

**No. 25-1383**

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT**

EXPRESS SCRIPTS, INC., et al.,

Plaintiffs-Appellants,

v.

FEDERAL TRADE COMMISSION, et al.,

Defendants-Appellees.

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On Appeal from the United States District Court  
for the Eastern District of Missouri

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**BRIEF FOR APPELLEES**

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YAAKOV M. ROTH

*Acting Assistant Attorney  
General*

JOSHUA M. SALZMAN

DANIEL AGUILAR

*Attorneys, Appellate Staff  
Civil Division*

*U.S. Department of Justice  
950 Pennsylvania Avenue NW  
Washington, DC 20530  
(202) 514-5432*

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## **SUMMARY OF THE CASE AND STATEMENT REGARDING ORAL ARGUMENT**

The Federal Trade Commission initiated a hearing to determine whether plaintiffs have engaged in unfair trade practices and methods of competition under the Federal Trade Commission Act, 15 U.S.C. § 45. Plaintiffs sued in district court seeking to enjoin that proceeding and asserting various constitutional challenges. The district court denied a preliminary injunction, holding that plaintiffs failed to demonstrate a likelihood of success on the merits and also failed to establish any of the remaining preliminary injunction factors. Plaintiffs appealed and sought an injunction pending appeal, which this Court denied.

The Court may affirm the judgment based on the district court's thorough opinion and the arguments presented here. The government stands ready to present oral argument if it would assist the Court.

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## **JURISDICTION**

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. § 1331. App. 25; R. Doc. 1, at 8. The district court denied plaintiffs' motion for a preliminary injunction on February 18, 2025, App. 344; R. Doc. 59, at 22, and plaintiffs filed a notice of appeal on February 21, 2025, App. 345; R. Doc. 60, at 1. This Court has jurisdiction. 28 U.S.C. § 1292(a)(1).

## INTRODUCTION AND STATEMENT OF THE ISSUES

In 1914, Congress established the Federal Trade Commission (FTC) and prohibited “unfair methods of competition in commerce.” Pub. L. No. 63-203, § 5, 38 Stat. 717, 719 (1914). Congress further directed that, when there is “reason to believe” that a person or entity is engaged in such unfair methods of competition, the FTC may hold a hearing and, if warranted, order the person or entity “to cease and desist from” violative conduct. 38 Stat. at 719-20. The district court held that this longstanding grant of adjudicative authority is constitutional, and that plaintiffs are not entitled to a preliminary injunction of the FTC hearing in their case.

The issues presented are:

1. Are plaintiffs entitled to relief based on their challenge to statutory removal restrictions, which plaintiffs do not allege have caused them any compensable harm?

The most apposite cases are:

- *Collins v. Yellen*, 594 U.S. 220 (2021)
- *Bhatti v. Federal Housing Finance Agency*, 97 F.4th 556 (8th Cir. 2024)

2. Has Congress constitutionally assigned adjudications for violations of the FTC Act to the FTC?

The most apposite cases and statutory provisions are:

- *SEC v. Jarkesy*, 603 U.S. 109 (2024)
- *Arkansas Wholesale Grocers' Association v. FTC*, 18 F.2d 866 (8th Cir. 1927)
- *FTC v. A. McLean & Son*, 84 F.2d 910 (7th Cir. 1936)
- Federal Trade Commission Act, Pub. L. No. 63-203, § 5, 38 Stat. 717, 719-21 (1914) (codified at 15 U.S.C. § 45)

3. Does the FTC's authority to initiate an enforcement proceeding and issue a decision violate due process?

The most apposite cases are:

- *Withrow v. Larkin*, 421 U.S. 35 (1975)
- *Smith v. Sorensen*, 748 F.2d 427 (8th Cir. 1984)
- *Chamber of Commerce of Minneapolis v. FTC*, 280 F. 45 (8th Cir. 1922)

4. Did the district court abuse its discretion in determining that none of the other preliminary injunctive factors (irreparable harm, the public interest, and the balance of the equities) favors injunctive relief?

The most apposite cases are:

- *Planned Parenthood Minnesota, South Dakota, North Dakota v. Rounds*, 530 F.3d 724 (8th Cir. 2008) (en banc).
- *Leachco, Inc. v. Consumer Product Safety Commission*, 103 F.4th 748 (10th Cir. 2024)

## STATEMENT OF THE CASE

### I. STATUTORY AND REGULATORY FRAMEWORK

In 1914, Congress enacted the Federal Trade Commission Act, which both established the FTC and prohibited “unfair methods of competition in commerce.” Pub. L. No. 63-203, § 5, 38 Stat. 717, 719 (1914) (codified as amended at 15 U.S.C. § 45(a)(1)). Congress further directed that when the FTC has “reason to believe” that a person or entity is engaged in unfair methods of competition, then the FTC “shall issue \* \* \* a complaint stating its charges in that respect and containing a notice of a hearing.” 15 U.S.C. § 45(b). The FTC holds a hearing and determines whether there has been a statutory violation—if there has, then the FTC issues an order requiring the respondent “to cease and desist from using such method of competition.” *Id.* The respondent can seek judicial review in the court of appeals. *Id.* § 45(c).

A hearing can be overseen by the FTC as a whole, by one of the Commissioners, or by an administrative law judge (ALJ). 5 U.S.C. § 556(b); 16 C.F.R. § 3.42(a). Because the FTC Commissioners are engaged in many tasks, evidentiary hearings are usually assigned to an ALJ. At the conclusion of a hearing, the ALJ issues a “recommended decision” that is not legally binding, and which the FTC reviews *de novo* in all cases. 5

U.S.C. § 557(b); 16 C.F.R. §§ 3.51-3.54. Upon review, the Commission can “adopt, modify, or set aside” the recommended decision. 16 C.F.R. § 3.54(a).

By statute, the FTC Commissioners are removable by the President only for “inefficiency, neglect of duty, or malfeasance in office.” 15 U.S.C. § 41. ALJs within the federal government are removable by their employing agency “only for good cause established and determined by the Merit Systems Protection Board.” 5 U.S.C. § 7521(a). Members of the Merit Systems Protection Board, in turn, are removable by the President “for inefficiency, neglect of duty, or malfeasance in office.” *Id.* § 1202(d).

## **II. PRIOR PROCEEDINGS**

### **A. FTC Proceedings**

Plaintiffs are pharmacy benefit managers and their affiliated entities, who act as “third-party administrator[s] of prescription drug programs.” App. 323; R. Doc. 59, at 1. The FTC issued an administrative complaint against plaintiffs, stating that there was reason to believe they have “engaged in conduct that violates Section 5 of the FTC Act, 15 U.S.C. § 45,” by allegedly engaging in unfair and anticompetitive acts that inflate the price of prescription drugs for consumers. Complaint at 1-3, *In re*

*Caremark Rx, LLC*, No. 9437 (FTC Nov. 26, 2024),

<https://perma.cc/883S-PJLA> (FTC Complaint).

