No. 24-20270

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

FEDERAL TRADE COMMISSION,
Plaintiff – Appellee,

v.

U.S. ANESTHESIA PARTNERS, INCORPORATED,
Defendant – Appellant.

On Appeal from the United States District Court
for the Southern District of Texas
No. 4:23-CV-03560
Hon. Kenneth M. Hoyt

REPLY OF THE FEDERAL TRADE COMMISSION IN SUPPORT OF MOTION TO DISMISS APPEAL tes .226 548j EM4S8 >

USAP's opposition fails to show that either of the rulings it challenges falls within the narrow class of interlocutory orders that are appealable under the collateral order doctrine. Rather than making the parties undertake full briefing in a case where appellate jurisdiction is plainly lacking—and potentially delaying district court litigation for several months—the Court should dismiss this appeal now.

USAP's assertion that its claims on appeal somehow implicate "a right not to be tried" is patently false. USAP's first claim is that the FTC cannot bring an action for a permanent injunction under Section 13(b) without also bringing an administrative complaint seeking the same relief. That is plainly wrong and contrary to precedent. But even if USAP were correct, it would not mean that USAP has a right not to be tried in federal court. It would mean that USAP would potentially face trials in both fora. USAP's second claim boils down to an argument that Section 13(b) is unconstitutional. That claim is also foreclosed by binding precedent, but in any case, contrary to what USAP now argues, it is not the functional equivalent of an immunity defense. An immunity defense must rest on a specific constitutional or statutory guarantee that the defendant will not face trial. USAP points to no such right.

Moreover, immunity defenses are personal to the defendant. Claims that a statute is unconstitutional are not. USAP must await a final judgment before seeking review of this issue.

It is clear that USAP's principal aim in filing this appeal is simply to delay the merits adjudication of the antitrust charges against it. The day after filing its notice of appeal, USAP moved for a stay in district court, arguing that the pendency of the appeal stripped the district court of jurisdiction to conduct any proceedings, including discovery. See ECF_155. The reason that courts narrowly construe the collateral order doctrine is precisely to avoid this kind of gamesmanship and interference with a district court's ability to manage proceedings. The Court should not reward USAP's abusive delay tactics—while Texas consumers continue to pay inflated prices as a result of USAP's unlawful conduct—by referring this motion to the merits panel. The appeal should be dismissed now.

I. USAP'S ARGUMENTS DO NOT IMPLICATE A RIGHT NOT TO BE TRIED.

USAP's attempt to frame its arguments as involving a "right not to be tried" cannot withstand scrutiny. As the Supreme Court has explained, "virtually every right that could be enforced appropriately by

pretrial dismissal might loosely be described as conferring a 'right not to stand trial'," but because "the issue of appealability under § 1291 is to be determined for the entire cate gory to which a claim belongs," such a broad construction of the doctrine would eviscerate § 1291's final-decision requirement. Digital Equip. Corp. v. Desktop Direct, Inc. , 511 U.S. 863, 873, 868 (1994). Accordingl y, appellate courts must "view claims of a 'right not to be tried' wi th skepticism, if not a jaundiced eye." Id . at 873. For purposes of the collate ral order doctrine, the "right not to be tried" must be grounded in a "statutory or consti tutional guarantee that trial will not occur." Midland Asphalt Corp. v. United States , 489 U.S. 794, 801 (1989); accord Digital Equip. , 511 U.S. at 879. Neither of USAP's claims involves a right not to be tried in this sense. The collateral order doctrine thus does not provide a basis for appellate jurisdiction.

A. Even Under USAP's Flawed Reading of Section 13(b), USAP Would Still Be Subject to Suit in Federal Court.

USAP's argument about the prop er construction of Section 13(b) does not implicate any right not to be tried in federal court. At most, USAP's flawed reading of that prov ision would lead to the conclusion

that USAP should face an administrative trial in addition to a trial in federal court.

Ignoring the plain text of Sect

within the prescribed time after issuance of a preliminary injunction or TRO, "the order or injunction shall be dissolved." 15 U.S.C. § 53(b). The text does not say the court complaint must be dismissed or the court proceeding terminated. If an administrative complaint is not timely issued, the court case would thus continue all the way to a final judgment on the request for a permanent injunction.

At most, USAP's arguments suggest that USAP should be defending against the same FTC complaint in another forum—not that USAP has a right not to be tried at all. As we have shown (Mo. 15-16), claims about where the litigation should take place are "different in kind" than "a right not to be sued at all," and thus are collaterally unreviewable. Lauro Lines s.r.l. v. Chasser, 490 U.S. 495, 501 (1989);

collateral order doctri ne in this case. [2] Indeed, this Court has held that a transfer between an Article III cour t and an Article I court (where judges do not enjoy life tenure) is not reviewable under the collateral order doctrine. Persyn v. United States

omitted). USAP's constitutional challenge to Section 13(b) falls in the latter category and is thus collaterally unreviewable. USAP can raise its constitutional argument on appeal from a final judgment.

