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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 21-86, Axon Enterprise versus FTC.

Mr. Clement.

ORAL ARGUMENT OF PAUL D. CLEMENT

ON BEHALF OF THE PETITIONER

MR. CLEMENT: Mr. Chief Justice, and may it please the Court:

Congress has expressly granted district courts original jurisdiction over all civil actions arising under the Constitution, and it is common ground that Congress has never expressly withdrawn or restricted that jurisdiction with respect to the constitutional claims at issue here. Instead, all that Congress has done expressly is to give additional jurisdiction to the courts of appeals to a person subject to an FTC cease-and-desist order.

Axon is not subject to and does not challenge such an order. Instead, Axon challenges the constitutionality of statutes that insulate agency officials from presidential

1 removal and the clearance process by which Axon
2 is denied access to the courts.

3 Nonetheless, the government insists
4 that the grant of additional jurisdiction to the
5 courts of appeals over orders not at issue here
6 impliedly precludes jurisdiction that Congress
7 expressly conferred.

8 That argument does not follow from any
9 explicit statutory text, and the three factors
10 that this Court has fashioned to decide the
11 reach of implied preclusion all favor district
12 court jurisdiction here, just as in *Free*
13 *Enterprise Fund*.

14 First, any review mechanism that
15 delays judicial review of a here-and-now
16 constitutional injury until it has come and went
17 does not provide meaningful review. Second, the
18 constitutional claims here are wholly collateral
19 to the merits of any particular contested
20 acquisition. And, third and finally, not only
21 does the agency lack expertise in these
22 constitutional issues, it is wholly outside its
23 authority to declare itself unconstitutional or
24 strike down removal restrictions on ALJs that
25 are located in an entirely separate statutory

1 provision.

2 Simply put, there's nothing in the
3 statutory text nor the Thunder Basin factors
4 that provides a basis for finding in two express
5 grants of jurisdiction an elimination of the
6 jurisdiction to -- for the claims at issue here.

7 JUSTICE THOMAS: Mr. Clement -- Mr.
8 Clement, is this case distinguishable from Free
9 Enterprise? We -- seems as though we've been
10 down this road.

11 MR. CLEMENT: We don't think it is
12 distinguishable from Free Enterprise, Justice
13 Thomas. Obviously, some lower courts have
14 disagreed with us on that. But I don't think
15 there's any material basis for distinguishing
16 the two, especially when you look at the nature
17 of the claims here.

18 The nature of the claims here are
19 structural claims. They go to the very
20 existence of the agency. And those are wholly
21 collateral to the merits of any acquisition.
22 Those claims are beyond the competence of the
23 agency. And the agency is not in a position to
24 provide meaningful relief.

25 JUSTICE THOMAS: Could you take just a

1 minute to set out just more specifically why the
2 agency could not consider these constitutional
3 claims within its structure? What -- I think
4 you'd have to start by saying what it actually
5 does and what would be reviewed at the appellate
6 level after the agency issues an order.

7 MR. CLEMENT: Sure. So, if you start
8 with the -- the typical case, where the agency
9 builds an administrative record that informs
10 their position on a particular transaction, all
11 of the claims here are sort of cross-cutting or
12 may be even logically anterior to any of that
13 process.

14 One of the due process claims goes to
15 the clearance process by which a transaction
16 goes before the FTC rather than the Justice
17 Department, and that claim obviously doesn't
18 really focus on FTC agency action, but it
19 focuses on executive branch action that's beyond
20 the FTC.

21 And then, as to the more structural
22 claims, I mean, those are beyond the competence
23 of the agency for two reasons. One, no agency
24 has the authority to declare itself
25 unconstitutional. But, if you think about the

1 double for-cause removal restriction on the ALJs
2 in particular, I mean, the most logical way to
3 remedy that violation, at least following the
4 logic of Free Enterprise Fund, would be to
5 declare the second layer of for-cause removal
6 provisions unconstitutional. But that second
7 layer of provisions is in Title 5, 5 U.S.C.
8 7521. It's not in the FTC Act.

9 So the idea that the FTC could declare
10 another act of Congress in a different title of
11 the U.S. Code unconstitutional is completely
12 beyond its ken, but, of course, that's exactly
13 what district courts do on a day-to-day basis
14 exercising jurisdiction under Section 1331.

15 JUSTICE KAGAN: May I ask, Mr.
16 Clement, about the scope of your argument?
17 Because sometimes, as you just responded to
18 Justice Thomas's question, you're focused very
19 specifically on the constitutional claims at
20 issue in this case, and, in particular, the
21 Thunder Basin analysis lends itself to that kind
22 of focus.

23 You have other arguments in your
24 brief, the -- you know, sometimes you call them
25 the plain text arguments or just about the way

1 1331 and the review provisions interact, which
2 would seem to go much further, would seem to
3 sweep in not just constitutional claims but
4 statutory claims and would seem to sweep in many
5 preliminary rulings, you know, like real -- you
6 know, truly, truly interlocutory rulings of the
7 kind -- you know, it might be evidentiary
8 rulings, it might be discovery rulings.

9 So some of those statutory arguments
10 would seem to extend way beyond the -- the
11 constitutional claims at issue here. So which
12 are you really arguing?

13 MR. CLEMENT: So, Justice Kagan, I'm
14 really arguing to win this case on the Thunder
15 Basin factors. That seems to be the
16 straightforward way to win the case.

17 If -- if I can just say a moment about
18 the broader arguments, I think, if you look at
19 the statutes, if the Court were drawing on a
20 clean slate, I would probably say the right way
21 to decide these cases is, of course, there's
22 jurisdiction, and there's a whole host of
23 non-jurisdictional doctrines, like ripeness and
24 exhaustion, that would probably get you to
25 almost the exact same result as the Thunder

1 Basin factors.

2 So, if I were a law professor, I might
3 quibble that these factors that the Court has
4 come up with for jurisdiction really should go
5 to non-jurisdictional factors and these cases
6 should be resolved on B-6 rather than B-1, but
7 I'm not a law professor. I'm here to represent
8 a client. And I think our client wins well
9 under the Thunder Basin factors. So we're happy
10 to win on -- on those factors.

11 JUSTICE SOTOMAYOR: Counsel, almost
12 any administrative process could be called
13 collateral on constitutional issues, whether
14 it's tax review, as in Elgin, or it's
15 immigration issues. All of those petitioners
16 are required to go through administrative
17 processes, despite the fact that most of those
18 agencies can't reach constitutional issues.

19 So I don't know what makes this
20 situation different, other than perhaps -- and
21 I'm not sure about this -- the existence of the
22 adjudicatory body, the fact that the AF -- your
23 removal clause challenge.

24 But all of the other due process
25 challenges seem to be the quintessential

1 process-dependent claim. You can't get more
2 intertwined than that.

3 Your argument seems to be saying that
4 any due process claim counts. What about the
5 claim in the companion case, Cochran, that there
6 has been -- that has been abandoned, that the
7 SEC violated her due process rights by failing
8 to follow its own rules and procedures?

9 That's a classic due process claim
10 that, I think, in almost every other agency
11 action we wait until the end of the review
12 process for the Court to look at.

13 So it seems to be that you're saying
14 this is unfair because I have to go through the
15 process. But going through the process is what
16 due process is all about. I don't understand
17 why you are any different than any other
18 administrative agency petitioner who has to go
19 through the process, a flawed process, and wait
20 until the end to have that corrected.

21 MR. CLEMENT: So, Justice Sotomayor,
22 with respect to due process claims in
23 particular, I don't think we're -- we're arguing
24 for special rule for this particular agency. As
25 I look at the Court's cases -- and they go all

1 the way back to Mathews v. Eldridge and McNary,
2 so this, you know, would apply in immigration
3 cases as well -- the distinction that the Court
4 has drawn is between cross-cutting due process
5 claims that don't in any way depend on the
6 circumstances of a particular case.

7 So, if you think essentially on its
8 face that the statute doesn't provide due
9 process, then that does seem like a claim that
10 is wholly collateral to the merits of any
11 particular --

12 JUSTICE SOTOMAYOR: Well, what about
13 if you win? You don't care how you win,
14 meaning, once you're in a case, if you've been
15 given inadequate process, but you still win,
16 you're not going to -- you're going to suffer
17 the litigation costs, et cetera, but it doesn't
18 really matter what basis you win on.

19 MR. CLEMENT: Well, I -- I --

20 JUSTICE SOTOMAYOR: This is -- this
21 just gives you another hole in the -- in your
22 pocket, another card in your pocket that you can
23 play if you lose.

24 MR. CLEMENT: I -- I don't think
25 that's quite right, Justice Sotomayor, which is,

1 you know, this isn't a case like Elgin, where
2 there's a review process for losing your federal
3 job and all the plaintiffs wanted was their
4 federal job back.

5 This is not a situation where all we
6 want is to not have a cease-and-desist order.

7 JUSTICE SOTOMAYOR: Oh, it is because
8 your complaint asked the district court to
9 enjoin the FTC and its Commissioners from
10 pursuing an administrative enforcement action.
11 Your motion for a preliminary injunction asked
12 for the same thing.

13 MR. CLEMENT: Absolutely. But that's
14 actually --

15 JUSTICE SOTOMAYOR: So it is tied to
16 the proceeding very directly.

17 MR. CLEMENT: It's tied to the
18 proceeding, but it's not tied to a
19 cease-and-desist order in the same way as the
20 challenge in Elgin. We believe that we suffer a
21 here-and-now constitutional injury just from
22 being subjected to an unconstitutional agency
23 process with respect to the removal
24 restrictions, and we think we suffer an injury
25 the second that we are assigned to the FTC

1 rather than the Justice Department and
2 effectively denied any early access to court.
3 Those are the claims we want to bring.

4 They're not the claim that, like, we
5 wanted to have three witnesses and we only got
6 two and, gee whiz, if the ALJ would have just
7 given us one more witness, that would have
8 satisfied due process. Those are the kind of
9 claims that are not wholly collateral, and those
10 are the kind of claims that belong in the
11 administrative process.

12 CHIEF JUSTICE ROBERTS: But those are
13 --

14 JUSTICE BARRETT: So what's the remedy
15 that you --

16 JUSTICE JACKSON: Sorry, go ahead.

17 CHIEF JUSTICE ROBERTS: I was just
18 going to say that the examples you gave are
19 pretty extreme to -- to make your point, but it
20 strikes me that your -- your distinction between
21 structural constitutional claims and the
22 particular due process claims in the proceeding
23 is going to be hard to draw in a large number of
24 cases, particularly if you -- you prevail and
25 people -- it makes a difference to when they can

1 bring their constitutional or other challenges.

2 MR. CLEMENT: Well, with respect, Mr.
3 Chief Justice, I don't know that that's the
4 case. I mean, all we're asking for, as I
5 stressed with Justice Kagan, is an application
6 of the Thunder Basin factors.

7 I think what we've been talking about
8 really goes to the second factor about what it
9 means to be wholly collateral. And I don't
10 really think that's that difficult to apply in
11 the due process context. If you think that the
12 statute set -- as set up just says -- doesn't
13 give you any witnesses and that's going to be
14 true in every single hearing, that seems like a
15 case you ought to be able --

16 CHIEF JUSTICE ROBERTS: Well, that's
17 again -- yeah, sure, but that's an easy case. I
18 mean, an -- anytime you get multi-factors, as in
19 Thunder Basin, the application is going to be
20 difficult in, I think, many cases.

21 MR. CLEMENT: I -- I -- I mean, look,
22 there are going to be edge cases to be sure.
23 And I guess I would -- you know, this is where I
24 would sort of remind you that the statutory text
25 actually is pretty clear here.

1 And if we're going to have a rule for
2 the edge cases, I'd rather live in a republic
3 where the -- where the rule for the edge cases
4 was we err on the side of giving the citizen
5 early access to the courts as opposed to erring
6 on the side of deferring judicial review.

