

## [Securities Regulation Daily Wrap Up, ACCOUNTING AND AUDITING—U.S.: Supreme Court considers immediate judicial review of federal agency proceedings, \(Nov. 7, 2022\)](#)

Securities Regulation Daily Wrap Up

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By [Jeffrey May, J.D.](#)

Justices urged to allow district court jurisdiction to block federal agency proceedings instead of requiring targets in the proceedings to wait for appellate court review of a final agency action.

The U.S. Supreme Court heard arguments on November 7 about whether Congress stripped federal district courts of jurisdiction to hear constitutional challenges to federal agency proceedings. In two cases, the Court was asked to consider if targets in agency proceedings must wait until a final agency action is issued before an Article III court can consider their structural constitutional claims. One case, *Axon Enterprise v. Federal Trade Commission*, [Dkt. 21-86](#), involves an underlying Federal Trade Commission administrative challenge to a consummated acquisition by taser/body-worn camera maker Axon of Viewu, described by Axon as “an essentially insolvent competitor.”

The other case concerns federal district court jurisdiction to consider Securities and Exchange Commission proceedings in *SEC v. Cochran*, [Dkt. 21-1239](#). That case was brought by Michelle Cochran—a certified public accountant—who was fined for violating the Exchange Act for failing to comply with auditing standards issued by the Public Company Accounting Oversight Board. Both Axon and Cochran contend that they should not have to wait for an administrative process to run its course before obtaining access to an Article III court. The Justices appeared divided on the issue. However, there were concerns raised from both liberal and conservative Justices that allowing federal district court cases to proceed could lead to delays in proceedings and additional litigation against federal agencies.

**FTC case.** At issue in the FTC case is a divided Ninth Circuit panel [opinion](#), holding that a federal district court lacked jurisdiction to hear a constitutional challenge to the FTC Act while the administrative process was pending. Although the FTC Act is silent on the subject, Congress impliedly stripped the district courts of jurisdiction to hear such cases and required parties to move forward first in the agency proceeding, in the appellate court’s view. The High Court in January 2022 granted a [petition for certiorari](#) from Axon to decide whether federal district courts have jurisdiction over suits challenging the constitutionality of the FTC’s procedures and structure while an administrative action is pending. According to Axon, it would rather be facing the Department of Justice Antitrust Division in a federal district court in a merger challenge instead of the FTC in administrative proceedings. Axon takes issue with the “blackbox” clearance process under which the FTC and Antitrust Division decide which agency will review a merger transaction.

**SEC case.** In addition to considering the administrative law issues raised in *Axon* in the context of the FTC, the High Court took up a similar question with respect to federal district court jurisdiction to consider SEC proceedings. At issue in that case is an *en banc* decision of the Fifth Circuit, which [held](#) that the Securities Exchange Act of 1934 did not strip federal district courts of subject-matter jurisdiction to hear a constitutional challenge to SEC Administrative Law Judge removal protections. The Fifth Circuit decision in *Cochran v. SEC* created a circuit conflict with the Ninth Circuit decision in the *Axon* case. The government filed a [petition for review](#) in the *Cochran* case. The petition was granted on May 16, 2022. Briefing was consolidated in the two cases. There will be separate arguments.

**Arguments.** Both Axon and Cochran are seeking to get out of long-running administrative proceedings. Paul D. Clement of Clement & Murphy, PLLC summed it up for his client Axon: “We’ve been trying for years to get out

of the FTC process. We've even offered to walk away from the transaction. So, we think just being subjected to their processes as currently structured is our injury."

According to Clement, neither the text of the relevant statutes nor precedent prevent Axon from seeking relief in the federal district court.

Much of the Justices' questioning surrounding factors outlined in a trilogy of cases concerning the jurisdictional issues, including *Free Enterprise Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477 (2010); *Elgin v. Department of Treasury*, 567 U.S. 1 (2012); and *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994).