The merits of these allegations are not at issue on appeal. For context, however, the administrative complaint alleges that plaintiffs create drug formularies, “lists of preferred and non-preferred drugs grouped by categories.” FTC Complaint at 2, ¶ 4. Plaintiffs allegedly threatened to exclude certain drugs from these formularies unless the manufacturers provided higher rebates for those drugs. *Id.* at 2, ¶ 5. The drug manufacturers allegedly increased their rebates while, simultaneously, increasing the initial list price of the drugs. *Id.* at 19-21, ¶¶ 112-129. These increases in the drugs’ list price allegedly caused millions of Americans to pay more money out of pocket for these drugs, *id.* at 10-12, ¶¶ 56-70, while simultaneously increasing the administrative fees that plaintiffs earn (which are based on a percentage of the list price), *id.* at 8-9, ¶¶ 45-49.

The administrative complaint alleged that plaintiffs’ conduct “is unfair because it goes beyond competition on the merits,” and “constitutes an unfair method of competition” and an “unfair act or practice” in violation of 15 U.S.C. § 45(a). FTC Complaint at 41, 42, 43, ¶¶ 257, 261, 267, 274. If the FTC determines that there has been a violation of the FTC Act, the complaint contemplates that the FTC may issue a cease-and-desist

order prohibiting plaintiffs from (1) discriminating against a lower-cost version of a manufacturer's drug when the manufacturer's more expensive drug is already covered on the formulary; (2) receiving payment based on a drug's list price; (3) helping to design any "benefit plan that bases patients' deductibles or coinsurance on the list price." *Id.* at 44-45.

The FTC ordered an evidentiary hearing before an ALJ. FTC Complaint at 43.

### **B. District Court Proceedings**

Plaintiffs sued in district court, seeking declaratory relief and an "order preliminarily and permanently enjoining" the FTC proceeding. App. 57; R. Doc. 1, at 40. Plaintiffs raised three separate constitutional challenges, arguing that (1) the removal restrictions for the FTC Commissioners and the ALJ violate the separation of powers, App. 54-55; R. Doc. 1, at 37-38, ¶¶ 92-102; (2) the FTC's claims must be initially adjudicated in an Article III Court, App. 53; R. Doc. 1, at 36, ¶¶ 88-91, and (3) FTC adjudication violates due process because the FTC initiates and adjudicates the proceeding, App. 55-56; R. Doc. 1, at 38-39, ¶¶ 103-108.

The district court denied plaintiffs' motion for a preliminary injunction. App. 323-44; R. Doc. 59. On plaintiffs' removal challenges, the court held that plaintiffs "have a low likelihood of success on the merits,"

noting that this Court had recently declined to grant an injunction pending appeal on a materially identical ALJ removal challenge. App. 336; R. Doc. 59, at 14 (citing *H&R Block, Inc. v. Himes*, No. 24-2626, 2024 WL 4678003 (8th Cir. Sept. 13, 2024)). The court likewise determined that plaintiffs were unlikely to succeed on their Article III challenge based on this Court’s precedent upholding as constitutional Congress’ choice for the FTC to find facts and engage in executive adjudication. App. 327-28; R. Doc. 59, at 5-6 (citing *Arkansas Wholesale Grocers’ Association v. FTC*, 18 F.2d 866, 870 (8th Cir. 1927)). Nor, the court concluded, were plaintiffs likely to succeed on their due process challenge, because the “combination of investigative and adjudicative functions does not, without more, constitute a due process violation.” App. 337; R. Doc. 59, at 15 (quoting *Withrow v. Larkin*, 421 U.S. 35, 58 (1975)).

The district court further held that plaintiffs had failed to demonstrate “harm that is certain and great and of such imminence that there is a clear and present need for equitable relief.” App. 338; R. Doc. 59, at 16 (quoting *Cigna Corp. v. Bricker*, 103 F.4th 1336, 1346 (8th Cir. 2024)). Plaintiffs’ asserted injuries were “contingent on the validity of their legal theories,” and “[w]ithout a showing that they will likely prevail \* \* \* Plaintiffs’ ‘asserted threat of irreparable harm is correspondingly

weakened.” App. 341; R. Doc. 59, at 19 (quoting *Planned Parenthood Minnesota, South Dakota, North Dakota v. Rounds*, 530 F.3d 724, 738 n.11 (8th Cir. 2008) (en banc)). And the court concluded that the public interest and the balance of the equities counseled against a preliminary injunction. App. 341-43; R. Doc. 59, at 19-21.

Plaintiffs appealed, App. 345; R. Doc. 60, at 1, and sought an injunction of the FTC proceeding pending appeal, which the district court denied, App. 380; R. Doc. 64. Plaintiffs then requested an injunction pending appeal from this Court, which this Court denied. Order, *Express Scripts, Inc. v. FTC*, No. 25-1383 (8th Cir. Mar. 20, 2025).<sup>1</sup>

## **SUMMARY OF ARGUMENT**

**I.** The Court should affirm the denial of a preliminary injunction because plaintiffs are not likely to succeed on their claims.

**A.** Plaintiffs challenge the statutory removal restrictions for FTC Commissioners, 15 U.S.C. § 41, and the multiple layers of removal restrictions involved in removing administrative law judges, 5 U.S.C. §§ 1202(d), 7521(a). But in order to obtain relief on those claims, plaintiffs

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<sup>1</sup> While the appeal was pending, the FTC issued an order staying the administrative proceeding until at least July 15, 2025. See Order Staying Administrative Adjudication, *In re Caremark Rx, LLC*, No. 9437 (FTC Apr. 1, 2025), <https://perma.cc/3XHG-WJDF>.

need to show “compensable harm” caused by those removal restrictions, *Collins v. Yellen*, 594 U.S. 220, 259 (2021), *i.e.*, “a nexus between” an inability to remove the officer “and the challenged actions taken by the insulated actor.” *Bhatti v. Federal Housing Finance Agency*, 97 F.4th 556, 561 (8th Cir. 2024). Because plaintiffs fail to make any such showing of harm, they are not likely to obtain relief on those claims.

**B.** In 1914, Congress created the FTC and authorized it to adjudicate whether there had been a violation of the FTC Act and to determine whether to issue a cease-and-desist order. Plaintiffs err in contending that this longstanding grant of executive authority violates Article III.

Matters concerning private rights, “the stuff of the traditional actions at common law tried by the courts at Westminster in 1789,” are generally reserved to Article III courts. *Stern v. Marshall*, 564 U.S. 462, 484 (2011). But Congress may also create statutory rights and obligations that do not involve “common law claims.” *SEC v. Jarkesy*, 603 U.S. 109, 128 (2024). For these public rights, “no involvement by an Article III court in the initial adjudication is necessary,” and Congress can assign their adjudication to the Executive Branch. *Id.* at 128-31. Because the common law did not prohibit unfair trade practices and methods of competition, and failed to adequately protect the public interest, Congress passed the FTC Act and

created the FTC to enforce its prohibitions. Those are matters of public right, and the constitutionality of this executive adjudication has long been settled. *See Arkansas Wholesale Grocers' Association v. FTC*, 18 F.2d 866, 870 (8th Cir. 1927); *FTC v. A. McLean & Son*, 84 F.2d 910, 911-12 (7th Cir. 1936).

