No. 18-16034

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMERITECH FINANCIAL, *ET AL.*,
Plaintiffs-Appellants,

v.

FEDERAL TRADE COMMISSION,
Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of California
No. 4:17-cv-04817-SBA
Hon. Saundra Brown Armstrong, U.S. Distr. J.

ANSWERING BRIEF FOR THE FEDERAL TRADE COMMISSION

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INTRODUCTION

Appellants are three interrelated corporations that purportedly provided student loan debt relief services, and an individual who is their CEO and primary shareholder. The Federal Trade Commission (FTC) suspected that appellants were violating the FTC Act and related rules and began to investigate. Appellants then sought to short-circuit the agency's normal investigation and enforcement processes by rushing to court seeking a declaration that their practices do not violate the law, rather than awaiting the outcome of the investigation and then—if necessary—defending themselves against an enforcement lawsuit. In the order on appeal, the district court rejected their attempt to jump the gun and dismissed their case for lack of subject matter jurisdiction on the ground that the FTC had not taken any "final agency action" that could be challenged in court.

Meanwhile, the FTC concluded its investigation and filed an enforcement complaint against appellants in the same district court. The FTC's complaint alleged that appellants violated the FTC Act and related rules by operating a student debt relief scam that tricked consumers out of millions of dollars. The United States recently filed

criminal charges for the same conduct against appellant Frere, who ran the scheme.

Appellants could have focused on defending their practices in the FTC's enforcement case, where they could—and, in fact, did—raise the exact same claims and defenses that they raised in this declaratory action. Instead, they have filed this appeal from the district court's dismissal of their complaint.

Appellants now attempt to recast their complaint to avoid an unbroken, decades-long line of authority precluding judicial challenges to FTC investigations. The attempt fails. For one thing, they waived their principal argument that they satisfied the APA requirements for suit by failing to raise it below. The claim fails on its merits in any event because a judicial challenge to an FTC investigation is plainly not viable under longstanding and unbroken precedent. The Court should affirm the decision below.

JURISDICTION

Appellants claimed in their complaint below that the district court had jurisdiction under the Declaratory Judgment Act, 28 U.S.C. § 2201, and the general federal question statute, 28 U.S.C. § 1331. The district

court held that it lacked jurisdiction, and as we show below, that determination was correct. This Court has jurisdiction under 28 U.S.C. § 1291.

QUESTIONS PRESENTED

Appellants sought a declaration that their student loan debt relief services—which, at the time of their complaint, were the subject of an ongoing FTC investigation—were either not subject to, or not in violation of, the FTC Act and related regulations. The district court dismissed for lack of subject matter jurisdiction. The questions presented on appeal are:

1. Whether the district court had jurisdiction; and

2. Whether the district court properly exercised its discretion when it denied leave to file a second amended complaint.

STATEMENT OF THE CASE

A. The FTC Act and Enforcement Process

The FTC Act, 15 U.S.C. §§ 41 *et seq*., prohibits "unfair methods of competition" and "unfair or deceptive acts or practices" in or affecting commerce. *Id*. § 45(a). Congress empowered the FTC to enforce these provisions, in its discretion, either through administrative adjudication

or enforcement actions in federal district courts. *Id.* §§ 45(a) & (b), 53(b).

Congress also authorized the FTC to undertake investigations, and issue compulsory process, to ferret out violations of the FTC Act. Section 3 of the FTC Act, for example, empowers the FTC to prosecute any inquiry necessary to its duties in any part of the United States. 15 U.S.C. § 43. Section 6 empowers the agency to gather and compile information concerning, and to investigate from time to time, the organization, business, conduct, practices and management of, any person, partnership or corporation engaged in or whose business affects commerce, with certain exceptions not relevant here. *Id.* § 46. Section 9 authorizes the FTC to issue subpoenas to compel the testimony of witnesses and the production of documentary evidence. *Id.* § 49; *see* 16 C.F.R. § 2.7. And Section 20 empowers it to require, via a "Civil Investigative Demand," the production of documents or information relating to any law enforcement investigation. 15 U.S.C. § 57b-1; *see* 16 C.F.R. § 2.7(b). *See also United States v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950) (affirming FTC's power to investigate probable violations of the FTC Act); *Casey v. FTC*, 578 F.2d 793, 799 (9th Cir. 1978) (same).

Following an investigation, the FTC may issue an administrative complaint whenever it determines that such action is in the public interest, and it has "reason to believe" that a person, partnership, or corporation has been or is violating the Act's prohibitions. 15 U.S.C. § 45(b). Administrative complaints are tried before an administrative law judge and are subject to *de novo* review by the five-member Commission. *Id.*; 16 C.F.R. §§ 3.51-3.54. If the FTC determines that the Act was violated, it may issue a cease and desist order. 15 U.S.C. § 45(b). FTC cease and desist orders are subject to judicial review exclusively in the U.S. courts of appeals. *Id.* § 45(c).

Alternatively, the FTC may file a federal district court action under section 13(b) of the FTC Act. 15 U.S.C. § 53(b). That provision authorizes a lawsuit when the FTC has "reason to believe" that a person, partnership, or corporation is violating or is about to violate any provision of law enforced by the FTC. *Id.* Section 13(b) empowers the district court to grant injunctive and such other relief as the Court may deem appropriate to halt and redress the violation, *id.*, including equitable monetary relief. *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1102 (9th Cir. 1994).

Whichever enforcement route the FTC follows, the commissioners alone are charged with deciding, by a majority vote, whether to initiate a law enforcement proceeding—and where (i.e., in an administrative or federal court forum). 16 C.F.R. § 4.14.

B. The FTC's Telemarketing Sales Rule

In the Telemarketing and Consumer Fraud and Abuse Prevention Act, Congress directed the FTC to prescribe rules that prohibit abusive or deceptive telemarketing acts or practices. 15 U.S.C. §§ 6101-6108. In 1995, the FTC thus promulgated the Telemarketing Sales Rule (TSR), which the agency has amended several times since, most recently in 2016. *See* 16 C.F.R. Part 310. A violation of the TSR constitutes a violation of the FTC Act. *See* 15 U.S.C. §§ 57a(d)(3), 6102(c).

As relevant here, the TSR prohibits sellers and telemarketers from misrepresenting any material aspect of a "debt relief service." 16 C.F.R. § 310.3(a)(2)(x). The TSR defines that term to mean "any program or service represented, directly or by implication, to renegotiate, settle, or in any way alter the terms of payment or other terms of the debt between a person and one or more unsecured creditors or debt collectors, including, but not limited to, a reduction in the

balance, interest rate, or fees owed by a person to an unsecured creditor or debt collector." *Id.* § 310.2(o).