Justice Clarence Thomas appeared to sympathize with petitioner Axon. Asking whether this case was distinguishable from the *Free Enterprise Fund* case, in which the Supreme Court recognized federal district court jurisdiction for a constitutional challenge—Thomas said: "It seems as though we've been down this road."

Justice Thomas also raised the issue of the limited number of administrative cases that actually reach a cease-and-desist order and are appealed. The settlements preclude the courts from reaching the constitutional issues. "It's a relatively small number of these cases where the party has kind of the wherewithal to endure the whole process," said Clement.

Justice Sonia Sotomayor followed up that the number of district court cases that go on to appeal is very small as well. "I'm not quite sure that merely because a good number of cases settle means that you still don't have an adequate and meaningful opportunity to raise these claims before a court," she noted.

Justice Neil Gorsuch took a straight-forward, textual approach. He pointed to the text of 28 U.S.C. §1331—which provides for federal district court jurisdiction over civil actions arising under the Constitution—and the provision within the FTC Act that provides for federal appellate court review of agency cease-and-desist orders and asked: "Tell me what I'm missing?" Gorsuch seemed to suggest that the prudential factors of *Thunder Basin* would come into play if a cease-and-desist order had been issued.

Clement took the position that even if the *Thunder Basin* factors were applied, Axon would still win.

Justice Ketanji Brown Jackson expressed concern that parties might use federal district courts to delay proceedings. She appeared to take the position that "once you are in the channel ... exclusive review or exclusive jurisdiction [has been given] to the court of appeals to review a final order of the agency."

Clement pointed out that Axon's concerns were not just with agency process. "If you're saying this whole agency is unconstitutional or it has no business exercising jurisdiction over this case, you're not in the regulatory channel; you're in the regulatory maw," said Clement. "That's your whole claim, is that we don't belong here at all."

Deputy Solicitor General Malcolm L. Stewart told the Court that "district courts have no authority to entertain constitutional challenges to the Commission's conduct of agency adjudications." He added that the burdens associated with the administrative proceedings were not a sufficient reason to disrupt "a longstanding principle of administrative law that courts will not intervene in an ongoing agency proceeding until that proceeding culminates in a rule or order that imposes sanctions or determines legal rights or obligations."

Stewart said that the Administrative Procedure Act (APA) "confirms that this review mechanism is exclusive and further confirms that antecedent steps taken during the adjudications are subject to review on the review of the final agency action."

Chief Justice John Roberts made the point that a series of cases about constitutional issues raised over agency proceedings "make the case about the need for direct resolution of a related claim pretty strong."

As for the argument in the SEC case, Gregory George Garre of Latham & Watkins LLP, arguing for Michelle Cochran, explained that the issue was essentially the same, but that the involvement of an individual plaintiff "illustrates the crucial importance of this district court jurisdiction for everyday Americans who find themselves trapped before an unconstitutional agency decisionmaker."

Garre noted, however, that the *Free Enterprise Fund* case, which strongly supports Clement’s position, “applies even more forcefully to this case, which involves the same statute and the exact same claim here.” He added that one difference between the two cases made the question in the SEC case easier. He pointed to “a saving clause in the SEC Act in which Congress made clear that it was not displacing traditional rights or remedies.” According to Garre, one of those remedies was the right to go to court to get an injunction against an agency action.

During his argument, Stewart noted the need for agency expertise that is available in pursuing these questions in administrative proceedings. Justice Sotomayor pointed out that the FTC could, for instance, provide more detail about the clearance system pursuant to which the agencies decide who will review a merger.

“That’s certainly an aspect of the case as to which the agency could exercise its expertise,” Stewart pointed out.

Justice Brett M. Kavanaugh raised questions about what makes sense going forward for the government, for citizens, and for the court system. He said that concerns, such as “floodgates, delay, obstruction,” support the government’s position. However, clarity, certainty, and speed supported allowing a challenge to the structure of the agency to go forward in the district court.

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Companies: Axon Enterprise, Inc.; Viewu, LLC

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