

No. 22-256

In the
Supreme Court of the United States

CLETUS WOODROW BOHON, BEVERLY ANN BOHON,
WENDELL WRAY FLORA, MARY MCNEIL FLORA,
ROBERT MATTHEW HAMM AND AIMEE CHASE HAMM,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION AND
MOUNTAIN VALLEY PIPELINE, LLC,
Respondents.

*On Petition for Writ of Certiorari to the United States
Court of Appeals for the District of Columbia Circuit*

REPLY BRIEF FOR PETITIONERS

SYDNEY PHILLIPS
Counsel of Record
P.O. Box 552
Olympia, WA 98507
(434) 426-4442
sPhillips@freedomfoundation.com

MIA YUGO
CHRISTOPHER E. COLLINS
YUGO COLLINS, PLLC
25 Franklin Rd. SW
Roanoke, VA 24011
(540) 861-1529
mia@yugocollins.com
chris@yugocollins.com

WILLIAM V. DEPAULO
860 Court Street North
Suite 300
Lewisburg, WV 24901
(304) 342-5588
william.depaulo@gmail.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... ii

INTRODUCTION.....1

ARGUMENT.....1

1. The issuance of an agency order does not insulate the agency from district court jurisdiction over structural attacks to the enabling legislation1

2. The Nov. 7 Oral Argument in *Axon Enterprises v. FTC* and *SEC v. Cochran* is instructive and weighs strongly in favor of Petitioners’ arguments here3

3. Petitioners’ “beef” is not with the Commission but with Congress, which is why this case, like *Cochran* and *Axon*, belongs in district court.....5

4. Allowing § 1331 jurisdiction for this Non-Delegation Doctrine challenge would also satisfy Justice Jackson’s requirement for structural claims6

5. The declaratory and injunctive relief landowners seek against the unconstitutional scheme here is the same as the relief sought in *Cochran* and *Axon*, and can only be granted by the district court under § 13317

CONCLUSION8

TABLE OF AUTHORITIES

Cases

<i>Axon Enter. v. FTC</i> , 986 F.3d 1173 (9th Cir. 2021).....	3, 7
<i>Axon Enterprises v. FTC</i> , (No. 21-86)	2, 3, 5, 7
<i>Elgin v. Dep’t of the Treasury</i> , 567 U.S. 1 (2012).....	4
<i>Cochran v. United States SEC</i> , 20 F.4th 194 (5th Cir. 2021) (en banc)	2, 3
<i>SEC v. Cochran</i> , (No. 21-1239)	2, 3, 5, 6, 7

Statutes

15 U.S.C. § 717 <i>et seq.</i>	1
28 U.S.C. § 1331	1, 3, 6, 7, 8

INTRODUCTION

Petitioners file this Joint Reply to the Briefs in Opposition filed by Respondents Federal Energy Regulatory Commission (“FERC”) and Mountain Valley Pipeline (“MVP”) on November 18, 2022.

ARGUMENT

1. The issuance of an agency order does not insulate the agency from district court jurisdiction over structural attacks to the enabling legislation

Respondents suggest that the mere existence of an agency order relinquishes district court jurisdiction over structural Non-Delegation Doctrine challenges. Not so. It is the **nature** of the claim—not the existence of an order¹—that determines whether the district court retains jurisdiction under 28 U.S.C. § 1331. Petitioners invoked the Non-Delegation Doctrine—a staple of the separation of powers—to raise a **structural** constitutional attack to the agency’s **enabling** legislation, 15 U.S.C. § 717 *et seq.*, the Natural Gas Act (NGA). This Non-Delegation

¹ As Justice Gorsuch pointed out during the Nov. 7 oral argument, even the existence of an agency order does **not** extinguish district court jurisdiction under 28 U.S.C. § 1331; rather, in such cases, “we would look, if we had a final order, to *Thunder Basin* factors to see whether, nonetheless, there should be room for a district court proceeding.” *Cochran* Oral Arg. Tr. 33:1-4 (Gorsuch, J, questioning Cochran counsel). This strongly supports Petitioners’ argument that the issuance of an agency order does not relinquish the district court’s jurisdiction over the **structural** Non-Delegation Doctrine challenge.

Doctrine challenge is a structural challenge to the constitutionality of the entire legislative scheme that authorizes FERC to act in the first place; it is not an assault on any agency decision.

