

No. 22-6530

IN THE
SUPREME COURT OF THE UNITED STATES

WARREN HAVENS, Petitioner
v.
ARNOLD LEONG, Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE CALIFORNIA COURT OF APPEAL

PETITION FOR REHEARING

WARREN HAVENS
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Proceeding in forma pauperis

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CORPORATE DISCLOSURE

The Corporate Disclosure Statement in the petition remains unchanged.

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THE PRO SE PLEADING STANDARDS SHOULD BE APPLIED TO THIS PETITION

The following standards for a pro se party who is not an attorney, which includes me, should be applied to this Petition. This Supreme Court has held that pro se pleadings are subject to “less stringent standards than formal pleadings drafted by lawyers” and should be liberally construed in the plaintiff’s favor. *Hughes v. Rowe*, 449 U.S. 5, 9 (1980); *Haines v. Kerner*, 404 U.S. 519, 520 (1972). Accord *Erickson v. Pardus*, 127 S. Ct. 2197 (2007).

APPENDIX TABLE OF CONTENTS

Cases

AXON ENTERPRISE, INC., PETITIONER v. FEDERAL TRADE COMMISSION, ET AL.
SECURITIES AND EXCHANGE COMMISSION, et al., PETITIONERS v. MICHELLE
COCHRAN. Supreme Court of the United States No. 21-86 and No. 21-1239. Apr 14, 2023
(U.S. Apr. 14, 2023) (also herein called *Axon-Cochran*).

TABLE OF AUTHORITIES

NOTES. (1) This Petition relies on the decision of this US Supreme Court in *AXON ENTERPRISE, INC., PETITIONER v. FEDERAL TRADE COMMISSION, ET AL. SECURITIES AND EXCHANGE COMMISSION, et al., PETITIONERS v. MICHELLE COCHRAN*. Supreme Court of the United States No. 21-86 and No. 21-1239. Apr 14, 2023 (U.S. Apr. 14, 2023) (which I call the "*Axon-Cochran*" decision). I list this as the first Authority below with page numbers it appears herein.

(2) From this Supreme Court *Axon-Cochran* decision, I also list below statutes and cases cited in the opinion of the Court by Kagan, in the opinion by Gorsuch, and in the opinion by Thomas. The purposes for this are several including to show the authorities in these three opinions in the *Axon-Cochran* decision, and that the decision is based on existing US Supreme Court precedents, rather than being a decision that sets new law such as by overturning a past US Supreme Court precedent. That makes this *Axon-Cochran* decision retroactively applicable to all pending cases to which it applies. See e.g., *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993). These pending cases include my pending cases at the FCC in its enforcement docket EB-11-71 which are the seminal proceedings from which this Petition arose and thus encompasses this Petition.

(3) I do not list below the page numbers in the *Axon-Cochran* decision, in its three opinions noted above, in which the below listed statutes and cases appeal. That is not directly relevant to the above-stated purposes and is also due to my critical health condition and shortage of time.

IN THIS PETITION

AXON ENTERPRISE, INC., PETITIONER v. FEDERAL TRADE COMMISSION, ET AL. SECURITIES AND EXCHANGE COMMISSION, et al., PETITIONERS v. MICHELLE COCHRAN. Supreme Court of the United States No. 21-86 and No. 21-1239. Apr 14, 2023 (U.S. Apr. 14, 2023).....	each page 1-6
<i>Harper v. Virginia Dep't of Taxation</i> , 509 U.S. 86 (1993)	v, 2
47 USC 151 et seq. the Federal Communications Act	6
18 USC 1519 of the federal criminal code	6

CASES IN THE PRO SE STANDARDS SECTION

<i>Erickson v. Pardus</i> , 127 S. Ct. 2197 (2007)	ii
<i>Haines v. Kerner</i> , 404 U.S. 519, 520 (1972)	ii
<i>Hughes v. Rowe</i> , 449 U.S. 5, 9 (1980).....	ii

IN THE *AXON-COCHRAN* DECISION (see notes above)A copy is in the Appendix

OPINION OF THE COURT BY KAGAN (see Notes above)

Statutes and Cases cited (many but not all included below)

28 U.S.C. §1331 (federal question jurisdiction)

Cochran v SEC. 20 F. 4th 194, 207-208. Fifth Cir., 2021

Elgin v. Department of Treasury, 567 U.S. 1

Free Enterprise Fund v. Public Company Accounting Oversight Bd., 561 U.S. 477, 489 (2010)

FTC v. Standard Oil Co. of Cal., 449 U.S. 232, 244.

Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 51 (1938)

Seila Law LLC v. Consumer Financial Protection Bureau, 591 U.S. ___, ___.

Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 207-213

GOR SUCH OPINION (agreeing with the conclusion-judgment but not the method, and giving an opinion of the right method) (see Notes above)

Statutes and Cases cited (many but not all included below)

28 U.S.C. §1331

5 U.S.C. §704 (in the Administrative Procedure Act

Fed. Rule Civ. Proc. 1

Cohens v. Virginia, 6 Wheat. 264, 404 (1821) (Marshall, C. J., for the Court)

Executive Jet Aviation, Inc. v. Cleveland, 409 U.S. 249, 266 (1972).

Free Enterprise Fund v. Public Company Accounting Oversight Bd., 561 U.S. 477, 491, n. 2 (2010)

Foremost Ins. Co. v. Richardson, 457 U.S. 668, 676-677 (1982)

Hamer v. Neighborhood Housing Servs. of Chicago, 583 U.S. 17, (2017) (slip op., 8)

Hertz, 559 U.S., at 94

Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 438 (1999)

Jones v. Bock, 549 U.S. 199, 203 (2007)

New Orleans Public Service, Inc. v. Council of City of New Orleans, 491 U.S. 350, 359 (1989)

Rake v. Wade, 508 U.S. 464, 471 (1993)

Rosencrans v. United States, 165 U.S. 257, 262 (1897)

Ross v. Blake, 578 U.S. 632, 640, n. 1 (2016)

Sheldon v. Sill, 49 U.S. 441, 449 (1850)

Sisson v. Ruby, 497 U.S. 358, 364, n. 2 (1990)

Thunder Basin Coal Co. v. Reich, 510 U.S. 200 (1994)

THOMAS OPINION (concurring and adding questions and opinions) (see Notes above)

Cases cited (many but not all included below)

B&B Hardware, Inc. v. Hargis Industries, Inc., 575 U.S. 138, 171 (2015) (dissenting opinion)

Granfinanciera, S. A. v. Nordberg, 492 U.S. 33, 61 (1989)

Marbury v. Madison, 1 Cranch 137 (1803)

Oil States Energy Services, LLC v. Greene's Energy Group, LLC, 584 U.S., (2018) (slip op., at 6)

Tull, 481 U.S., at 422

Wellness Int'l Network, Ltd. v. Sharif, 575 U.S. 665, 711 (2015) (THOMAS, J., dissenting)

PETITION FOR REHEARING

Petitioner Warren Havens, acting pro se and under a granted motion to proceed in forma pauperis (see the decision denying my petition for a writ of certiorari) petitions for rehearing of this Court's April 2023 Order denying my petition for a writ of certiorari.

REASONS FOR GRANTING REHEARING

This Court's Rule 44.2 authorizes a petition for rehearing based on "intervening circumstances of a substantial . . . effect." After my petition for a writ of certiorari was filed, this court recently filed its 9-0 decision in in Axon v FTC and SEC v Cochran (also called herein, the "Axon-Cochran" decision.¹ This Axon-Cochran" decision is an "intervening circumstance[]" of a substantial . . . effect."

I. THIS IN AN APPROPRIATE CASE FOR REHEARING

This Axon-Cochran" decision is an "intervening circumstance[]" of a substantial . . . effect." This decision justifies and calls for, along with considering my "*Full Cert Petition*" (defined on p. 5 below) the herein requested rehearing.