The TSR also prohibits so-called "advanced fees," meaning the collection of money from a debtor before the debt has been successfully renegotiated to the debtor's satisfaction. Specifically, the Rule bars sellers and telemarketers of debt relief services from either requesting or receiving fees for their services *until and unless* (A) the seller or telemarketer has renegotiated, settled, reduced, or otherwise altered the terms of the debt pursuant to a plan or agreement executed by the customer; *and* (B) the customer has made at least one payment pursuant to that plan or agreement between the customer and the creditor or debt collector. 16 C.F.R. § 310.4(a)(5)(i).

C. Appellants' Business Practices

Plaintiff-appellants are American Financial Benefits Center (AFBC), Ameritech Financial (Ameritech), Financial Education Benefits Center (FEBC), and their CEO and primary shareholder, Brandon Frere. Op. 1-2; *First Amended Complaint* (*FAC*) (DE.19) ¶¶5-8

[EOR_278-79].[1] Until late 2015, AFBC marketed to consumers two types of services, which they usually bundled together: student loan debt relief services, and so-called "supplemental membership benefits." Op. 3; *FAC* ¶¶19-20, 23 [EOR_281, 283]. AFBC provided student loan debt relief services by purportedly "identifying potential federal loan relief programs available to consumers, preparing documentation for those consumers, and performing other related student loan processing services." *Id*. AFBC's "supplemental membership benefits," included a range of products unrelated to student debt relief services, such as financial planning tools, educational kits, access to various websites and forms, identity theft protection tools, credit repair service discounts, and even roadside assistance, medical savings cards and telemedicine. *Id*.

Apparently out of concerns that AFBC's business practices may have violated the FTC laws and regulations described above, Frere formed Ameritech and FEBC in 2015 in order to provide the student loan services and the supplemental membership benefits through

[1] As used in this brief, "EOR" refers to appellants' Excerpts of Record; "SER" refers to the FTC's Supplemental Excerpts of Record; and "DE" refers to the district court's Docket Entry Number.

separate entities. Op. 3; *FAC* ¶¶21-22 [EOR_282]. Appellants alleged below that since 2015, Ameritech has not accepted "advanced fees" for its student loan debt relief services and that FEBC's membership services have been offered to Ameritech's student loan customers through an optional program for a monthly fee. Op. 3-4; *FAC* ¶¶21, 23 [EOR_282-83]. AFBC, meanwhile, allegedly stopped marketing to consumers, but has continued to provide its existing customers with the so-called "membership services" and to assist them with the annual re-certifications necessary to their continued eligibility for student loan debt relief programs. Op. 4; *FAC* ¶20 [EOR_281-82].

D. Appellants' Declaratory Judgment Action

The FTC began to investigate appellant's business practices in early December 2016. After appellants learned of the investigation, they sued the FTC seeking a declaration "that the debt relief provision of the TSR will not apply to [appellants], or, alternatively, that [appellants] are fully complying with the legal requirements outlined by the TSR." *FAC* ¶4 [EOR_278]; *see id.* at 12 (Prayer for Relief) (same) [EOR_288]. Appellants sought in their amended complaint a further declaration

that they "are making no knowing misrepresentations to consumers through [their] practices and operations." *FAC* ¶4 [EOR_278].

Appellants claimed that the district court had jurisdiction under the general federal question provision, 28 U.S.C. § 1331, and the Declaratory Judgment Act, 28 U.S.C. § 2201. *FAC* ¶10 [EOR_279]. Appellants' jurisdictional claim rested on a single factual allegation: that they "learned that Defendant FTC was in the final process of gathering information to file a lawsuit against one or more of [appellants] on the purported and factually unsupportable basis that [appellants] made misrepresentations to consumers, and also violated the debt relief service provision of the [TSR]." *Id.* ¶3 [EOR_277]. Appellants alleged that if and when the FTC brings its enforcement action against them, "it will seek emergency and potentially ex parte injunctive relief that may lead to the closing of [the corporate appellants]," and that they "face[d] perilous danger by these actions." *Id.* ¶35 [EOR_287].[2]

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[2] Appellants alleged that their counsel wrote to the former Chairwoman of the FTC on December 29, 2016, "to inform her of the services being offered by [appellants], and to explain why the TSR did not apply to [them]." *FAC* ¶25 [EOR_284]. Appellants claimed that because the Chairwoman "never responded" to their letter, they "were left in the

E. The FTC's Enforcement Action

On February 7, 2018, following conclusion of its investigation, the FTC filed an enforcement action against appellants in the same district court where their declaratory action was pending. *See* Complaint for Permanent Injunction and Other Equitable Relief, *FTC v. American Financial Benefits Ctr., et al.*, No. 4:18-cv-0806 (N.D. Cal. *filed* Feb. 7, 2018) [SER_027-089]. The FTC charged that appellants "have operated a debt relief enterprise that has tricked consumers out of millions of dollars." *Id.* ¶12 [SER_030]. It charged appellants with one count of violating the FTC Act, and two counts of violating the TSR. *Id.* ¶¶47-59 [SER_039-042]. Specifically, the FTC alleged that appellants unlawfully collected from consumers advanced fees of $600-800 plus additional monthly fees, "purportedly to enroll consumers in federal loan assistance programs." *Id.* ¶12-13 [SER_030-31]. In many cases, however, "the consumer was not enrolled in the promised federal loan program," and the monthly fees, which consumers believed were being applied to pay down their loans, "[we]re actually going towards a membership to a 'financial education' program that includes access to

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dark without any recourse." *Id.* As we discuss below, appellants' letter does not alter the jurisdictional analysis in this case. *See infra*, at 28-30.

various resources unrelated to their student loans." *Id*. On November 29, 2018, the district court entered a preliminary injunction against appellants and appointed a receiver for their businesses. Order Granting Motion for Preliminary Injunction, *FTC v. AFBC*, No. 18-cv-0806 (N.D. Cal. Nov. 29, 2018) [SER_164-190].[3]

F. Proceedings Below

On October 20, 2017, the FTC moved to dismiss appellants' original complaint for lack of jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1). In response, appellants filed an amended complaint, but the amendments failed to cure the jurisdictional defects. *FAC* [EOR_276-288]. The FTC thus renewed its motion to dismiss. (DE.24). The FTC showed that an administrative agency's duly authorized investigation, even if it could lead to an enforcement suit, raises no justiciable issues—both because it is not a final agency action, and because the target of the investigation will have adequate relief if there is a future enforcement action. DE.24 at 6-11.

