



FOR IMMEDIATE RELEASE

Media Inquiries: [Judy Pino](#), 202-869-5218

NCLA Amicus Brief Argues District Courts May Hear Constitutional Claims Against Federal Agencies

Axon Enterprise, Inc. v. Federal Trade Commission, et al.

Washington, DC (March 25, 2021) – The Federal Trade Commission’s (FTC) enforcement proceedings are unconstitutionally structured, and Axon, a maker of body cameras for law enforcement use, is entitled to raise its constitutional objections in front of an Article III court before enduring the agency’s internal—costly, multi-year, and almost certainly futile—adjudicative process. Today’s [amicus brief](#) filed by the New Civil Liberties Alliance, a nonpartisan, nonprofit civil rights group, makes this argument to the U.S. Court of Appeals for the Ninth Circuit in *Axon Enterprise, Inc. v. Federal Trade Commission, et al.*

NCLA’s brief asks for rehearing *en banc* after a split three-judge panel of the Ninth Circuit ruled 2-1 against Axon in January, thereby creating an intra-circuit conflict regarding the scope of district court jurisdiction to hear constitutional challenges like Axon’s. The panel decision directly conflicts with the Ninth Circuit’s prior decisions in *Mace* and *Latif*. Those cases hold that plaintiffs are entitled to file district-court constitutional challenges to agency proceedings from the outset.

FTC is acting in violation of separation-of-powers principles because its Administrative Law Judges (ALJs) are insulated from control by the President by at least two layers of for-cause removal restrictions. In 2018 the U.S. Supreme Court held in [Lucia v. SEC](#) that defendants have a due process right to not be subjected to hearings in front of constitutionally defective tribunals—where government agencies, like FTC, act as prosecutor, judge, and jury.

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. The agency also has not lost an administrative proceeding trial in the past quarter-century. Under the FTC’s dispositive home-court advantage, Axon’s constitutional claims against the very legitimacy of the agency and its ALJs would remain unaddressed for years.

NCLA is asking the court to grant the petition for rehearing *en banc* to rightly resolve an issue of exceptional importance—whether the federal agencies’ statutes impliedly prevent federal district courts from hearing a structural challenge. NCLA is still awaiting decision in a similar case from the *en banc* U.S. Court of Appeals for the Fifth Circuit argued in January. In *Cochran v. SEC*, NCLA likewise argued in favor of a defendant’s ability to first raise constitutional arguments in federal district court, albeit in the SEC enforcement context.

NCLA released the following statements:

“Recent Supreme Court decisions indicate that the manner in which FTC conducts its administrative proceedings is unconstitutional. But the Ninth Circuit has held that the federal courthouse doors are closed to the targets of the FTC’s unconstitutional actions. The Ninth Circuit should reconsider its mistaken decision and allow those individuals to seek vindication of their constitutional rights.”

— **Richard Samp, NCLA Senior Litigation Counsel**

“The full Ninth Circuit Court of Appeals should consistently apply its own precedents and follow controlling Supreme Court precedent to vindicate Axon Enterprise’s right to have its claims adjudicated before a lawful judge qualified to decide them—in a federal court. The FTC administrative proceedings and orders not only put Axon in a bet-the-company posture, but they threaten to make Axon repeat that costly fiasco once it secures a ruling on the legitimacy of its FTC administrative law judge. This isn’t exhaustion of remedies—it’s annihilation by administrative process.”

— **Peggy Little, NCLA Senior Litigation Counsel**

For more information about this case visit [here](#).

ABOUT NCLA

[NCLA](#) is a nonpartisan, nonprofit civil rights group founded by prominent legal scholar [Philip Hamburger](#) to protect constitutional freedoms from violations by the Administrative State. NCLA’s public-interest litigation and other pro bono advocacy strive to tame the unlawful power of state and federal agencies and to foster a new civil liberties movement that will help restore Americans’ fundamental rights.

###