II. THE RECENT 5-14-2023 DECISION OF THIS COURT IN AXON V FTC AND SEC V COCHRAN PROVIDE STRONG GROUNDS FOR REHEARING

A. The new case Axon-Cochran

The United States Supreme Court on April 14, 2023 filed its 9-0 decision in *AXON ENTERPRISE, INC., PETITIONER v. FEDERAL TRADE COMMISSION, ET AL. SECURITIES AND EXCHANGE COMMISSION, et al., PETITIONERS v. MICHELLE COCHRAN*. No. 21-86 and No. 21-1239 (which I call the "Axon-Cochran" decision).

¹ See full cite in the Table of Authorities above. Herein also called the "Axon-Cochran" decision.

This decision was filed after my petition for a writ of certiorari was filed after which I could not amend and refile it, nor when I filed it could I predict whe the Axon-Cochran decision would be made and filed.

The ruling was that a party in a federal agency enforcement proceeding need not "exhaust" attempts and appeals before the agency where the agency is acting in ways described in the "Thunder Basin" criteria that provide for exceptions to such exhaustion in exceptional agency cases (exceptions to regular agency proceedings) that are beset with the violations described in the Supreme Court's *Thunder Basin* case (listed in Table of Authorities above).

The ruling further was that in federal agency case, like the Axon and Cochran cases, beset with said violations, the party that is subject to the violations can without further attempts before the agency sue the agency in a civil suit in a United States District Court with venue to resolve the case in controversy, and there obtain rights available in such civil suits to discovery, witness testimony, election of a jury trial, etc.

Axon-Cochran did not set new law but resolved a split in two circuits (9th and 5th) and had nationwide importance and clarified and applied existing Supreme Court case holdings. It is thus applicable to all pending cases to which it applies - and that involves this Case in this Circuit Court and the underlying FCC order in the FCC enforcement docket EB-11-71 and other matters in that docket not yet finally decided. See e.g., *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993)

This Axon-Cochran exception to exhaustion before a federal agency of administrative attempts and appeals supports this petition for rehearing for the following reasons below.

- B. The new case *Axon-Cochran* is an "intervening circumstance[]" of a substantial . . . effect." and considered with my petition for a writ of certiorari (the "*Cert Petition*") calls for grant of this petition for rehearing

The *Cert Petition* was in large part based upon my arguments that the underlying decision was based upon ongoing FCC enforcement proceedings (mostly in its docket EB-11-71) that were beset with unlawful actions by the FCC that included those described in the *Axon-Cochran* decision under the "Thunder Basin" criteria, described below.

These FCC proceedings were the basis of *Leong v Havens* cases in the California Superior Court California Court of Appeals,² Delaware Chancery and Supreme Courts,³ and in the Ninth Circuit US Court of Appeals⁴ (and some other courts and cases not directly relevant here).⁵

These criteria were the basis of the court's opinion by Justice Kagan in *Axon Cochran*, to which Justice Thomas wrote a concurring opinion and Justice Gorsuch wrote an opinion agree with the conclusions-judgment but describing a simpler method to reach the conclusion-judgement.

Thus, *Axon Cochran* provides strong grounds to grant rehearing when considered with my "*Full Cert Petition*" (defined on p. 5 below). This is further presented below.

In *Axon Cochran* in the opinion for this court by Kagan, this court held (underling and some para. breaks added):

Syllabus

Held: The statutory review schemes set out in the Securities Exchange Act and Federal Trade Commission Act do not displace a district court's federal-question jurisdiction over claims challenging as unconstitutional the structure or existence of the SEC or FTC. Pp. 7–18.

² Resulting in Case 22-6530 in this Supreme Court.

³ Resulting in Case 22-6529 in this Supreme Court.

⁴ Resulting in Case 22-6683 in this Supreme Court.

⁵ As stated in my Full Cert Petition (defined herein) certain FCC radio spectrum licenses nationwide were the sole material assets in each of these court cases, each originating in and still subject to these FCC proceedings in FCC docket EB 11-71.

(a) Although district courts may ordinarily hear challenges to federal agency actions by way of §1331's jurisdictional grant for claims "arising under" federal law, Congress may substitute an alternative review scheme. In both the Exchange Act and the FTC Act, Congress did so: It provided for review of claims about agency action in a court of appeals following the agency's own review process. The creation of such a review scheme divests district courts of their ordinary jurisdiction over covered cases.