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[3] On December 5, 2018, the United States filed criminal charges against appellant Brandon Frere, for wire fraud stemming from the same conduct at issue in the FTC's enforcement action against appellants. *See United States v. Frere*, No. 3:18-mj-71724-SK (N.D. Cal. *filed* Dec. 5, 2018).

In the order on review, the district court granted the FTC's motion to dismiss. Op. 18 [EOR_23]. It held that neither the Declaratory Judgment Act nor the federal question statute supplies jurisdiction. The court noted first that appellants had "acknowledge[d]" in their own briefing that the Declaratory Judgment Act, 28 U.S.C. § 2201, " 'does not create an independent jurisdictional basis for actions in federal court'." Op. 7 [EOR_12] (citing MTD Opp'n 14 [EOR_249]; quoting *Marathon Oil Co. v. U.S.*, 807 F.2d 759, 763 (9th Cir. 1986)).

The district court next concluded that the general federal question statute did not provide jurisdiction in the absence of a final order that provided a cause of action under the Administrative Procedure Act (APA), 5 U.S.C. §§ 701 *et seq*. In particular, the court held that "although the APA does not itself confer jurisdiction, it both creates a cause of action and provides a waiver of sovereign immunity in suits seeking judicial review of federal agency action under § 1331." Op. 8 [EOR_13] (citing *Navajo Nation v. Dep't of the Interior*, 876 F.3d 1144, 1170-71 (9th Cir. 2017)).

The court rejected as "utterly without basis" appellants' argument that the APA does not apply in this case, noting that appellants "fail[ed]

to identify any other basis for judicial review" of the FTC's actions. Op. 9 [EOR_14]. Moreover, the court explained that the APA's restriction of judicial review to a "final agency action for which there is no other adequate remedy in a court," 5 U.S.C. § 704, " 'is a jurisdictional requirement imposed by statute'." Op. 10 [EOR_15] (quoting *Ukiah Valley Med. Ctr. v. FTC*, 911 F.2d 261, 266 (9th Cir. 1990)).

Turning to the issue of whether appellants' action satisfied the APA requirements, the district court first found that appellants "ha[d] waived any argument that jurisdiction exits [*sic*] under the APA." Op. 11 [EOR_16]. It noted that they had raised the claim only in a one-sentence footnote, asserting without discussion or support that "the actions taken by the FTC would be sufficiently reviewable and that there would be no adequate remedy in court." *Id.* (citing MTD Opp'n 6 n.6 [EOR_241]).

"Waiver aside," the district court also found that "finality under the APA is lacking" here. Op. 12 [EOR_17]. It relied on the Supreme Court's decision in *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232 (1980), which held that an FTC administrative complaint is not a final action subject to judicial review. "[I]f the issuance of a complaint does not

constitute final agency action," the court reasoned, "then *a fortiori*, the investigation leading up to the decision to file a complaint does not constitute such action." Op. 13 [EOR_18].

The district court concluded further that appellants failed the second part of the APA finality requirement as well because they had "another adequate remedy": the FTC's enforcement action against them now pending before the same court. Op. 15 [EOR_20]. There, appellants "will be able to present all of the defenses and arguments they seek to advance in this action," and the remedy they seek "will be available" there as well. *Id.*[4]

Finally, the court denied appellants' request for leave to amend their complaint a second time. Op. 17-18 [EOR_22-23]. It found their "bare request" meritless because they "already amended their complaint without success," and their "vaguely defined proposed amendments—i.e., addressing the APA and updating the factual background to include the filing of the FTC's civil complaint—would be futile." *Id.*

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[4] The FTC also argued that appellants' claims were unripe and that declaratory relief was inappropriate. Op. 16 [EOR_21]. The court declined to reach those issues, however, in light of its determination regarding finality. *Id.* at 16-17 [EOR_21-22].

This appeal followed.

STANDARD OF REVIEW

This Court reviews *de novo* a district court's grant of a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1). *Recinto v. U.S. Dep't of Veterans Affairs*, 706 F.3d 1171, 1175 (9th Cir. 2013); *San Francisco Cnty. Democratic Cent. Comm. v. Eu*, 826 F.2d 814, 818 n.3 (9th Cir. 1987), *aff'd*, 489 U.S. 214 (1989).

The Court reviews a district court's denial of leave to amend the complaint for abuse of discretion. *U.S. ex rel. Silingo v. WellPoint, Inc.*, 904 F.3d 667, 676 (9th Cir. 2018); *Telesaurus VPC, LLC v. Power*, 623 F.3d 998, 1003 (9th Cir. 2010).

SUMMARY OF ARGUMENT

The need for this appeal is perplexing. The thrust of appellants' complaint was that only a declaratory judgment action could give them a way to show that the TSR did not apply to their business. The theory had little strength to begin with, since appellants could defend themselves against any FTC enforcement proceeding. The claim was sapped of any force by the FTC's subsequent filing of an enforcement case, in the course of which appellants may—and indeed already did—

raise every legal argument they tried to raise in seeking a declaratory judgment. This appeal therefore will determine nothing of substance, but amounts largely to a waste of government and judicial resources.

I. The district court lacked subject matter jurisdiction over appellants' challenge to the FTC's investigation into their business practices. The APA is the only statutory route to judicial review here, and appellants fail to meet the baseline requirements that they challenge a final agency action and that they have no other adequate remedy in court.

An agency action is final only if it (a) marks "the consummation of the agency's decisionmaking process" in the sense that "it must not be of a merely tentative or interlocutory nature"; and (b) is "one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (internal quotation marks and citations omitted). Appellants come nowhere close to satisfying either prong.

An FTC investigation is barely the beginning of the agency's process, let alone its consummation. Nor does an investigation (or even an FTC-issued complaint) determine any legal rights or obligations.

That is why the Supreme Court established decades ago in *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232 (1980), that an FTC complaint does not constitute a reviewable "final agency action." It follows *a fortiori* that a pre-complaint investigation cannot amount to a final action.

Nor are appellants without a remedy in court. That was clear during the investigation, since their claims could have been raised during any ensuing enforcement case. It is even clearer now that the FTC has actually filed a case and appellants have actually raised their identical legal claims there.

Appellants cannot escape the holding of *Standard Oil* by now recasting their claims as a purely legal challenge to the FTC's authority. At the outset, they raised no such argument below and may not do so now. Moreover, appellants' repackaging of their complaint as a purely legal challenge collides with the complaint, which plainly raises factbound issues. And even if their claims were purely legal, that alone does not satisfy the APA's definition of finality. The D.C. Circuit's decision in *Ciba-Geigy v. EPA*, 801 F.2d 430 (D.C. Cir. 1986), is not to the contrary. There, the agency directed a regulated party to take

action, thereby fixing that party's legal obligations. Here, by contrast, the FTC has not directed appellants to do anything at all. Only the district court can do that.

