

The Quick Look



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SUPREME COURT TO DECIDE WHETHER FEDERAL COURTS CAN CONSIDER CHALLENGES TO THE CONSTITUTIONALITY OF THE FTC'S ADMINISTRATIVE PROCESS

On January 24, 2022, the Supreme Court granted Axon Enterprise, Inc.'s petition for certiorari on the question of whether federal courts have jurisdiction to decide challenges to the constitutionality of the FTC's administrative process before the agency has issued a final order.

Axon had filed suit against the FTC after the FTC decided to challenge Axon's consummated acquisition of Viewu. This was an acquisition of a small company that was struggling financially, valued at only \$13 million. Following an 18-month investigation by the FTC, Axon offered to divest all Viewu assets. The FTC rejected that offer and threatened to initiate administrative proceedings unless Axon also agreed to grant licenses for its intellectual property to the buyer of Viewu, a demand that likely would have created a stronger entity than Viewu had been prior to the transaction.

Axon asserted in its lawsuit that the FTC could only make such a brazen demand because it knows it cannot lose, challenging the constitutionality of the FTC and the administrative process. Specifically, it asserted that the "black-box clearance" process that the FTC and DOJ use to assign merger investigations to either the FTC's administrative-enforcement track or a district court-enforcement track violates the Due Process Clause. Axon also challenged the fact that an ALJ cannot be removed without "good cause" and that two levels of approval effectively insulates ALJs from Presidential control.

The District Court dismissed Axon's suit on the ground that a party cannot challenge an agency action until the agency has issued a final order. Axon appealed, and a split panel of the Ninth

Circuit upheld the lower court's dismissal. Although the majority agreed with Axon that "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," it concluded that the FTC's proceedings are, in fact, capable of culminating in a final order that can be appealed to a court with jurisdiction to hear the constitutional challenge. For that reason, the court determined that the FTC Act provides for "meaningful judicial review", and thus, Axon's claims are "of the type that Congress intended to subject to the FTC Act's judicial review procedures."

Axon requested review by the Supreme Court. Axon's petition asked the Court to decide two questions: whether a federal court has jurisdiction to decide a challenge to the FTC's constitutionality before the agency has issued a final order, and whether the structure of the FTC and the protections given to ALJs are consistent with the Constitution. The Supreme Court accepted the first question, but declined to decide the second.

This is a significant development for companies subject to merger review by the FTC. The FTC has not lost an administrative proceeding in 20 years, and the current ALJ has never ruled in favor of the merging parties in a merger challenge. Though the ALJ has ruled in favor of the defendants in a handful of non-merger cases, the Commissioners – the same Commissioners who had voted to bring the cases in the first place – overruled the ALJ in all but one case. The Commissioners have never overruled an ALJ decision in favor of the FTC. Although there have been significant concerns about the constitutionality of the FTC's administrative process, spending the time and resources to conduct a full trial on the merits before raising them in an appeal is untenable for most clients. The practical reality is that many companies facing an FTC administrative challenge have no choice but to walk away from their transactions, regardless of the strength of their defenses. A decision from the Supreme Court allowing judicial review before FTC proceedings occur will go a long way toward protecting merging parties' due process rights.

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