But the statutory scheme does not necessarily extend to every claim concerning agency action. See, e.g., *Thunder Basin Coal Co. v. Reich*, 510 U. S. 200, 207–213. This Court has identified three considerations—commonly known as the Thunder Basin factors—to determine whether particular claims concerning agency action are "of the type Congress intended to be reviewed within th[e] statutory structure." *Id.*, at 212. First, could precluding district court jurisdiction "foreclose all meaningful judicial review" of the claim? *Id.*, at 212–213. Next, is the claim "wholly collateral" to the statute's review provisions? *Id.*, at 212. And last, is the claim "outside the agency's expertise"? *Ibid.*

....

(b) The Court must decide if the constitutional claims here are "of the type" Congress thought belonged within a statutory review scheme. *Thunder Basin*, 510 U. S., at 212. Like the accounting firm in *Free Enterprise Fund*, Cochran and Axon assert sweeping constitutional claims: They charge that the SEC and FTC are wielding authority unconstitutionally in all or broad swaths of their work.

Applying the Thunder Basin factors here, the Court comes out in the same place as in *Free Enterprise Fund*.

First, preclusion of district court jurisdiction "could foreclose all meaningful judicial review." *Id.*, at 212–13.

Adequate judicial review does not usually demand a district court's involvement. And the statutes at issue in this case provide for judicial review of adverse SEC and FTC actions in a court of appeals.

But Cochran and Axon assert a "here-and-now injury" from being subjected to an illegitimate proceeding, led by an illegitimate decisionmaker. *Seila Law LLC v. Consumer Financial Protection Bureau*, 591 U. S. ___, ___. That injury is impossible to remedy once the proceeding is over, which is when appellate review kicks in.

Judicial review of the structural constitutional claims would thus come too late to be meaningful. To be sure, "the expense and disruption" of "protracted adjudicatory proceedings" on a claim do not alone justify immediate review. *FTC v. Standard Oil Co. of Cal.*, 449 U. S. 232, 244. But the nature of the injury here is different: As with a right "not to stand trial" that is "effectively lost" if review is deferred until after trial, see *Mitchell v. Forsyth*, 472 U. S. 511, 526, *Axon and*

Cochran will lose their rights not to undergo the complained-of agency proceedings if they cannot assert those rights until the proceedings are over.

The collateralism factor also favors Axon and Cochran. The challenges to the Commissions' authority have nothing to do with either the enforcement-related matters the Commissions regularly adjudicate or those they would adjudicate in assessing the charges against Axon and Cochran. *Elgin*, 567 U. S., at 22. The parties' claims are thus " 'collateral' to any Commission orders or rules from which review might be sought. " *Free Enterprise Fund*, 561 U. S., at 490.

Finally, Cochran's and Axon's claims are "outside the [Commissions'] expertise." *Thunder Basin*, 510 U. S., at 212. The Court in *Free Enterprise Fund* determined that claims that tenure protections violate Article II raise "standard questions of administrative" and constitutional law, detached from "considerations of agency policy." 561 U. S., at 491.[...]

And Axon's constitutional challenge to the combination of prosecutorial and adjudicative functions in the FTC is similarly distant from the FTC's "competence and expertise." Ibid.

The Commission knows a good deal about competition policy, but nothing special about the separation of powers. For that reason, "agency adjudications are generally ill suited to address structural constitutional challenges"—like those maintained here. *Carr v. Saul*, 593 U. S. ___, ___.

The Court concludes that the claims here are not the type the statutory review schemes at issue reach. Pp. 10–18.

No. 21–86, 986 F. 3d 1173, reversed and remanded;
No. 21–1239, 20 F. 4th 194, affirmed and remanded.

The subject Cert Petition including its Appendix exhibits -- those that were required *and those I elected to include, as permitted, for clarification of the issues in the case below under the Cert Petition* (together "My Full Cert Petition") -- is founded on the issues of law now resolved in the *Axon-Cochran* holdings cited above which, as first noted above, arouse in the subject FCC enforcement proceeding EB-11-71 that is the basis of the decision below, and that is still going on to this day.

