
In the Supreme Court of the United States

CLETUS WOODROW BOHON, ET AL.,
Applicants,

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.,
Respondents.

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

**MOTION TO LIFT THE HOLD, REVERSE & REMAND
IN LIGHT OF *SEC V. COCHRAN & AXON ENTERPRISES V. FTC***

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Pursuant to this Court’s unanimous 9-0 decision in *Axon Enterprises v. FTC* (No. 21-86) and *SEC v. Cochran* (No. 21-1239), Petitioners respectfully move the Court to lift the hold on the Petition for Writ of Certiorari, grant certiorari, summarily reverse the decision below and remand Petitioners’ separation-of-powers challenge for trial. Alternatively, should the Court have any questions, Petitioners move to lift the hold, grant certiorari, and schedule this case for oral argument. In support thereof, Petitioners state as follows:

1. Petitioners invoked the Non-Delegation Doctrine to raise a structural separation-of-powers challenge to the agency—to its very existence and authority to act at all;
2. Petitioners alleged that the agency wields illegitimate power to issue certificates, that its authority to act is derived from an unlawful and overly broad delegation of power by Congress, and that its structure violates the separation-of-powers and Non-Delegation Doctrine;
3. As *Amicus Curiae* Center for Constitutional Jurisprudence explained, Petitioners’ case “presents a challenge to the constitutional authority of the Federal Energy Regulatory Commission.” *See* Brief for Center for Constitutional Jurisprudence as *Amicus Curiae*, p. 1 (emphasis added). For that reason, the decision of the court below that such a claim must first be submitted to the Commission whose authority is being challenged is plainly wrong. The case is about the core principle of separation of powers which

prohibits delegation of legislative power; *see id.* at p.8-9 (explaining that there is no “legislative determination” supporting this delegation and that the “power delegated to the agency is itself broad and undefined and therefore constitutionally problematic[.]”) (citing *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935); *Dept. of Transp. v. Association of American Railroads*, 575 U.S. 43, 60-61 (2015) (Alito, J., concurring)).

4. On January 6, 2023, pursuant to Rule 21, this Court granted Petitioners’ Emergency Motion to Hold the Petition for Writ of Certiorari in Abeyance pending the Court’s decision on an almost identical jurisdictional issue in *Axon & Cochran*;
5. Respondents opposed the hold. Following this Court’s decision in *Axon* and *Cochran*, undersigned counsel for Landowners reached out and conferred with Counsel for FERC and MVP on this motion. MVP opposes the motion. FERC opposes reversal and remand.
6. On April 14, 2023, the Court released a unanimous 9-0 decision in *Axon & Cochran*, 598 U.S. ____ (2023), reversing the Ninth Circuit and affirming the Fifth Circuit;
7. In briefing submitted to this Court last fall, Petitioners argued that the “nature of the claim” is what determines district court jurisdiction, not the status of agency proceedings or the existence of an agency order. *See* Brief for Petitioners 11, stating: “It is the nature of the claim, not the procedural posture

or identity of the property owner, that determines the district court’s original jurisdiction;”

8. By contrast, Respondents argued the opposite, erroneously insisting that the status of agency proceedings or the issuance of an agency order strips the district court of jurisdiction and routes all constitutional challenges—even structural ones involving the separation-of-powers—to the agency;
9. But on April 14, 2023, this Court confirmed Landowners’ position and held that the district court retains § 1331 jurisdiction over structural separation-of-powers challenges;
10. As Justice Kagan explained, the jurisdictional inquiry “requires considering the nature of the claim, not the status (pending or not) of an agency proceeding.” *Axon*, 598 U.S. ____ (2023) (emphasis added);
11. Just as Axon’s separation-of-powers claim is not about the FTC order, neither is Petitioners’ separation-of-powers claim here about FERC’s order. All three claims—Cochran’s, Axon’s, and Petitioners’—involve subjection to unconstitutional agency authority. Because that type of separation-of-powers injury cannot be remedied by the agency or the court of appeals, it must be raised in district court. *See Axon*, 598 U.S. ____ (2023) (“The court could of course vacate the FTC’s order. But Axon’s separation-of-powers claim is not about that order.”);

12. Consistent with Petitioners' arguments here,¹ the Court further rejected the agency's claim that it has "special expertise" in adjudicating separation-of-powers challenges, noting "The Commission knows a good deal about competition policy, but nothing special about the separation of powers;"
13. The same is true here: FERC knows nothing about the Non-Delegation Doctrine and has openly admitted² it cannot adjudicate separation-of-powers challenges to its authority and existence;
14. Finally, whilst the Court in *Axon* unanimously found that the district court retains jurisdiction, Justices Thomas and Gorsuch wrote separately to highlight the various issues with the *Thunder Basin* factors in cases such as these. (Gorsuch, J., concurring) ("At bottom, *Thunder Basin* rests on a view that it is sometimes more important to allow agencies to work without the bother of having to answer suits against them than it is to allow individuals their day in court.");
15. Petitioners-Landowners have been waiting years for their "day in court" on their Non-Delegation Doctrine challenge to the agency;

¹ Brief for Petitioners 17-20 (explaining the difference between the *Thunder Basin Coal Co. v. Reich* and *Elgin v. Dep't of Treasury* line of cases, where the agency could apply its special technical, scientific, or fact-finding expertise to correct the error alleged and the *Free Enterprise v. Public Co. Accounting Oversight Bd.* line of cases, including *Johnson v. Robison*, *Cirko v. Commissioner of Social Security*, and similar cases, where courts have repeatedly explained the agency has no expertise because "adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies." *Id.* 19.

² See *id.* 20 (citing FERC's Certificate Order to MVP where FERC admits: "[S]uch a question is beyond our jurisdiction: only the Court can determine whether Congress' action in passing section 7(h) of the NGA conflicts with the Constitution.").

16. In accordance with this Court's unanimous decision in *Cochran & Axon* confirming § 1331 jurisdiction over structural separation-of-powers challenges, Petitioners respectfully move the Court to lift the hold, grant certiorari, summarily reverse the decision below and remand their Non-Delegation Doctrine case for trial. *Alternatively*, if the Court has further questions, Petitioners move the Court to lift the hold, grant certiorari, and schedule this case for briefing and oral argument in light of *Cochran & Axon*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Mia Yugo, a member of the Supreme Court Bar, hereby certify that on April 17, 2023, a copy of the accompanying Motion to Lift Hold, Reverse, & Remand in light of *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.

April 17, 2023

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