7 I mean, the Court could provide a
8 different presumption, I suppose, to help with
9 the edge cases, but I'd prefer it if it was a
10 presumption that was in favor of judicial
11 review.

12 After all, Congress did pass 1331 that
13 does seem to promise the people that if you have
14 a problem with the constitutionality of
15 government action, you can get early access to
16 court to sort it out.

17 JUSTICE JACKSON: But, Mr. Clement,
18 why doesn't -- why doesn't whether or not it's
19 wholly collateral turn to some extent on the
20 remedy that you're asking for? It would seem to
21 me that one way to think about the
22 collateralness of this is whether, when you're
23 done with it, the claim that you want to bring
24 in district court, you would go back to the
25 agency and the agency would proceed.

1 I think that in a situation in which
2 you have the type of claim, maybe some of your
3 removal claims with respect to the ALJ, for
4 example, if the remedy is just give us a new
5 ALJ, then there's these -- there's a concern
6 that what is happening by allowing citizens to
7 go to the district court is that they're sort of
8 superintending the agency process, whereas you
9 could say -- and -- and, therefore, you could
10 say it's not wholly collateral in the same way
11 as if you went over and the remedy was to
12 terminate the agency process.

13 So why -- why can't we -- why
14 shouldn't we be thinking about the collateral
15 nature of this based on the remedy that you're
16 asking for?

17 MR. CLEMENT: So two things, Justice
18 Jackson. First of all, I think the most sort of
19 straightforward way to think about whether it's
20 wholly collateral is does it turn on the facts
21 of the particular case or is it a claim that
22 would be the same no matter what the facts of
23 the particular transaction is or the particular
24 immigration circumstances of an individual. And
25 if it really doesn't matter on your

1 circumstances, then I think it's wholly
2 collateral.

3 To your point about the remedy,
4 though, I think that favors us, especially on
5 the removal claim, because I -- I think the
6 problem is there are cases where the remedy you
7 want is really just to have your federal job
8 back or the mine safety board order vacated.

9 And in those situations, maybe it
10 makes sense to say, yeah, if you're in the
11 process that leads to an order and at the end of
12 the order you can get it vacated, that's good
13 enough. That's a meaningful judicial remedy.

14 JUSTICE JACKSON: But I guess --

15 JUSTICE BARRETT: Mister --

16 JUSTICE JACKSON: -- maybe I'm not so
17 clear. I meant a remedy that does not have you
18 returning to the agency in any respect so that
19 your claim is such that, you know, the -- the
20 core constitutional claim this agency doesn't
21 have power over me, you can go to the district
22 court because, if you win, then the agency is
23 done.

24 What I'm concerned about is the
25 interpretation that allows you to take certain

1 claims over to the district court and have it
2 impact the agency -- ongoing agency proceeding
3 in a way that makes it unclear that that's what
4 Congress intended in terms of saving 1331.

5 MR. CLEMENT: So, I -- I guess I would
6 just amend your observation. I mean, I think
7 you're right that if you have a remedy that says
8 I ought to be completely immune from this
9 agency's actions at all, that's something that
10 does seem like it should be able to go forward
11 in district court.

12 But I think, if you have a claim
13 that's effectively "I shouldn't be in front of
14 this agency at all as currently structured,"
15 that is equally a claim that doesn't belong in
16 front of the agency. And I think -- as I
17 indicated to Justice Thomas, I think it's
18 particularly clear when you start thinking about
19 the right remedy for the double for-cause
20 removal restriction here.

21 Now, obviously, you could remedy a
22 double for-cause removal restriction by
23 invalidating either layer of removal, but if a
24 court were to follow the pattern of Free
25 Enterprise Fund, you'd get rid of the second

1 layer of removal restrictions, and those are in
2 5 U.S.C. 7521.

3 JUSTICE BARRETT: Mr. Clement, can --

4 MR. CLEMENT: Now there's --

5 JUSTICE BARRETT: Go ahead, Justice
6 Alito.

7 JUSTICE ALITO: No.

8 JUSTICE BARRETT: Okay. I just wanted
9 to know of -- could you say a little bit about
10 what remedy you want for your black-box claim?
11 Are you arguing that everything needs to go the
12 DOJ track, or are you saying you just want
13 transparency on that claim? Because we've been
14 kind of focused on the removal claim.

15 MR. CLEMENT: I -- I -- I think either
16 one of those would probably remedy the claim.
17 So, you know, I -- I think we'd ask for what
18 would probably be the most robust remedy, which
19 is send us to DOJ. We want early access to
20 court.

21 But, if a court fashioned a remedy
22 that said that, okay, we're going to provide
23 transparency to this process, and I don't know
24 what it would be, you know, everything sort of A
25 through M goes to DOJ and everything N through Z

1 goes to the FTC, something that would tell the
2 citizenry, okay, there's a rational process by
3 which you're being denied early access to court,
4 I think that would at least be a -- an -- an
5 available remedy.

6 But, obviously, we got stuck -- you
7 know, we lost at the threshold here, so we
8 didn't get to the point of electing our
9 remedies.

10 JUSTICE BARRETT: Do you think that's
11 a weaker case for immediate pre-enforcement
12 action in district court than the removal claim?

13 MR. CLEMENT: I mean, I suppose by one
14 tick on the scale, sure. I mean, I -- the --
15 the claims that go to the very existence of the
16 agency are the structure of the agency as it's
17 currently structured got to -- have to be in my
18 view the strongest possible claims, but I think
19 a due process claim that actually attacks a
20 decision that's anterior to the whole agency
21 process would be, you know, pretty high on the
22 list as well.

23 If I could say one thing about why I
24 think, in addition to the existential nature of
25 the kind of removal claim, why that's such a

1 strong case is, if you sort of think about,
2 like, the theory for why it is that, like, a
3 challenge to kind of early agency action doesn't
4 go to federal court, it must be, I think, on the
5 theory that, well, until it gets to the Article
6 III court, there's at least supervision by the
7 Article II branch that provides the citizen with
8 some protection of their liberty.

9 So, if your whole claim is that the
10 Article II supervision being provided by the
11 President is insufficient, then you're really
12 saying I don't have any protection the whole
13 time this stays before the executive branch.
14 And that really does seem like a claim that
15 almost uniquely belongs in district court, and
16 then it gets resolved one way or another.

17 JUSTICE KAVANAUGH: Can I ask you
18 about Free Enterprise Fund in particular?
19 Because Judge Lee in the opinion in the Ninth
20 Circuit really tried to carefully parse Elgin
21 and Free Enterprise Fund.

22 What do you do with the part of Free
23 Enterprise Fund that emphasized the fact that it
24 was at the investigation stage and that would be
25 the only way -- the -- the, therefore, there

1 would be no way ever to get judicial review of
2 the claim at issue there? I guess it's the one
3 paragraph on 490 of Free Enterprise Fund. How
4 do you think we should deal with that?

5 MR. CLEMENT: Well, I -- I -- I think
6 you should deal with it by sort of applying it
7 here and saying, actually, it's on all fours
8 with that situation. I mean, obviously, in Free
9 Enterprise, because of the structure there, you
10 had the unique sort of dynamic that, you know,
11 there -- there was a complaint about the Board's
12 activity, and the review mechanism dealt with
13 the Commission's activity.

14 But, with respect to the idea that the
15 only real way you could get review for the
16 here-and-now injury that the -- the -- the Free
17 Enterprise Fund was suffering was to sort of
18 precipitate a contempt sanction and go to court
19 immediately, that's exactly our situation. Our
20 beef here isn't limited to the cease-and-desist
21 order. We're -- we've been trying for years to
22 get out of the ST -- FTC process. We've even
23 offered to walk away from the transaction. So
24 we think just being subjected to their processes
25 as currently structured is our injury.

1 The only way we can try to get that to
2 -- remedied is exactly what the situation was in
3 Free Enterprise Fund. We can try to resist any
4 cooperation with the FTC, sort of get ourselves
5 in contempt and see if they did something to
6 bring us to federal court. But this Court has
7 said you don't have to bet the farm in that kind
8 of way.

9 JUSTICE KAVANAUGH: And -- and your
10 distinction of Elgin I want to explore briefly.
11 So, if you were bringing a claim challenging the
12 constitutionality of the statute that was being
13 investigated or -- or the basis for the
14 investigation/enforcement action, you couldn't
15 -- or what's your answer to whether you could
16 bring a challenge like that in district court?

17 MR. CLEMENT: Well, maybe the easier
18 way is to just articulate how I would
19 distinguish Elgin, and then maybe, if --

20 JUSTICE KAVANAUGH: Yeah.

21 MR. CLEMENT: -- if that doesn't
22 answer your question, I'm happy to respond.

23 But, to me, the -- the critical thing
24 in Elgin was the party was challenging the very
25 government action that the review mechanism was

1 set up to provide a special avenue for review.
2 So it was the challenge to adverse major
3 employment action. And what the Court held, I
4 think correctly, is it doesn't matter what your
5 theory is. It can be a cross-cutting
6 constitutional theory, but if you're challenging
7 the exact same adverse major employment action,
8 you have to go through the process.

9 So, if we were -- like, if we waited
10 until the very end of this process and
11 challenged the cease-and-desist order, I think
12 then we'd be in all fours with Elgin. And I
13 actually think, no matter what our theory was at
14 that point, we'd have to bring it in the court
15 of appeals. We couldn't at that late stage
16 challenge the cease-and-desist order itself in
17 district court.

18 JUSTICE KAVANAUGH: And --

19 MR. CLEMENT: But, to me, that's the
20 way to distinguish Elgin.

21 JUSTICE KAVANAUGH: -- and then one
22 last one. What's your exact formulation of the
23 rule? So a challenge to the structure of the
24 agency, I think, is covered. Anything beyond
25 that?

1 MR. CLEMENT: So I -- I would start
2 with Judge Bumatay's formulation that its
3 structure, existence, and procedures --

4 JUSTICE KAVANAUGH: So let me stop you
5 there. "Procedures" concerns me because I think
6 that could be wildly open-ended and presents
7 some of the problems that the Chief Justice and
8 others were pointing out. So respond to that.

9 MR. CLEMENT: It -- it concerns me as
10 well, which is why I was about to say, by
11 "procedures," I think he meant the kind of
12 cross-cutting procedures that don't turn on the
13 circumstances of any particular case. And I
14 think that sort of -- it -- that actually
15 explains some of the pre-Thunder Basin cases,
16 like McNary and Mathews v. Eldridge.

17 But I did want to add one important
18 point. That describes the basic universe of
19 situations that you're dealing with, these kind
20 of, like, specialized appellate court review
21 regimes, but there are other situations where
22 you get into district court under 1331 despite
23 the government making a Thunder Basin argument,
24 and a great example of that is the first Sackett
25 case back in 2012, because there you had a

1 situation where the government, relying on
2 Thunder Basin, was telling the citizen: "Hey,
3 wait, you can't get into court to challenge this
4 determination. You have to wait until we bring
5 an enforcement action."

6 And this Court rejected that argument
7 and said, no, the citizen gets into court under
8 1331. So I think the formulation with that
9 slight amendment that Judge Bumatay had is the
10 right one for this class of cases.

11 JUSTICE KAGAN: I -- I think that the
12 -- the -- the gloss you put on the procedures
13 language doesn't go all that far. I mean, even
14 if you say it's a challenge to a procedure that
15 extends to all cases, I mean, you know, agencies
16 have a lot of procedures, just as courts do.

17 And, you know, suppose you claimed
18 something about the way agencies treated
19 witnesses or what kinds of witnesses were
20 allowed or what kinds of cross-examination or
21 when subpoenas were issued or -- you could just
22 keep on going. I mean, would all of that go to
23 a court first?