Nor can appellants escape *Standard Oil* on the theory that the FTC has reached a "final" legal determination that the TSR applies to them. The agency must reach such a tentative decision every time it investigates and issues a complaint. Recasting the FTC's legal theory of its case as a "final" legal determination would nullify both the holding of *Standard Oil* and the APA finality requirement. Indeed, the Supreme Court expressly warned against "turning prosecutor into defendant." 449 U.S. at 242-43.

Even less persuasive is appellants' argument that their claims fit within the "agency delay" exception to the APA's finality rule. The relief available for agency delay is a writ of mandamus, but appellants did not seek such relief. Nor would they be entitled to mandamus. There has been no delay at all here, let alone delay serious enough to justify extraordinary relief. And appellants point to no action that the FTC is required to take but has unreasonably withheld. Nor have appellants identified any harm they have suffered from a supposed delay.

II. The district court did not address appellants' ripeness arguments and neither should this Court. At any rate, appellants point to no final FTC action, and their claims are unripe for that reason alone. They also cannot show any hardship in the absence of judicial consideration. They claimed below that they risked being shut down without prior notice, but that outcome is foreclosed by the FTC Act, and is moot anyway in light of the intervening filing of the enforcement case and the district court's preliminary injunction proceeding in that case.

III. The district court's denial of leave to file yet another amended complaint was well within its discretion. Appellants had already fruitlessly amended their original complaint in response to the FTC's jurisdictional challenge. As the district court rightly put it, their "vaguely defined" proposed further amendments simply could not cure "the fundamental and fatal deficiencies in their complaint."

ARGUMENT

I. APPELLANTS' DECLARATORY JUDGMENT ACTION FAILED TO SATISFY THE APA REQUIREMENTS FOR JUDICIAL REVIEW

A. The APA Is Appellants' Only Route to Judicial Review

Federal district courts are courts of limited jurisdiction; they "possess only that power authorized by Constitution and statute."

Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994). It therefore is "to be presumed that a cause lies outside this limited jurisdiction," and "the burden of establishing the contrary rests upon the party asserting jurisdiction." *Id.* Appellants asserted below that the district court had jurisdiction under the Declaratory Judgment Act, 28 U.S.C. § 2201, and the general federal question statute, 28 U.S.C. §1331. *FAC* ¶10 [EOR_279]. As the district court correctly ruled, however, neither statute gives appellants a cause of action over which that court could have exercised jurisdiction. Appellants have now abandoned their reliance on Section 2201 and press only Section 1331.[5]

Section 1331 grants district courts jurisdiction over "civil actions arising under the * * * laws * * * of the United States." 28 U.S.C. § 1331. But it does not supply jurisdiction in the absence of a cause of action granted by another law under which the case arises. *See Merrell*

[5] The Declaratory Judgment Act creates only a remedy and not "an independent jurisdictional basis for actions in federal court." *Marathon Oil*, 807 F.2d at 763; *accord Wilton v. Seven Falls Co.*, 515 U.S. 277, 288 (1995). A plaintiff seeking declaratory relief therefore must invoke the Court's jurisdiction on some other basis. *Rhoades v. Avon Prods., Inc.*, 504 F.3d 1151, 1157 (9th Cir. 2007).

Dow Pharm. Inc. v. Thompson, 478 U.S. 804, 808-09 (1986); *Republican Party of Guam v. Gutierrez*, 277 F.3d 1086, 1088-89 (9th Cir. 2002).

When the United States or one of its agencies is the subject of a lawsuit concerning administrative action (or inaction), "[t]he jurisdiction of the federal courts * * * is codified in the Administrative Procedure Act." *General Finance Corp. v. FTC*, 700 F.2d 366, 372 (7th Cir. 1983); *accord Navajo Nation*, 876 F.3d at 1170-71; *Gallo Cattle Co. v. U.S. Dep't of Agric.*, 159 F.3d 1194, 1198 (9th Cir. 1998). The APA is the "exclusive" method for review of agency conduct; parties "may not bypass" it "simply by suing the agency in federal district court under 1331." *General Finance*, 700 F.2d at 368 (citing 5 U.S.C. §§ 703, 704). "If a review proceeding is not authorized by" Section 704 of the APA, then general jurisdictional statutes like Section 1331 "cannot be used to confer jurisdiction." *Id.* at 372. Moreover, the government is generally immune from suit under principles of sovereign immunity, and it is the APA that waives sovereign immunity in suits seeking review of a federal agency action under § 1331. *Gallo Cattle*, 159 F.3d at 1198.

Thus, the district court could have exercised jurisdiction under § 1331 *only if* appellants satisfy the APA conditions for review of administrative actions. As we show next, they do not.

B. Appellants' Claims Fail the APA Requisites for Judicial Review

The APA permits judicial review for two categories of agency conduct: (1) "[a]gency action made reviewable by statute"; and (2) "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704; *see Ukiah Valley*, 911 F.2d at 263. Appellants concede that they do not challenge agency action "made reviewable by statute." *See* Br. 30 n.5.

Thus, the APA would allow appellants to sue *only if* they *both* (a) challenged a "final" FTC action; *and* (b) had "no other adequate remedy in a court." Appellants satisfied neither condition.

1. Appellants do not challenge any "final" FTC action

Two prerequisites "must be satisfied" for an agency action to be deemed "final" for purposes of judicial review under the APA: "First, the action must mark the consummation of the agency's decisionmaking process," in the sense that "it must not be of a merely tentative or interlocutory nature"; and "second, the action must be one by which

rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. at 177-78 (internal quotation marks and citations omitted); *accord Fairbanks North Star Borough v. U.S. Army Corps of Eng'rs*, 543 F.3d 586, 591 (9th Cir. 2008).

The only FTC action that appellants challenged in their amended complaint was the then-pending investigation by FTC staff into their debt relief practices. An investigation does not meet the *Bennett* conditions for finality. It is not nearly "the consummation of the agency's decisionmaking process"; it is scarcely the beginning of that process. When appellants filed suit, the FTC had not even completed its inquiry, let alone decided whether to proceed against them. The procedural posture matters because many FTC investigations do not result in an enforcement action, and even if the FTC's staff recommends action, a case may be filed only if a majority of the FTC's commissioners vote to do so. *See* 16 C.F.R. § 4.14.