As reflected in my *Full Cert Petition* (defined right above): My Thunder-Basin type defenses and claims in EB-11-71 commenced *not later than year 2005* (in other FCC

proceedings that led to the commencement of EB-11-71 in 2015, as the full FCC Commission wrote in the Order commencing EB-11-71) and have been "stuck" at the FCC to this day, *close to 20 years later*. This is the sort of injustice *Axon Cochran* resolved.

As reflected in my *Full Cert Petition* (defined above): My case at the FCC, just noted, includes my repeated vehement assertions *of each of* the Thunder Basin factors or criteria quoted in the Syllabus above. Always to no avail and largely not even responded to by the FCC staff involved, at the full Commission at times, and at the Wireless and Enforcement Bureaus at other times and by one FCC Administrative Law Judge dealing with matters in EB-11-71.

As reflected in my *Full Cert Petition* (defined above): These vehement assertions, under the Thunder Basis factors, include among others: **(i)** destruction of core evidence by the adverse parties that they admitted to (a crime under 18 USC 1519 of the federal criminal code); **(ii)** the FCC trial staff from the Enforcement Bureau ending up acting as counsel for the accused under asserted confidential arrangements, not for the FCC Commission with no permission to do so (which could not lawfully be granted if requested); **(iii)** the FCC deferring to and enlisting the services of the courts below and other courts, and abdicating its jurisdiction, authority and duties under the Federal Communications Act, codified at 47 USC 151 et seq. which is one demonstration that the Communications Act violates the anti-delegation and major-questions doctrines (as does the lack of intelligible principles in the Act of how the FCC is to perform its combined rulemaking legislative, adjudicatory judging, and executive enforcement roles-violating separation of powers in the Constitution); **(v)** lack of authority of the FCC administrative law office and administrative law judge ("ALJ") involved in FCC EB-11-71 (see above) and said office and ALJ extensive egregious actions that were abuse of power and arbitrary and capricious (as described and barred in the Federal Administrative Act including the

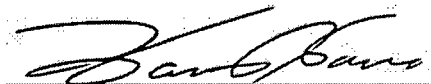
provision for suing the agency for relief therefrom); (iv) Constitutional violations in the Communications Act itself and as it is carried out by the FCC including but not limited to the injustices listed above; and (v) other injustices and constitutional violations as described in *Axon Cochran* under the Thunder Basin factors.

Thus, *Axon Cochran* considered with my Cert Petition calls for grant of the herein requested rehearing.

CONCLUSION

For the foregoing reasons and those stated in my Full Cert Petition (defined on p. 5 above) under my petition for writ of certiorari, this Court should grant rehearing, grant my petition for a writ of certiorari, and review the decision and decision below.

Respectfully submitted,

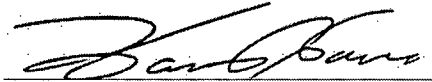


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Signed and filed by manual delivery to the court by courier on
May 4. 2023, the due date.

CERTIFICATE OF PRO SE PETITIONER

As the petitioner, pro se, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 44.2 and any other applicable Rule or sub-rule.

A handwritten signature in black ink, appearing to read "Warren Havens", is written over a horizontal line.

Warren Havens

CERTIFICATE OF COMPLIANCE OF THIS DOCUMENT

This petition is 7 pages long which is less than the 15 page limit in Rule 33.2(b). This document is on 8.5x11 inch paper and uses 12 pt. typeface and double spacing of the lines (except for indented case quotes) which are each permitted for a pro se party, as I am.

/s/ Warren Havens

b

APPENDIX

**APPENDIX TABLE OF CONTENTS
AND A COPY OF THE ONE CASE**

The decision of this Court and its three opinions in *AXON ENTERPRISE, INC., PETITIONER v. FEDERAL TRADE COMMISSION, ET AL. SECURITIES AND EXCHANGE COMMISSION, et al., PETITIONERS v. MICHELLE COCHRAN*. Supreme Court of the United States No. 21-86 and No. 21-1239. Apr 14, 2023 (U.S. Apr. 14, 2023)

A copy of this decision is on following pages.

**Additional material
from this filing is
available in the
Clerk's Office.**