24 MR. CLEMENT: I -- I don't think so,
25 Justice Kagan, and that's sort of the beauty of

1 the Thunder Basin factors because, if you're
2 talking about a procedural provision that's put
3 in only by a rule and you want to challenge
4 that, I think you could say, well, that's
5 actually within the agency's comp -- you know,
6 competency to fix.

7 If -- if -- but, if Congress passes a
8 new, like, agency tomorrow and it just says, you
9 know, the citizen's going to be dragged in front
10 of there and they're going to be denied any
11 ability to call any witnesses, I -- I would
12 think that you would actually want people to be
13 able to get into court immediately and say:
14 "Well, that's crazy. That -- that -- we should
15 declare that that restriction is
16 unconstitutional. It doesn't turn on the
17 circumstances of any individual's case."

18 So, I -- I -- I do think that's the --
19 the right rule, but, you know -- and -- and I
20 think, you know, our -- our particular due
21 process challenge, I think, is a strong case
22 because it's a step that's anterior to the
23 agency itself's process.

24 JUSTICE KAGAN: So can I ask just on
25 the -- the actual challenge that you've brought,

1 it seems to me that the hardest of the Thunder
2 Basin factors for you is the meaningful review
3 factor because, you know, basically, what we
4 think about a -- appealing, appeals generally,
5 is you have to wait until the end, and often
6 that's a lot of inconvenience, that's a lot of
7 expense, but boy, we're very stingy in allowing
8 interlocutory appeals as long as you'll get your
9 chance in the end. So what makes this
10 different?

11 MR. CLEMENT: So what makes this
12 different is that the relief at the end of the
13 process is -- doesn't really go to the heart of
14 the constitutional injury, which is being
15 subject to the unconstitutional agency action.
16 There's sort of a mix --

17 JUSTICE KAGAN: So, I -- I -- I -- I
18 thought -- I thought you were going to say that,
19 and I was trying to think of other examples that
20 are pretty analogous to it.

21 So, I -- I -- I would think that when
22 somebody claims that a court did not have
23 subject matter jurisdiction or when somebody
24 claims that there was no personal jurisdiction
25 as to that person or a criminal defendant saying

1 that a prosecutor was unconstitutionally
2 appointed, all of these are basically saying the
3 entire process is illegitimate and I should not
4 have been subject to it.

5 So what makes yours different from
6 those?

7 MR. CLEMENT: Well, two things, Your
8 Honor. I mean, one, as to the removal, you
9 know, provisions and the Humphrey's executor
10 claim for that matter, as to those provisions,
11 there's a big difference, which is all of the
12 cases that are already in federal district
13 court, it's taken as a given that the Article
14 III judges are legitimate, properly appointed,
15 properly insulated by good -- you know, good
16 behavior and all of that.

17 Whereas, here, on the Article II
18 claims, we're basically saying that the process
19 we're stuck in until we get to Article III court
20 is itself constitutionally deficient as a
21 structural matter. So that does seem kind of
22 fundamentally different.

23 And then, with respect to the other
24 claims, I mean, nobody says in the situation of
25 the district court, court of appeals, collateral

1 order kind of context, nobody says that the
2 district court is, like, powerless to hear the
3 claim in the first instance. It's just the
4 district court's perfectly powerful to hear the
5 claim. It just ruled against you.

6 And in -- in this situation, if we
7 have a claim before the agency like our due
8 process claim about the clearance process that
9 is anterior to the agency, the agency has no
10 business deciding it, that doesn't seem
11 analogous to the situation in most of the
12 collateral order cases.

13 And, of course, even in the collateral
14 order cases, you do have things like double
15 jeopardy, where you conceptualize the injury as
16 really being subject to the procedure or the
17 proceeding, rather, and I would say that is a
18 fair description of the claims that we're
19 bringing.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 Justice Thomas, anything further?

23 JUSTICE THOMAS: Just briefly.

24 Mr. Clement, there's a lot of
25 discussion about reaching a final order and then

1 assuming, I guess, an appeal.

2 What percentage of these cases
3 actually go to a cease-and-desist order and what
4 percentage actually are appealed?

5 MR. CLEMENT: So I think -- I mean, I
6 don't have the exact denominator, I'm a -- I'm
7 afraid, so I can't tell you. I -- the
8 overwhelming majority of these cases do settle
9 out in the process, and so there's no appeal.

10 It's a relatively small number of
11 these cases where the party has kind of the
12 wherewithal to endure the whole process. And
13 one of the things that does sort of skew the
14 numbers is that the FTC's position has been that
15 they essentially -- if -- won't accept a
16 settlement unless you forego your appellate
17 rights.

18 And so it is really -- you have to be
19 very hardy to make yourself all the way through
20 that process and preserve your objections.

21 CHIEF JUSTICE ROBERTS: Justice Alito?

22 JUSTICE ALITO: Are the so-called
23 Thunder Basin factors simply inferences about
24 congressional intent? And if that -- that's
25 what they are, are they the whole ball game? Is

1 there anything else that the Court should or
2 must consider in determining whether, in a case
3 where we're under the Thunder Basin line of
4 cases, anything else that's proper for us to
5 consider or that we must consider?

6 MR. CLEMENT: So, Justice Alito, I --
7 I guess what I would say is, you -- you know, if
8 you -- if you want to sort of save the Thunder
9 Basin factors, I think you would construe them
10 as being helpful guidepost to discern the
11 underlying legislative intent.

12 You know, it's more traditional for
13 this Court, of course, to discern legislative
14 intent from text. And I think, if you did infer
15 legislative intent from text, you would end up
16 in a world as I was describing to Justice Kagan
17 where you -- you much more readily recognize
18 that there's jurisdiction in the district court,
19 but then you start applying all these other
20 doctrines, like finality and exhaustion.

21 I can't help but look at the Thunder
22 Basin factors and think that the Court was sort
23 of cheating a little and sort of front-loading
24 some of those non-jurisdictional factors into
25 the jurisdictional inquiry, but be that as -- as

1 it may, we -- we -- we think you'd probably get
2 to almost the same result by applying finality,
3 ripeness, primary jurisdiction, all of those
4 other doctrines.

5 CHIEF JUSTICE ROBERTS: Justice
6 Sotomayor?

7 JUSTICE SOTOMAYOR: Mr. Clement,
8 Justice Thomas asked you a question about the
9 impetus to settle. That's true in an Article
10 III court. The number of district court cases
11 that go on appeal is -- is very small. Very
12 true in criminal law cases, where most are
13 settled by plea and most prosecutors require
14 waivers there.

15 So I'm not quite sure that merely
16 because a good number of cases settle means that
17 you still don't have an adequate and meaningful
18 opportunity to raise these claims before a
19 court, which is what I think Thunder Basin --

20 MR. CLEMENT: So, Justice Sotomayor, I
21 -- I --

22 JUSTICE SOTOMAYOR: -- Thunder Basin
23 was based on, which is, if you have a chance to
24 raise it, that's enough.

25 MR. CLEMENT: So I -- I guess what I

1 would say is I -- I don't think my answer to
2 Justice Thomas was meant to subsume all three
3 factors or be a complete answer, but I do think
4 it's worth recognizing how anomalous this
5 situation is because, if you take the case of my
6 client, for example, they offered basically to
7 walk away from the transaction and infuse the
8 potential acquisition company with cash.

9 Now it seems to me that if we were in
10 front of an Article III court and with the
11 Justice Department prosecuting this --

12 JUSTICE SOTOMAYOR: Now you're getting
13 to the merits, Mr. Clement. Thank you.

14 MR. CLEMENT: Well -- okay.

15 CHIEF JUSTICE ROBERTS: Justice Kagan?
16 Justice Gorsuch?

17 JUSTICE GORSUCH: Tell me what I'm
18 missing. 1331 says that district courts have
19 jurisdiction over these claims absent any other
20 consideration. And, normally, we consider
21 district courts bound to exercise their
22 jurisdiction when they have a claim.

23 Okay. Then we have the FTC Act that
24 says fine -- cease-and-desist orders can be
25 reviewed in the courts of appeals rather than

1 the district courts. Those are the two statutes
2 we have.

3 We don't have a cease-and-desist order
4 here. I would have thought that might have been
5 the end of the game and that the -- the Thunder
6 Basin factors would come in handy if we did have
7 a cease-and-desist order. In that circumstance,
8 then perhaps we would make you wait and consider
9 the -- the -- all these prudential factors about
10 interfering with agency proceedings.

11 Again, what am I missing?

12 MR. CLEMENT: So I don't think you're
13 missing anything. I think you're going to love
14 Mr. Garre's argument later today. I -- but what
15 I would say is I do think, if you go with that
16 simplistic, you know -- straightforward, no --
17 no --

18 JUSTICE GORSUCH: Is simplistic -- no,
19 go ahead. Go ahead.

20 MR. CLEMENT: -- straightforward.

21 JUSTICE GORSUCH: Simplistic, we can
22 --

23 MR. CLEMENT: I didn't like
24 simplistic. Straightforward. If you go --

25 (Laughter.)

1 JUSTICE GORSUCH: Textual maybe? How
2 about that?

3 MR. CLEMENT: Textual.

4 JUSTICE GORSUCH: Okay.

5 MR. CLEMENT: Straightforward. All of
6 those words seem to apply. Simplistic was a bad
7 word choice.

8 JUSTICE KAGAN: It could have been
9 worse.

10 (Laughter.)

11 MR. CLEMENT: But, if you go with that
12 approach, then I do think that, you know,
13 district courts are going to have to be ready to
14 apply a whole bunch of, you know, fairly
15 well-established doctrines of ripeness and
16 exhaustion, primary jurisdiction, maybe
17 abstention. I know, you know, you generally --

18 JUSTICE GORSUCH: Don't -- don't they
19 do that all the time? I mean, maybe that's
20 simplistic, but --

21 MR. CLEMENT: They -- they do do that
22 all the time. I -- I don't think it's, like,
23 entirely kismet, though, that -- if you -- if
24 you step back and said what would the result be
25 of applying all of those other

1 non-jurisdictional doctrines, boy, I think you'd
2 get to a situation that said they've got a claim
3 that's wholly collateral, you don't get
4 meaningful review, and the agency doesn't have
5 any expertise, that's going to go forward to the
6 merits in the district court.

7 And if one of those or two of those
8 actually aren't satisfied, then probably you're
9 going to get tripped up by ripeness or
10 exhaustion or something -- some -- so it would
11 be a cleaner world. It would be a simpler
12 world, a more textual world to go that route.

13 But I think you're going to end up in
14 kind of the same place, which is why, you know,
15 we're -- we're here happy to win on the Thunder
16 Basin factors as well.

17 JUSTICE GORSUCH: Okay. An -- and
18 then you haven't had a chance to address the
19 government's APA argument. Put aside the waiver
20 or forfeiture issue. If you could address it on
21 the merits.

22 MR. CLEMENT: Sure. I mean, we -- we
23 don't feel like we have anything to fear under
24 the APA argument. We actually think the APA
25 gets you to a very similar place. And we do

1 think the APA is best understood as a
2 non-jurisdictional argument, one of the many,
3 and it does basically say, you know, you should
4 apply a specialized administrative regime but
5 not where it doesn't provide adequate relief.

6 And we think this is a classic
7 situation where it doesn't provide adequate
8 relief.

9 So another way of sort of answering
10 your first question is to say I suppose you
11 could get to the Thunder Basin factors just as a
12 gloss on the APA, but I don't think it would
13 cause you under any circumstances to say that
14 these claims can't go forward to the merits in
15 district court.

16 CHIEF JUSTICE ROBERTS: Justice
17 Kavanaugh?

18 Justice Barrett?

19 JUSTICE BARRETT: Just a quick
20 question. So Justice Kagan asked you about
21 interlocutory appeals, and it's true they're
22 disfavored in all the contexts in which Justice
23 Kagan was saying.