**C.** The Supreme Court and this Court have consistently held that governments may direct agencies to both initiate and adjudicate enforcement proceedings consistent with due process. *Withrow v. Larkin*, 421 U.S. 35 (1975); *Smith v. Sorensen*, 748 F.2d 427 (8th Cir. 1984); *Chamber of Commerce of Minneapolis v. FTC*, 280 F. 45 (8th Cir. 1922). Plaintiffs err in suggesting that the Court depart from those precedents.

**II.** The remaining factors counsel against a preliminary injunction.

Plaintiffs will not suffer irreparable harm by participating in an FTC hearing—they can receive an adequate remedy at law for any errors in that proceeding by petitioning for judicial review. While plaintiffs assert that their constitutional injuries are irreparable, those claims lack merit, which “correspondingly weaken[s]” plaintiffs’ claims of irreparable harm. *Planned Parenthood Minnesota, South Dakota, North Dakota v. Rounds*, 530 F.3d 724, 738 n.11 (8th Cir. 2008) (en banc). Accordingly, other courts of appeals have affirmed the denial of preliminary injunctions in similar

circumstances, *e.g.*, *Leachco, Inc. v. Consumer Product Safety Commission*, 103 F.4th 748, 765 (10th Cir. 2024), just as this Court has denied injunctive relief pending appeal, Order, *Express Scripts, Inc. v. FTC*, No. 25-1383 (8th Cir. Mar. 20, 2025).

And as the district court explained, the public interest and the equities weigh in favor of permitting the Executive Branch to protect the public through the exercise of statutory authority conferred by the Nation’s elected representatives.

### **STANDARD OF REVIEW**

The Court reviews the district court’s legal conclusions de novo, its factual findings for clear error, and its application of law to facts for abuse of discretion. *Cigna Corp. v. Bricker*, 103 F.4th 1336, 1342-43 (8th Cir. 2024).

### **ARGUMENT**

“A preliminary injunction is an extraordinary remedy never awarded as of right.” *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 24 (2008). In seeking a preliminary injunction, plaintiffs were required to show that they were likely to succeed on the merits, that they would suffer irreparable injury absent an injunction, and that the public interest and balance of equities support an injunction. *Id.* at 20; *Dataphase Systems*,

*Inc. v. C L Systems, Inc.*, 640 F.2d 109, 114 (8th Cir. 1981) (en banc). No single factor is dispositive, but the likelihood of success “is the most significant.” *Cigna Corp. v. Bricker*, 103 F.4th 1336, 1342 (8th Cir. 2024).

Because plaintiffs fail to satisfy any of these factors, the district court correctly denied their request for a preliminary injunction.

### **I. Plaintiffs Are Not Likely To Succeed On The Merits**

Because plaintiffs seek to “enjoin the implementation of a duly enacted” federal statute, they must demonstrate at the “threshold” that they are “likely to prevail on the merits.” *Planned Parenthood of Minnesota, North Dakota, South Dakota v. Rounds*, 530 F.3d 724, 732-33 (8th Cir. 2008) (en banc). Plaintiffs fail to satisfy that “rigorous standard,” and the district court correctly declined to “thwart” the United States’ “presumptively reasonable democratic processes \* \* \* after an appropriately deferential analysis.” *Id.* at 733.

#### **A. Plaintiffs Have Not Demonstrated Compensable Harm in Their Removal Challenges**

1. The Constitution provides that all of the executive power is vested in the President, U.S. Const. art. II, § 1, cl. 1, and that the President may be assisted in his duties by properly appointed executive officers, *id.* art. II, § 2, cl. 2, who wield “significant authority” under federal law, *Lucia v. SEC*, 585 U.S. 237, 245 (2018). Because these subordinate officers wield

executive power on the President's behalf, they must be accountable to him. Accordingly, there are only limited exceptions to the President's general power to remove executive officers at will. *See generally Seila Law LLC v. CFPB*, 591 U.S. 197, 213-18 (2020).

Congress has sometimes encroached on the President's Article II authority through statutes that purport to limit the President's ability to remove executive officers who do not fall within the limited exceptions to the President's removal power. To the extent that a statute imposes impermissible constraints on the President's removal authority, those restrictions cannot be enforced against the President, who retains the authority to remove those subordinates at will. *Seila Law*, 591 U.S. at 238.

In recent years, regulated parties have sought to block or void government actions on the theory that the relevant executive officer had unconstitutional removal protections, and therefore the officer categorically could not take any executive action. The Supreme Court considered and generally rejected that contention in *Collins v. Yellen*, 594 U.S. 220 (2021). There, the Supreme Court explained that "there is no reason to regard any of the actions taken" by a properly appointed officer "as void" simply because a "statute unconstitutionally limited the President's authority to remove" that officer. *Id.* at 257-58. As Justice Thomas explained, "[t]he

mere existence of an unconstitutional removal provision \* \* \* generally does not automatically taint Government action,” and so long as an officer is properly appointed, there is “no barrier to them exercising power in the first instance.” *Id.* at 266-67 (Thomas, J., concurring). After all, a person raising a meritorious removal challenge is not contesting the officer’s authority to exercise executive power—rather, the argument is that the President might have wished for the officer to use their power differently, and the removal restriction might have been an impediment.

In many cases, an invalid removal restriction will have no impact on a given proceeding because the President will be satisfied with the subordinate’s performance, or because the matter does not “ris[e] to the President’s notice.” *See Collins*, 594 U.S. at 275 (Kagan, J., concurring) (“Consider the hundreds of thousands of decisions that the Social Security Administration [] makes each year”). Accordingly, a plaintiff challenging agency action based on an allegedly invalid removal restriction must show that the provision has “inflict[ed] compensable harm” to receive relief. *Collins*, 594 U.S. at 259.

As this Court has explained, “compensable harm” means a showing more than just that the “removal restriction transgresses the Constitution’s separation of powers”—it means showing how that removal restriction

harmed them in their case. *Bhatti v. Federal Housing Finance Agency*, 97 F.4th 556, 559 (8th Cir. 2024). In other words, the plaintiff’s harm (here, the initiation of an enforcement proceeding) “must be connected in some way, or share some nexus with, the president’s inability to remove” the relevant official (here, the FTC Commissioners and the ALJ). *Id.* at 561. Without a “concrete showing” of harm, *id.*, a plaintiff raising a removal challenge “fail[s] to state a claim for relief,” *id.* at 562 n.3. Under that standard, the *Bhatti* plaintiff failed to adequately allege harm, even when relying on a President’s statement (made after he left office) that he would have removed the unconstitutionally insulated officer. *Id.* at 559-61.

