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# The United States Supreme Court Holds that Federal District Courts May Hear Structural Constitutional Challenges to Ongoing SEC and FTC Enforcement Proceedings

Although federal district courts have original jurisdiction over “civil actions arising under the Constitution, laws, or treaties of the United States,” 28 U.S.C. § 1331, Congress can authorize administrative law judges (“ALJs”) – rather than federal district courts – to hear certain disputes in the first instance, subject to review by federal courts of appeal. To that end, Congress has empowered two federal agencies – the Securities and Exchange Commission (“SEC”) and Federal Trade Commission (“FTC”) – to address violations of the Securities Exchange Act of 1934 (“Exchange Act”) and the Federal Trade Commission Act (“FTC Act”), respectively, through proceedings overseen by ALJs. This review scheme has resulted in inconsistent rulings in the lower courts, where plaintiffs have raised constitutional challenges to agency proceedings under the separation of powers doctrine. While the U.S. Court of Appeals for the Fifth Circuit had held that federal district courts lack jurisdiction to hear such claims, the U.S. Court of Appeals for the Ninth Circuit had reached the opposite conclusion, creating a circuit split.<sup>1</sup> On April 14, 2023, the Supreme Court resolved this split, holding that district courts have jurisdiction to hear structural constitutional challenges to agency enforcement proceedings.<sup>2</sup>

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## I. Factual and Procedural Background

The Exchange Act and the FTC Act authorize the SEC and the FTC, respectively, to address violations of the relevant statutes through their own administrative proceedings overseen by ALJs. 15 U.S.C. § 78d–1(a); 15 U.S.C. § 45(b). Only after a final decision in the administrative proceedings may a losing party seek review by a federal court of appeal. The relevant statutes do not address whether a challenge to the constitutionality of proceedings before the ALJ must be brought solely before the ALJ or whether they may be brought in a federal district court.

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<sup>1</sup> See *Cochran v. Securities and Exchange Commission*, 20 F.4th 194 (5th Cir. 2021) (*en banc*) (holding that the SEC’s administrative review scheme strips federal district courts of jurisdiction to hear constitutional challenges to agency proceedings) and *Axon Enterprise v. Federal Trade Commission*, 986 F.3d 1173 (9th Cir. 2021) (holding that the FTC’s administrative review scheme *does not* strip federal district courts of the same).

<sup>2</sup> *Axon Enter., Inc. v. Fed. Trade Comm’n*, Nos. 21-86 and 21-1239, 2023 WL 2938328 (U.S. Apr. 14, 2023).

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In *Thunder Basin Coal Company v. Reich*,<sup>3</sup> the Supreme Court held that statutes authorizing administrative proceedings overseen by ALJs do not preclude federal district courts from hearing all claims arising from those proceedings. Specifically, under *Thunder Basin*, courts presume that Congress did not intend to limit the jurisdiction of federal district courts where (1) the lack of district court jurisdiction forecloses meaningful judicial review of the claims, (2) the claims are collateral to the relevant statute’s review provisions, and (3) the claims are outside the relevant agency’s area of expertise.<sup>4</sup>

Courts have had difficulty applying these factors, leading to a split between the Fifth and Ninth Circuits concerning whether challenges to the constitutionality of proceedings overseen by ALJs could be brought in federal district courts.

In *Cochran v. Securities and Exchange Commission*,<sup>5</sup> the SEC alleged that a certified public accountant violated the Exchange Act by failing to comply with various auditing standards. After an SEC ALJ found that the accountant had violated the statute, the accountant appealed. While the appeal was pending, the Supreme Court held in *Lucia v. Securities and Exchange Commission*<sup>6</sup> that certain ALJs – like the one in *Cochran* – had been improperly appointed. The SEC then ordered a new hearing with a different ALJ, but before the hearing could begin, the accountant sued the SEC in federal district court, alleging that Congress had violated the separation of powers doctrine by improperly insulating the ALJ from removal. (SEC ALJs are removable by the President only for cause.) The district court dismissed the action for lack of personal jurisdiction, and on appeal, the Fifth Circuit affirmed in a divided opinion.<sup>7</sup> The Fifth Circuit eventually took up the case *en banc* and ultimately reversed, finding that the accountant’s claims “would not receive ‘meaningful judicial review’ in a court of appeals,” were “wholly collateral to the Exchange Act’s statutory-review scheme,” and “fell ‘outside the SEC’s expertise.’”<sup>8</sup>

In *Axon Enterprise v. Federal Trade Commission*,<sup>9</sup> the Ninth Circuit heard a similar challenge to the authority of FTC ALJs, who are subject to the same removal for cause requirement as SEC ALJs. Unlike *Cochran*, however, the Ninth Circuit found that federal jurisdiction did not exist because the plaintiff’s constitutional challenge “fell within the FTC Act’s scheme,” which “guarantee[s] . . . meaningful judicial review” by allowing appeals of final orders to be made in federal courts of appeals.<sup>10</sup>

The Supreme Court granted review of both cases to resolve this split.