24 I had been thinking about those too as
25 I was reading your brief and thinking about your

1 argument. I want to ask you if I'm making this
2 distinction in -- in the right way.

3 When we are talking about appeals or
4 interlocutory appeals from district court to the
5 court of appeals, we're talking about 1292 and
6 finality under 1292 and exceptions to what can
7 be final. So, you know, is it a collateral
8 order? Could we treat it as final for that
9 purpose?

10 But this isn't that, really, because
11 we're not asking whether it's final or
12 collateral in that sense of finality. And we're
13 not talking about looking at 1292 in a
14 definition of final. A pre-enforcement
15 challenge isn't interlocutory in that sense
16 because there's no appeal from any kind of order
17 that's been made, right?

18 So what are we supposed to draw --
19 because, I mean, I had some of those same
20 questions in my mind too. What are we supposed
21 to draw from that context of interlocutory
22 appeal? Nothing or something?

23 MR. CLEMENT: Well, I -- I think you
24 can draw something, which is I -- I do think
25 even in that context, although it's focused on a

1 different question, there is this con -- concept
2 of whether the claim you're bringing is
3 collateral from the merits.

4 JUSTICE BARRETT: Right.

5 MR. CLEMENT: And I -- I do think
6 that's a useful thing to borrow and bring over
7 to this context, but I also think, as it -- as I
8 -- as I said to Justice Kagan, it's also
9 important to recognize the differences in the
10 context because, in an Article III court, when
11 you have some claim that doesn't qualify for the
12 collateral order doctrine, you've still gotten a
13 ruling by a properly structured entity that has
14 -- has every competence to decide the issue in
15 your favor.

16 We don't have issues where we concede
17 that the district court doesn't have any ability
18 to consider the issue, but you're still stuck in
19 district --

20 JUSTICE BARRETT: Jurisdiction to
21 decide jurisdiction?

22 MR. CLEMENT: Yeah.

23 JUSTICE BARRETT: Yeah.

24 MR. CLEMENT: Yeah. We don't -- we
25 don't accept that notion. I mean, so -- so you

1 already are in a much better position if you're
2 in district court. Again, our -- you know, the
3 thrust of our complaint is we would love to be
4 in district court fighting the bona fides of
5 this acquisition. So I do think it's a
6 different context.

7 JUSTICE BARRETT: Thank you.

8 CHIEF JUSTICE ROBERTS: Justice
9 Jackson?

10 JUSTICE JACKSON: Yes. Mr. Clement,
11 did I misunderstand you to say that your client
12 has not received a cease -- cease-and-desist
13 order? Is there such an order at -- at issue
14 here? I mean, not at issue. Did -- did you get
15 a cease-and-desist order, your client?

16 MR. CLEMENT: No. The
17 cease-and-desist order, for purposes of the
18 statutory review provision, is the culmination
19 of the FTC process.

20 JUSTICE JACKSON: I see.

21 MR. CLEMENT: So we haven't gotten
22 that. I mean, in --

23 JUSTICE JACKSON: But you are in the
24 active agency review process, right?

25 MR. CLEMENT: Well, it's a little bit

1 complicated because we did get a stay of the
2 process pending this case out of the Ninth
3 Circuit.

4 JUSTICE JACKSON: Absent that stay,
5 the agency had decided that they were going to
6 go forward with respect to your client?

7 MR. CLEMENT: Not on the morning that
8 we filed our complaint. On the afternoon that
9 we filed our complaint.

10 JUSTICE JACKSON: I see.

11 MR. CLEMENT: And, you know, look, I
12 -- I -- I don't know -- for purposes of the
13 argument I'm making today --

14 JUSTICE JACKSON: Yes.

15 MR. CLEMENT: -- I don't know that
16 anything turns on that. For some of these
17 non-jurisdictional doctrines, like abstention --

18 JUSTICE JACKSON: Right.

19 MR. CLEMENT: -- who filed first might
20 matter a lot.

21 JUSTICE JACKSON: But can -- can I
22 just explore that, though, because I'm wondering
23 why anything doesn't turn on that. In other
24 words, when the agency decides to go forward, I
25 would assume they're sort of in -- you're in the

1 channel then of agency review, as opposed to
2 cases like Free Enterprise Fund, where they were
3 just in the investigative world and they hadn't
4 decided.

5 And so, once you're now in the agency
6 process, I'm concerned about people using the
7 district court jurisdiction to sort of do -- to
8 -- to stay the agency process or do an end run
9 around it. And I'm wondering, why isn't that a
10 legitimate concern, given a statute in which
11 it's pretty clear that once you are in the
12 channel, they've given exclusive review or
13 exclusive jurisdiction to the court of appeals
14 to review a final order of the agency?

15 MR. CLEMENT: So two kinds of answers,
16 Justice Jackson. The first is, I mean, you
17 know, generally, for jurisdictional purposes,
18 it's the situation at the time of the filing of
19 the complaint that matters. So, even if you're
20 going to draw this distinction, I think we're on
21 the right line.

22 But the second and probably more
23 responsive answer is I think this is why you
24 have to look at the nature of the claim that's
25 being brought, because if you're bringing sort

1 of a claim that's really about the agency
2 process and that's your beef, then I think it's
3 fine to say we're in the channel of review.

4 But, if you're saying this whole
5 agency is unconstitutional or it has no business
6 exercising jurisdiction over this case, you're
7 not in the regulatory channel; you're in the
8 regulatory maw. That's your whole claim, is
9 that we don't belong here at all.

10 JUSTICE JACKSON: And it doesn't
11 matter to you that as a result of making that
12 second kind of claim, you would be
13 terminating -- I mean, I'm with you to the
14 extent that you say I'm making that claim and
15 the point is we -- they have no jurisdiction
16 over me, and, district court, if you agree, I'm
17 out, and the whole thing is over.

18 What I'm concerned about is drawing a
19 line that involves you returning to the agency
20 after you've made a claim in district court,
21 because then it seems like the district court is
22 being used to superintend the agency process
23 rather than making the very kind of claim you
24 say you want to make in this case.

25 MR. CLEMENT: But, if you think about

1 our two claims -- or, you know, we had three
2 claims. Depends how you number them. But, if
3 you think about our claim that we shouldn't be
4 in the FTC at all, that seems to fit your
5 paradigm. The relief we could get there, at
6 least one of the forms of relief we could get,
7 is essentially to be sent to the DOJ.

8 But then, if you think about our
9 removal claims, what we're basically saying is
10 we shouldn't be sent to the agency at all as it
11 is currently structured. The agency can't help
12 us with that claim. They're powerless to do
13 anything about the claim. But the district
14 court isn't, and what the district court could
15 do is -- I mean, here, they port us out on
16 jurisdiction, but if it granted the merits, it
17 could say, you know, you're right, 5 U.S.C. 7521
18 is unconstitutional. ALJs can be removed by the
19 MSPB at will. And in that world, now you're
20 back to the agency. But you're -- you're, in
21 our view, back at a different agency where we at
22 least kind of know who to complain about if we
23 think we're being mistreated by the ALJs.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 Mr. Stewart.

2 ORAL ARGUMENT OF MALCOLM L. STEWART

3 ON BEHALF OF THE RESPONDENTS

4 MR. STEWART: Mr. Chief Justice, and
5 may it please the Court:

6 It is a longstanding principle of
7 administrative law that courts will not
8 intervene in an ongoing agency proceeding until
9 that proceeding culminates in a rule or order
10 that imposes sanctions or determines legal
11 rights or obligations.

12 Consistent with that principle, the
13 FTC Act review provisions governing
14 adjudications authorize court of appeals review
15 only of the final Commission orders that
16 terminate the proceedings. The APA confirms
17 that this review mechanism is exclude --
18 exclusive and further confirms that antecedent
19 steps taken during the adjudications are subject
20 to review on the review of the final agency
21 action. Those provisions, taken together, make
22 clear that district courts have no authority to
23 entertain constitutional challenges to the
24 Commission's conduct of agency adjudications.

25 Axon argues that review of final

1 Commission orders will provide inadequate relief
2 because it will not protect it from the burdens
3 associated with the administrative proceedings
4 themselves.

5 But this Court has repeatedly rejected
6 similar arguments both in the agency review
7 context and in applying the collateral order
8 doctrine. The Court, therefore, should hold
9 that the district court lacked jurisdiction over
10 this suit.

11 In the alternative, the Court should
12 hold that Axon lacks a valid cause of action
13 because the commencement of a Commission
14 adjudication is not immediately reviewable.

15 I welcome the Court's questions.

16 JUSTICE THOMAS: Would you at least
17 give us your clearest textual argument? As
18 Justice Gorsuch men -- mentioned, you have the
19 FTC Act and you have 1331. Could you make --
20 could you at least argue textually why there is
21 no jurisdiction with -- as between those two
22 statutes?

23 MR. STEWART: I -- I guess the other
24 thing I would point to, Justice Thomas, is the
25 APA and specifically 5 U.S.C. 704, which is

1 reproduced at page 1a of the appendix to our
2 brief, and -- and the relevant sentence for
3 these purposes is: "A preliminary, procedural,
4 or intermediate agency action or ruling not
5 directly reviewable is subject to review on the
6 review of the final agency action." And the
7 Court in FTC versus Standard Oil discussed the
8 implications of this provision.

9 And imagine for a second that this
10 sentence appeared as the second sentence of the
11 FTC Act review provision and you had the first
12 sentence with words to the effect that a person
13 who receives a cease-and-desist order may file a
14 petition for review in the court of appeals, and
15 then the second sentence said preliminary steps
16 taken during the adjudication shall be reviewed
17 on review of the final agency action.

18 That would be powerful evidence that
19 Congress intended any review of the antecedent
20 steps to occur in the court of appeals when the
21 final cease-and-desist order is issued. And --
22 and the language doesn't have any less salience
23 by virtue of the fact that it appears in the APA
24 instead. The whole --

25 JUSTICE GORSUCH: Mr. Stewart?

1 MR. STEWART: Yes.

2 JUSTICE GORSUCH: So, if I understand
3 your -- your answer, and I'm sorry to interrupt
4 you, but I -- I just want to make sure I
5 understand, 1331 grants jurisdiction to district
6 courts. The FTC Act grants jurisdiction to
7 courts of appeals for cease-and-desist orders.
8 There's no withdrawal jurisdiction anywhere in
9 the -- those statutes, and so you ask us to turn
10 to the APA to discern that. Is that right?

11 MR. STEWART: We're -- we're asking
12 you --

13 JUSTICE GORSUCH: Is that your
14 argument?

15 MR. STEWART: -- I -- I think the APA
16 confirms that the provision governing review of
17 final cease-and-desist orders is intended to
18 cover not only the final order itself but any
19 challenge --

20 JUSTICE GORSUCH: Well --

21 MR. STEWART: -- to the manner in
22 which the proceeding was --

23 JUSTICE GORSUCH: -- okay. So we're
24 on to the APA now. We're past the FTC Act. And
25 what do you say first to the argument that --

1 that that contention by the government was
2 forfeited or waived?

3 And, second, what do you say to the
4 argument that the sentence you're pointing to in
5 704 speaks to an agency action that's not
6 directly reviewable, is subject to review on the
7 final agency order, final agency action, and an
8 agency action is defined as "a rule, an order, a
9 license, a sanction, or relief?" And we have
10 none of those things here. So we don't have
11 agency action.

12 What do you say to those two -- two
13 arguments?

14 MR. STEWART: I -- I think -- as -- as
15 to the first point, I don't know -- think that
16 our court of appeals brief quoted this specific
17 sentence from the APA. We did make the argument
18 in the court of appeals that what they are
19 challenging is not final agency action to begin
20 with because, under Standard Oil, the
21 commencement of agency proceedings is not
22 reviewable at all. So that argument has been
23 preserved.