2. Plaintiffs here seek an injunction of the FTC proceeding, arguing that the FTC Commissioners’ removal restrictions, 15 U.S.C. § 41, and the multiple layers of removal restrictions for ALJs and the Merit Systems Protection Board in 5 U.S.C. §§ 1202(d), 7521, are unconstitutional. But plaintiffs do not even attempt to demonstrate “a substantiated desire by the President to remove” the ALJ, “a perceived inability to remove” any of these officers “due to the infirm [removal] provision,” or “a nexus between the desire to remove and the challenged actions taken by the insulated actor.” *Bhatti*, 97 F.4th at 561 (quoting *Community Financial Services Association of American v. CFPB*, 51 F.4th 616, 632 (5th Cir. 2022), *rev’d on other*

*grounds* 601 U.S. 416 (2024)). Without those “requisites for proving harm,” plaintiffs fail to “causally link[] a specific, tangible harm to the for-cause removal provision[s].” *Id.* at 561.

That conclusion is in line with every other court of appeals to have considered the issue, holding that plaintiffs must demonstrate concrete harm caused by the removal restriction in order to be entitled to relief. *See CFPB v. Law Offices of Crystal Moroney, P.C.*, 63 F.4th 174, 180 (2d Cir. 2023); *CFPB v. National Collegiate Master Student Loan Trust*, 96 F.4th 599, 613-16 (3d Cir. 2024); *K&R Contractors, LLC v. Keene*, 86 F.4th 135, 149 (4th Cir. 2023); *Community Financial Services*, 51 F.4th at 632-33; *Calcutt v. FDIC*, 37 F.4th 293, 317-20 (6th Cir. 2022), *rev’d on other grounds per curiam*, 598 U.S. 623 (2023); *Kaufmann v. Kijakazi*, 32 F.4th 843, 849-50 (9th Cir. 2022); *Leachco, Inc. v. Consumer Product Safety Commission*, 103 F.4th 748, 763-64 (10th Cir. 2024), *cert. denied* 145 S. Ct. 1047 (2025); *Rodriguez v. SSA*, 118 F.4th 1302, 1315 (11th Cir. 2024).

Plaintiffs assert that they do not need to show concrete harm because they are suing to enjoin the FTC before it can issue a decision. Br. 32-33. Plaintiffs do not explain why they should be entitled to an injunction without a showing of harm when—they appear to concede—they could not overturn a final FTC decision based on the exact same argument. “*Collins*

did not rest on a distinction between prospective and retrospective relief,” *Community Financial Services*, 51 F.4th at 631, and the required showing of harm “remains the same whether the petitioner seeks retrospective or prospective relief,” *Calcutt*, 37 F.4th at 316. *See also Bhatti*, 97 F.4th at 561 (citing *Community Financial Services* and *Calcutt* with approval); *Leachco*, 103 F.4th at 765 (affirming the denial of a preliminary injunction because plaintiff failed to show “how the allegedly unconstitutional removal protections \* \* \* actually affected, or will affect, the [agency’s] actions against it”); *YAPP USA Automotive Systems, Inc. v. NLRB*, No. 24-1754, 2024 WL 4489598 (6th Cir. Oct. 13, 2024) (denying injunction pending appeal). Because plaintiffs fail to demonstrate harm, they are not entitled to relief on their removal challenge. <sup>2</sup>

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<sup>2</sup> The United States is not defending the constitutionality of the FTC Commissioners’ removal restrictions or the multiple layers of removal restrictions in 5 U.S.C. §§ 1202(d), 7521. *See* Letter from Sarah M. Harris to Speaker Mike Johnson (Feb. 12, 2025), <https://perma.cc/ACR7-FDAF>; Letter from Sarah M. Harris to Speaker Mike Johnson (Feb. 20, 2025), <https://perma.cc/9CBU-HTX4>. The President has removed FTC Commissioners and a Member of the Merit Systems Protection Board notwithstanding the statutory restrictions. Those officers have challenged their removal, and the matters are currently in litigation. *Slaughter v. Trump*, No. 25-cv-909 (D.D.C. filed March 27, 2025) (FTC Commissioners); *Harris v. Bessent*, No. 25-5055 (D.C. Cir. filed March 4, 2025) (Merit Systems Protection Board Member). These actions underscore that plaintiffs cannot show that the President has been improperly inhibited from exercising control over the FTC officials responsible for the challenged administrative proceeding against them.

## **B. Congress Constitutionally Directed the FTC to Adjudicate Violations of the FTC Act**

1. The Constitution vests Article III courts with the judicial power of the United States. And throughout the Nation's history, it has been established that certain matters outside of the judicial power may be adjudicated by the Executive Branch. Thus, the first Congresses tasked the Secretary of War with adjudicating whether veterans of the Revolutionary War were entitled to military pensions. *See* Harold J. Krent, *Presidential Control of Adjudication Within the Executive Branch*, 65 Case W. Res. L. Rev. 1083, 1089-90 (2015). “[S]ince the beginning of the Republic,” executive officials have “conduct[ed] adjudications,” which may take “‘judicial’ forms” but are ultimately “exercises of \* \* \* the ‘executive Power.’” *City of Arlington v. FCC*, 569 U.S. 290, 304 n.4 (2013).

In delineating which matters may be determined by the Executive, the Supreme Court has distinguished between “public rights” and “private rights.” *Oil States Energy Services, LLC v. Greene’s Energy Group, LLC*, 584 U.S. 325, 334 (2018). Private rights, “the stuff of the traditional actions at common law tried by the courts at Westminster in 1789,” are generally reserved to Article III courts. *Stern v. Marshall*, 564 U.S. 462, 484 (2011). But for public rights, “the mode of determining matters \* \* \* is completely within congressional control,” and Congress may decide the matter itself,

“delegate that power to executive officers, or may commit it to judicial tribunals.” *Crowell v. Benson*, 285 U.S. 22, 50 (1932).

The Supreme Court has not “definitively explained” the difference between public and private rights, but its “precedents have recognized that the [public-rights] doctrine covers matters ‘which arise between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments.’” *Oil States*, 584 U.S. at 334 (quoting *Crowell*, 285 U.S. at 50). Thus, public rights include matters like taxation, immigration, public lands, public benefits, and patents. *SEC v. Jarkesy*, 603 U.S. 109, 128-31 (2024). These cases do not involve “common law claims,” and so “no involvement by an Article III court in the initial adjudication is necessary”—these matters can be determined by executive adjudicators, such as the Tax Court, the Social Security Administration, or an immigration judge. *Id.* at 128.

Under that framework, actions that are “quintessentially suits at common law” remain private rights adjudicated in Article III courts. *Jarkesy*, 603 U.S. at 133. When Congress “create[s] claims whose causes of action are modeled on common law fraud and that provide a type of remedy available only in law courts,” that “target the same basic conduct as

common law fraud, employ the same terms of art, [] operate pursuant to similar legal principles,” and impose “a punitive remedy,” those matters remain private rights. *Id.* at 134-36. Thus, actions to impose civil penalties under the federal securities laws, which Congress modeled directly on common law fraud, must be adjudicated in an Article III court with a jury. *Id.* By contrast, if Congress creates “a new cause of action, and remedies therefor, unknown to the common law,” that matter does not concern private rights “tried by the courts at Westminster,” *id.* at 128, 137. For such public rights, the Constitution does “not require judicial determination,” and so Congress may choose whether to decide the matter itself, “delegate that power to executive officers, or may commit it to judicial tribunals.” *Ex parte Bakelite Corp.*, 279 U.S. 438, 451 (1929).