Nor is the conduct of an investigation an action that determines rights or obligations or from which legal consequences will flow under *Bennett*'s second prong. Indeed, the Supreme Court made clear in

Standard Oil that even the filing of a complaint is not a "final" decision. As the district court properly reasoned (Op. 13), if the agency's issuance of a formal complaint is not a final, reviewable action, then *a fortiori* a mere preliminary investigation to determine whether to issue or file a complaint cannot possibly be final. *Standard Oil* also held that having to defend against an FTC complaint is not the type of injury that can render an agency action final for APA review. 449 U.S. at 244.

In *Standard Oil*, after an antitrust investigation, the FTC issued an administrative complaint against the Standard Oil Company. *See* 449 U.S. at 234. The company then sued the FTC, seeking a declaration that the issuance of the administrative complaint was unlawful because the FTC lacked a valid "reason to believe" that an antitrust violation had occurred. *Id*. at 235.

The Supreme Court held that "[t]he Commission's issuance of its complaint was not 'final agency action.'" 449 U.S. at 239. It reasoned that a complaint represents merely "a threshold determination that further inquiry is warranted and that a complaint should initiate proceedings." *Id*. at 241. Noting that the issuance of the FTC's complaint would have no legal force or business consequences, the

Court cautioned that judicial review "before adjudication concludes" "is likely to be interference with the proper functioning of the agency and a burden for the courts," and thus "should not be a means of turning prosecutor into defendant." *Id.* at 242-43.

Like the issuance of an administrative complaint, the filing of an FTC enforcement complaint in court merely *initiates* the process of fixing the rights and obligations of the parties. Only the court's final judgment would mark the point when appellants' rights or obligations can be said to "have been determined." *Bennett*, 520 U.S. at 178. Until then, *no* "legal consequences will flow" from the FTC's actions. *Id.*

Numerous courts, including this one, have applied *Standard Oil*'s reasoning to reject pre-enforcement challenges to FTC investigations. *See, e.g.*, *Ukiah Valley*, 911 F.2d at 263-64; *LabMD, Inc. v. FTC*, 776 F.3d 1275, 1279 (11th Cir. 2015); *General Finance*, 700 F.2d at 368-69; *Blue Ribbon Quality Meats, Inc. v. FTC*, 560 F.2d 874, 876-77 (8th Cir. 1977); *Direct Mktg. Concepts, Inc. v. FTC*, 581 F.Supp.2d 115, 117 (D. Mass. 2008). That consistent line of decisions establishes firmly that a challenge to an FTC investigation is not final under the APA and therefore is not subject to challenge in court.

Appellants nevertheless claim that the district court wrongly "applied an expansive reading of *Standard Oil*," which they contend does not control here. Br. 31. In fact, *Standard Oil* is on all fours with this case. As described above, in *Standard Oil*, the FTC investigated possibly unlawful conduct, determined that it had "reason to believe" that a violation had occurred, and issued an administrative complaint. In virtually the same way here, the FTC investigated appellants' conduct, then later determined that it had "reason to believe" they had violated the FTC Act, and filed a complaint in federal court. The procedural difference in administrative versus judicial venue is immaterial to the question of finality.

Appellants are wrong that *Standard Oil* is unlike this case because there the question was whether the FTC had reason to believe that a violation occurred whereas here the question is whether the law applies to appellants. Br. 31-32. That is a distinction without a difference. In both cases, the operative question is whether the FTC's pre-judgment processes constitute final action for purposes of APA review.

Appellants cannot escape the implications of *Standard Oil* on the ground that "[t]he very fact of [the FTC's] investigation demonstrates that the FTC finally decided that the * * * TSR applied to" them. Br. 15. The agency must reach such a tentative decision every time it investigates and issues a complaint. Recasting the Commission's legal theory of its case as a "final" legal determination would nullify both the holding of *Standard Oil* and the APA finality requirement. Indeed, in *Standard Oil*, the Commission declined to dismiss the complaint, thereby affirming its prior determination that it had a valid reason to believe that a violation had been committed. The Supreme Court held that the refusal to dismiss still was not a "definitive" action for purposes of APA finality. 449 U.S. at 243. Moreover, even if the FTC's legal theory could somehow be deemed final, it does not in any sense determine "rights or obligations" and no "legal consequences will flow" from it. *Bennett*, 520 U.S. at 177-78.

Appellants are also incorrect in suggesting that the finality requirement is excused because the FTC did not respond to a letter that appellants wrote to the agency's head in 2016 "to explain why the TSR did not apply to [them]." *FAC* ¶25 [EOR_284]. *See* n.2, *supra*; Br. 46.

They argue that the letter shows that they exhausted their administrative remedies, and contend that exhaustion renders the FTC's [in]action final.

In fact, "whether the plaintiffs have exhausted their administrative remedies does not determine the issue of finality" under the APA. *Ukiah Valley Med. Ctr. v. FTC*, No. C-89-4494, 1990 WL 25035, *3 (N.D. Cal. Jan. 30, 1990), *aff'd*, 911 F.2d 261 (9th Cir. 1990). That principle is clear from *Standard Oil*, where the company sought agency dismissal of the administrative complaint before filing its declaratory action in court. The Court explained that the company "may well have exhausted its administrative remedy as to the averment of reason to believe. But the Commission's refusal to reconsider its issuance of the complaint does not render the complaint a 'definitive' action." 449 U.S. at 243. Likewise, in *Ukiah Valley*, this Court determined that the FTC's issuance of a complaint challenging a merger was not a reviewable final agency action and then found it unnecessary to consider whether the merging parties had exhausted administrative remedies. 911 F.2d at 266 n.5 (citing *Lone Star Cement Corp. v. FTC*, 339 F.2d 505, 509-512 (9th Cir. 1964)). *See also General Finance*, 700

F.2d at 371 (FTC's issuance of investigatory subpoenas deemed not final notwithstanding agency's denial of petitions to quash the subpoenas); *Blue Ribbon Quality Meats*, 560 F.2d at 875-76 (same).

2. Appellants have another remedy for their claims

Appellants also failed to show that they had "no other adequate remedy in a court," 5 U.S.C. § 704, which independently bars their case under the APA. They plainly had such a remedy when they filed their case: they could raise their claims in defense of a future FTC enforcement action.

Now, the adequacy of appellants' remedy is even plainer. The FTC has actually filed an enforcement case, in the same district court before the same judge, in which appellants will be able to defend their practices and press all the claims and defenses that they advance here. Likewise, the remedy that they sought in the district court—a ruling that their businesses are either not subject to or satisfy the TSR, and that they are not making material misrepresentations to consumers—will be available to them in the FTC enforcement proceeding. Indeed, appellants' continued pursuit of their declaratory action in this Court—all the while making the very same claims and defenses in the FTC's

enforcement action against them[6]—is puzzling, and simply wastes scarce government and judicial resources.