24 The -- the second thing I would say is
25 I think that agency action is at issue in this

1 case; that -- that is, Mr. Clement said what
2 we're really challenging is the composition of
3 the agency or the question of whether it's
4 constitutionally structured.

5 But, obviously, as a matter of Article
6 III, a plaintiff couldn't get into court simply
7 by saying the relevant statutory --

8 JUSTICE GORSUCH: I'm not concerned
9 about what the plaintiff's saying. I'm
10 concerned about where is the agency action that
11 would implicate 704. That 704, the sentence you
12 rely on, speaks of agency action being
13 reviewable upon the final order.

14 MR. STEWART: In this case, it --

15 JUSTICE GORSUCH: And, here, where --
16 where is the agency action? Under 551, I think
17 it's paragraph 13 maybe --

18 MR. STEWART: In -- in this --

19 JUSTICE GORSUCH: -- it defines agency
20 action, and -- and I'm just struggling to see
21 where that's present in this case.

22 MR. STEWART: In this case, it is the
23 commencement of the FTC's administrative
24 adjudication, the commencement by the FTC and
25 the assignment of that proceeding to an ALJ.

1 And -- and the point I was making is a
2 plaintiff can't get into court simply by saying
3 the statute is unconstitutional because the
4 agency is improperly structured. In order to
5 have Article III standing, the plaintiff would
6 have to say the agency is doing something or is
7 about to do something that injures me.

8 And, in this case, the thing that the
9 agency was about to do, because, as Mr. Clement
10 said, the suit was filed a few hours before the
11 proceeding was commenced, the thing that Mr.
12 Clement is complaining about is the fact that an
13 administrative adjudication was commenced.

14 Had there been no adjudication
15 commenced, perhaps Axon could have found other
16 --

17 JUSTICE GORSUCH: Do we have -- do we
18 have here a rule, an order, a license, a
19 sanction, or relief?

20 MR. STEWART: Well, the whole thing
21 that an -- and we -- we don't have that, and
22 that's why --

23 JUSTICE GORSUCH: We don't have any of
24 those things?

25 MR. STEWART: That -- but that's why

1 -- that is why we don't have final agency
2 action, but if Mr. -- if --

3 JUSTICE GORSUCH: Well, we can have an
4 interim order. That -- I mean, there are all
5 sorts of interim orders and interim relief that
6 an agency could grant to constitute agency
7 action under that definition.

8 MR. STEWART: If the Commission had
9 given no indication that it intended to commence
10 an administrative adjudication against Axon,
11 then Axon would clearly have lacked standing to
12 raise the claim that the ALJs were improperly
13 insulated from removal.

14 JUSTICE GORSUCH: All right. Let me
15 see if I just have a summary of it. Textually,
16 for -- putting aside other things, we don't have
17 anything in the FTC Act, we don't have anything
18 in 1331, we have to go to the APA, we have to
19 find that you didn't waive it, and we have to
20 agree with your understanding of what an agency
21 action is. Is that right?

22 MR. STEWART: Well, we -- you
23 certainly have -- have to agree that a plaintiff
24 needs to identify an agency action in order to
25 challenge the composition or structure of the

1 agency, but I think that is basic administrative
2 law.

3 I don't think any litigant or Justice
4 on the Court would say that the --

5 JUSTICE GORSUCH: I'm going to take
6 that as a yes.

7 JUSTICE KAGAN: I -- I don't
8 understand why you have to go to the APA, Mr.
9 Stewart. I mean, you have a statutory provision
10 that says there's jurisdiction over these
11 cease-and-desist or other final orders in the
12 courts of appeals, that jurisdiction is
13 exclusive.

14 The question is, what does that
15 subsume? And, I mean, you might be using the
16 APA as kind of an analogy to help you answer
17 that question, but you can answer that question
18 without the APA that, normally, in our legal
19 system, we understand that when you give
20 exclusive jurisdiction to a court as to a final
21 order it also subsumes a whole lot of
22 interlocutory things leading up to it.

23 MR. STEWART: I -- I would agree that
24 we would -- we don't need the APA, that this
25 would be the logical inference to be drawn from

1 the provision that authorizes court of appeals
2 review of final Commission orders. I -- I think
3 it is more than an analogy because the APA is
4 not simply a statute that covers district court
5 suits in circumstances where no special review
6 provision exists.

7 The APA covers, provides basic rules
8 of the road even for review of agency action
9 under a special review provision.

10 JUSTICE KAGAN: May -- may -- may I
11 ask --

12 CHIEF JUSTICE ROBERTS: Doesn't -- no,
13 go ahead.

14 JUSTICE KAGAN: Go ahead.

15 CHIEF JUSTICE ROBERTS: Doesn't Free
16 Enterprise stand as a pretty insurmountable
17 barrier to your argument?

18 MR. STEWART: No, I think there are
19 three distinctions between this case and Free
20 Enterprise Fund.

21 The -- the first is the Court in Free
22 Enterprise Fund stressed that, in order to
23 trigger an SEC adjudication and thereby get
24 judicial review under the Exchange Act review
25 provision, the Free Enterprise Fund would have

1 had to deliberately committed a violation and
2 subjected itself to penalties.

3 And this Court invoked MedImmune,
4 which, in turn, summarizes a long line of this
5 Court's decisions that say we really strain to
6 provide judicial review that is not contingent
7 on committing a violation and subjecting
8 yourself to penalties.

9 And -- and the Court in Standard Oil
10 addressed this point where the Court was
11 explaining why the requirement to participate in
12 the adjudication itself was different from what
13 was at issue in Abbott Labs.

14 And the Court said in Abbott Labs we
15 were dealing with judicial review of
16 regulations, and the rules imposed legal
17 obligations, you could get penalties, you could
18 be subjected to penalties if you violated them.

19 And in that --

20 CHIEF JUSTICE ROBERTS: I -- I thought
21 it was pretty clear in -- in that opinion that
22 the availability, the grant of judicial
23 jurisdiction in other forums wouldn't be read as
24 an implied removal of jurisdiction in 1331.

25 MR. STEWART: Well, the other thing

1 that was different about Free Enterprise Fund
2 was that in that case, people were not -- the --
3 the plaintiff was not complaining about removal
4 protections that attached to SEC officials who
5 conducted the adjudications. They were
6 complaining about the removal protections for
7 the PCAOB members, and it -- there was only a
8 kind of --

9 CHIEF JUSTICE ROBERTS: Oh, no, be --
10 the -- but the -- the Board's activities were
11 fully under the supervision of the agency.

12 MR. STEWART: Yes, but -- but the
13 point was their -- their -- their challenge was
14 to an ongoing investigation that affected them
15 on the ground. It had only a -- an attenuated
16 and speculative connection to any potential SEC
17 adjudication.

18 Here -- here, the challenge is
19 directed specifically at the adjudication
20 itself, and, as I say, it could -- the people --
21 people to challenge the removal protections for
22 FTC ALJs that have standing only if they were
23 involved in an actual or imminent FTC
24 adjudication.

25 The other thing I'd say is, in Elgin,

1 which was decided two years after Free
2 Enterprise Fund, the Court said we don't
3 distinguish for purposes of an exclusive review
4 provision between different types of
5 constitutional claims. And --

6 CHIEF JUSTICE ROBERTS: Well, in
7 Elgin, you -- you understand the response from
8 your friends on the other side that the claims
9 there was -- were intertwined with the
10 proceeding itself before the Commission while,
11 in this case, it doesn't matter what the
12 Commission's going to do under the -- your --
13 your friend's claim. It's still
14 unconstitutionally constituted.

15 MR. STEWART: Well, I -- I think Mr.
16 Clement, with -- with respect, was going back
17 and forth between two arguments. That is, he
18 said in this case our claim is systemic. We're
19 not arguing about anything that will happen in
20 any particular adjudication. We're arguing
21 about the way that the Commission is structured
22 and the way that its proceedings take place
23 generally.

24 But then, when he was asked to discuss
25 Elgin, he -- he acknowledged that, yes, the

1 claim in that case was that the federal statute
2 that provides for male-only Selective Service
3 registration was unconstitutional. That was the
4 nature of the Elgin plaintiffs' claims.

5 And he said it doesn't matter that
6 their legal theory was broad and sweeping. What
7 matters is that they asserted that legal theory
8 as a vehicle for trying to get their own jobs
9 back.

10 And we think he was right when he was
11 talking about Elgin. But we think that the same
12 thing is true here. What Axon is complaining
13 about is the fact that they are in an
14 administrative adjudication, and their complaint
15 sought certain forms of declaratory relief.

16 But the only injunctive relief it
17 sought, the only tangible change in the agency's
18 behavior that it sought was terminate the ALJ
19 proceedings, enjoin the administrative
20 adjudication.

21 And so, under Elgin, the fact that
22 their constitutional basis for seeking that
23 relief is broad and sweeping doesn't mean that
24 they can get in a court -- into court any sooner
25 than they could get into court --

1 JUSTICE KAGAN: May I step back for --
2 unless -- do -- do you have a sentence finisher
3 there?

4 MR. STEWART: No, that's fine.

5 JUSTICE KAGAN: I guess I was pretty
6 surprised when I read your brief, Mr. Stewart,
7 because, you know, three times in the last
8 couple of decades we've confronted a case like
9 this one and three times we've used Thunder
10 Basin to decide it.

11 And your brief doesn't talk about
12 Thunder Basin until page 51, and it doesn't use
13 -- it doesn't talk about Thunder Basin at all in
14 your summary of the argument.

15 And I -- I guess I read your brief and
16 I'm trying to figure out, do you think you lose
17 under Thunder Basin? Because I thought Thunder
18 Basin was the law here.

19 MR. STEWART: We -- we think that we
20 win under Thunder Basin. I -- I think, you
21 know, Mr. Clement thought that the Court in
22 Thunder Basin was tilting the scales against the
23 claimants.

24 I think the Thunder Basin perhaps
25 could have been written even more vigorously if

1 it said certain things that we are treating as
2 implications are, in -- in fact, buttressed by
3 the text of the APA.

4 And so, for instance, the Court has
5 said repeatedly when Congress provides for a
6 comprehensive and specific review mechanism
7 governing a particular class of agency conduct,
8 we will offer -- infer from that detail and
9 specificity that it is -- it is intended to be
10 exclusive and that review through an alternative
11 district court mechanism is unavailable.

12 And so what -- what we intended to be
13 an important point in our brief was that is not
14 just an inference. The APA actually says that.
15 And on the -- the same page of the appendix to
16 our brief, 5 U.S.C. 703 says "the form of
17 proceeding for judicial review is the special
18 statutory review proceeding relevant to the
19 subject matter in a court specified by statute
20 or, in the absence or inadequacy thereof, any
21 applicable form of legal action."

22 And so, again, the APA actually says,
23 if there is a special statutory review mechanism
24 and if it is not inadequate, then you have to
25 use that. You can only use the fallback review

1 mechanism in district court in the absence or
2 inadequacy of a special review mechanism.

3 So we were trying to respond to the
4 argument that Thunder Basin is on thin ice
5 because it's all implication by saying no, there
6 is specific language in the APA that says the
7 same thing.

8 JUSTICE JACKSON: But what about the
9 argument that Thunder Basin either supports you
10 just on its actual elements or doesn't? I --
11 I'm -- I'm trying to understand your argument
12 with respect to the collateral nature or not of
13 the claims that are being made in this case.

14 MR. STEWART: We think Thunder Basis
15 supports us. That is, the first factor is
16 meaningful review available through the -- the
17 -- the special review provision. That maps on
18 precisely to the APA language about inadequacy
19 of review. And we say this is adequate because,
20 at the end of the day, if a court agrees with
21 their constitutional theory, it can set aside
22 the final order issued by the --

23 JUSTICE JACKSON: What about
24 collateral? Isn't that the hardest part for
25 you?

1 MR. STEWART: I -- I don't think it is
2 because the -- the Thunder Basin test refers to
3 collateral to the review provisions. And in our
4 view, this is really the -- the least collateral
5 thing you can imagine; that is, the very thing
6 -- it -- it is not like in Thunder Basin or in
7 Elgin, where the plaintiff was complaining about
8 something that happened in the world, the
9 requirement that the employer post a notice in
10 Thunder Basin or the termination from employment
11 in Elgin, and then the question was, do you have
12 to go through this review scheme?