**2.** Because then-existing law did not sufficiently protect the public, Congress created a new cause of action and equitable remedies—unknown to the common law—in the FTC Act and constitutionally directed the FTC to adjudicate violations of those public rights.

The common-law and equitable precedent of the late 19th Century forbade federal courts from prohibiting unfair methods of competition or unfair trade practices writ large. As Justice Bradley explained while riding circuit, the existing law did not permit “a civil action to every honest dealer

against every dishonest one engaged in the same trade.” *New York & Rosendale Cement Co. v. Coplay Cement Co.*, 44 F. 277, 279 (C.C.E.D.Pa. 1890). There was no doubt that engaging in unfair trade practices was “a great evil, and an immoral” act, but it was “not an illegal” one “unless there is an invasion of some” property interest to the plaintiff. *Id.* at 278-79. Thus, the court dismissed a complaint seeking to enjoin defendant’s sale of “Rosendale Cement,” which would misleadingly be understood to come from plaintiff’s business in Rosendale, New York, and not defendant’s business in Pennsylvania. *Id.* at 276-77. In dismissing the case, however, the court observed that “[t]he public, of course, is deeply interested in” suppressing such practices, “and if the laws are deficient, the legislature might very justly intervene to prevent impositions of this kind by public prosecution of the offenders.” *Id.* at 279.

Thus, Congress enacted the FTC Act against the existing framework of the common law and equity that it is “morally wrong and improper to impose upon the public by the sale of spurious goods,” but that “does not give rise to a private right of action” generally. *American Washboard Co. v. Saginaw Manufacturing Co.*, 103 F. 281, 285 (6th Cir. 1900). Instead, these wrongs “can only be righted through public prosecution, and for which the legislature, and not the courts, must provide a remedy.” *Id.*

Congress took up that call, and prohibited “[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce.” 15 U.S.C. § 45(a)(1). And in doing so, Congress “explicitly considered, and rejected, the notion that it reduce the ambiguity of the phrase ‘unfair methods of competition’ by tying the concept of unfairness to a common-law” standard. *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239-40 (1972).

Rather than transplanting the existing common law into the FTC Act—which “would not have been a difficult feat of draftsmanship”—Congress instead prohibited actions encompassed by “the broader and more flexible phrase ‘unfair methods of competition,’” which substantively differed from the “narrow” common law standard. *FTC v. R.F. Keppel & Brother, Inc.*, 291 U.S. 304, 310-12 (1934). And from the first few cases challenging FTC cease-and-desist orders—arising from FTC adjudications—the Supreme Court had “no doubt of the authority and power of the Commission to order a discontinuance of practices” that violated the statute. *FTC v. Beech-Nut Packing Co.*, 257 U.S. 441, 455 (1922). The Court thus affirmed the FTC’s authority to prohibit “unfair method[s] of competition” through its enforcement proceedings, because “it is to the

interest of the public that a proceeding to stop the practice be brought.”

*FTC v. Winsted Hosiery Co.*, 258 U.S. 483, 493 (1922).

Thus, when the Supreme Court listed “[f]amiliar illustrations of administrative agencies created for the determination” of public rights, *Crowell*, 285 U.S. at 51, it naturally included the FTC, *id.* n. 13 (citing *International Shoe Co. v. FTC*, 280 U.S. 291, 297 (1930)). *International Shoe* explained that when the FTC adjudicated violations of the antitrust laws, it did so “for the protection of the public against the evils which were supposed to flow from the undue lessening of competition.” 280 U.S. at 297-98. In this way, both the “Clayton Act and the Federal Trade Commission Act” serve the same “great purpose \* \* \* to advance the public interest by securing fair opportunity for the play of the contending forces ordinarily engendered by an honest desire for gain.” *Id.* at 298 (quoting *FTC v. Sinclair Refining Co.*, 261 U.S. 463, 476 (1923)). Accordingly, Congress created the FTC to further “the public interest as distinguished from provisions intended to afford remedies to private persons.” *Pep Boys-Manny, Moe & Jack, Inc. v. FTC*, 122 F.2d 158, 160 (3d Cir. 1941).

Indeed, the Supreme Court identified the FTC Act as an example of constitutionally appropriate executive adjudication even as it struck down other statutes as constitutionally infirm. In *A.L.A. Schechter Poultry Corp.*

*v. United States*, 295 U.S. 495 (1935), the Court explained that the FTC Act’s prohibition on “unfair methods of competition” was “an expression new in the law” that departed from the common law and would be determined “in the light of particular competitive conditions and of what is found to be a specific and substantial public interest.” *Id.* at 532-33. The Act provided for executive adjudication by the FTC and judicial review. *Id.* at 533. The Supreme Court went on to strike down portions of a different statute (the National Industrial Recovery Act) as unconstitutional, based in part on the Court’s observation that the infirm statute “dispense[d] with” the FTC Act’s well-accepted “administrative procedure.” *Id.*

In line with this precedent, this Court in *Arkansas Wholesale Grocers’ Association v. FTC*, 18 F.2d 866, 870 (8th Cir. 1927) rejected materially the same constitutional challenge raised by plaintiffs here. In *Arkansas Wholesale*, the FTC conducted a hearing and determined that the petitioner grocery suppliers were engaged in an unfair method of competition—that they essentially operated as a cartel and “by persuasion, intimidation, threats of boycott, and by boycott” prevented their groceries from being sold to retail stores that declined to join the cartel. *Id.* at 868. The FTC issued a cease-and-desist order and the petitioners sought this Court’s review, arguing that Congress could not constitutionally vest this

fact-finding and adjudication in the FTC. *Id.* at 870. This Court held the challenge to be meritless, noting that “the question cannot now be regarded an open one,” and that Congress has authority “to delegate to an administrative body, or head of a department, the duty and power of finding facts upon which subsequent orders may be made.” *Id.* In this way, Congress’ choice to vest the FTC with adjudicatory responsibilities was no different than similar adjudications conducted by the Department of Interior, Department of Agriculture, Post Office, or Commissioner of Immigration. *Id.* Judge Trieber concurred in the opinion, and further explained why the petitioners’ constitutional arguments flowed from erroneous premises. *Id.* at 872.