Contrary to USAP's assertion, the claim that Section 13(b) is unconstitutional is not the "functional equivalent" of "claims of immunity." Opp. 14. Immunity claims focus on the status and rights of the defendant. By contrast, USAP's argument focuses on the authority of the FTC—the plaintiff—to bring the case. That argument is more analogous to a standing challenge, and this Court has held questions of standing "not properly subject to collateral order jurisdiction." Mi Familia Vota v. Ogg, 105 F.4th 313, 333 (5th Cir. 2024); accord Williams v. Davis, No. 22-30181, 2023 WL 119452, *2 (5th Cir. Jan. 6, 2023), cert. denied, 143 S. Ct. 2464 (2023).

USAP's reliance on Axon Enterprise, Inc. v. FTC, 598 U.S. 175 (2023), is also misplaced. Axon did not involve the collateral order doctrine, but rather addressed whether a district court had jurisdiction under 28 U.S.C. § 1331 to entertain a claim that an FTC administrative proceeding was unconstitutional. See Mo. 21-22. The Court's analysis of that question has no bearing on the completely separate question of

whether a district court's rejection of a constitutional argument is a "final decision" for purposes of 28 U.S.C. § 1291. In Axon

interpretation of the "permanent injunction" proviso in Section 13(b). Opp. 19-20. AMG described two possible readings of Section 13(b)'s language, 593 U.S. at 76, before settling on what the Court characterized as the "coherent" reading: "[T]he Commission may use § 13(b) to obtain injunctive relief while administrative proceedings are foreseen or in progress, or when it seeks only injunctive relief." Id. at 78 (emphasis added). The Court thus made clear that the FTC can seek injunctive relief even when administrative proceedings are not "foreseen or in progress." Id.[3] The district court held that it would not "gainsay" the Supreme Court's pronouncements in AMG (ECF_146 at 18) and this Court should not either. [4]

---

[3] USAP erroneously cites to two district court decisions that purportedly "did not decide this issue in the FTC's favor." Opp. 20 n.2. In fact, both of those courts read AMG exactly as the FTC does here, and both courts held that—contrary to USAP's argument—the FTC may seek a permanent injunction in court without first initiating administrative proceedings. See FTC v. Neora LLC, 552 F.Supp.3d 628, 634-36 (N.D. Tex. 2021); FTC v. Cardiff, 2021 WL 3616071, *6-*7 (C.D. Cal. June 29, 2021).

[4] As the district court noted, even if the Supreme Court's statements could be characterized as dicta, "dicta acquires a certain luster when it comes from the U.S. Supreme Court." ECF_146 at 17. And this Court is "generally bound by Supreme Court dicta, especially when it is recent

In a similar vein, USAP's constitutional claim is foreclosed by Consumers' Research v. CPSC, 91 F.4th 342 (5th Cir. 2024). The Court there held that under Humphrey's Executor v. United States, 295 U.S. 602 (1935), it is not unconstitutional for the Consumer Product Safety Commission to exercise "substantial executive power," even though its members are removable only for cause. Consumers' Research, 91 F.4th at 345; see Mo. 24-25. USAP points to statements from Judge Willett suggesting that the Supreme Court should reconsider Humphrey's Executor. Opp. 23. But unless and until the Supreme Court does so, the issue is settled law. The mere possibility that the Supreme Court will abandon a long-established precedent that it declined to overrule twice in the past four years, see Collins v. Yellen

insulated from presidential removal in violation of Article II." 88 F.4th at 1046-47.

USAP argues that it "has a right to petition the Supreme Court to distinguish, cabin, or overrule" Humphrey's Executor (Opp. 24), but its ability to seek Supreme Court review in the future does not make the district court's order immediately reviewable under the collateral order doctrine. The theoretical possibility that a binding precedent might be distinguished, cabined, or overruled does not render that precedent—or any lower court's ruling based on it—"unsettled" for purposes of collateral review. Otherwise, no issue would ever be "settled," and the requirement of a serious and unsettled issue would be a dead letter.

III. THE COURT SHOULD DISMISS THE APPEAL NOW.

The Court should not be swayed by USAP's fallback argument that the motion to dismiss should be carried with the case and decided by a merits panel. Opp. 24-25. This is not a close case of eligibility for collateral review. Rather, USAP is engaging in procedural gamesmanship by using its improper notice of appeal to prevent the district court case from moving forward. See ECF_155 (USAP motion to stay district court proceedings in light of appeal). Meanwhile,

consumers seeking anesthesia servic es throughout the State of Texas continue to pay inflated prices as

CERTIFICATE OF COMPLIANCE

I certify that the foregoing re ply complies with the volume limitations of Fed. R. App. P. 27(d)(2)(A) because it contains 2,402 words, excluding the parts exempted by Fed. R. App. P. 32(f).

I certify further that the fore going reply complies with the typeface and type style requirements of Fed. R. App. P. 27(d)(1)(E) because it was prepared using Micro soft Word 2010 in 14-point Century Schoolbook.

August 5, 2024

/s/ Imad Abyad

IMAD D. ABYAD
Attorney
FEDERAL TRADE COMMISSION
600 PENNSYLVANIA AVENUE , N.W.
WASHINGTON , D.C. 20580