13 Here, the review scheme is the precise
14 thing that they are complaining about. They are
15 saying --

16 JUSTICE ALITO: Do you think that --

17 JUSTICE KAGAN: I mean, I don't
18 understand --

19 JUSTICE ALITO: Do you think that
20 meaningful review means no review? Do you think
21 a party gets meaningful review if, unless at the
22 end of the administrative proceeding, it can't
23 get any review of its claim?

24 MR. STEWART: It -- it -- I -- I
25 think, if it can't get review of the claim, that

1 would be correct, but if the --

2 JUSTICE ALITO: Sure. Then it has no
3 review. So what does the word "meaningful" add
4 to it?

5 MR. STEWART: I mean, I -- I think
6 what the Court is -- what the statute -- or --
7 or what the Court is perhaps getting at is in
8 circumstances, for instance, like Digital
9 Equipment. Digital Equipment involved a -- a
10 situation in which the defendant said -- I'm
11 sorry, the -- a better case would be Mohawk,
12 where the question was, should materials that
13 were arguably subject to the attorney-client
14 privilege be turned over?

15 And the district court said no, and
16 the question was, is that immediately appealable
17 under the collateral order doctrine? And the
18 Court said no collateral order review, that if
19 these materials are introduced at trial and
20 that's later determined to be error, you can get
21 vacatur of the judgment and that's good enough.

22 And the Court acknowledged that
23 wouldn't undo the whole harm of turning over
24 privileged materials because the privilege was
25 against disclosure at all, not simply about the

1 introduction in court proceedings, but this is
2 good enough. And -- and I think similarly here.

3 And -- and to -- to kind of proceed
4 directly to the -- the argument that the -- Axon
5 is making, the -- the prime argument as to why
6 review at the end of the day wouldn't be
7 adequate is that it wouldn't save them from the
8 burdens of the proceeding. They would still get
9 review only after having gone through the ALJ
10 and Commission adjudication.

11 And -- and that's the kind of argument
12 that the Court has rejected time after time. In
13 FTC versus Standard Oil, the claim was there was
14 an inadequate evidentiary basis for commencing
15 the adjudication in the first place.

16 JUSTICE ALITO: Let me ask a question
17 that -- that is simplistic perhaps. What sense
18 does it make for a claim that goes to the very
19 structure of the agency having to go through the
20 administrative process?

21 MR. STEWART: I -- I think we would
22 say two things, and I'll say what I really
23 believe to be the less important point first.
24 The first is the SEC -- I'm -- I'm sorry, the
25 FTC Commissioners probably don't have anything

1 about their own removal protections that a court
2 would find useful, but the Commissioners do have
3 expertise in the way that the adjudications are
4 conducted. And so they could say it might seem
5 like a black box to someone else, but here are
6 the criteria that we use to determine which
7 cases will go to court or which cases --

8 JUSTICE ALITO: Well, I'm talking
9 about -- let's take the removal -- the removal
10 claim. That's really what I'm thinking of to
11 start out.

12 MR. STEWART: I -- I -- I would say
13 two things. The first is, even as to that, the
14 FTC Commissioners could say here are what we
15 think of as the advantages and disadvantages of
16 removal protections for our ALJs. And the
17 court -- the -- the agency couldn't declare the
18 statute unconstitutional, so it couldn't provide
19 relief on that ground at the end of the day, but
20 it could still provide something that could be
21 useful to a reviewing court.

22 But the main practical advantage, the
23 main reason we think it makes sense are the
24 reasons that the Court identified in *FTC versus*
25 *Standard Oil*. First, you avoid piecemeal

1 litigation. If there's ultimately a
2 cease-and-desist order entered, it may well be
3 that Axon will want to challenge it not just on
4 the ground that various officials had improper
5 removal protections but also on the ground that
6 there was no antitrust violation or that the ALJ
7 committed some error in the conduct of the
8 proceedings.

9 And as the Court said in Standard Oil,
10 by deferring review until the end of the day, we
11 ensure that all of those challenges can be
12 consolidated in a single proceeding.

13 JUSTICE ALITO: But this argument
14 about the -- the removal status of ALJs hangs
15 over everything the agency is doing. Isn't it
16 in your interest to get this decided?

17 MR. STEWART: Well, we -- we actually
18 have a case out of the Fifth Circuit in Jarkesy
19 in which the court recently denied -- the Fifth
20 Circuit recently denied rehearing en banc, in
21 which the Fifth Circuit has held that two layers
22 of removal protections for the ALJs do violate
23 the Constitution. And so we do have a prospect
24 of getting that to the court and getting a -- a
25 final resolution now, and that's the way that

1 these issues have been decided recently in cases
2 like *Seila Law*, *Arthrex*, *Noel Canning*. You had
3 systemic challenges to the way that agency
4 adjudications were conducted, but the Court has
5 always resolved those challenges in the context
6 of an appeal from an actual agency adjudication.

7 And to go -- to go back to -- to your
8 prior question, the second thing that the Court
9 said in *Standard Oil* as an advantage of
10 deferring review, in addition to the fact that
11 you avoid piecemeal litigation, is that
12 sometimes the agency adjudication will culminate
13 in a way that makes judicial review unnecessary.

14 And so, for instance, if the FTC
15 ultimately agrees with *Axon* that there was no
16 antitrust violation here or that it's been
17 sufficiently cured, the Court would not need to
18 weigh in. And the Court in *Standard Oil* pointed
19 out that has traditionally been seen as an
20 advantage rather than a disadvantage of
21 requiring agency processes.

22 CHIEF JUSTICE ROBERTS: It -- when
23 given that laundry list of cases where the
24 government didn't prevail, and -- and I gather
25 the one in the Fifth Circuit as well, doesn't

1 that underscore the need for direct -- a direct
2 proceeding to raise the constitutional claim
3 rather than waiting however many years before
4 the agency?

5 MR. STEWART: I mean, it -- it -- it
6 -- this -- it is -- this is true of deferral of
7 review generally in -- both in the collateral
8 order doctrine and in the agency review context,
9 that, yes, when a challenge has been found to be
10 meritorious, we will almost always say, looking
11 back on it, it would have saved people time and
12 trouble if there had been a more expeditious --

13 CHIEF JUSTICE ROBERTS: Well, that's
14 the case with respect to one, but this is a
15 series of cases that are a constellation around
16 some fairly basic propositions. And to have it
17 go over and over and over again, it does make
18 the case about the need for direct resolution of
19 a related claim pretty strong.

20 MR. STEWART: Well, as we've said in
21 our brief, mandamus review is available in
22 extreme cases. And so, for instance, if an
23 agency in the -- had simply flouted Seila Law
24 and -- or, I'm sorry, had flouted Lucia and in
25 the wake of Lucia had continued to conduct

1 adjudications through ALJs who had not been a --
2 appointed in conformity with the Appointments
3 Clause, then mandamus review could have been
4 granted.

5 But I think it would be perilous to
6 try to identify a class of systemic challenges
7 that, from recent experience, we think are
8 sufficiently likely to proceed that they should
9 go to -- to the front of the line.

10 JUSTICE GORSUCH: Isn't that a little
11 awkward, though, that we -- we would think that
12 the APA or -- or whatever precludes 1331
13 jurisdiction to resolve these claims, but it
14 doesn't preclude All Writs Act jurisdiction in
15 the district court to -- to -- to bring these
16 claims? I mean --

17 MR. STEWART: No.

18 JUSTICE GORSUCH: -- what if Mr.
19 Clement had simply styled this as a mandamus
20 petition, suggesting that the FTC had acted
21 wholly without jurisdiction, which is a classic
22 mandamus argument, because of all of our
23 mountain of precedent with respect to two layers
24 of removal?

25 MR. STEWART: He certainly could have

1 made that argument. I -- I --

2 JUSTICE GORSUCH: And so then we would
3 have been in district court, and that would have
4 been okay?

5 MR. STEWART: No. First, the mandamus
6 petition would have had to be filed in the court
7 of appeals. That is the All Writ -- the 1651
8 authorizes courts to issue writs in aid of their
9 jurisdiction. And we cited a couple of cases --

10 JUSTICE GORSUCH: Okay. So he would
11 have been in the court of appeals, but he could
12 have gotten to a court immediately --

13 MR. STEWART: But --

14 JUSTICE GORSUCH: -- you would agree,
15 to raise his claim if he had simply styled it
16 under the All Writs Act rather than under 1331?

17 MR. STEWART: The only claim that he
18 could have raised under mandamus would have been
19 that he had a clear and indisputable right to
20 this relief. And I think that even --

21 JUSTICE GORSUCH: Well, that's -- that
22 -- I think that's the nature of his argument,
23 that the two layers of removal is clear and
24 indisputable.

25 MR. STEWART: It -- it can't be --

1 JUSTICE GORSUCH: Let's suppose it
2 were. Let -- let's -- he could do that.

3 MR. STEWART: Oh, he -- if it were
4 clear and indisputable, if the Court in Free
5 Enterprise Fund had said "and our holding about
6 double for-cause removal applies to adjudicative
7 officials as well, he would have a clear and
8 indisputable right to relief."

9 Now the Court in Free Enterprise Fund
10 did the opposite of that. It said "we are
11 specifically reserving the question whether
12 adjudicative officials are to be treated
13 differently."

14 He -- he -- Mr. Clement may win on
15 that argument in -- in the fullness of time, but
16 I don't think he could plausibly have told a
17 court of appeals on a request for mandamus that
18 he had a clear and undisputable right to that.

19 JUSTICE GORSUCH: Why -- why -- why --
20 why does the APA preclude 1331 but not All
21 Writs?

22 MR. STEWART: I -- again, I don't
23 think of it as the APA precluding. The APA
24 confirms the inference that the court of appeals
25 is the only court to exercise review.

1 And, in general, the court of appeals
2 jurisdiction is limited to the final
3 cease-and-desist order. But we cited two cases
4 at page 50 of our brief that said -- say "when
5 the All Writs Act refers to issuing writs in aid
6 of your jurisdiction, that can mean not only an
7 actual pending appeal but a potential appeal."

8 And so the court that could review the
9 cease-and-desist order has a form of ancillary
10 jurisdiction to -- to superintend the
11 administrative process to the extent of being
12 able to step in if there is really an egregious
13 deviation from appropriate practice.

14 JUSTICE KAGAN: Mr. Stewart, go --
15 going back to Thunder Basin, I -- I told Mr.
16 Clement that I thought his worst factor was
17 meaningful review. I -- I think that the other
18 two factors are pretty darn bad for you.

19 On expertise, the Court in Free
20 Enterprise Fund, whatever distinctions there
21 might be as between Free Enterprise Fund and
22 this case, the Court in Free Enterprise Fund
23 just says you lose on expertise.

24 Then, on collateral, I mean, I think
25 just the ordinary understanding of what we --

1 what we mean when we use that term is, is it
2 unrelated to the essence or the subject matter
3 of this dispute, and -- and a -- a -- a claim
4 that goes to the legitimacy of the agency
5 structure as a whole is completely unrelated to
6 the subject matter of the suit.

7 So why aren't those two pretty easy
8 wins for Mr. Clement?

9 MR. STEWART: I -- I think, as to the
10 -- even as to the expertise factor, the SEC may
11 have lacked expertise regarding the way in which
12 the PC -- the -- the removal protections for the
13 PCAOB officers, but it certainly has expertise
14 in the way SEC adjudications are conducted.

