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**In the Supreme Court of the United States**

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CLETUS WOODROW BOHON, ET AL.,  
*Applicants,*

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.,  
*Respondents.*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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**EMERGENCY MOTION TO HOLD PETITION FOR WRIT OF CERTIORARI  
IN ABEYANCE OR TO GRANT CERTIORARI BUT WITHHOLD FURTHER  
BRIEFING PENDING THE COURT'S DECISION ON § 1331 JURISDICTION  
IN *SEC V. COCHRAN & AXON ENTERPRISES V. FTC***

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**EMERGENCY MOTION TO HOLD PETITION FOR WRIT OF CERTIORARI  
IN ABEYANCE OR TO GRANT CERTIORARI BUT WITHHOLD FURTHER  
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Pursuant to Rule 21 of the Rules of this Court, Petitioners move the Court to defer consideration of the Petition for Writ of Certiorari or to grant certiorari but withhold further briefing pending the outcome in *Axon Enterprises v. FTC* (No. 21-86) and *SEC v. Cochran* (No. 21-1239) so as to spare judicial resources and obtain the benefit of the Court's upcoming decision on § 1331 jurisdiction over structural constitutional claims. Emergency consideration is requested because this Petition is scheduled for distribution soon.

1. Petitioners invoked the Non-Delegation Doctrine—a staple of the separation of powers—to raise a structural constitutional attack on the agency's enabling legislation—on its very existence and authority to act at all;
2. Recent developments during the Nov. 7 Oral Argument in *Cochran* and *Axon* indicate that the Court is poised to soon resolve the Circuit Split on the issue of § 1331 jurisdiction over structural constitutional claims. See Petitioners' Reply Brief discussing, in more detail, *Cochran* and *Axon*;
3. Questioning by the Justices during the Nov. 7 Oral Argument weighs strongly in favor of landowners' argument here that the district court does indeed retain § 1331 jurisdiction over these types of structural constitutional claims, and that agency review of such claims is futile;

4. 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;
5. As Chief Justice Roberts noted, there is no special “benefit” to sending a structural constitutional claim to the agency for purposes of getting the agency’s input on the legitimacy of its own power because that same input would be provided via briefing to the district court. *See Cochran* Oral Arg. Tr. 41:1-24 (Roberts, C.J., asking “you’re saying the agency would -- it would be a valuable thing to send to the agency a claim that the agency is 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.”);
6. Allowing § 1331 jurisdiction for Petitioners’ structural challenge would also easily satisfy Justice Jackson’s proposed requirement that structural constitutional claims be the types of claims that would “shut the whole thing down.” *Cochran* Oral Arg. Tr. 35:7-10. Here, there is no question that Petitioners’ victory on the merits of their Non-Delegation Doctrine claims would indeed “shut down” the unconstitutional scheme that enables the agency to exercise unchecked power, ultimately forcing Congress to amend the NGA to comply with the “intelligible principle” test (or another test if the Court should be inclined to revisit that standard for congressional delegations of power to administrative agencies);

7. 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 but with Congress and its decision to delegate unchecked power to the agency, which is why this case, like *Cochran* and *Axon*, belongs in district court under § 1331;
8. For these reasons, it appears the Court is poised to soon address this issue in its decision in *Cochran* and *Axon*. Petitioners therefore move the Court to either grant certiorari or, to the extent that there is any question, to hold their Petition for Writ of Certiorari in Abeyance and/or withhold further substantive briefing in this case until such time as the Court issues its decision in *Cochran* and *Axon*. This would spare judicial resources and allow the parties the benefit of the Court's upcoming decision on § 1331 jurisdiction;
9. Respondents oppose this Motion.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

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I, Sydney Phillips, a member of the Supreme Court Bar, hereby certify that on December 2, 2022, a copy of the accompanying Emergency Motion to Hold Petition for Writ of Certiorari in Abeyance or to Grant Certiorari but Withhold Further Briefing Pending the Court's Decision on § 1331 Jurisdiction in *SEC v. Cochran & Axon Enterprises v. FTC* was sent by commercial carrier and by electronic mail to:

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All parties required to be served have been served.

December 2, 2022

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