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NCLA's Joint *Amicus* Brief in 9th Cir. Challenges Decision Rejecting Constitutional Claims Versus FTC

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

Washington, DC (May 12, 2020) – The New Civil Liberties Alliance, a nonpartisan, nonprofit civil rights group filed a [joint *amicus* brief](#) in the United States Court of Appeals for the Ninth Circuit in *Axon Enterprise Incorporated v. Federal Trade Commission, et al.* The brief filed in conjunction with TechFreedom, a public policy think tank based in Washington, DC, asks the Court to reverse the district court and find subject-matter jurisdiction over Axon's constitutional claims against the FTC.

The appeal by Axon (f/k/a TASER Int'l) seeks to avoid irreparable harm to the company and the body camera industry. *Amici* argue in the brief that Axon is entitled to a hearing before an Article III court and should not have to endure FTC's internal adjudicative process (wherein FTC acts as prosecutor, judge and jury) on Axon's claims unrelated to antitrust law. Forcing Axon into such a hearing, *amici* contend, violates, *inter alia*, the Due Process Clause of the Fifth Amendment.

The main issue in the case is whether the FTC Act requires constitutional claims like those asserted here to be brought first to the FTC's in-house adjudicatory process. The FTC Act's purpose and design demonstrate that Congress intended to prevent delay in FTC's antitrust enforcement, but not to grant FTC exclusive jurisdiction over constitutional claims.

In 2018 the U.S. Supreme Court held in *Lucia v. SEC* that defendants have a due process right not to be subjected to hearings in front of constitutionally defective tribunals. NCLA is presenting the same argument in courts across the country in its ongoing [Lucia](#), [Cochran](#), and [Gibson](#) cases against the U.S. Securities & Exchange Commission (SEC). Axon Enterprise is now trying to vindicate a similar due process right against FTC by relying on rulings such as the preliminary injunction that NCLA obtained for client Michelle Cochran in the U.S. Court of Appeals for the Fifth Circuit last fall.

The decision by the district court would mean Axon's constitutional case against FTC and its Administrative Law Judges would linger unaddressed for years to come. The Ninth Circuit should not tolerate FTC's desire to bury all constitutional claims against the agency until it has run a company through its administrative ringer. No rational legislature would choose this process for the vindication of constitutional rights.

NCLA released the following statements:

"NCLA filed in support of Axon because constitutional rights should not be subject to bureaucratic delay and obfuscation. The federal district courts were put on earth to vindicate those constitutional rights. Congress has given no direction to strip them of jurisdiction, so Axon and everyone in a similar position should have an independent judiciary available to determine whether the Constitution has been followed."

–John J. Vecchione, Senior Litigation Counsel, NCLA

“Should federal courts stand aside and do nothing while a federal agency thoroughly bullies and drags a company through its administrative-review process that is famously rigged against the company? The answer ought to be a resounding “No!” because constitutional claims that ask federal courts to decide whether the agency’s process is lawful properly belong in federal court.”

–**Adi Dynar, Litigation Counsel, NCLA**

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.

For more information visit us online at NCLAlegal.org.

ABOUT TECHFREEDOM

TechFreedom is a non-profit, non-partisan technology policy think tank. We work to chart a path forward for policymakers towards a bright future where technology enhances freedom, and freedom enhances technology.

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