The “order/no order” dichotomy raised to distinguish this case from *Axon Enterprises v. FTC* (No. 21-86) or *SEC v. Cochran* (No. 21-1239) is a red herring – an artificial line that would produce nonsensical results. A simple application of that dichotomy proves its absurdity: under that view, the district court has jurisdiction over landowners’ Non-Delegation Doctrine claims so long as FERC has not yet issued an order conferring the power of eminent domain to the pipeline company. But the moment FERC issues the order affecting Petitioners’ land, jurisdiction disappears only to reappear again in a federal court of appeals following a futile agency proceeding that would result in the agency not answering the constitutional question. As the Fifth Circuit noted, “this peekaboo approach to constitutional claims makes very little sense.” *Cochran v. United States SEC*, 20 F.4th 194, 231 (5th Cir. 2021) (en banc) (Oldham, J., concurring) (explaining that the dissent’s investigation-enforcement distinction is “illogical” because the claim would remain “illusory” until after the agency concludes its proceedings at which point the claim suddenly “reappears”).

Because the nature of the claim determines jurisdiction, the issuance of an agency order neither controls nor relinquishes district court jurisdiction. The test for jurisdiction is not, “Has the agency initiated proceedings or issued an order?” The test,

rather, is whether the agency can apply its special technical or scientific expertise to fix the problem and grant the type of relief being sought. But the agency has neither the expertise nor the authority to adjudicate Non-Delegation Doctrine challenges. Thus, if the challenge is a structural constitutional attack on the agency's very existence—on its authority to act at all—as it is here and in *Cochran* and *Axon*—then the challenge belongs in district court under § 1331.

2. The Nov. 7 Oral Argument in *Axon Enterprises v. FTC* and *SEC v. Cochran* is instructive and weighs strongly in favor of Petitioners' arguments here

As Chief Justice Roberts suggested during the Nov. 7 oral argument,² there is no special “benefit” to sending a structural constitutional claim to the agency to get the agency's input because that same input would be provided to the district court, which would resolve the claim faster:

[Y]ou're just saying the agency might write a brief, presumably, defending the structure of the agency - which it can do when the case goes before the district court. . . Well, my point is, when you send it back, you're saying the agency would - - it would be a valuable thing to send to the agency a claim that the agency is

² Petitioners raised the existence of a Circuit Split as grounds for granting their Petition on the issue of district court jurisdiction over structural constitutional claims. Based on the oral argument on Nov. 7, it appears the Court will soon resolve that question.

unconstitutionally structured because you'll get the benefit of their views -- which is what you would get if you go to 1331 and we get a brief from the government.

See Cochran Oral Arg. Tr. 41:1-24. Because agencies—whether FERC, the SEC, or the FTC—cannot answer structural constitutional questions, the end result of sending such claims to the agency would be an entirely futile proceeding—what Justice Alito dubbed a process of needlessly complex “procedural hoops” before eventually reaching a court capable of granting the relief being sought. *Elgin v. Dep’t of the Treasury*, 567 U.S. 1, 32 (2012) (Alito, J, dissenting, joined by Ginsburg, J., and Justice Kagan). Just as the SEC cannot decide the constitutionality of its enabling legislation or the ALJs’ powers, neither can FERC here decide the constitutionality of the NGA or Congress’s overly broad delegation of power to an unelected, unaccountable agency taking private property at will. FERC admits this but argues—as agencies always do—that the futile agency review should proceed full-steam ahead.

But as Justice Kavanaugh noted, the “upside” of allowing a challenge to the structure of the agency to move forward in district court is “clarity,” “certainty,” and “speed.” *Cochran Oral Arg. Tr. 48:16-20.* For those same reasons, the Petition here should be granted so that landowners’ Non-Delegation Doctrine challenge may proceed in district court.

3. Petitioners’ “beef” is not with the Commission but with Congress, which is why this case, like *Cochran* and *Axon*, belongs in district court

Justice Kagan pointed out on Nov. 7, in reference to the Court’s language in *Free Enterprise Fund*, that “it would be really strange just to seek Commission review when your beef is not with the Commission’s rules.” *Cochran* Oral Arg. Tr. 23:21-23. So too, here, landowners’ “beef” is similarly not with the Commission or even with MVP, which is profiting³ from an unconstitutional scheme Congress put in place; landowners’ beef, rather, is with Congress, and Congress’s decision in 1938 to delegate the power of eminent domain—a uniquely governmental and coercive power—to a private *for-profit* party. Just as the challengers in *Cochran* and *Axon* are not challenging a particular agency adjudication, neither are landowners here challenging a particular agency decision; all three challenges attack the structural scheme – the very existence and authority of the

