

# Client Alert: Supreme Court Permits Constitutional Challenges to Administrative Agencies While an Enforcement Proceeding Is Pending

## Publications

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On April 14, 2023, in *Axon Enterprise, Inc. v. Federal Trade Commission* and the companion case *Cochran v. Securities and Exchange Commission*, the Supreme Court held that district courts have jurisdiction to hear structural challenges to the constitutionality of the FTC and the SEC while an agency enforcement action is pending against the challenger. Although litigants have always had the ability to raise such arguments, previously it was unclear if a litigant had to wait until administrative proceedings concluded before raising those claims in court. The Supreme Court has now unanimously said no: a litigant may bring a separate constitutional challenge to the agency's structure in an Article III court before the conclusion of the agency's enforcement proceeding. The opinion (authored by Justice Kagan and joined by seven other Justices, with Justice Gorsuch concurring in the judgment) will allow litigants to bring structural constitutional challenges before incurring the full costs of an agency enforcement proceeding. The decision also potentially points the way to other kinds of challenges that could be mounted in federal court before the conclusion of agency proceedings, including proceedings by the SEC and FTC as well as other agencies.

## Background

In *Axon* and *Cochran*, the plaintiffs were the targets of administrative enforcement actions proceeding before the respective agency's in-house tribunal. Both challenged the constitutionality of having an administrative law judge (ALJ) preside over their case. Slip op. at 1. Both respondents claimed that the ALJs—who are only removable “for cause” by the Merit Systems Protection Board, the members of which in turn are only removable for cause by the President—were too insulated to be sufficiently accountable to the President as required by separation-of-powers principles. *Id.* at 1–2.

While administrative proceedings were ongoing, both *Axon* and *Cochran* brought suit in the district court, asserting jurisdiction under 28 U.S.C. § 1131. *Id.* at 4. In both cases, the district court dismissed the action for want of jurisdiction because of the existence of a pending administrative

proceeding. *Id.* at 5. Axon and Cochran appealed. *Id.* at 6. The Ninth Circuit affirmed Axon’s dismissal, finding that “Axon’s constitutional challenges fell within the FTC Act’s scheme,” and thus was barred, “mainly because the scheme guaranteed them ‘meaningful judicial review’” after the administrative proceeding concluded. *Id.* (citation omitted). However, the Fifth Circuit reversed Cochran’s dismissal based on the *Thunder Basin* factors, finding that “Cochran’s claim would not receive ‘meaningful judicial review’ in a court of appeals; that the claim was ‘wholly collateral to the Exchange Act’s statutory-review scheme’; and that the claim fell ‘outside the SEC’s expertise.’” *Id.* (citation omitted).

## **The Court’s Decision**

The Supreme Court, relying on its prior opinion in *Free Enterprise Fund v. PCAOB*, 561 US 477, 489 (2010) and applying the factors from *Thunder Basin Coal Co. v. Reich*, 510 US 200 (1994), held that district courts have the authority to address a litigant’s constitutional challenges to the FTC’s and SEC’s administrative scheme when administrative proceedings are pending against that same litigant.

First, the Court noted that the issues presented by *Free Enterprise Fund* were similar to those presented by Axon and Cochran. Slip op. at 9. Specifically, it explained that in *Free Enterprise Fund* the “main claim” challenged the constitutionality of “two layers of tenure protection” that insulated officials from presidential control. *Id.* at 9–10. Similarly, the Court remarked, Axon’s and Cochran’s challenges went “to the core” of the administrative agency’s existence, rather than to a “substantive decision” by the agency or the “commonplace procedures agencies use to make such a decision.” *Id.* at 11.

Next, the Court applied the *Thunder Basin* factors. Those factors are: 1) whether precluding jurisdiction would “foreclose all meaningful judicial review of the claim,” 2) whether the claim is “wholly collateral to [the] statute’s review provisions,” and 3) whether “the claim is outside the agency’s expertise.” *Id.* at 8 (internal citations omitted; alteration in original).

The Court found that each factor favored judicial review of Axon’s and Cochran’s claims. On the first factor, the Court acknowledged that the FTC and SEC statutes provide for judicial review of final FTC and SEC actions, but that this review came too late to be meaningful. *Id.* at 12–13. Axon’s and Cochran’s alleged harm—being subjected to unconstitutional agency authority—is a “here-and-now injury” that “is impossible to remedy once the proceeding is over, which is when appellate review kicks in.” *Id.* at 13 (internal quotation marks omitted). As the Court explained, “[a] proceeding that has already happened cannot be undone.” *Id.* The second factor, “collateralism,” favored Axon and Cochran “for much the same reason”—because they challenged “the Commissions’ power to proceed at all rather than the actions taken in the agency proceedings.” *Id.* at 14. The Court elaborated that the claims had “nothing to do with the enforcement related matters” regularly adjudicated by the Commissions. *Id.* at 15. Finally, the Court found that the structural constitutional claims Axon and Cochran raised were outside of the FTC’s and SEC’s expertise. *Id.* at 16. With all

three *Thunder Basin* factors pointing “in the same direction,” the Court found that a district court could review Axon and Cochran’s respective claims. *Id.* at 17–18.

Justices Thomas and Gorsuch wrote separately. Justice Thomas, who joined the opinion in full but wrote a separate concurrence, expressed “doubts about the constitutional propriety of Congress vesting administrative agencies with primary authority to adjudicate core private rights with only deferential judicial review on the back end.” Slip op. at 1 (Thomas concurring). Justice Thomas opined that “when private rights are at stake, full Article III adjudication is likely required.” *Id.* at 3. Justice Gorsuch, concurring only in the judgment, would have reached the same result on different grounds. Slip op. at 1 (Gorsuch concurring). Expressing the view that “many problems” existed with the *Thunder Basin* factors, including “sheer incoherence,” Justice Gorsuch explained that courts should not apply the factors and should instead only ask whether Congress “carved out some exception” to the court’s jurisdiction under Section 1331. *Id.* at 2, 5–8.

## **Implications**

The decision appears to clear an important roadblock from parties who believe an agency’s chosen forum is not constitutionally sound. Although parties have always had the ability to *eventually* challenge the constitutionality of the forum, the need to first go through the litigation in the agency’s chosen forum—with attendant time, expense, and uncertainty—may have chilled such challenges.

Looking ahead, the Court’s opinion in *Axon Enterprises* provides important guidance to litigants before administrative agencies. For example, litigants before the SEC or FTC need not wait until a final decision before asserting claims in court based on a constitutional defect in the agency’s structure or ALJ’s authority. Although the Court did not address the question, it is also possible that fact-specific constitutional claims could be raised in such a suit. And based on the logic of the *Axon* decision, litigants before other agencies, including those that use ALJs, may likewise be able to assert constitutional claims in a separate lawsuit before bearing the burden of litigating an enforcement proceeding in full.

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