

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION  
OFFICE OF ADMINISTRATIVE LAW JUDGES



In the Matter of

Axon Enterprise, Inc.,

a corporation,

and

Safariland, LLC,

a corporation.

ORIGINAL

Docket No. D9389

PUBLIC DOCUMENT

RESPONDENT'S RENEWED MOTION TO  
DISQUALIFY THE ADMINISTRATIVE LAW JUDGE

Respondent Axon Enterprise, Inc. (“Axon”) moves pursuant to Rule 3.42(g)(2) to disqualify and remove the Administrative Law Judge (“ALJ”) as a matter of law because the ALJ’s double-for-cause tenure protection violates Article II of the United States Constitution and the separation of powers.

Axon makes this Motion to further preserve the constitutional defense asserted in its Amended Answer and Defenses.<sup>1</sup> Notwithstanding this Motion, Axon asserts that neither the ALJ nor the Commission has authority to decide constitutional issues, including the issue presented by this Motion, which fall “outside the Commission’s competence and expertise.” *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 491 (2010); *cf. Elgin v. Dep’t of Treasury*, 567 U.S. 1, 17 (2012) (“We need not, and do not, decide whether the MSPB’s view of its power

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<sup>1</sup> Axon recognizes that the Commission has addressed the ALJ’s removal protections before. In each case, the Commission determined that respondents had waived challenges to the ALJ’s removal protections by failing to raise them at the pleading stage or before the ALJ, and the Commission also rejected the challenges on the merits. *See In the Matter of Otto Bock HealthCare N. Am., Inc.*, No. 9378, 2019 WL 5957363, at \*48 (F.T.C. Nov. 1, 2019); *In the Matter of 1-800 Contacts*, No. 9372, 2018 WL 6078349, at \*53 (F.T.C. Nov. 7, 2018); *In the Matter of LabMD, Inc.*, Dkt. No. 9357, 2015 WL 5608167, at \*2 (F.T.C. Sept. 14, 2015). Here, Axon asserted its objection to the ALJ’s removal protections at the pleading stage, *see* Jan. 21, 2020 Answer, Fourteenth Defense; Mar. 2, 2020 Amended Answer, Fifteenth Defense, and, as noted, brings this motion to further preserve its defense.

is correct, or whether the oft-stated principle that agencies cannot declare a statute unconstitutional is truly a matter of jurisdiction.”).<sup>2</sup> Consistent with that lack of authority, Rule 3.42(g) addresses situations in which an ALJ is disqualified to preside “in a particular proceeding,” not a situation in which the Constitution disables all ALJs in all proceedings. Axon further asserts that even if the Commission had authority to decide constitutional issues, any Commission ruling on this Motion would be invalid because—as also asserted in Axon’s Amended Answer, Fourteenth Defense—the constraints on removal of the Commissioners also violate Article II of the Constitution and the separation of powers.<sup>3</sup>

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<sup>2</sup> The ALJ and the Commission likewise lack authority to decide Axon’s other constitutional defenses, which Axon has asserted in its Answer and Amended Answer and continues to preserve for purposes of appellate review by Article III courts. Of course, the fact that the Commission has purported to decide constitutional issues does not mean that it is able to do so. Notably, the Commission has ruled unanimously that its ALJs are not “inferior officers” who need to be hired in accordance with the Appointments Clause, *LabMD*, 2015 WL 5608167, at \*\*1-2, and the Supreme Court has rejected the same analysis in a decision as to the SEC’s ALJs, *Lucia v. S.E.C.*, 138 S. Ct. 2044, 2053-55 (2018).