C. Appellants Waived Any Argument That They Can Seek Review Under the APA, But Their Claims Are Meritless Anyway

1. Appellants did not preserve below the argument that they satisfy the APA finality test

Appellants devote the bulk of their brief to arguing that their declaratory action satisfied the APA conditions for judicial review. Below, however, they raised the issue only in a "terse one-sentence footnote." Op. 11 [EOR_16] (citing *Recycle for Change v. City of Oakland*, 856 F.3d 666, 673 (9th Cir. 2017)). The district court rightly held that appellants' fleeting mention of the issue waived it. They may not press the claim for the first time on appeal.

Specifically, the FTC based its motion to dismiss the original complaint on the primary ground that it did not satisfy the APA conditions for judicial review. *See FTC Motion to Dismiss Complaint* (DE.18), at 6-12. In response, appellants filed an amended complaint. DE.19 [EOR_276-288]. Despite appellants' clear understanding that

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[6] *See, e.g.*, Order Denying Defendants' Motion to Dismiss, *FTC v. AFBC*, No. 18-cv-0806 (N.D. Cal. Aug. 8, 2018), at 17-19 [SER_159-161] (affirming applicability of the TSR to appellants' conduct).

they faced a challenge under the APA finality requirements, the amended complaint did nothing to address them. *Id.*

The FTC's second motion to dismiss renewed the argument that the amended complaint identified no "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704; *see FTC Motion to Dismiss First Amended Complaint* (DE.24), at 6-11 [EOR_261-66]. Even then, however, appellants' opposition ignored finality and relied entirely on the claim that the APA does not apply to their declaratory action at all. *See Plaintiffs' Opposition to FTC Motion to Dismiss FAC* (DE.30), at 6-9 [EOR_241-44].

As a backstop to their primary argument, appellants included the following footnote:

> While Plaintiffs contend the APA does not apply, their position is that jurisdiction would exist were this Court to apply that statute because the actions taken by the FTC would be sufficiently reviewable, and that there would be no adequate remedy in court.

Id. at 6 n.6 [EOR_241]. That was appellants' only effort below to address judicial review under the APA.

This Court has long rejected efforts to introduce on appeal arguments that were not properly preserved in the district courts. In

Int'l Union of Bricklayers & Allied Craftsman Local Union No. 20, AFL-CIO v. Martin Jaska, Inc. (*Bricklayers*), 752 F.2d 1401 (9th Cir. 1985), for example, the Court held that it "will not * * * review an issue not raised below unless necessary to prevent manifest injustice." *Id.* at 1404; *accord Recinto*, 706 F.3d at 1176 n.3; *Kline v. Johns-Manville*, 745 F.2d 1217, 1221 (9th Cir. 1984); *Komatsu, Ltd. v. States S.S. Co.*, 674 F.2d 806, 812 (9th Cir. 1982).[7] As if describing appellants' own footnote, this Court rejected in *Bricklayers*—as "pitiably inadequate"—an attempt to preserve an argument for appeal by merely mentioning it as a "just in case" backstop. 752 F.2d at 1405 n.6.

2. Appellants' APA arguments lack merit anyway

Even if the Court were to consider appellants' new arguments, they are meritless. Appellants seek to escape the mandate of *Standard Oil* and its progeny by recasting their complaint as posing only a question of law concerning whether the FTC has statutory authority over them. They then assert that the FTC has conclusively answered

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[7] To show "manifest injustice," "the proponent 'must show exceptional circumstances why the issue was not raised below'." *Bricklayers*, 752 F.2d at 1404 (quoting *Taylor v. Sentry Life Ins. Co.*, 729 F.2d 652, 655-56 (9th Cir. 1984) (per curiam)). Appellants have not even attempted to make such a showing.

that question and that the agency's legal determination is a final action reviewable under the APA. But the new theory cannot be squared with the actual allegations of the complaint, and would not satisfy the APA requisites for judicial review in any event.

Appellants' complaint sought a declaration that appellants' businesses were not subject to the requirements of the TSR as a matter of law—but it also asked for a declaration that, *as a matter of fact*, their practices *complied* with the statute. *See FAC* ¶37 [EOR_287-88]. Appellants also acknowledged in their complaint that the FTC's investigation also involved misrepresentations in violation of Section 5 of the FTC Act, *see id.* ¶4 [EOR_278], and their complaint sought a declaration that "they are not making misrepresentations to consumers." *FAC* ¶40 [EOR_288]. The plain terms of the complaint thus fatally undermine their claim on appeal that the case "presents a 'purely legal' question of statutory interpretation—whether [their] activities fall within the [TSR] definition of 'debt relief service.'" Br. 36.

Even if the complaint were construed as a purely legal challenge, however, it still fails the APA finality test. As we explained above (at 23-26), the Supreme Court has ruled that the Commission's vote to

issue a complaint is not a final action but only "a threshold determination that further inquiry is warranted," *Standard Oil*, 449 U.S. at 241. It does not "impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process." *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948); *accord Bennett v. Spear*, 520 U.S. at 177-78. An FTC investigation does not even reach that stage of the proceeding. The ultimate determination whether the FTC has authority over alleged violative practices will be made by the court hearing an enforcement case.

Yet *every time* the Commission votes to issue or file a complaint, it must reach a legal determination that a statute alleged to be violated applies to the defendant and the acts at issue. Appellants' proposed approach would, therefore, gut the rule of *Standard Oil* and the many cases that have followed it.

The D.C. Circuit did not hold to the contrary in *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430 (D.C. Cir. 1986), appellants' principal case. *See* Br. 33-36. There, the Environmental Protection Agency (EPA) ordered Ciba to change the labeling on a pesticide product. Ciba challenged the

directive on the ground that EPA's statute required it to cancel the company's product registration before it could impose labeling changes. "The sole question" before the D.C. Circuit in that case was "whether Ciba-Geigy's complaint presents a controversy ripe for judicial review." 801 F.2d at 434. The court ruled that the matter was ripe.

As appellants would have it, *Ciba-Geigy* stands for the proposition that as long as a complaint presents a "purely legal question," it is reviewable under the APA. That is false. For one thing, *Ciba-Geigy* did not involve the APA at all; it addressed ripeness. That inquiry demands only that the agency action be "sufficiently final" to warrant the expenditure of judicial resources, *id*. at 435, not that it be final within the meaning of the APA.