15 But the second thing I would say is,
16 if this were a challenge, for instance, to a
17 rule of evidence that bound the ALJ and -- and
18 the rule -- and it was being attacked on the
19 ground that it violated due process because it
20 didn't allow the respondent in the proceeding a
21 sufficient opportunity to rebut the agency's
22 charges, we would surely say that challenge has
23 to go through the administrative scheme.

24 It may -- whether the due process
25 challenge succeeds may be unrelated to the

1 merits of any particular allegation that a
2 regulated party has violated the FTC Act, but
3 it's still -- it is still not collateral to the
4 review provisions because it goes to the way in
5 which the administrative adjudication will be
6 conducted.

7 And -- and, here, we have basically
8 the same thing, that -- oh -- oh, the challenge
9 to the removal protections for the FTC
10 Commissioners is a little bit different because
11 the FTC does a lot of other things.

12 If the Commission issued a rule, then
13 the rule could be challenged on the ground that
14 the Commissioners were unlawfully protected from
15 removal. That kind of challenge is not
16 inherently linked to a --

17 JUSTICE KAGAN: I -- I mean, if -- if
18 -- if I just sort of cut to -- to the core of
19 your argument, you seem to be saying something
20 like it -- it's not collateral if it arose from
21 an enforcement proceeding. But almost
22 everything is going to arise from an enforcement
23 proceeding. That -- you -- you're basically
24 making the collateral inquiry do no work at all.

25 MR. STEWART: I -- I think we're --

1 there's a difference between asking did it arise
2 from the -- well, did it arise from the
3 enforcement proceeding and was it directed at
4 the enforcement proceeding.

5 For instance, the statute that governs
6 the SEC, the Exchange Act, authorizes the SEC to
7 issue temporary cease-and-desist orders that
8 constrain the regulated parties' conduct while
9 the adjudication is ongoing.

10 And that -- that may be -- and the
11 Exchange Act specifically provides for district
12 court review of those orders because they
13 require the party to do more than participate
14 the -- in the proceedings themselves. They
15 constrain the parties' freedom of movement
16 outside the proceedings.

17 And -- and those could be viewed as
18 collateral because even though they are
19 contingent on the pendency of an adjudication,
20 they are still not part of the process by which
21 the adjudication is resolved. They affect
22 private conduct outside the scope of the
23 proceedings themselves.

24 I -- I will say one other thing about
25 the Court's collateral review doctrine --

1 collateral order doctrine, that both in the
2 agency -- I'm sorry, Mr. Chief --

3 CHIEF JUSTICE ROBERTS: You can finish
4 your thought.

5 MR. STEWART: Both in the agency
6 review context and in the collateral order
7 context, really, the only exception the Court
8 has recognized to the general principle that you
9 can't get out of it simply by invoking the
10 burdens of the proceedings, the only exception
11 to that principle is claims of immunity.

12 So the Court has said adverse rulings
13 under -- on the double jeopardy clause, on state
14 sovereign immunity, on qualified immunity, they
15 can be appealed immediately, but other claims
16 that would terminate the proceedings can't.

17 What we have here is at the first --
18 furthest extreme from a claim of immunity.

19 CHIEF JUSTICE ROBERTS: Thank you.

20 Justice Thomas?

21 JUSTICE THOMAS: Mr. Stewart, I'm
22 interested in how -- what that review would look
23 like before the FTC. How would they consider
24 Mr. Clement's, Petitioner's, claims here?

25 MR. STEWART: I -- I think the ALJ --

1 JUSTICE THOMAS: Particularly the
2 constitutional claims.

3 MR. STEWART: Probably the ALJ
4 wouldn't consider them at all. And the FTC, if
5 it proceeded to that point, if there was a -- a
6 -- an appeal to the FTC, he -- he's right that
7 they could -- the FTC couldn't declare a federal
8 statute unconstitutional, but it could say here
9 are what we think of as the strengths and
10 weaknesses of giving removal protections to the
11 ALJs, coming at it from a -- a -- their
12 perspective, coming at it from a position of
13 expertise.

14 The -- the corollary point I would
15 make, in FTC versus Standard Oil, the Court said
16 that -- said we don't anticipate that the agency
17 in the course of the administrative proceedings
18 will reconsider its original determination that
19 there was reason to believe a violation had
20 occurred.

21 So the justification was -- for
22 deferring review was not that the Court expected
23 the agency to shed more light on it in the
24 course of the proceedings.

25 JUSTICE THOMAS: And the -- the

1 remedy, I assume, that they would like is an
2 injunction against having to appear before an F
3 -- a Commission or an ALJ they think is
4 unconstitutionally appointed.

5 So how would they get that remedy at
6 the appellate court level?

7 MR. STEWART: I -- I mean, I think
8 they would -- they -- I think the remedy they
9 would be entitled to at the appellate court
10 level -- they would be vacatur of the
11 cease-and-desist order. And if the court of
12 appeals said our rationale for vacating the
13 cease-and-desist order is that we think that the
14 ALJs are unconstitutionally insulated from
15 removal, that would effectively preclude the FTC
16 from using the adjudicative method in any case
17 that could've -- be appealed to the Eighth
18 Circuit, unless and until -- yeah, unless -- I'm
19 sorry, the Ninth Circuit, unless and until the
20 removal protection was eliminated.

21 Now, if the case ever reached this
22 Court and the Court said it was right to vacate
23 the cease-and-desist order because we agree that
24 the ALJs had an unconstitutional removal
25 protection, this Court could specify what's the

1 remedy, what statutory provisions could be
2 severed, et cetera.

3 JUSTICE THOMAS: Thank you.

4 CHIEF JUSTICE ROBERTS: Justice Alito?

5 JUSTICE ALITO: On the Thunder Bay
6 factors, does Axon have to win on all three, do
7 you have to win on all three, or is the
8 appropriate course to balance how they -- how
9 they end up?

10 MR. STEWART: I mean, I think, if Axon
11 won on Factor 1, that would be sufficient under
12 the APA because the APA, the provision I was
13 referring to earlier, Section 703, says the form
14 of proceeding is the special statutory review
15 proceeding, except -- or in the absence or
16 inadequacy thereof any form of action in
17 district court.

18 And so I think the implication of that
19 is, if Axon prevailed at the first Thunder Bay
20 factor, if it showed that the -- there was no
21 meaningful relief at the end of the day, that
22 would be tantamount to saying the -- the
23 specified statutory review provision is
24 inadequate for purposes of this sort of claim.
25 And -- and that would facilitate suit in

1 district court.

2 JUSTICE ALITO: Okay. Suppose they
3 lose on the first factor but win on the other
4 two. What happens?

5 MR. STEWART: I mean, I --

6 JUSTICE ALITO: You say they have to
7 -- they have to win on all three?

8 MR. STEWART: I mean, I -- I think the
9 first factor under the text of the APA is the
10 most important factor because it says "you use
11 the special statutory review procedure unless
12 it's inadequate."

13 I -- another category of cases that I
14 haven't mentioned in which the collateral factor
15 could be relevant is suppose that at the same
16 time Axon had a pending adjudication the
17 Commission issued a rule, a regulation that
18 caused Axon separate harm.

19 There is a separate provision of the
20 FTC Act that authorizes court of appeals review
21 of regulations, and that sort of dispute would
22 clearly be collateral to the adjudication. It
23 would be a step -- a legal dispute between --
24 with between the regulated party and the same
25 agency.

1 JUSTICE ALITO: But this is really
2 kind of a simple question, and maybe Mr. Clement
3 will also address it when he -- when he delivers
4 his rebuttal. Does Axon have to win on all
5 three? Do you have to win on all three? Or can
6 either of you win if one or more factors go in
7 one direction and the other factor or factors go
8 in the other direction?

9 MR. STEWART: I -- I -- I'm not trying
10 to be obstreperous, but I think it would depend
11 on the rationale for holding that this is not
12 collateral. That is, if you say so long as it
13 is unrelated to the merits of the -- the claim,
14 then it is collateral, even if it is a tack on
15 the way that the adjudication will be conducted.
16 I don't think that would be sufficient.

17 JUSTICE ALITO: Okay. Thank you.

18 CHIEF JUSTICE ROBERTS: Justice
19 Sotomayor?

20 JUSTICE SOTOMAYOR: I -- I have a
21 question about Mathews versus Eldridge. The
22 Ninth Circuit held, and it makes some sense to
23 me, that "wholly collateral" should be
24 understood to mean not the procedural vehicle
25 that a party is using to reverse the agency act

1 -- decision. But that definition doesn't fit
2 with Mathews v. Eldridge.

3 I think -- I could be wrong, and you
4 can correct me -- that Mathews v. Eldridge talks
5 about what's meaningful, correct?

6 MR. STEWART: Yes. And, I mean,
7 Mathews versus Eldridge dealt with a very
8 specific fact pattern: In -- individuals who
9 had been receiving Social Security disability
10 benefits were informed that they were -- that
11 the relevant agency considered them no longer to
12 be disabled, and, therefore, their benefits
13 would be terminated.

14 And the specific complaint in Mathews
15 versus Eldridge was "my benefits were terminated
16 before I received a hearing." They were still
17 entitled to a hearing down the road, and they
18 could get retroactive benefits if their benefits
19 were terminated, and then, at the end of the
20 day, they were found to be entitled. But there
21 would be an interruption of the stream of
22 benefits.

23 And the Court said "that's
24 sufficiently collateral to the overall
25 proceedings that you don't have to use the

1 review mechanism that you would use after your
2 benefits claim was finally resolved."

3 But I think that case really has a
4 close resemblance to the collaterals -- I mean
5 the temporary cease-and-desist order that I
6 mentioned earlier; that is, sometimes you have
7 situations where you have an ongoing proceeding,
8 and then you have a dispute about what rules
9 will apply while the proceeding continues,
10 before the proceeding -- is resolved. And the
11 claimants in -- the Court said in Mathews versus
12 Eldridge the claimant -- the claimants didn't
13 have any problem with the totality of the
14 proceedings that would be used to make a final
15 determination of what they got, the benefits.
16 What --

17 JUSTICE SOTOMAYOR: Mr. Stewart, I --
18 and -- I have a separate part of this question.

19 MR. STEWART: Okay. Sorry.

20 JUSTICE SOTOMAYOR: I think that there
21 are three claims, constitutional claims, here.
22 One is the removal. And I really -- whether or
23 not they like the double renewal or not, that
24 they could advise us about that. In an
25 adjudication, that's a pure legal question,

1 okay? Pure constitutional legal question. It's
2 rarely fact-bound in the same way.

3 That's different than the clearance
4 process and combined investigate --
5 investigator/prosecutor/ adjudicator claims,
6 which they call their due process claims. And I
7 think the Chief was right, where you draw that
8 line is really hard to draw.

9 So tell me what the agency could tell
10 us about the other two that counsels waiting
11 until the end.

12 MR. STEWART: Well, I mean, the first
13 thing we would say about the -- kind of the
14 black-box claim, the -- the contention that
15 there is either not a sufficient process or not
16 a sufficiently transparent process for deciding
17 when we go to court and when we commence agency
18 proceedings, that's kind of at the farthest
19 removed from any contention that the precedents
20 of this Court have more or less decided it and
21 so it's a waste of time.

22 The -- the -- I guess what -- what we
23 would say is the attempt to distinguish among
24 these claims is contrary to the Court's
25 precedents. That is, Elgin was decided two

1 years after Free Enterprise Fund, and the Court
2 said "it would be unproductive and confusing to
3 try to distinguish among constitutional claims
4 in order to determine which can go forward
5 immediately and which have to wait until the end
6 of the day, that what the focus ought to be on
7 is, what agency action are you challenging and
8 what relief are you seeking?"