*Arkansas Wholesale* is in accord with other contemporaneous precedent, which likewise rejected constitutional challenges to the FTC’s adjudicatory authority. The Seventh Circuit held that “there is no merit” to the argument that FTC adjudication “violates the federal constitutional mandate of separation of governmental functions,” including “art. 3, Sec. 1.” *FTC v. A. McLean & Son*, 84 F.2d 910, 911-12 (7th Cir. 1936) (citing *Arkansas Wholesale*). Likewise, the Sixth Circuit held that Congress “plainly has power to declare unfair methods of competition unlawful” and “with equal clearness has the power to authorize an administrative

commission to determine \* \* \* the mixed question of law and fact” about whether certain business practices are unfair methods of competition. *National Harness Manufacturers’ Association v. FTC*, 268 F. 705, 707 (6th Cir. 1920). By 1928, the FTC’s adjudicatory authority in 15 U.S.C. § 45 had “so often been considered and held to be constitutional by the courts that it is not necessary now to consider these objections to its constitutionality.” *FTC v. Balme*, 23 F.2d 615, 621 (2d Cir. 1928) (rejecting constitutional challenge that the FTC Act “authorizes an administrative body to legislate judicially”).

These court of appeals decisions were decided at the same time as the Supreme Court’s public-rights decisions in *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320 (1909); *Ex parte Bakelite Corp.*, 279 U.S. 438 (1929); and *Crowell v. Benson*, 285 U.S. 22 (1932). The Supreme Court’s recent opinion in *Jarkesy* cited those decisions with approval, 603 U.S. at 129-30, and current public-rights analysis employs the same logic as those decisions.

**3.** Plaintiffs’ arguments to the contrary are unavailing. Plaintiffs assert that the FTC proceeding concerns “core” private rights because the alleged unfair trade practices and methods of competition involve private contracts for prescription drugs. Br. 38. But just because a matter touches

on relations between private parties does not categorically exclude the matter from the area of public rights. Violations of the immigration laws are still matters of public rights, even if the laws relate to the relationship between a steamship company and its passengers. *Oceanic Steam Navigation*, 214 U.S. at 342-43 (upholding an administrative civil money penalty for a steamship that failed to conduct adequate medical examinations before permitting foreign passengers to board). Nor is the government’s seizure and sale of private land a matter of private rights when the seizure and sale were done to recover federal funds. *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 284-85 (1855). Thus, “[m]any matters that involve the application of legal standards to facts and affect private interests are routinely decided by agency action with limited or no review by Article III courts.” *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 583 (1985).

Plaintiffs also suggest that the FTC’s cease-and-desist order “is closely analogous to an injunction” and so must be an equitable remedy for private rights disputes. Br. 40. That comparison is misguided. Injunctions are enforceable under threat of contempt by the issuing court. *Taggart v. Lorenzen*, 587 U.S. 554, 560 (2019) (“[C]ourts have long imposed civil contempt sanctions to ‘coerce the defendant into compliance’ with an

injunction.”). By contrast, the FTC lacks authority to coerce any respondent to comply—its cease-and-desist orders can be enforced only by a court. 15 U.S.C. § 45(l). Moreover, there are other remedies for public rights that might—at a surface level—be compared to a court’s equitable powers, but they are not thereby transformed into private rights. The Executive Branch may seize and sell a person’s property for failure to pay taxes, 26 U.S.C. § 6331, but the collection of taxes “plainly gives rise to public rights,” and there is “no doubt that the resolution of such disputes can be relegated to a non-Article III forum,” *Samuels, Kramer & Co. v. Commissioner*, 930 F.2d 975, 992 (2d Cir. 1991).

Finally, plaintiffs attempt to distinguish this Court’s decision in *Arkansas Wholesale* as merely addressing the FTC’s ability to make conclusive factual findings that bind an Article III court. Br. 41-42. But that is part of the Article III analysis. If a matter “involve[es] public rights,” then Congress can choose whether and how to allow Article III review at all, and can authorize executive determinations to be “conclusive, either upon particular facts involved in the inquiry or upon the whole” dispute. *Murray’s Lessee*, 59 U.S. at 284. When a matter concerns private rights, “the responsibility for deciding that suit rests with Article III judges in Article III courts,” which necessarily includes the “resolution of the

mundane \* \* \* issues of fact.” *Stern*, 564 U.S. at 484 (quotation marks omitted). Thus, *Stern* explained, non-Article III bankruptcy judges can make conclusive factual determinations concerning public rights in bankruptcy, *id.* at 486-87, but for private-right determinations, bankruptcy judges may only “submit proposed findings of fact” to the Article III district court, which determines those factual issues *de novo*, *id.* at 475, 502. In upholding the FTC’s authority to conclusively determine facts—which would be impermissible for private rights—*Arkansas Wholesale* necessarily upheld the FTC’s ability to adjudicate and determine matters of public right. *Accord A. McLean & Son*, 84 F.2d at 912 (citing *Arkansas Wholesale* to reject an Article III challenge).

### **C. FTC Adjudication Complies with Due Process**

1. The Supreme Court has squarely held that adjudication complies with due process when proceedings are initiated and determined by the same administrative body. *Withrow v. Larkin*, 421 U.S. 35 (1975). In *Withrow*, a state medical board could initiate a proceeding to revoke a physician’s license when the board “finds probable cause” to believe that the physician has “engaged in certain prohibited acts,” and the board would be the ultimate decisionmaker on whether to revoke the license. *Id.* at 37, 40. A plaintiff physician challenged this scheme as contrary to due process,

arguing that the board could not possess the “combination of investigative and adjudicative functions,” because this would “necessarily creat[e] an unconstitutional risk of bias.” *Id.* at 47. The district court agreed and held that this scheme violated due process; the Supreme Court unanimously reversed. *Id.* at 38, 59.

The Supreme Court began by explaining that it had “squarely rejected” similar due process challenges in cases involving the FTC. *Withrow*, 421 U.S. at 47-48 (citing *FTC v. Cement Institute*, 333 U.S. 683 (1948)). The Court observed that the plaintiff’s theory, taken seriously, would call into question the entire adjudicative structure for Social Security benefits, where the adjudicators have “responsibility for developing the facts and making a decision as to disability claims.” *Id.* at 49-50. Plaintiffs’ concerns, the Court explained, were “not new,” and there was “[n]o single answer” on how to best structure adjudicative and investigatory functions within an agency. *Id.* at 51. Instead, “Congress has addressed the issue in several different ways, providing for varying degrees of separation from complete separation of functions to virtually none at all.” *Id.* at 51-52. The most common approach—codified in the Administrative Procedure Act and employed by the FTC—is to exclude investigative employees from adjudication, but to allow “the agency or \* \* \* members of the body

comprising the agency” to engage in investigation, prosecution, and adjudication. *Id.* at 52 (citing 5 U.S.C. § 554(d)).<sup>3</sup>

Thus, it was well established half a century ago that precedent “generally rejects the idea that the combination of judging and investigating functions is a denial of due process.” *Withrow*, 421 U.S. at 52 (alterations omitted) (quoting 2 Kenneth Culp Davis, *Administrative Law Treatise* at 175, § 13.02 (1958)).