<sup>3</sup> See also Jan. 21, 2020 Answer, Thirteenth Defense. In the event that the ALJ or the Commission nevertheless decides this Motion on the merits under Rule 3.42(g), the procedural requirements are met. First, although Rule 3.42(g)(2) states that “such motion [is] to be supported by affidavits setting forth the alleged grounds for disqualification,” the Commission has recognized that affidavits are not necessary to support motions seeking disqualification as a matter of law, where no underlying facts require attestation. See *In re N. Carolina Bd. of Dental Examiners*, Dkt. No. 9343, 151 F.T.C. 644, 644, 2011 WL 3568995, at \*1 (Feb. 16, 2011). Second, Axon is filing this motion at the “earliest practicable time.” See Rule 3.42(g)(3). On January 3, 2020, before the Commission filed its Administrative Complaint in this matter, Axon filed a complaint in the United States District Court for the District of Arizona. Axon asserted that the FTC’s structure violates Article II of the United States Constitution, including with respect to ALJ removal, and requested injunctive relief from administrative enforcement action. On January 9, Axon moved the District Court for a preliminary injunction of this proceeding pending resolution of its constitutional claims. On January 10, Axon moved the Commission to stay this proceeding until entry of final judgment in the District Court action, or at least until entry of an order on Axon’s preliminary injunction motion. On January 16, an Order designating the ALJ was entered in this action. (That Order was dated January 6 but not actually docketed or served until January 16.) On February 27, the Commission denied the stay motion. On March 19, the Commission ordered that “this proceeding be fully stayed for 30 calendar days” in light of the current public health crisis. On April 8, the District Court dismissed the District Court action for lack of jurisdiction. On April 13, the Commission extended the stay for an additional 45 days in light of the public health emergency. Although this proceeding was stayed, out of an abundance of caution, on April 24 Axon filed this Motion to Disqualify promptly after the District Court’s dismissal but the Secretary refused to accept it. Now that the stay has lifted (following a further extension on June 3), Axon promptly refiles this Motion. Axon has appealed the District Court’s dismissal and will continue to press the same constitutional claims in federal court. Axon maintains that the Commission should stay the administrative proceeding, including any action on the Motion to Disqualify, pending final resolution of the federal court action including exhaustion of all appellate review.

## ARGUMENT

Article II of the United States Constitution vests “the executive Power” in the President, who has the responsibility to “take Care that the laws be faithfully executed” and who is ultimately responsible for the removal of federal officers. U.S. Const. Art. II, §§ 1, 3. The President may delegate his removal authority to department heads, themselves removable at will. And until *Humphrey’s Executor v. United States* is overruled, Congress may, under limited circumstances, confer good-cause tenure protection on principal officers or inferior officers without offending the separation of powers, particularly when the officer exercises “quasi-legislative and quasi-judicial” powers. *See* 295 U.S. 602, 620, 627-29 (1935); *see also Morrison v. Olson*, 487 U.S. 654 (1988) (permitting good-cause restrictions on the removal of an inferior officer).<sup>4</sup>

The Supreme Court has rejected further attenuation of the President’s removal power. *See Free Enterprise*, 561 U.S. at 484. While *Humphrey’s Executor* and *Morrison* permit Congress to confer good-cause tenure protection on both principal officers and inferior officers, *Free Enterprise* prohibits it from doing both in tandem. Securities and Exchange Commissioners—themselves removable by the President only for “inefficiency, neglect of duty, or malfeasance in office”—were once permitted by statute to remove members of the Public Company Accounting Oversight Board (“PCAOB”) only “for good cause shown.” *Id.* at 486-87. The Court rejected this scheme, holding that the “dual for-cause limitations” on the President’s removal of PCAOB members “contravene[d] the Constitution’s separation of powers” because “[n]either the President,

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<sup>4</sup> As noted, Axon preserves its defense that the constraints on removal of the Commissioners also violate Article II and the separation of powers. There is a growing consensus that *Humphrey’s Executor* was wrongly decided. The Supreme Court itself has acknowledged problems with the reasoning of *Humphrey’s Executor*, admitting “it is hard to dispute that the powers of the FTC ... would at the present time be considered ‘executive,’ at least to some degree.” *Morrison*, 487 U.S. at 690 n.28. And just this Term, in *Seila Law LLC v. Consumer Financial Protection Bureau*, the Court observed that its conclusion in *Humphrey’s Executor* “that the FTC did not exercise executive power has not withstood the test of time.” 591 U.S. ---, ---, 2020 WL 3492641, at \*10 n.2 (2020) (Slip op., at 14 n.2).

nor anyone directly responsible to him, nor even an officer whose conduct he may review only for good cause, ha[d] full control over the Board.” *Id.* at 492, 496. As the Court explained, the “second layer of tenure protection changes the nature of the President’s review.” *Id.* at 496. The Supreme Court therefore rejected the double for-cause removal as unconstitutional.

The same unconstitutional scheme purports to insulate the FTC ALJ from removal. The Administrative Procedure Act directs that the ALJ may be removed only “for good cause” found by the Merit Systems Protection Board (the “Board”). 5 U.S.C. § 7521(a). The Board’s “good cause” determinations, moreover, enjoy deference because the definition of “good cause” is “established and determined by the [Board].”<sup>5</sup> *Id.*; see, e.g., *Abrams v. Social Security Admin.*, 703 F.3d 538, 543 (Fed. Cir. 2012) (deferring to the Board’s “good cause” standard in determining the ALJ’s ability and fitness); *Long v. Social Security Admin.*, 635 F.3d 526, 533 (Fed. Cir. 2011) (deferring to the Board’s determination that “good cause” standard is met where ALJ “undermines public confidence in the administrative adjudicatory process”).

