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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Axon Enterprise Incorporated,

10 Plaintiff,

11 v.

12 Federal Trade Commission, et al.,

13 Defendants.
14

No. CV-20-00014-PHX-DWL

ORDER

15 **INTRODUCTION**

16 Pending before the Court is Plaintiff Axon Enterprise, Inc.’s (“Axon”) motion for
17 preliminary injunction. (Doc. 15.)

18 Axon sells various technological tools, including body-worn cameras, to police
19 departments. In May 2018, Axon acquired one of its competitors. This acquisition
20 prompted the Federal Trade Commission (“FTC”) to conduct an antitrust investigation. In
21 January 2020, just as the FTC was about to initiate a formal administrative proceeding to
22 challenge the acquisition, Axon filed this lawsuit, which seeks to enjoin the administrative
23 proceeding based on three constitutional claims: *first*, that the FTC’s structure violates
24 Article II of the Constitution because its commissioners are not subject to at-will removal
25 by the President and its administrative law judges (“ALJs”), who are appointed by its
26 commissioners, are also insulated from at-will removal; *second*, that the FTC’s combined
27 role of “prosecutor, judge, and jury” during administrative proceedings violates the Due
28 Process Clause of the Fifth Amendment; and *third*, that the FTC and the Antitrust Division

1 of the U.S. Department of Justice, which are both responsible for reviewing the antitrust
2 implications of acquisitions but employ different procedures and substantive standards
3 when conducting such review, utilize an arbitrary and irrational “clearance” process when
4 deciding which agency will review a particular acquisition, in violation of the Equal
5 Protection Clause of the Fifth Amendment. (Doc. 15 at 6-15.)¹

6 The constitutional claims Axon seeks to raise in this case are significant and topical.
7 Indeed, the Supreme Court recently held oral argument in a case that raises similar issues.
8 *Seila Law LLC v. Consumer Fin. Prot. Bureau*, No. 19-7. This Court, however, is not the
9 appropriate forum to address Axon’s claims. It is “fairly discernable” from the FTC Act
10 that Congress intended to preclude district courts from reviewing the type of constitutional
11 claims Axon seeks to raise here—instead, Axon must raise those claims during the
12 administrative process and then renew them, if necessary, when seeking review in the Court
13 of Appeals. Thus, this Court lacks subject matter jurisdiction over this action, Axon’s
14 request for a preliminary injunction must be denied, and this action must be dismissed.

15 BACKGROUND

16 I. Factual Background

17 Axon, which was formerly known as TASER International, Inc., is a Delaware
18 corporation that sells various technological tools, including body-worn cameras and cloud-
19 computing software, to police departments. (Doc. 1 ¶¶ 13, 19-21; Doc. 15-2 ¶ 2.) In May
20 2018, Axon acquired one of its competitors, Viewu. (Doc. 1 ¶ 24.) The next month, the
21 FTC notified Axon that it was investigating the acquisition. (*Id.* ¶ 25.) Axon cooperated
22 with the investigation over the next 18 months. (*Id.* ¶ 26.) Axon contends that it “spent in
23 excess of \$1.6 million responding to the FTC’s investigational demands, including attorney
24 and expert fees, ESI production and related hosting and third-party vendor fees and
25 expenses.” (Doc. 15-2 at 3 ¶ 5.)

26
27 ¹ In its reply, Axon clarifies that it “is not challenging the mere fact of concurrent
28 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.)

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

8 II. Procedural History

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

14 Also on January 3, 2020 (but later that day), the FTC filed an administrative
15 complaint challenging Axon’s acquisition of Viewu. (Doc. 15 at 2 n.1.) An evidentiary
16 hearing in the administrative proceeding was originally scheduled for May 19, 2020. (Doc.
17 22 at 2.) That hearing has now been continued until late June 2020.

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

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

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

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

27 On March 27, 2020, the New Civil Liberties Alliance (“NCLA”) filed a motion for
28 leave to submit an amicus brief in support of Axon. (Doc. 32.) That motion was granted.

1 (Doc. 33.)

2 On April 1, 2020, the Court heard oral argument. (Doc. 39.)²

3 On April 2, 2020, Axon supplemented the record by filing certain documents
4 generated during the administrative proceeding. (Doc. 40.)

5 ANALYSIS

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

13 In general, district courts “have original jurisdiction of all civil actions arising under
14 the Constitution, laws, or treaties of the United States.” 28 U.S.C. § 1331. This includes
15 the authority to “declare the rights and other legal relations of any interested party seeking
16 such a declaration.” *Id.* § 2201. “This grant of jurisdiction, however, is not absolute.”
17 *Kerr v. Jewell*, 836 F.3d 1048, 1057 (9th Cir. 2016). Among other things, Congress can
18 “preclude[] district court jurisdiction” over claims pertaining to the conduct of an
19 administrative agency by creating a review framework that evinces a “fairly discernable”
20 intent to require such claims “to proceed exclusively through the statutory review scheme.”
21 *Id.* at 1057-58 (citation omitted). *See also Bennett v. SEC*, 844 F.3d 174, 178 (4th Cir.
22 2016) (“Congress can . . . impliedly preclude jurisdiction by creating a statutory scheme of
23 administrative adjudication and delayed judicial review in a particular court.”).

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

27 _____
28 ² Due to the COVID-19 pandemic, the Court allowed counsel for the FTC and NCLA
to attend the hearing telephonically. (Docs. 31, 34.) Additionally, the Court allowed media
organizations and members of the public to listen to the hearing telephonically. (Doc. 37.)

1 entertain Axon’s claims.

2 I. Background Law

3 On three occasions between 1994 and 2012, the Supreme Court addressed whether
4 Congress’s enactment of a scheme of administrative adjudication should be interpreted as
5 an implicit decision by Congress to preclude district court jurisdiction. Although none of
6 those decisions involved the FTC Act, they control the analysis here. *Cf. Bennett*, 844 F.3d
7 at 178-81 (identifying these cases as “the trilogy”).

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

20 The Court held that when a statutory scheme, such as the Mine Act, “allocate[s]
21 initial review to an administrative body” and authorizes only “delayed judicial review,”
22 courts must analyze three factors—(1) “the statute’s language, structure, and purpose,” (2)
23 “its legislative history,” and (3) “whether the claims can be afforded meaningful review”—
24 when assessing whether Congress’s intent to “preclude initial judicial review” can be
25 “fairly,” if impliedly, “discerned” from the statutory scheme. *Id.* at 207. The Court then
26 analyzed these factors and concluded that all three supported a finding of preclusion.

27 First, the Court noted that the Mine Act creates a “detailed structure” for regulated
28 parties to seek review of enforcement activity under the Act—a mine operator is entitled

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