stripping involved challenges to the agency's decision, not ones to the constitutional legitimacy of the decisionmaker.

As multiple federal judges have concluded, *Free Enterprise Fund*'s analysis "controls here" and compels the conclusion that district courts have jurisdiction to hear challenges to the constitutional legitimacy of FTC ALJs. *Tilton v. SEC*, 824 F.3d 276, 292 (2d Cir. 2016) (Droney, J., dissenting); *see Cochran v. SEC*, 969 F.3d 507, 521 (5th Cir.) (Haynes,

J., dissenting), *reh. en banc granted*, 978 F.3d 975 (5th Cir. 2020). The "lesson" of Supreme Court case law and prior Ninth Circuit decisions "is straightforward: Absent language to the contrary, challenges to an agency's *structure*, *procedures*, or *existence*, rather than to an agency's adjudication of the merits on an individual case, may be heard by a district court." Slip op. 34 (Bumatay, J., dissenting). Rehearing *en banc* is warranted to correct the panel's error.

The panel's reliance on *FTC v. Standard Oil Co. of Calif.*, 449 U.S. 232 (1980), is likewise misplaced. The plaintiff in *Standard Oil* did not challenge the constitutional authority of the adjudicator; rather, it challenged the legal sufficiency of the allegations in the agency's administrative complaint. *Id.* at 235. In concluding that the plaintiff could not seek judicial review of its statutory challenge in advance of a final ruling by the agency, the Supreme Court never disputed the district court's jurisdiction to hear the challenge. Rather, it held that the plaintiff had failed to state a claim under the Administrative Procedure Act because the agency's issuance of a complaint did not constitute "final agency action" under 5 U.S.C. § 704. *Id.* at 246-47. That holding has no application to Axon's constitutional claim. As *Free Enterprise Fund* explained, the Supreme Court's "established practice" is to recognize a right of action for equitable relief to "preven[t] entities from acting unconstitutionally." 561 U.S. at 491 n.2 (citations omitted).

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I am an attorney for *amicus curiae* New Civil Liberties Alliance. Pursuant to Fed.R.App.P. 32(a)(7)(C), I hereby certify that the foregoing brief of NCLA is in 14-point, proportionately spaced Garamond type. According to the word processing system used to prepare this brief (WordPerfect X8), the word count of the brief is 4,200, not including the certificate of interest, table of contents, table of authorities, certificate of service, and this certificate of compliance.

/s/ Richard A. Samp
Richard A. Samp

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of March, 2021, I electronically filed the brief of *amicus curiae* New Civil Liberties Alliance with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/CF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Richard A. Samp
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