Like the Commissioners in *Free Enterprise*, Board members, in turn, may only be removed by the President for “inefficiency, neglect of duty, or malfeasance in office.” 5 U.S.C. § 1202(d). This phrase is “definite and unambiguous” and does not permit removal at the mere preference of the Executive. *Humphrey’s Executor*, 295 U.S. at 623. The double-for-cause tenure protection afforded the FTC ALJ “changes the nature of the President’s review” of executive officers, *Free*

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<sup>5</sup> The Commission has maintained that the “good cause” requirement would be permissible under *the Commission’s* purported construction of the Administrative Procedure Act’s “good cause” standard. See *Otto Bock*, 2019 WL 5957363, at \*50. But the fact that *the Board* receives deference for its interpretation of “good cause” undermines any argument that *the Commission* could rely on its own independent construction in an effort to save the statute. See *Epic Sys. v. Lewis*, 138 S. Ct. 1612, 1629 (2018). The deference accorded to the Board’s “good cause” standard also confirms that, contrary to the Commission’s view, the statute unambiguously gives the Board—not the Commission—authority to determine whether the facts found by the Board give rise to good cause. Even under the Commission’s erroneous interpretations of the statute, moreover, the dual-for-cause removal structure would be an unconstitutional intrusion on the President’s authority.

*Enterprise*, 561 U.S. at 496, just as the double-for-cause tenure protection afforded the PCAOB did. It is unconstitutional under *Free Enterprise*.

Although the Court in *Free Enterprise* did not address ALJs, *see* 561 U.S. at 507 n.10, nothing in law or logic distinguishes the FTC ALJ from members of the PCAOB with respect to the President’s removal power. At that time, “[w]hether administrative law judges are necessarily ‘Officers of the United States’ [wa]s disputed.” *Id.* In *Lucia*, 138 S. Ct. 2044, the Court resolved that question by holding that SEC ALJs, based on the same powers afforded the FTC ALJ, *are* “Officers of the United States” within the meaning of the Appointments Clause. Even subsequent to *Lucia*, the Commission has noted that the ALJ’s “adjudicative power is limited to initial factfinding and initial rulings that the Commission reviews *de novo*.” *In the Matter of Otto Bock*, 2019 WL 5957363, at \*50. But this feature does not make the ALJ’s adjudicative powers “purely recommendatory.” *Free Enterprise*, 561 U.S. at 507 n.10. As *Lucia* explains, for example, ALJs have “significant discretion” and carry out “important functions,” and they issue not recommendations but initial decisions that become final absent Commission action. 138 S. Ct. at 2053-55. The FTC ALJ also has the power to impose a variety of sanctions for failure to comply with discovery obligations. *See* 16 C.F.R. § 3.38(b); *see also Lucia*, 138 S. Ct. at 2054. And the FTC ALJ’s powers are not limited to adjudicative functions. *Free Enterprise*, 561 U.S. at 507 n.10. The FTC ALJ is also authorized “to conduct rulemaking proceedings under section 18(a)(1)(B) of the Federal Trade Commission Act” and “other rulemaking proceedings as directed,” and to serve as the “Chief Presiding Officer.” 16 C.F.R. § 0.14. The FTC ALJ is an “Officer of the United States” within the meaning of the Appointments Clause, just like the SEC ALJs.

In all events, whether or not the nature of the ALJ's authority may justify good-cause protection from removal in the abstract, nothing about the scope of his authority changes "the nature of the President's review," which must include the power to remove *either* the inferior officer or the superior charged with his removal for good cause.<sup>6</sup> *Free Enterprise*, 561 U.S. at 496. The FTC ALJ's dual for-cause protection from removal is an unconstitutional infringement on the President's power under Article II.

### CONCLUSION

The ALJ's double-for-cause tenure protection is unconstitutional, and Axon brings this Motion to Disqualify in order to further preserve its constitutional defense. The ALJ and the Commission lack authority to rule on the constitutional issue presented by the Motion, but if the Motion nevertheless is decided on the merits, it should be granted.

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<sup>6</sup> As noted, Axon reserves its distinct defense that the limitation on removal of Commissioners is itself unconstitutional.