2. Under *Withrow*, this Court has rejected materially identical due process challenges to those that plaintiffs raise here. In *Smith v. Sorensen*, 748 F.2d 427, 429 (8th Cir. 1984), the plaintiffs were terminated from their employment at the Nebraska Department of Labor. The plaintiffs could administratively appeal their termination to the Merit Council, which would hold a hearing and issue a recommendation. *Id.* at 435. But the final decision about whether to sustain or rescind the plaintiffs’ termination rested with the relevant office in the Nebraska Department of Labor that initially terminated the plaintiffs. *Id.* The district court held that this

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<sup>3</sup> Thus, many statutes provide that an agency Secretary—or even the President—has authority both to initiate an enforcement hearing and to issue the final decision of that hearing. *See, e.g.*, 21 U.S.C. § 824 (Attorney General); 42 U.S.C. § 1320a-8(b) (Social Security Administrator); 49 U.S.C. § 5123 (Secretary of Transportation); 50 U.S.C. § 4819(c) (Secretary of Commerce); *id.* § 4843(b)-(c) (the President).

system violated due process because the Department of Labor “remained the ultimate judge of the propriety of its decision.” *Id.* at 430. This Court reversed, holding that the combination of functions here—initiating the contested action and determining whether it was appropriate—“is not violative of due process without a further showing of bias or prejudgment.” *Id.* at 436 (citing *Withrow*, and *Nevels v. Hanlon*, 656 F.2d 372 (8th Cir. 1981)).

The framework in *Smith* is materially the same as the framework for FTC adjudications. The FTC initially determines whether there is “reason to believe” that a person has used an unfair trade practice or method of competition. 15 U.S.C. § 45(b). The FTC then assigns the matter to an ALJ to hold a hearing and issue a recommended decision. 5 U.S.C. §§ 556(b), 557(b); 16 C.F.R. §§ 3.42(a), 3.51(a). And on review of that decision, the FTC determines whether there has in fact been a statutory violation and, if so, what kind of cease-and-desist order ought to issue. 15 U.S.C. § 45(b); 16 C.F.R. § 3.54. Just as the proceedings in *Smith* comply with due process, so do the FTC proceedings.

A century ago, this Court and other courts of appeals—animated by the principles endorsed by *Withrow*—rejected materially the same due process challenges to FTC proceedings that plaintiffs raise now. *Chamber*

*of Commerce of Minneapolis v. FTC*, 280 F. 45, 48 (8th Cir. 1922)

(rejecting due process challenge to FTC proceedings). Thus, when parties argued that the FTC’s alleged “combin[ation of] legislative, executive, and judicial powers and functions” violated due process, the courts explained that such a challenge was “too unsubstantial to justify discussion.”

*National Harness Manufacturers’ Association*, 268 F. at 707-08; *accord A. McLean & Son*, 84 F.2d at 812 (similar). Plaintiffs assert that a different outcome is warranted here because the FTC can sometimes seek civil penalties “in federal court” without “supplementation of the [administrative] record.” Br. 45-46. Plaintiffs do not explain why that authority violates due process, or why it matters here where the FTC has not sought any civil penalties.

**3.** Plaintiffs further err in claiming that FTC adjudications violate due process based on the assertion that the FTC has “found liability in *every* case in which it has ruled on the merits.” Br. 43. That is incorrect for three reasons. First, the D.C. Circuit has explained that plaintiffs’ factual claim is “unsubstantiated,” noting a study had found that “between 1977 and 2016, the Commission dismissed 29% of the administrative cases before it, including 16% on the merits.” *Meta Platforms, Inc. v. FTC*, No. 24-5054, 2024 WL 1549732, at \*1 (D.C. Cir. Mar. 29, 2024) (citing Maureen

K. Ohlhausen, *Administrative Litigation at the FTC: Effective Tool for Developing the Law or Rubber Stamp*, 12 *Journal of Competition Law & Economics* 623, 626 (2016).

Second, a “raw statistic cannot of itself show bias in a particular case.” *Singh v. Garland*, 20 F.4th 1049, 1055 (5th Cir. 2021). Thus, this Court has explained that a Social Security ALJ’s “impartiality should not be judged by statistics of how that judge has previously ruled.” *Perkins v. Astrue*, 648 F.3d 892, 903 (8th Cir. 2011) (collecting cases). That same caution applies here. Historically, the FTC conducted more adjudications and found liability less often; more recently, the agency has brought far fewer cases but determined liability in a higher percentage of them. Ohlhausen, 12 *Journal of Competition Law & Economics* at 633 (1977-1986: 94 cases with liability in 64%; 2007-2016: 12 cases with liability in 92%). Accordingly, another court explained that it was “equally plausible that a high win-rate is a product of caution and due diligence on the FTC’s part in deciding which discretionary enforcement actions to bring.” *Meta Platforms, Inc. v. FTC*, 723 F. Supp. 3d 64, 90 (D.D.C. 2024) (dismissing due process challenge).

Third, the district court correctly noted that it likely lacked jurisdiction over plaintiffs’ statistical due-process challenge, which is not a “structural constitutional” challenge to the agency itself. App. 338; R. Doc.

59, at 16. Plaintiffs’ statistical argument is “not based on the FTC’s power generally but rather on something ‘particular about how that power [is] wielded.’” App. 338; R. Doc. 59 at 16 (quoting *Axon Enterprise, Inc. v. FTC*, 598 U.S. 175, 193 (2023)). Under the FTC Act, district courts generally lack jurisdiction over such challenges, which instead are decided first by the agency and then by the court of appeals. *Axon*, 598 U.S. at 185.

## **II. The Remaining Factors Do Not Support A Preliminary Injunction**

Plaintiffs have failed to satisfy the “threshold” requirement of showing that they are likely of succeed on the merits, and so the Court “need not address the remaining” preliminary injunction factors. *Planned Parenthood of Minnesota* 530 F.3d at 737 & n.11. In all events, the district court correctly held that plaintiffs have failed to demonstrate that they will suffer irreparable injury or that the public interest favors an injunction. App. 338-43; R. Doc. 59, at 16-21.

1. To show irreparable harm, plaintiffs must have “no adequate remedy at law,” *Rogers Group v. City of Fayetteville*, 629 F.3d 784, 789 (8th Cir. 2010), and must “show that the harm is certain and great and of such imminence that there is a clear and present need for equitable relief,” *Morehouse Enterprises, LLC v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 78 F.4th 1011, 1017 (8th Cir. 2023). Plaintiffs failed to do so.

First, plaintiffs have an adequate remedy at law, as they can seek judicial review to set aside an adverse FTC decision based on their constitutional claims. 15 U.S.C. § 45(c). The ability to petition for review of agency action is “an adequate legal remedy,” and its availability demonstrates that plaintiffs “will not suffer irreparable harm if equitable relief is denied.” *Pieper v. United States*, 604 F.2d 1131, 1134 (8th Cir. 1979) (citing availability of judicial review of an agency proceeding); *accord Birch v. Mazander*, 678 F.2d 754, 756 (8th Cir. 1982) (equitable relief unavailable because plaintiff had an “adequate remedy at law” where he could move “for new trial” or “appeal his conviction”).