9 And, here, they're challenging the
10 commencement of an adjudication. They're
11 seeking an injunction against the a --
12 adjudication. And it doesn't matter what their
13 different theories of relief are. Those are the
14 salient points for purposes of when they get
15 into court.

16 JUSTICE SOTOMAYOR: Thank you.

17 CHIEF JUSTICE ROBERTS: Justice Kagan?
18 Justice Gorsuch?

19 JUSTICE KAVANAUGH: On Elgin, you
20 emphasize that the Court said "that just because
21 it's a constitutional claim doesn't mean that
22 you have to go -- that you can avoid the agency
23 review process." That case definitely helps
24 you. No doubt about it.

25 But then Free Enterprise Fund makes

1 clear, and I realize it was two years earlier,
2 that some constitutional claims, you can avoid
3 the agency process, namely, I think, on 490,
4 claims going to the Board's existence. And --
5 and I think where the confusion has come in in
6 the courts of appeals, and the courts of appeals
7 have been very explicit about trying to figure
8 out the distinction between Free Enterprise Fund
9 and Elgin, is that next paragraph of Free
10 Enterprise Fund, which was responding to the
11 government's argument that, oh, you could just
12 get review afterwards anyway.

13 And the Court said: "No, not in this
14 particular circumstance because the court --
15 because the plaintiff was challenging the
16 investigation itself and there might not be a
17 final sanction."

18 And the question's really, if you're
19 just sticking within the precedent, you know, is
20 that last -- is that second paragraph in Free
21 Enterprise Fund, is that just responding to the
22 government's argument, or is that setting forth
23 a condition that is necessary before you can
24 avoid the agency review process?

25 I think that's what the court of

1 appeals have zeroed in on, exactly that, and I'd
2 be interested in your response.

3 MR. STEWART: I -- I mean, I -- I
4 don't know that it's -- I -- I think the Court
5 in Free Enterprise Fund in the paragraph you
6 refer to, the idea that in order to trigger an
7 SEC adjudication, you would have to commit a
8 violation deliberately and subject yourself to
9 penalties, I think that's really the -- the
10 heart of the opinion.

11 And I think, in that respect, it was
12 not announcing anything new. It was drawing on
13 a long line of precedent that said --

14 JUSTICE KAVANAUGH: But -- but one
15 could say the heart of the opinion -- and to
16 follow up on Justice Alito's question, the --
17 the Court really emphasizes the wholly
18 collateral factor, and one could say that the
19 heart of the opinion is the paragraph before,
20 where, in responding to the government's
21 argument, the Court says but Petitioners object
22 to the Board's existence, not to any of its
23 auditing standards. Petitioners' general
24 challenge to the Board is collateral to any
25 Commission orders or rules from which review

1 might be sought.

2 So you could say, "well, Free
3 Enterprise Fund was about a challenge to the
4 Board's existence or structure, and, therefore,
5 it's collateral."

6 MR. STEWART: I -- I guess the two
7 things I would say are, first, Elgin did come
8 two years after Free Enterprise Fund, and it
9 said don't distinguish among constitutional
10 claims. And that would be a peculiar thing to
11 say if the Court thought it had announced the
12 other principle.

13 But the other thing I would say is, to
14 the extent that you read the MedImmune
15 paragraph, the bet-the-farm paragraph, as the
16 heart of the opinion, then the case was drawing
17 on a -- a very longstanding, well-established
18 body of doctrine. It was articulating a
19 principle that the Court had articulated time
20 and again, that regulated parties should not
21 have to commit violations in order to get
22 judicial review.

23 If you say the crucial part of the
24 opinion was the part that said "this is a
25 systemic challenge to the -- kind of the very

1 composition of the agency, you are -- you're
2 introducing a thought that really had -- as an
3 exclusive test or a predominant test, had no
4 grounding in the Court's precedents, and it's
5 very hard to square with constitutional
6 avoidance principles." That is, usually, we
7 would say "we'll try particularly hard to avoid
8 constitutional challenges if it's possible to do
9 so." And so it would be peculiar to say at a
10 stage of the proceedings where you couldn't
11 raise any other sort of challenge, you can raise
12 a broad-ranging constitutional challenge to the
13 -- kind of the -- the very composition and
14 structure of the agency.

15 JUSTICE KAVANAUGH: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice
17 Barrett?

18 JUSTICE BARRETT: So I have a question
19 about meaningful review, although it -- it -- it
20 overlaps a little bit with the collateral point.

21 So, on page 36 of his brief, Mr.
22 Clement points out that Axon's beef is not that
23 it must pay an invalid fine or should not lose a
24 job on an unconstitutional basis, like the
25 claims in Thunder Basin and Elgin, that the

1 relief that it's seeking, you know, isn't going
2 to get it off the hook from liability altogether
3 for either a constitutional reason or some
4 reason related to the application of the statute
5 to its facts.

6 Now Justice Sotomayor pointed out
7 earlier that even a -- a structural challenge to
8 the agency is a means of escaping from an
9 ultimate order. It's -- it's a challenge that
10 you can make to get out from under it. But I
11 take Mr. Clement's point to be that, listen, the
12 most we get is a do-over. So this isn't just
13 about having to endure the expense and the
14 inconvenience of proceedings before we can
15 ultimately challenge them and get relief. It's
16 that the relief that we get in the end isn't an
17 ultimate out from liability, but it's simply
18 saying, if you want to come after us again, you
19 have to do it in a properly constituted agency.

20 Is that an argument that you find
21 persuasive on the meaningful review point?

22 MR. STEWART: I -- I -- I -- I don't
23 because they -- they -- if -- if anything, you
24 would think it would cut the other way. If
25 anything, you would say -- think that they would

1 be arguing getting this particular
2 cease-and-desist order set aside wouldn't
3 provide adequate relief because -- it wouldn't
4 provide meaningful relief because they could
5 always come at us some other direction.

6 I -- I think it'd -- still, in
7 determining whether it's adequate relief, the --
8 the only real reason they've said this would be
9 inadequate is we will have to go through the
10 proceeding itself if we wait -- have to wait for
11 a cease-and-desist order in order to get
12 judicial review.

13 And the Court has said in a variety of
14 contexts that's not a sufficient basis either
15 for a -- avoiding the limits on judicial review
16 of agency action or for getting immediate review
17 under the collateral order doctrine.

18 JUSTICE BARRETT: Thanks.

19 CHIEF JUSTICE ROBERTS: Justice
20 Jackson?

21 Thank you, counsel.

22 MR. STEWART: Thank you.

23 CHIEF JUSTICE ROBERTS: Rebuttal, Mr.
24 Clement?

25

1 REBUTTAL ARGUMENT OF PAUL D. CLEMENT
2 ON BEHALF OF THE PETITIONER

3 MR. CLEMENT: Thank you. Just a few
4 points in rebuttal.

5 First of all, my friend on the other
6 side is very focused on the APA and review of
7 agency action, but, of course, here, we're not
8 really challenging agency action as such.

9 We are challenging the
10 constitutionality of statutes that insulate
11 agency officials from presidential removal, and
12 we're challenging the assignment process, the
13 clearance process that actually precedes any
14 agency action by the FTC.

15 My friend loves the Standard Oil case,
16 but the Standard Oil case, of course, is a
17 finality case. It's not, strictly speaking, a
18 jurisdictional case. And it also illustrates
19 how different this case is from that.

20 In that case, what Standard Oil's beef
21 was about was about the initiation of a
22 complaint. They said we're so innocent from all
23 of this you shouldn't have even initiated a
24 complaint.

25 Well, of course, that is unripe -- an

1 unripe challenge because that agency action is
2 very specific to that individual company and
3 will eventually be merged into the final agency
4 action. But what we have in these cross-cutting
5 constitutional claims is fundamentally
6 different.

7 Now my friend also invoked this
8 argument in the briefs, this kind of standing
9 jurisdiction trap until you have an agency
10 action you don't have standing. Then, as soon
11 as you do, you're stuck in the agency forever
12 until they let you out.

13 That's sort of wrong on both ends, I
14 think. I mean, first of all, if we have a
15 reasonable belief that we're about to be subject
16 to agency action that we think is
17 unconstitutional, the government would have to
18 come in in -- in response to our complaint and
19 say, well, they have no reasonable risk, that's
20 speculative.

21 I don't think they could have done
22 that the morning we filed our complaint when
23 they were going to initiate action later that
24 day. And if we'd done it three weeks earlier or
25 four weeks earlier, we would still have standing

1 to bring the claim. It doesn't depend on the
2 agency action. It depends on a meaningful
3 possibility that we're going to be subjected to
4 government action.

5 And on the back end, we think, for all
6 the reasons we've talked about, we're not in
7 this jurisdictional trap because we're not
8 really challenging the agency action.

9 Now, on the difference between the APA
10 factors and the Thunder Basin factors, I mean, I
11 was quite surprised when the government was
12 asked about its argument under the Thunder Basin
13 factors that it seemed to really want to talk
14 about the APA instead, and I sort of took from
15 the whole colloquy that the government's view is
16 that the Thunder Basin factors are kind of a bad
17 gloss or an inadequate gloss on where the APA
18 would get you.

19 And maybe, you know, that starts to
20 make me think that maybe the straightforward way
21 of approaching this is right if I kind of
22 thought the best thing you could say about the
23 Thunder Basin factors is they sort of get you
24 where you would get with the APA anyway, so it's
25 kind of no harm, no foul, but if even the

1 government thinks that that's not the right
2 gloss on the APA, maybe we should just stick
3 with the text.

4 Now that brings us to the Thunder
5 Basin factors. Justice Alito asked, you know,
6 are the three factors necessary or sufficient.
7 I don't think -- when the Court was formulating
8 those three factors, I think they're more
9 guideposts than factors. I don't think they
10 were designed perfectly to be mutually exclusive
11 and collectively exhaustive.

12 I think, if you look at the way this
13 Court applied them, they tend to kind of all go
14 in a sweep one way or the other. Either all
15 three factors go together one way, or all three
16 factors go the other way.

17 I suppose, if there were a case of a
18 true, like, you know, kind of tie or a toss-up,
19 I'd like to think that the tie would go to the
20 citizen and to judicial review and to the text
21 of 1331 and that the tie wouldn't go to being
22 sucked into administrative action that you're
23 challenging as unconstitutional.

24 Lastly, on the issue of meaningful
25 relief, I mean, as to the removal claims in

1 particular, I mean, with all due respect to this
2 Court, if you look at what the splintered
3 decisions in the Collins case, when it came to
4 relief for this kind of removal action, when
5 it's retrospective, that seems like a
6 particularly good reason to allow prospective
7 relief and say, look, if an agency is
8 unconstitutionally structured, we shouldn't have
9 to go in there prospectively. And then you
10 don't have to get into all these difficult
11 questions about how to remedy the situation
12 retrospectively.

13 Second, just on the government's
14 response about the Jarkesy case, if you bake --
15 if you really think about the answer there,
16 there is a constitutional problem that I think
17 has been glaring since this Court decided the
18 Lucia case in the October term 2017.

19 The government's response is you might
20 be able to review that question in October '23
21 if and only if the government decides to file a
22 cert petition.

23 From the perspective of those subject
24 to this unconstitutional action, that's not good
25 enough. We should be able to go into court

1 under 1331 and get an immediate answer as to
2 whether or not the writing is on the wall and
3 this structure is unconstitutional.

4 And, lastly, the government says,
5 look, it's every citizen's burden to have to go
6 through these administrative processes before
7 you get judicial review.

8 I don't think that's right if the
9 administrative agency is alleged to be
10 unconstitutional or you're alleged to have to go
11 in front of the wrong agency. That should not
12 be the burden of citizenship, particularly given
13 the clarity with which 1331 promises judicial
14 review.

15 Thank you.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel. The case is submitted.

18 (Whereupon, at 11:34 a.m., the case
19 was submitted.)

20

21

22

23

24

25

Official

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