Moreover, *Ciba-Geigy* is nothing like this case. There, the EPA had ordered Ciba to change its labeling, a direct and immediate effect completely lacking here. The company's rights or obligations "ha[d] been determined" and "legal consequences * * * flow[ed]" from the agency's action. *Bennett*, 520 U.S. at 178. Here, as explained above, appellants have not been ordered to do anything and no rights have been determined. *See supra*, at 23-26. When appellants filed suit, the

FTC was only investigating them; now it has merely asked the court to determine whether a legal violation has occurred.

Ciba-Geigy also involved a "a pure legal question as to what procedures EPA was obliged to follow before requiring a labeling change," which was "independent of and separable from the largely factual question" of whether the pesticide at issue required a labeling change. 801 F.2d at 435.[8] As we showed above (at 33-34), this case does not involve a pure legal question. Nor is the legal question of whether the TSR applies to appellants separable from the facts. Whether appellants' practices constitute a "debt relief service" is a factbound inquiry. The TSR defines "debt relief service" as "any program or service *represented, directly or by implication*, to renegotiate, settle, *or in any way alter the terms* of payment or other terms" of a person's unsecured debt. 16 C.F.R. § 310.2(o) (emphasis added). Applying that definition plainly can be done only to a developed set of facts, including what appellants promised consumers and the services consumers received.

[8] The parties agreed that the matter was purely legal, which factored heavily in the court's conclusion that the issue was "fit for review." *See Ciba-Geigy*, 801 F.2d at 435 ("[W]e have no reason to believe that our consideration of the issue would be facilitated by further factual developments.").

Significant differences in the statutory schemes at issue here and in *Ciba-Geigy* underscore the factbound nature of this case compared with *Ciba-Geigy*. The EPA enforced pesticide labeling rules through product registration and cancellation hearings. *See* 801 F.2d at 431-32. The question of "what procedures EPA was obliged to follow before requiring a labeling change," was purely legal and had nothing to do with the merits of a mislabeling decision. *Id*. at 435. By contrast, the FTC enforces the TSR through adjudication, including development of a factual record on the alleged violation. For that reason, the D.C. Circuit specifically contrasted the EPA's regime to the FTC's and held that the FTC's "issuance of complaint initiating enforcement action" is "not separable from the agency's ultimate enforcement decision." *Id*. (*citing Standard Oil*, 449 U.S. at 241, 246).

Appellants' remaining cases (Br. 36-37) are equally inapposite. *Western Ill. Home Health Care, Inc. v. Herman*, 150 F.3d 659 (7th Cir. 1998), concerned a Department of Labor (DOL) determination that two affiliated entities had a "legal obligation * * * to cumulate the time their respective employees spend at each company for purpose of computing entitlement to overtime wages." *Id*. at 663. Entirely unlike the present

case, the DOL ruling had the very kind of direct, immediate, and concrete impact—wholly absent here—that rendered it "final for purposes of judicial review." *Id.*

Arch Mineral Corp. v. Babbitt, 104 F.3d 660 (4th Cir. 1997), is similar to *Western Illinois*. There, the agency notified Arch that it would be deemed a "presumed controller" of a related entity subject to agency sanctions, thereby rendering Arch itself ineligible for mining permits. *Id.* at 666. The Fourth Circuit concluded that the case was ripe for review because "[t]he critical facts are not disputed"; the agency "admits that it could list Arch on the [permit-blocking system] without notice"; and "this would inflict 'immense' harm on Arch." *Id.* at 665, 668. *Arch Mineral* has no bearing here for all the reasons discussed above. Here, there is no final agency action or allegation of serious hardship from the FTC's investigation or enforcement case.

Lastly, *Atchison, Topeka & Santa Fe Ry. Co. v. Pena*, 44 F.3d 437 (7th Cir. 1994) (en banc), involved an *undisputedly* final agency action. The Federal Railroad Administration published a new final rule in the Federal Register governing the conduct of regulated parties. *Id.* at 440. The rule was self-evidently final, and the issue barely merited

discussion in the court's opinion. *Id.* at 441. Appellants' reliance on the case is a mystery.

D. The "Agency Delay" Exception to the APA Finality Requirement Does Not Apply

Recognizing the feebleness of their finality argument, appellants argue in the alternative that the requirement does not apply to them at all. They claim that "the failure by the FTC to address the underlying jurisdictional question, whether by inaction or delay, has subjected Appellants to immediate, substantial hardship and irreparable harm with no avenue to obtain relief." Br. 43-44. The contention fails on several grounds.

Appellants did not raise any such contention below, and for the reasons discussed above, at pages 31-33, they may not do so now. As appellants' own cited authorities make clear, parties claiming unreasonable agency delay or inaction typically seek mandamus to compel the wrongly withheld agency action, and jurisdiction in such cases is granted by the All Writs Act, 28 U.S.C. § 1651(a). *See Pub. Util. Comm'r of Or. v. Bonneville Power Admin.*, 767 F.2d 622, 630 (9th Cir. 1985); *Telecomm. Research & Action Ctr. v. FCC* (*TRAC*), 750 F.2d 70, 72, 75-76 (D.C. Cir. 1984); *Air Line Pilots Ass'n Int'l v. Civil Aeronautics*

Bd., 750 F.2d 81, 84 (D.C. Cir. 1984). The complaint here neither sought mandamus relief nor invoked the All Writs Act. *See FAC*, at 12, ¶10 [EOR_288, 279].

Even if the argument were properly before the Court, it is meritless. To begin with, it is moot. It is not clear what type of action appellants claim the FTC has wrongly withheld, but the only "action" the FTC takes after an investigation is the issuance or filing of a complaint. A complaint has now been filed and there is nothing further for this Court to order the FTC to do. For the same reason, appellants may now raise all their legal challenges in court without the need for extraordinary relief.

More fundamentally, there has been no delay here for several reasons. The agency completed its investigation and filed its complaint in about a year, hardly an unreasonable amount of time. Indeed, even if it had not yet acted, agency action can be unreasonably delayed only if an agency is required to take some action—but the FTC faces no such requirement. The FTC is a law enforcement agency, akin to a prosecutor. It may investigate and determine whether or not to file a

case, but it has no duty to do either.[9] Indeed, as discussed above, even when the FTC files a complaint, that is not a final agency action, so no delay or inaction could have occurred in its conduct. Appellants' claimed exception to the finality rule is simply inapplicable under these circumstances.

Finally, appellants have failed to show the required irreparable harm resulting from the alleged delay. They assert without support that "the delay in this instance severely impacts the financial well-being of Appellants," Br. 46, but until the district court's preliminary injunction appellants operated their businesses without interruption. The burden of defense is not only unrelated to any "agency delay," but is not even a cognizable harm. *Standard Oil*, 449 U.S. at 244; *Ukiah Valley*, 911 F.2d at 264.

