

SCOTUS Considers Federal Court Jurisdiction Over Constitutional Challenges to Pending Agency Actions

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On November 7, 2022, the Supreme Court is scheduled to hear oral arguments in two cases with potentially far-reaching consequences for agency adjudications: *Securities and Exchange Commission (SEC) v. Cochran* and *Axon Enterprise, Inc. v. Federal Trade Commission (FTC)*. Both cases involve constitutional challenges to agency proceedings with significant [legal implications](#) in their own right, but the central issue before the Supreme Court this term is whether federal district courts can hear those challenges before the agencies decide them in the first instance. This Legal Sidebar begins with an overview of federal court jurisdiction. It then provides background on the *Axon Enterprise* and *Cochran* cases and the circuit split that prompted these petitions to the Supreme Court. Lastly, the Sidebar highlights the significance of these cases for Congress and other agencies.

Federal Court Jurisdiction

[Article III, Section 1](#), of the Constitution vests the judicial power in “one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” [Article I, Section 8, Clause 9](#), grants Congress the power to “constitute Tribunals inferior to the supreme Court.” By allowing Congress to establish lower federal courts, the Constitution implicitly gave Congress the power to define the [jurisdiction](#) of those courts (i.e., the types of cases the courts may adjudicate), which Congress has done through federal statutes. In particular, [28 U.S.C. § 1331](#) grants federal district courts “original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States”—also known as “[federal question jurisdiction](#).”

The Supreme Court has [long recognized](#) that Congress can also limit the jurisdiction of federal courts, including by assigning [initial review](#) of a dispute to an administrative agency. If Congress does so, the [Administrative Procedure Act](#) or another statute may authorize judicial review of the agency’s final decision, but judicial review of the agency’s proceedings *before* a final decision will generally be [precluded](#). Instead, a litigant must generally make its arguments first to the agency, [preserving](#) those arguments for later review by an Article III court.

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While Congress’s instruction to foreclose district court jurisdiction over claims involving non-final agency actions need not be explicit, it must be “fairly discernible” from the statutory scheme. In *Thunder Basin Coal Co. v. Reich*, the Court identified reasons why a federal statute implicitly precluded initial review in federal district court based on “the statute’s language, structure, and purpose, its legislative history,” and “whether the claims can be afforded meaningful review.” The Court explained that, by comparison, a statute does *not* preclude a district court from exercising jurisdiction where (1) preclusion “could foreclose all meaningful juridical review,” (2) the claims are “wholly collateral to a statute’s review provisions,” and (3) the claims are “outside the agency’s expertise.” These three factors came to be known as the *Thunder Basin* factors, and the Court subsequently applied them in other cases.

Axon Enterprise, Inc. v. FTC

Axon Enterprise, Inc. v. FTC stemmed from an FTC administrative action, on antitrust grounds, against Axon Enterprise’s acquisition of a competitor. While that action was pending before the FTC, Axon sued the FTC in federal district court to stop the proceedings. Axon argued, among other claims, that an administrative law judge (“ALJ”) could not preside over the FTC’s action because the agency’s ALJs were unconstitutionally insulated from removal under the Supreme Court’s reasoning in *Free Enterprise Fund v. Public Company Accounting Oversight Board (PCAOB)*. (The *Free Enterprise* decision and removal challenges to ALJs are discussed in more detail in this Legal Sidebar.) The district court concluded that it lacked jurisdiction to hear Axon’s challenge because a federal statute, the FTC Act, precluded initial review of Axon’s arguments in federal court. That statute authorizes the FTC to serve a complaint, hold a hearing, and issue a cease-and-desist order against a corporation that has violated the FTC Act, and it states that a corporation subject to a cease-and-desist order “may obtain a review of such order” in a federal court of appeals.

On appeal, the Ninth Circuit held that the FTC Act “reflects a fairly discernible intent to preclude district court jurisdiction.” The court explained that the statute “includes a detailed overview of how the FTC can issue complaints and carry out administrative proceedings.” Additionally, the court observed, the statute’s language concerning judicial review is “almost identical” to a provision in an SEC statute (discussed below) that courts have concluded strips district courts of jurisdiction. The court then applied the three *Thunder Basin* factors. First, the court concluded that the statute provided “meaningful judicial review” of Axon’s constitutional challenge even if an ALJ could not decide the issue, because Axon could appeal the agency’s final decision on the antitrust action to a federal court of appeals, which could consider the constitutional claim at that time. Second, the court reasoned that Axon’s constitutional claim was not “wholly collateral” to the statutory review scheme because it was the “vehicle by which” Axon sought to prevail at the agency level. By comparison, the court concluded that the third *Thunder Basin* factor weighed *against* stripping the federal court of jurisdiction, finding that the FTC lacked the “agency expertise” to resolve Axon’s constitutional challenge. Although the *Thunder Basin* factors “point[ed] in different directions,” the court followed the lead of other circuits in placing more emphasis on the first factor—meaningful judicial review. The Ninth Circuit concluded that “Axon can have its day in court—but only after it first completes the FTC administrative proceeding.”