³ Instead of buying the land from willing sellers in the open market, MVP forcibly takes whatever land it wants using its unconstitutionally delegated powers and routes the pipeline wherever it likes in order to maximize profits; the scheme, in other words, benefits *some* private parties, i.e., wealthy investors, while stripping other private parties, i.e., average Americans, of their private property rights. The scheme does what Justice O’Connor warned about in her dissent in *Kelo v. City of New London*: it takes private property from Person A and transfers it to Person B under the banner of economic benefit. The origin of this problem here is the unconstitutional and overly broad delegation of power. These takings would not be possible without Congress’ delegation via the NGA.

agency to act at all. Accordingly, all three challenges should proceed under § 1331.

4. Allowing § 1331 jurisdiction for this Non-Delegation Doctrine challenge would also satisfy Justice Jackson’s requirement for structural claims

Justice Jackson highlighted the need to place requirements on the types of claims that may proceed in district court: (1) the claim must be structural in nature; and (2) “the remedy that you’re seeking as the person who’s bringing the structural claim is to shut the whole thing down.” *Cochran* Oral Arg. Tr. 35:7-10. Petitioners’ Non-Delegation Doctrine challenge to the NGA easily satisfies both requirements and alleviates any concern that this structural claim would operate as an interlocutory appeal. As an initial matter, landowners’ Non-Delegation Doctrine challenge goes to the very existence of the Commission—the very authority of FERC to act and issue certificates to pipeline companies in the first place. Moreover, if Petitioners prevail on their underlying Non-Delegation claims, that victory would indeed “shut the whole thing down” in the sense that it would shut down this unconstitutional scheme and strip FERC of its unfettered authority to take private land at will and transfer it to *for-profit* entities; it would require Congress to amend the NGA to put in place strict requirements that satisfy the “intelligible principle” test (or a new test if the Court should revisit that standard) and render the delegation constitutional under the Non-Delegation Doctrine—something Congress should have done in the first place instead of

giving the Commission a blank check with unbridled power.

5. The declaratory and injunctive relief landowners seek against the unconstitutional scheme here is the same as the relief sought in *Cochran* and *Axon*, and can only be granted by the district court under § 1331

Respondents allege there is no jurisdiction because they claim Petitioners seek to void the agency order. That, again, is wrong and misleading. Petitioners are not seeking to “set aside” or “modify” any particular agency decision. Nor could the agency provide the relief Petitioners seek. Petitioners invoked the Non-Delegation Doctrine to seek a declaratory judgment that the agency’s enabling legislation is unconstitutional. Like all declaratory judgments, that judgment would have the practical effect of stripping the agency of its power to act, which would affect **all** agency certificates, not just the one affecting Petitioners. This declaratory and injunctive relief is the exact same relief sought in *Cochran* and in *Axon*. *See Axon Enter. v. FTC*, 986 F.3d 1173 (9th Cir. 2021) (explaining that Axon raises a constitutional challenge to the FTC’s structure under separation-of-powers principles); *see also Cochran* Oral Arg. Tr. 15:22-25 &16:1-15 (*Cochran* counsel explaining that, “structural constitutional claims are – are different in – in a way that’s meaningful” because the “**statute allows court of appeals to set aside or modify the final order. But, in a structural constitutional claim, that doesn’t give you the relief you’re**

looking for. It wouldn't give us the relief we're looking for because **we're looking for an injunction against this unconstitutional agency action. . .** And **we're talking, again, about the very existence, the very authority of the decision-maker to act at all,** which is different.") (emphasis added). So too are Petitioners here challenging the very existence—the very authority—of FERC to act at all—to issue *any* certificates to take land for *any* projects *anywhere*. This declaratory and injunctive relief—against the unconstitutional land-grab scheme—can only be obtained from the district court under 28 U.S.C. § 1331.

CONCLUSION

The district court retains § 1331 jurisdiction over this structural constitutional challenge to the agency's enabling legislation. The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

SYDNEY PHILLIPS

Counsel of Record

P.O. Box 552

Olympia, WA 98507

(434) 426-4442

sphillips@freedomfoundation.com

MIA YUGO

CHRISTOPHER E. COLLINS

YUGO COLLINS, PLLC

25 Franklin Rd. SW

Roanoke, VA 24011

(540) 861-1529

mia@yugocollins.com

chris@yugocollins.com

WILLIAM V. DEPAULO

860 Court Street North

Suite 300

Lewisburg, WV 24901

(304) 342-5588

william.depaulo@gmail.com

Counsel for Petitioners