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## II. The Supreme Court Decision

On April 14, 2023, the Supreme Court unanimously reversed *Axon* and affirmed *Cochran* in a consolidated decision, holding that the statutory review schemes in the Exchange Act and the FTC Act do not divest district courts of federal question jurisdiction over structural constitutional challenges to ongoing agency enforcement actions.

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<sup>3</sup> 510 U.S. 200 (1994).

<sup>4</sup> *Id.* at 212–213.

<sup>5</sup> 20 F.4th 194 (5th Cir. 2021); *see also* our firm memorandum on this decision, which can be found [here](#).

<sup>6</sup> 138 S. Ct. 2044 (2018); *see also* our firm memorandum on this decision, which can be found [here](#).

<sup>7</sup> *Cochran v. Securities and Exchange Commission*, 969 F.3d 507, 511–18 (5th Cir. 2020), reh’g *en banc* granted, opinion vacated, 978 F.3d 975 (5th Cir. 2020), and on reh’g *en banc* sub nom., 20 F.4th 194 (5th Cir. 2021), aff’d and remanded sub nom. *Axon Enter., Inc. v. Fed. Trade Comm’n*, 2023 WL 2938328 (U.S. Apr. 14, 2023).

<sup>8</sup> *Axon*, 2023 WL 2939328 at \*5 (quoting *Cochran*, 20 F.4th at 207–08).

<sup>9</sup> 986 F.3d 1173 (9th Cir. 2021).

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**First**, the Court analyzed whether preclusion of district court jurisdiction “could foreclose all meaningful judicial review.”<sup>11</sup> The Court noted that the plaintiffs in *Axon* and *Cochran* both alleged that the administrative proceedings caused their harm — what the Court called a “here-and-now injury” — that would be “impossible to remedy” when the “proceeding is over,” when “appellate review kicks in.”<sup>12</sup> Accordingly, the Court held that “judicial review of [the plaintiffs’] structural constitutional claims” by a court of appeal “would come too late to be meaningful.”<sup>13</sup>

**Second**, the Court considered whether the claims were wholly collateral to the statutes’ review provisions. Since both *Axon* and *Cochran* “challenged the [SEC’s and the FTC’s] power to proceed at all,” the Court reasoned that the claims had “nothing to do” with the alleged statutory violations, and the claims were thus collateral to the underlying enforcement proceedings.<sup>14</sup>

**Finally**, the Court examined whether the claims were outside the agencies’ areas of expertise. The Court noted that “agency adjudications are generally ill-suited to address structural constitutional challenges”<sup>15</sup> and held that, while the agencies may have expertise in securities and competition claims, they know “nothing special about the separation of powers.”<sup>16</sup>

Based on this analysis, the Court held that the plaintiffs’ claims “that the structure, or even existence, of an agency violates the Constitution” could be heard before a district court, rather than an agency ALJ.<sup>17</sup>

Justices Clarence Thomas and Neil Gorsuch wrote concurring opinions. Justice Thomas was skeptical that ALJs could constitutionally adjudicate “core private rights,” noting that “when private rights are at stake, full Article III adjudication is likely required.”<sup>18</sup> Judge Gorsuch believed that the judicial review provisions in the Exchange Act and the FTC Act apply only to final agency orders, not ongoing agency proceedings, which would have given federal district courts jurisdiction to hear plaintiffs’ claims under 28 U.S.C. § 1331.<sup>19</sup>

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### III. Implications

The Supreme Court’s decision allows parties to save cost and time by bringing structural constitutional challenges to agency proceedings in federal court without having to wait for final agency decisions. Among other consequences, this ruling may incentivize agencies like the SEC and the FTC – which can bring actions either in federal district court or in administrative proceedings – to prosecute more claims in court, since this would allow them to avoid challenges to the constitutionality of their administrative process. Following the Supreme Court’s decision in *Lucia*, the SEC has already begun a shift towards filing contested enforcement matters in federal district courts – a trend expected to continue, given the Court’s decision in *Axon*.

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<sup>11</sup> *Id.* at \*2.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at \*9.

<sup>15</sup> *Id.* at \*3 (quoting *Carr v. Saul*, 141 S. Ct. 1352, 1360 (2021)).

<sup>16</sup> *Id.* at \*10.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at \*12.

<sup>19</sup> *Id.* at \*17.

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to call or email authors Joel Kurtzberg (Partner) at 212.701.3120 or [jkurtzberg@cahill.com](mailto:jkurtzberg@cahill.com); John MacGregor (Partner) at 212.701.3445 or [jmacgregor@cahill.com](mailto:jmacgregor@cahill.com); or Lisa J. Cole (Associate) at 212.701.3247 or [lcole@cahill.com](mailto:lcole@cahill.com); or email [publications@cahill.com](mailto:publications@cahill.com).

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