SEC v. Cochran and the Circuit Split

SEC v. Cochran started as an SEC enforcement action against Ms. Cochran, a certified public accountant. The SEC ALJ assigned to the case found that Ms. Cochran violated the Exchange Act, a federal statute, and imposed a \$22,500 penalty and five-year suspension on practicing before the SEC. While Cochran was appealing the ALJ’s decision to the Commission, the Supreme Court ruled in *Lucia v. SEC* that SEC ALJs are “officers of the United States” who were not properly appointed in accordance with the Constitution’s Appointments Clause. As a result, the SEC reassigned Cochran’s case to a new, properly appointed ALJ. Cochran sought to enjoin the new proceeding in federal court, arguing that it was still

defective for the reason argued in *Axon Enterprise*—because ALJs have unconstitutional removal protections.

The district court [concluded](#) that it did not have jurisdiction to hear the challenge. The court applied [15 U.S.C. § 78y](#), which provides that a “person aggrieved by a final order of the Commission ... may obtain review of the order in [a] United States Court of Appeals.” The district court [held](#) that this provision requires a defendant in an SEC enforcement action to raise her constitutional claims before the agency for final resolution by the ALJ or the Commission and that the sole path to appeal that decision leads to circuit, not district, court. Cochran appealed the jurisdictional ruling to the Fifth Circuit. A three-judge [panel](#) affirmed, and the full circuit agreed to rehear the case *en banc*.

On rehearing, the Fifth Circuit [reversed](#) the district court’s decision in part, creating a circuit split with five other courts of appeals. The Fifth Circuit [held](#) that Section 78y “did not explicitly or implicitly strip the district court of jurisdiction” over Cochran’s constitutional claim. First, the court [explained](#), the federal question statute grants district courts jurisdiction over “*all* civil actions arising under the Constitution.” By comparison, the court [reasoned](#), Section 78y gives courts of appeals *some* jurisdiction (i.e., over appeals from final SEC orders) without precluding district courts from exercising jurisdiction over *other* claims, including constitutional challenges raised before the entry of a final order. Second, the court [interpreted](#) *Free Enterprise Fund* to hold that Section 78y does not strip district courts of jurisdiction over constitutional removal challenges to pending agency actions. In that case, the Supreme Court had applied the three *Thunder Basin* factors and [held](#) that the district court properly exercised jurisdiction over the plaintiff’s removal challenge to an investigation launched by the PCAOB, a board overseen by the SEC. According to the Supreme Court, the plaintiff could not obtain [meaningful](#) judicial review of its removal claim through the statutory process because the PCAOB’s investigation had not yielded formal sanctions and might not result in a final SEC order. Additionally, the constitutional challenge to PCAOB’s structure was “[collateral](#)” to any reviewable SEC order and not within the agency’s [expertise](#). The Fifth Circuit [found](#) *Free Enterprise Fund* to be controlling, even though the SEC had instituted not just an investigation of Cochran but an administrative action against her. The *en banc* court found this difference to be immaterial, [reasoning](#) that Cochran “is still not guaranteed an adverse final order, as the SEC might resolve her case in her favor.” Conducting its own analysis, the court further held that all three *Thunder Basin* factors suggested that Congress did not intend to divest district courts of jurisdiction over “[structural](#)” constitutional claims, such as Cochran’s removal challenge, which contest a feature of the statutory review scheme itself.

Considerations for Congress

Axon Enterprises and *Cochran* could pose a direct challenge to the concept of “[implied preclusion](#) of district court jurisdiction” because the parties advance different ways of discerning Congress’s intent in defining federal jurisdiction. Cochran, for instance, urges the Court to apply a “[plain reading](#)” of the Exchange Act, [arguing](#) that because she is not challenging a “final order of the Commission,” Section 78y does not divest district courts of their federal question jurisdiction over her constitutional claim. In contrast, the United States points to the statutes’ structure and context, [arguing](#) that the acts’ specific procedures for review supersede the general grant of district-court jurisdiction in 28 U.S.C. § 1331. It remains to be seen whether the Court will adhere to the *Thunder Basin* factors or require a more explicit statement of intent to preclude district court jurisdiction. As the Supreme Court has moved toward a more [textualist](#) approach to statutory interpretation, it has generally [declined](#) to “ventur[e] beyond Congress’s intent” as expressed in the text and structure of a statute. For example, while the Court once recognized implied causes of action based on the purpose and legislative history of a statute, it has come to “[abandon](#)” that approach.

The government [posits](#) that a Supreme Court decision in line with the Fifth Circuit’s ruling would yield several negative consequences. First, it would turn constitutional avoidance—the [doctrine](#) that courts

should decide constitutional issues only when necessary—“upside down” by “accelerating judicial consideration of constitutional claims while deferring consideration of non-constitutional claims” that might have disposed of the case. Second, authorizing district courts to hear constitutional claims during an ongoing administrative proceeding would, in the government’s [view](#), “produce parallel litigation” in the district and circuit courts and “[interfere](#) with the orderly and efficient conduct” of the administrative proceeding. The government also expressed concerns about the [difficulty](#) of distinguishing between “structural” constitutional claims and other constitutional arguments.

A Supreme Court decision in *Axon Enterprise* or *Cochran* is likely to have implications for other administrative review schemes. The judges who dissented from the Fifth Circuit’s decision [noted](#) that federal statutes likewise provide for appellate review of final agency actions by the [Occupational Safety and Health Review Commission](#) and the [National Labor Relations Board](#). If the Supreme Court were to require a more explicit statement from Congress in order to foreclose direct review of non-final SEC and FTC decisions in the district courts, then Congress would face consideration of whether these or other statutes require amendments to bring them in line with congressional intent and which, if any, types of claims should be immediately reviewable by federal district courts.

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