

## [Antitrust Law Daily Wrap Up, ACQUISITIONS & MERGERS NEWS: Solicitor General proposes coordinated briefing schedule in Supreme Court case, \(May 23, 2022\)](#)

Antitrust Law Daily Wrap Up

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By Jeffrey H. Brochin, J.D.

Despite *Axon v. FTC*, and *SEC v. Cochran* controversies being based on different statutory texts, the cases nevertheless pose overlapping questions which would need to be addressed across three different briefs in the absence of a coordinated briefing schedule.

The Office of Solicitor General of the U.S. Department of Justice has dispatched a [letter](#) to the Clerk of the Supreme Court requesting that the briefing schedules for two cases pending before the Supreme Court be allowed to coordinate briefing schedules. The Solicitor General made the request on behalf of the FTC in *Axon Enterprise, Inc. v. FTC*, and the SEC in *SEC v. Cochran*. Both Axon Enterprise, Inc. and Michelle Cochran consented to the proposal for a coordinated briefing schedule and the requisite re-alignment of parties. The proposal is intended to coordinate the briefing schedules and minimize duplicative briefing (*Axon Enterprise, Inc. v. FTC*, [Dkt. 21-86](#)); (*Securities and Exchange Commission v. Cochran*, [Dkt. 21-1239](#)).

The Solicitor General's letter noted that *Axon* [presents](#) the question of whether Congress impliedly stripped federal district courts of jurisdiction over constitutional challenges to the FTC's structure, procedures, and existence by granting the courts of appeals jurisdiction to affirm, enforce, modify, or set aside the Commission's cease-and-desist orders.

*Cochran*, on the other hand, [presents](#) the question of whether a federal district court has jurisdiction to hear a suit in which the respondent in an ongoing SEC administrative proceeding seeks to enjoin that proceeding, based on an alleged constitutional defect in the statutory provisions that govern the removal of the administrative law judge who will conduct the proceeding. All parties agreed that, although there are differences in the relevant statutory texts, the two cases substantially overlap.

**Practicalities of coordinated briefing.** Axon filed its opening brief on May 9, 2022, and the federal parties' brief is due August 8, 2022. In *Cochran*, the federal parties' opening brief is currently due June 30, 2022, and Cochran's brief is currently due August 1, 2022. Under that briefing schedule, the federal parties would be required to address overlapping questions across three different briefs (one brief as respondent in *Axon* and two as petitioner in *Cochran*) due on three different days. In addition, amici curiae briefs would be due on disparate dates in each case.

**Pragmatic proposal tendered.** To coordinate the briefing schedules and minimize duplicative briefing, the Solicitor General requested that: (1) the parties in *Cochran* be realigned, so that the federal parties are treated as Respondents and Cochran is treated as Petitioner; (2) Cochran's opening brief and joint appendix (or motion to dispense with the joint appendix) in that case be due June 30, 2022; (3) the federal parties' brief in that case be due August 8, 2022; and (4) the federal parties be allowed, in lieu of filing separate briefs in *Cochran* and *Axon*, to file a single, consolidated brief of 20,000 words across both cases.

**Precedents for re-alignment.** The Solicitor General's letter cited precedent whereby the Supreme Court has on occasion realigned parties to ensure that the same party is not treated as petitioner in one case and respondent in another, overlapping case. The letter referenced No. 19-508, *AMG Capital Management, LLC v. FTC*, and No. 19-825, *FTC v. Credit Bureau Center* (realigning parties so that the FTC was treated as respondent in both cases); and, noted that the Supreme Court has, on multiple occasions granted leave to a party to file a consolidated brief across two overlapping cases, citing to No. 21-463, *Whole Woman's Health v. Jackson*, and

No. 21-588, *United States v. Texas* (granting a party leave to file a consolidated brief of up to 20,000 words); No. 20-1199, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, and No. 21-707, *Students for Fair Admissions, Inc. v. University of North Carolina* (granting a party leave to file a consolidated brief of up to 20,000 words); No. 21-1086, *Merrill v. Milligan*, and No. 21-1087, *Merrill v. Caster* (granting a party leave to file a consolidated brief of up to 18,000 words).

**Maintaining separate arguing.** Although the Solicitor General's letter proposed coordinating the *briefing schedules*, all parties agreed that *Axon* and *Cochran* should be argued separately before the Supreme Court because notwithstanding the fact that the questions in both cases overlap in a general sense, as the questions presented underscore, each case arises under a different statute and ultimately presents a distinct question that would benefit from separate arguments.

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Companies: Axon Enterprise, Inc.; Viewu, LLC

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