

## [Securities Regulation Daily Wrap Up, ENFORCEMENT—U.S.: SEC asks SCOTUS to decide district courts' jurisdiction over ALJ challenges, \(Mar. 15, 2022\)](#)

Securities Regulation Daily Wrap Up

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By [Anne Sherry, J.D.](#)

The SEC asked the Supreme Court to hold their petition for certiorari pending the Court's decision of the same question with respect to FTC proceedings.

Continuing the debate over administrative law judge constitutionality, the SEC has asked the Supreme Court to decide whether respondents in administrative proceedings can challenge ALJ validity in district courts, or whether (as the SEC argues) the Exchange Act restricts such challenges to the appellate courts. As the Supreme Court has granted certiorari to consider this same question in the context of Federal Trade Commission administrative proceedings, the petitioners ask that their petition be held and then disposed of in accordance with that case ([SEC v. Cochran](#), March 11, 2022).

**Background.** In 2016 the SEC charged Michelle Cochran, a CPA, with failing to comply with PCAOB auditing standards when performing audits and reviews. An SEC ALJ imposed a penalty and five-year suspension, and the SEC adopted the decision, to which Cochran objected. After the Supreme Court held in [Lucia v. SEC](#) that SEC ALJs are officers under the Appointments Clause, Cochran's case was reassigned to a new, constitutionally appointed ALJ. Cochran then filed suit in district court to enjoin the proceedings, asserting that the second ALJ was unconstitutionally insulated from the president's removal power.

The district court dismissed for lack of subject matter jurisdiction, finding that the Exchange Act strips district courts of jurisdiction to hear challenges to ongoing enforcement proceedings. The court reasoned that Cochran should have raised her claims in the ALJ proceeding and then petitioned for review in an appellate court. A Fifth Circuit panel [affirmed](#) in a 2-1 decision, stating that it was bound by the fact that every appellate court to address the question held that the statutory review scheme is the only path to asserting a constitutional challenge to SEC proceedings. An *en banc* hearing was then granted, and the *en banc* court narrowly [reversed](#) the panel, over the dissent of seven judges. It is this decision that the SEC, along with its Chair and the U.S. Attorney General (as the defendants in the court case), seek to overturn.

**Cert petition.** In the petition, the government argues that the Fifth Circuit decision is an aberration because until that point, every court of appeals to consider this issue (citing decisions of the Second, Fourth, Seventh, Eleventh, and D.C. Circuits) had held that respondents may not "bypass the statutory review scheme" by suing to enjoin an ALJ proceeding in district court. The petition details that review scheme, including that under the statute a respondent "may obtain review of the order in the United States Court of Appeals for the circuit in which he resides or has his principal place of business, or for the District of Columbia Circuit."

The petition observes that the Court recently granted certiorari to decide this question with respect to Federal Trade Commission administrative proceedings ([Axon Enterprise, Inc. v. FTC](#)). The petition there argues that the Fifth Circuit decision in *Cochran v. SEC* created a circuit conflict with the Ninth Circuit decision in *Axon Enterprise*. The petitioners accordingly ask the Court to hold their petition for writ of certiorari pending the Court's decision in *Axon Enterprise*, and then dispose of the *Cochran* petition in keeping with that decision.

Attorneys: Karen L. Cook (Karen Cook PLLC) for Michelle Cochran. Joshua Marc Salzman, U.S. Department of Justice, for the SEC, Gary Gensler and Merrick Garland.

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