Dated: July 8, 2020

Respectfully submitted,

*s/ Louis K. Fisher*

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Pamela B. Petersen  
AXON ENTERPRISE, INC.  
17800 N 85th St.  
Scottsdale, AZ 85255-9603  
Phone: (623) 326-6016  
Facsimile: (480) 905-2027  
Email: ppetersen@axon.com

*Counsel for Respondent  
Axon Enterprise, Inc.*

Julie E. McEvoy  
Michael H. Knight  
Louis K. Fisher  
Jeremy P. Morrison  
Debra R. Belott  
JONES DAY  
51 Louisiana Avenue, N.W.  
Washington, D.C. 20001-2113  
Phone: (202) 879-3939  
Facsimile: (202) 626-1700  
Email: jmcevoy@jonesday.com  
Email: mhknight@jonesday.com  
Email: lkfisher@jonesday.com  
Email: jmorrison@jonesday.com  
Email: dbelott@jonesday.com

Aaron M. Healey  
JONES DAY  
250 Vesey Street  
New York, NY 10281-1047  
Phone: (212) 326-3939  
Facsimile: (212) 755-7306  
Email: ahealey@jonesday.com

*Counsel for Respondent  
Axon Enterprise, Inc.*

**UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION  
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**In the Matter of**

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**Docket No. D9389**

**PUBLIC DOCUMENT**

**RESPONDENT'S MEET AND CONFER STATEMENT**

Pursuant to the Scheduling Order issued on January 30, 2020, Respondent submits this certification that its counsel conferred with Complaint Counsel on April 21, 2020 in an effort to resolve by agreement the issues raised by the motion and has been unable to reach such an agreement. Complaint Counsel has advised Respondent Axon's counsel that it opposes the motion.



Dated: July 8, 2020

Respectfully submitted,

*s/ Louis K. Fisher*

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Pamela B. Petersen  
AXON ENTERPRISE, INC.  
17800 N 85th St.  
Scottsdale, AZ 85255-9603  
Phone: (623) 326-6016  
Facsimile: (480) 905-2027  
Email: ppetersen@axon.com

*Counsel for Respondent  
Axon Enterprise, Inc.*

Julie E. McEvoy  
Michael H. Knight  
Louis K. Fisher  
Jeremy P. Morrison  
Debra R. Belott  
JONES DAY  
51 Louisiana Avenue, N.W.  
Washington, D.C. 20001-2113  
Phone: (202) 879-3939  
Facsimile: (202) 626-1700  
Email: jmcevoy@jonesday.com  
Email: mhknight@jonesday.com  
Email: lkfisher@jonesday.com  
Email: jmorrison@jonesday.com  
Email: dbelott@jonesday.com

Aaron M. Healey  
JONES DAY  
250 Vesey Street  
New York, NY 10281-1047  
Phone: (212) 326-3939  
Facsimile: (212) 755-7306  
Email: ahealey@jonesday.com

*Counsel for Respondent  
Axon Enterprise, Inc.*

# **EXHIBIT A**

**UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION  
OFFICE OF ADMINISTRATIVE LAW JUDGES**

**In the Matter of**

**Axon Enterprise, Inc.  
a corporation;**

**and**

**Safariland, LLC  
a corporation.**

**Docket No. D9389**

**[PROPOSED] ORDER ON RESPONDENT'S  
MOTION TO DISQUALIFY THE ADMINISTRATIVE LAW JUDGE**

Upon consideration of Respondent's Motion to Disqualify the Administrative Law Judge, it is HEREBY ORDERED that the motion is [DENIED based on the undersigned Administrative Law Judge's lack of authority to decide the constitutional issue presented] [GRANTED and the undersigned Administrative Law Judge shall be removed from these proceedings].

SO ORDERED.

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D. Michael Chappell  
Chief Administrative Law Judge

Date:

**CERTIFICATE OF SERVICE**

I hereby certify that on July 8, 2020, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

April Tabor  
Acting Secretary  
Federal Trade Commission  
600 Pennsylvania Ave., NW, Rm. H-113  
Washington, DC 20580

The Honorable D. Michael Chappell  
Chief Administrative Law Judge  
Federal Trade Commission  
600 Pennsylvania Ave., NW, Rm. H-110  
Washington, DC 20580

I further certify that I delivered via electronic mail a copy of the foregoing document to:

