

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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SECURITIES AND EXCHANGE COMMISSION,)		
ET AL.,)		
Petitioners,)		
v.)		No. 21-1239
MICHELLE COCHRAN,)		
Respondent.)		

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v.) No. 21-1239

MICHELLE COCHRAN,)

Respondent.)

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Washington, D.C.

Monday, November 7, 2022

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:35 a.m.

APPEARANCES:

GREGORY G. GARRE, ESQUIRE, Washington, D.C.; on behalf of Michelle Cochran.

MALCOLM L. STEWART, Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Securities and Exchange Commission, et al.

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P R O C E E D I N G S

(11:35 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 21-1239, SEC versus Cochran.

Mr. Garre.

ORAL ARGUMENT OF GREGORY G. GARRE

ON BEHALF OF MICHELLE COCHRAN

MR. GARRE: Thank you, Mr. Chief Justice, and may it please the Court:

The question in this companion case is whether the SEC Act strips district courts of jurisdiction that they have historically possessed to adjudicate and enjoin structural constitutional violations, here, in the form of an agency decisionmaker that is unconstitutionally insulated from removal by the President.

But, unlike the Axon case, in which the plaintiff is a corporation, this case illustrates the crucial importance of this district court jurisdiction for everyday Americans who find themselves trapped before an unconstitutional agency decisionmaker.

The SEC acts as prosecutor, judge,

1 and, in effect, executioner in its own
2 proceedings, all of which give it an
3 extraordinary home court advantage. And yet SEC
4 ALJs suffer from a blatant constitutional
5 defect, dual-layered protection from removal,
6 that taints their very existence and vitiates
7 their authority to act at all.

8 That structural defect inflicts a
9 here-and-now injury that exists wholly apart
10 from any adverse outcome in that proceeding.

11 Going back to Marbury versus Madison,
12 this Court has recognized that district courts
13 possess jurisdiction under 28 U.S.C. 1331 to
14 enjoin government entities from acting
15 unconstitutionally. Nothing in Section 78y of
16 the SEC Act nor anything else pointed to by the
17 government, an act in which Congress merely
18 granted jurisdiction to the courts of appeals to
19 hear challenges from final orders of the
20 Commissions, takes -- takes that jurisdiction
21 away as to the structural constitutional claims
22 at issue here.

23 That conclusion is compelled first and
24 foremost by the text of the relevant statutory
25 provisions. It is compelled by this Court's

1 decision in Free Enterprise Fund, which involved
2 the same statute and the same kind of
3 constitutional claim, and is consistent with
4 this Court's own Thunder Basin factors.

5 I welcome the Court's questions.

6 JUSTICE THOMAS: Mr. Garre, is there
7 any meaningful difference between the facts of
8 this case and the arguments in the previous
9 case?

10 MR. GARRE: In essence, no, Your
11 Honor. And this case is different in a few
12 respects. Number one, Free Enterprise Fund,
13 which we believe strongly supports Mr. Clement's
14 position, applies even more forcefully to this
15 case, which involves the same statute and the
16 exact same claim here.

17 I think the statute in this case,
18 although similar in many respects, is different
19 in at least one respect that makes this case
20 easier, and that's the saving clause in the SEC
21 Act in which Congress made clear that it was not
22 displacing traditional rights or remedies. And
23 we think that one of the remedies that it -- it
24 protected was the traditional remedy of going to
25 a federal court to get an injunction against

1 agency action. But the short answer to your
2 question is we believe that jurisdiction exists
3 in both cases for largely the same reasons.

4 JUSTICE THOMAS: And one final
5 question, just a short one. There's a lot of
6 talk about these cases, orders actually being
7 entered in these cases, and then they're subject
8 to review. How often does that happen?

9 MR. GARRE: Very infrequently in the
10 relative sense, Your Honor. The vast majority
11 of these cases settle, more than 90 percent,
12 because the individuals just, frankly, can't
13 endure the years of proceedings that it takes to
14 get to an Article III court.

15 JUSTICE THOMAS: How many years has
16 this been going on?

17 MR. GARRE: Well, it's -- it's been
18 going on really in our situation since
19 Dodd-Frank, in which many of these claims have
20 been channeled to these in-house agency
21 proceedings.

22 Now the SEC doesn't have to act this
23 -- this way. It can go to federal district
24 court, in which citizens enjoy greater rights
25 and protections. It can go before its own

1 Commission. But, instead, it elects typically
2 to go before its own in-house ALJs, which suffer
3 from this blatant constitutional defect.

4 And to the Chief Justice's point
5 earlier, we think that the Jarquesy case shows
6 exactly the flaw with the government's position,
7 that you would have to wait some seven years in
8 Mr. Jarquesy's case to go through those rounds of
9 proceedings before you can finally get to an
10 Article III court to present your constitutional
11 claim that the agency didn't have authority to
12 act at all against that individual.

13 CHIEF JUSTICE ROBERTS: You said since
14 Dodd-Frank. I -- I don't have it at the tip of
15 my brain or whatever when that was.

16 MR. GARRE: 2000 -- I believe it was
17 2010, Your Honor, 2009, 2010. That's where more
18 of these claims were funneled into that system.

19 I -- I -- I think, on -- on -- on the
20 Thunder Basin analysis, you know, our position
21 is that the Court should look, in this case, as
22 in any statutory interpretation case, first and
23 foremost to the text of the relevant provisions.
24 And we agree wholeheartedly with the Fifth
25 Circuit that those provisions unambiguously

1 leave district court jurisdiction over the
2 structural constitutional claims at issue.

3 I think one reading of Thunder Basin
4 is that the Court applied those factors as a
5 means of discerning congressional intent so that
6 ultimately the Court was engaging in an inquiry
7 into what Congress intended, albeit not in the
8 way the Court would typically construe a
9 statute.