Second, plaintiffs fail to establish “great” and irreparable harm based on their claims. The harm identified by plaintiffs is the requirement to participate in an allegedly unlawful FTC hearing. That claim was made and rejected in *FTC v. Standard Oil Co.*, 449 U.S. 232 (1980), where the Supreme Court explained that “the expense and annoyance of litigation is part of the social burden of living under government,” not “irreparable harm,” and that the “court of appeals reviewing a cease-and-desist order has the power to review alleged unlawfulness in the issuance of a complaint.” *Id.* at 244-45. A contrary rule would suggest that all respondents in FTC proceedings are entitled to an injunction. So too would

all parties in proceedings before ALJs, from Black Lung Benefits Act cases,<sup>4</sup> to Medicare payment disputes,<sup>5</sup> to determining whether products for small children pose safety hazards.<sup>6</sup> And injunctions would automatically extend as well to any proceeding where, by statute, Congress directed the agency head to initiate the hearing and issue a final decision. Plaintiffs cite no authority for the proposition that preliminary injunctions should flow so broadly and unexpectedly (regardless of the circumstances in individual cases). *Winter*, 555 U.S. at 24. Precedent counsels to the contrary, as courts, “[i]n exercising their sound discretion, \* \* \* should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.” *Id.*

Plaintiffs mistakenly rest their claim of irreparable harm on *Axon Enterprise, Inc. v. FTC*, 598 U.S. 175 (2023), a case that concerned whether district courts had jurisdiction to consider certain structural constitutional challenges to agency enforcement proceedings. In holding that Congress had not implicitly channeled such claims to the court of appeals, *Axon* explained that district court jurisdiction was proper because “having to appear in proceedings before an unconstitutionally insulated ALJ” is “a

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<sup>4</sup> *Decker Coal Co. v. Pehringer*, 8 F.4th 1123 (9th Cir. 2021).

<sup>5</sup> *Padda v. Becerra*, 37 F.4th 1376 (8th Cir. 2022).

<sup>6</sup> *Leachco*, 103 F.4th at 751.

here-and-now injury” that “is impossible to remedy once the proceeding is over.” *Id.* at 191 (quotation marks omitted). Here, the district court exercised jurisdiction over plaintiffs’ complaint and properly concluded that plaintiffs had not demonstrated an entitlement to an immediate injunction of Executive Branch proceedings. That conclusion is in line with the other courts of appeals, which have explained that *Axon* addresses “statutory jurisdiction,” and “does not say that every agency proceeding already underway must immediately be halted because of an asserted constitutional flaw.” *Alpine Securities Corp. v. Financial Industry Regulatory Authority*, 121 F.4th 1314, 1336 (D.C. Cir. 2024).

Thus, *Axon* did not “creat[e] an entitlement on the merits to a preliminary injunction in every case where such constitutional challenges are raised.” *Leachco*, 103 F.4th at 759.<sup>7</sup> Instead, when plaintiffs cannot show compensable harm caused by the challenged removal restrictions, they also cannot show irreparable harm based on that same challenge. And the lack of merit in plaintiffs’ Article III and due process claims likewise

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<sup>7</sup> *Accord Space Exploration Technologies, Corp. v. NLRB*, 129 F.4th 906, 910 (5th Cir. 2025) (rejecting categorical assertion that “participating in an unconstitutional proceeding is irreparable harm”); *YAPP USA Automotive Systems*, 2024 WL 4489598, at \*3 (*Axon* “did not address issues of relief or injury”).

“correspondingly weaken[s]” plaintiffs’ claims of irreparable harm based on those claims. *Planned Parenthood of Minnesota*, 530 F.3d at 737 n.11.

2. The balance of equities and the public interest also weigh against a preliminary injunction. *See Morehouse Enterprises*, 78 F.4th at 1018 (these factors “merge when the Government is the party opposing” the injunction). As the district court explained, the public has a strong interest in enforcement of the FTC Act and its prohibition on unfair trade practices and methods of competition. 15 U.S.C. § 45(a). The challenged FTC hearing will determine whether plaintiffs unfairly inflated insulin prices, potentially leading to widespread harm to millions of Americans, who may be unable to access life-saving medication. *See* App. 343; R. Doc. 59, at 21 (plaintiffs are alleged to “administer approximately eighty percent of all prescriptions in the United States”). The district court acted well within its “sound discretion” in acknowledging “the public consequences in employing the extraordinary remedy of injunction.” *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982).

Plaintiffs’ requested injunction would also undermine the governmental and public interest in enforcing federal law enacted by “the people’s elected representatives.” App. 342; R. Doc. 59, at 20. And “[a]ny time’ that the federal government is ‘enjoined by a court from effectuating

statutes enacted by representatives of its people, it suffers a form of irreparable injury.” App. 342; R. Doc. 59, at 20 (quoting *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers)).

Considering these same factors, this Court previously denied an injunction of FTC proceedings pending appeal in this case, Order, *Express Scripts, Inc. v. FTC*, No. 25-1383 (8th Cir. Mar. 20, 2025), and in another case raising similar constitutional challenges to the FTC, Order, *H&R Block, Inc. v. Himes*, No. 24-2626 (8th Cir. Sept. 13, 2024); Order (Oct. 15, 2024) (denying rehearing en banc). Those orders are in line with other decisions that have similarly denied injunctions pending appeal or affirmed the denial of preliminary injunctions based on similar claims. *YAPP USA Automotive Systems*, 2024 WL 4489598, at \*3 (denying injunction pending appeal); *YAPP USA Automotive Systems, Inc. v. NLRB*, No. 24A348, 2024 WL 4508993 (U.S. Oct. 15, 2024) (Kavanaugh, J., denying injunction pending appeal); *Leachco*, 103 F.4th at 765 (affirming denial of preliminary injunction); *Leachco, Inc. v. Consumer Product Safety Commission*, No. 23A124, 2023 WL 5728468 (U.S. Aug. 7, 2023) (Gorsuch, J., denying injunction pending appeal). The district court did not abuse its discretion in reaching the same conclusion.

## CONCLUSION

The district court's denial of a preliminary injunction should be affirmed.

Respectfully submitted,

YAAKOV M. ROTH  
*Acting Assistant Attorney  
General*

JOSHUA M. SALZMAN  
*/s/ Daniel Aguilar*  
\_\_\_\_\_  
DANIEL AGUILAR  
*Attorneys, Appellate Staff  
Civil Division  
U.S. Department of Justice  
950 Pennsylvania Avenue NW  
Washington, DC 20530  
(202) 514-5432  
Daniel.J.Aguilar@usdoj.gov*

May 2025

## **CERTIFICATE OF COMPLIANCE**

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 8,792 words, and it also complies with the requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Georgia 14-point font, a proportionally spaced typeface.

Pursuant to Circuit Rule 28A(h)(2), I further certify that the brief has been scanned for viruses and is virus free.

/s/ Daniel Aguilar  
Daniel Aguilar

## **CERTIFICATE OF SERVICE**

I hereby certify that on May 19, 2025, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Daniel Aguilar  
Daniel Aguilar