Jennifer Milici  
J. Alexander Ansaldo  
Peggy Bayer Femenella  
Mika Ikeda  
Nicole Lindquist  
Lincoln Mayer  
Merrick Pastore  
Z. Lily Rudy  
Dominic Vote  
Steven Wilensky  
FEDERAL TRADE COMMISSION  
600 Pennsylvania Avenue, NW  
Washington, DC 20580  
Phone: (202) 326-2638  
Facsimile: (202) 326-2071  
Email: jmilici@ftc.gov  
Email: jansaldo@ftc.gov  
Email: pbayer@ftc.gov  
Email: mikeda@ftc.gov  
Email: nlindquist@ftc.gov  
Email: lmayer@ftc.gov  
Email: mpastore@ftc.gov  
Email: zrudy@ftc.gov  
Email: dvote@ftc.gov  
Email: swilensky@ftc.gov

*Counsel for the Federal Trade Commission*

Dated: July 8, 2020

*s/ Louis K. Fisher*

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Louis K. Fisher

**CERTIFICATE FOR ELECTRONIC FILING**

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed documents that is available for review by the parties and the adjudicator.

Dated: July 8, 2020

*s/ Louis K. Fisher*

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Louis K. Fisher

Notice of Electronic Service

**I hereby certify that on July 08, 2020, I filed an electronic copy of the foregoing Respondent's Renewed Motion to Disqualify the Administrative Law Judge, with:**

D. Michael Chappell  
Chief Administrative Law Judge  
600 Pennsylvania Ave., NW  
Suite 110  
Washington, DC, 20580

Donald Clark  
600 Pennsylvania Ave., NW  
Suite 172  
Washington, DC, 20580

**I hereby certify that on July 08, 2020, I served via E-Service an electronic copy of the foregoing Respondent's Renewed Motion to Disqualify the Administrative Law Judge, upon:**

Julie E. McEvoy  
Jones Day  
jmcevoy@jonesday.com  
Respondent

Michael H. Knight  
Jones Day  
mhknight@jonesday.com  
Respondent

Louis K. Fisher  
Jones Day  
lkfisher@jonesday.com  
Respondent

Debra R. Belott  
Jones Day  
dbelott@jonesday.com  
Respondent

Jeremy P. Morrison  
Jones Day  
jmorrison@jonesday.com  
Respondent

Aaron M. Healey  
Jones Day  
ahealey@jonesday.com  
Respondent

Jennifer Milici  
Attorney  
Federal Trade Commission  
jmilici@ftc.gov  
Complaint

J. Alexander Ansaldo  
Attorney  
Federal Trade Commission  
jansaldo@ftc.gov

Complaint

Peggy Bayer Femenella  
Attorney  
Federal Trade Commission  
pbayer@ftc.gov  
Complaint

Mika Ikeda  
Attorney  
Federal Trade Commission  
mikeda@ftc.gov  
Complaint

Nicole Lindquist  
Attorney  
Federal Trade Commission  
nlindquist@ftc.gov  
Complaint

Lincoln Mayer  
Attorney  
Federal Trade Commission  
lmayer@ftc.gov  
Complaint

Merrick Pastore  
Attorney  
Federal Trade Commission  
mpastore@ftc.gov  
Complaint

Z. Lily Rudy  
Attorney  
Federal Trade Commission  
zrudy@ftc.gov  
Complaint

Dominic Vote  
Attorney  
Federal Trade Commission  
dvote@ftc.gov  
Complaint

Steven Wilensky  
Attorney  
Federal Trade Commission  
swilensky@ftc.gov  
Complaint

Pamela B. Petersen  
Director of Litigation  
Axon Enterprise, Inc.  
ppetersen@axon.com  
Respondent

Joseph Ostoyich  
Partner  
Baker Botts LLP



joseph.ostoyich@bakerbotts.com  
Respondent

Christine Ryu-Naya  
Baker Botts LLP  
christine.ryu-naya@bakerbotts.com  
Respondent

Caroline Jones  
Associate  
Baker Botts LLP  
caroline.jones@bakerbotts.com  
Respondent

Llewellyn Davis  
Attorney  
U.S. Federal Trade Commission  
ldavis@ftc.gov  
Complaint

William Hine  
Hine & Ogulluk LLP  
wjhine@hineogulluk.com  
Respondent

Sevan Ogulluk  
Hine & Ogulluk LLP  
sogulluk@hineogulluk.com  
Respondent

Brian Hine  
Hine & Ogulluk LLP  
bwhine@hineogulluk.com  
Respondent

Blake Risenmay  
Attorney  
U.S. Federal Trade Commission  
brisenmay@ftc.gov  
Complaint

Emily Hutson  
Associate  
Baker Botts LLP  
emily.hutson@bakerbotts.com  
Respondent

Aaron Healey  
Attorney