II. APPELLANTS' RIPENESS ARGUMENTS ARE NOT PROPERLY BEFORE THIS COURT AND ARE MERITLESS ANYWAY

Appellants argue that their claim is "ripe" for judicial review. Br. 37-43. This Court, like the district court, need not reach the issue because this case fails for lack of jurisdiction. The question is not

[9] Appellants' letter to the FTC chairwoman did not impose a duty to act on the agency any more than a letter to the United States Attorney can do so.

properly before the Court anyway because the district court did not address it, Op. 16 [EOR_21], and "the general rule" is that "a federal appellate court does not consider an issue not passed upon below." *Singleton v. Wulff*, 428 U.S. 106, 120 (1976); *accord Standard Ins. Co. v. Saklad*, 127 F.3d 1179, 1180 n.1 (9th Cir. 1997).

At any rate, the matter is not ripe. The Supreme Court has set out two factors for evaluating ripeness: "fitness of the issues for judicial decision," and "hardship to the parties of withholding court consideration." *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967), *abrogated on other grounds, Califano v. Sanders*, 430 U.S. 99 (1977); *see Pence v. Andrus*, 586 F.2d 733, 737 (9th Cir. 1978) (same). Appellants satisfy neither factor.

First, "[w]ithin the context of pre-enforcement challenges to agency [actions], fitness for judicial decision requires a finding that the agency action is final and that the issues involved are legal ones." *Pence*, 586 F.2d at 737 (citing *Abbott Labs.*, 387 U.S. at 149). As discussed above, appellants have failed to show a final agency action even under the more lenient finality inquiry of ripeness doctrine, and their ripeness argument fails for that reason alone. Moreover, as

discussed above, the issues that appellants' complaint raises—i.e., whether the TSR applies to their commercial activities and whether their practices satisfy the FTC's statutory and regulatory mandates—are not purely legal. They are factbound and would require significant record development to resolve. *See, e.g.*, *Pence*, 586 F.2d at 737 (issues requiring factual development are not ripe).

Nor will any hardship flow if the court does not consider their claims. Their only allegation of harm below was a purported "threat of being shut down without prior notice." *FAC* ¶32 [EOR_286]. But appellants would—and did—have ample notice to defend against an attempt to shut them down. They briefed the issue extensively before the district court granted a preliminary injunction and appointed a receiver for their businesses.[10] *See* Order Granting Motion for Preliminary Injunction, *FTC v. AFBC*, No. 18-cv-0806 (N.D. Cal. Nov.

[10] In some cases, the FTC seeks *ex parte* temporary relief to prevent the dissipation of assets or destruction of evidence. Fed. R. Civ. P. 65(b)(1). But that rationale loses its force when the investigation's target knows about the investigation—as was the case here, *FAC* ¶¶26-31 [EOR_284-86]. And even when the FTC seeks an *ex parte* TRO, subsequent preliminary relief must be pursued expeditiously, Fed. R. Civ. P. 65(b)(3), and may only be granted "after notice to the defendant." 15 U.S.C. § 53(b).

29, 2018) [SER_164-190]. Moreover, appellants' alleged fear of "*ex parte*" closure of their operations, *FAC* ¶35 [EOR_287], was baseless since they were well aware of the investigation and in continual discussions with FTC staff about it. *See id*. ¶¶26-31 [EOR_284-86].

On appeal, appellants claim that their having to operate under the cloud of legal uncertainty brought on by the FTC's investigation satisfies the hardship requirement. Br. 38-39. Not so. Ripeness requires a showing that the FTC action "is hurting [appellants] now" and "is not just a portent of a future harm that cannot occur unless and until the agency takes other measures against [them]." *General Finance*, 700 F.2d at 371. Likewise, appellants' attempt to re-cast their hardship claim as one flowing from the FTC's "Game of Loans" enforcement campaign is unavailing. Br. 39-42. The enforcement actions involved in that campaign—while grouped together in public announcements in order to raise consumer awareness—are in fact separate and independent court proceedings, affecting only the defendants named in each one. Appellants have not—and cannot—claim any immediate irreparable harm from the FTC's investigation of their practices, or from the courts' withholding consideration of their declaratory claims.

That is all the more so in light of the FTC's enforcement action, where those claims can be fully aired and decided.

III. THE DISTRICT COURT PROPERLY DENIED APPELLANTS LEAVE TO AMEND THEIR COMPLAINT YET AGAIN

After the FTC moved to dismiss the first complaint, appellants filed an amended one. After the district court dismissed their amended complaint, they asked for leave to yet again amend. The court carefully considered appellants' "vaguely defined proposed amendments" and concluded that they "would be futile" because they "[could] not cure the fundamental and fatal deficiencies in their complaint." Op. 17, 18 [EOR_22-23].

On appeal, appellants do not even attempt to explain how their proposed amendments would make a difference to their complaint's *jurisdictional* deficiency. The district court's 12(b)(1) dismissal was predicated not on an insufficiency of allegations, but on the absence of any final FTC action. Nothing in the proposed amendments could cure that basic jurisdictional flaw. Indeed, appellants had already failed to cure this deficiency in their first amended complaint—filed in response to the FTC's initial motion to dismiss, which invoked the very same jurisdictional arguments as the second motion.

In those circumstances, there is no reason to think that yet another amendment would be any more effective; appellants have thus failed to meet their burden of showing that the district court abused its discretion. "A district court may deny a plaintiff leave to amend if it determines that 'allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency'." *Telesaurus*, 623 F.3d at 1003 (quoting *Schreiber Distrib. Co. v. Serv–Well Furniture Co.,* 806 F.2d 1393, 1401 (9th Cir. 1986)).

Appellants' desire to keep *this* litigation alive, *see* Br. 48, is all the more curious since they now have a forum—the FTC's enforcement action, pending before the very same judge—in which they may raise all of their substantive claims and defenses. Yet appellants utterly fail to explain why the enforcement case would be inadequate to adjudicate the legality of their practices.

CONCLUSION

For the foregoing reasons, the district court's order of dismissal with prejudice should be affirmed.

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, no other cases in this Court are deemed related to this appeal.

Respectfully submitted,

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February 28, 2019

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(i), in that it contains 9,315 words, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and using the Microsoft Word word-processing system.

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CERTIFICATE OF SERVICE

I hereby certify that on February 28, 2019, I electronically filed the foregoing "Answering Brief for the Federal Trade Commission" and "Supplemental Excerpts of Record" with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users, and thus service will be accomplished by the appellate CM/ECF system.

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