10 But I think there's a -- there's an
11 important threshold consideration that explains
12 why Thunder Basin doesn't deal with this sort of
13 case. The threshold question that Thunder Basin
14 dealt with was a situation where the agency
15 action being challenged was the agency action
16 that was the subject of an exclusive
17 administrative scheme. So, in the Elgin case,
18 it was the CRSA's scheme which established a
19 system for challenging adverse employment
20 actions or removals. And in the Thunder Basin
21 case, it was a scheme that challenged -- for
22 challenging citations and other administrative
23 orders by the Mine Act.

24 And that's what you had in both of
25 those cases. And in that situation, where

1 you're challenging the very thing that Congress
2 channeled to an alternative scheme, the Thunder
3 Basin factors were actually a way in which the
4 Court would find that jurisdiction was
5 preserved. Even in that instance, where the
6 thing that you're challenging is the very thing
7 that Congress channeled -- channeled to a
8 different scheme, Thunder Basin could say that,
9 well, no, some of those claims are so separate
10 from that and involve things not before the
11 agency's ken that you can go to district court.

12 JUSTICE JACKSON: Mr. Garre, can I
13 just ask you, because it seems to me that the
14 thing that is bugging me about this, your
15 argument, is that we could look at the statute
16 that's here and discern that Congress intended
17 to allow the agency to do its work and then have
18 judicial review, not so much, you know, exactly
19 the nature of the claims that can be brought,
20 but, at -- at a minimum, the fact that the
21 statute requires the court of appeals to wait in
22 general before it gets involved, you have to
23 have a person who's been aggrieved by a final
24 order of the Commission before the court of
25 appeals gets involved makes me wonder whether

1 Congress really intended for 1331 to be
2 operating to allow the district court to be
3 issuing and considering interlocutory arguments
4 by parties, whether they're the kind that you're
5 making, this entire thing is unconstitutional,
6 or other things, discovery, whatever.

7 I'm worried about a notion that 1331
8 can be used here to undermine congressional
9 intent about the finality of agency action
10 before the courts come in.

11 MR. GARRE: Sure. So we don't think
12 that there's anything in 78y of the SEC Act
13 which indicates an intention to displace
14 district court jurisdiction over the structural
15 constitutional claims at issue here.

16 Now, you're right, Congress made clear
17 that it wanted challenges to final orders to go
18 to the courts of appeals. But another thing
19 that's, I think, relevant to the question here
20 is that in describing what the courts of appeals
21 could do, it said it could set aside or modify
22 an order on -- on the record that had been
23 developed.

24 And I think that that's pertinent to
25 the question here because that doesn't really

1 give us the relief that we're looking for, which
2 is an injunction against a proceeding before
3 unconstitutional ALJs.

4 JUSTICE JACKSON: I understand. But
5 my question is, do we -- can we fairly discern
6 that it was Congress's intention to allow for
7 that kind of interlocutory argument to be made,
8 or was it saying -- I mean, I agree with you
9 there's nothing that suggests that that argument
10 can't be made at all -- but can we fairly look
11 at the language here and say that Congress
12 intended for that kind of argument to be made
13 while the proceedings were going on?

14 And -- and -- and I think it matters.
15 I mean, one of the things that your colleague on
16 the other side pointed out is that maybe there
17 was a reason why Congress would have wanted that
18 to be made later, in part because it may avoid
19 having to have judicial review at all.

20 And, traditionally, our thought has
21 been you don't jump in to decide constitutional
22 questions, and if there's a way to avoid it, you
23 do.

24 So it seems rational to me that when
25 Congress was putting off even court of appeals

1 review in this case, it was saying anything that
2 you have related to the sort of constitutional
3 nature of this, wait until the agency finishes,
4 and then everything can be brought at that time.

5 MR. GARRE: Right. So I think that
6 set of concerns is -- is different, Your Honor,
7 in the sense that we're suffering what this
8 Court has called a here-and-now injury by simply
9 having to proceed before an ALJ that is
10 unconstitutional in its very existence.

11 Now that's --

12 JUSTICE JACKSON: But that assumes the
13 merits. That -- that assumes the merits, right?

14 MR. GARRE: Well, what it does, it
15 looks to the particular kind of claim here. Of
16 course, you're right, we have to actually prove
17 that the removal restrictions are
18 unconstitutional, but it's what distinguishes
19 the structural constitutional claim from the
20 sorts of preliminary orders that you might see
21 in an ALJ proceeding, which don't actually
22 aggrieve one until they're embodied in a order
23 of the Commission, which, at that point in time,
24 you can challenge to the court of appeals and
25 get the relief you're asking for by having the

1 court of appeals set aside that order.

2 That's not true here, both because
3 we're suffering this injury wholly apart from
4 whether or not we win or lose at the end of the
5 day before the agency.

6 JUSTICE JACKSON: But why isn't that
7 any single person who has the type of claim that
8 would, you know, challenge the agency review in
9 a -- in a similar way?

10 I mean, we've heard some of the other
11 examples of types of claims, and I'm just
12 wondering why couldn't anybody make the argument
13 similar to the way Justice Kagan brought up some
14 examples, those arguments sort of challenge the
15 unconstitutional functioning of the agency.

16 MR. GARRE: Well, I think most of the
17 arguments that we -- that would come up tend to
18 involve the particular facts and circumstances
19 of the individual proceeding.

20 The structural constitutional claims
21 are different. They're not related in any way
22 to the facts or circumstances of a given
23 proceeding. They -- they go to the inherent
24 nature, existence, of the decisionmaker.

25 And -- and I think --

1 JUSTICE KAGAN: Mister --

2 MR. GARRE: -- that that's an
3 important -- I'm sorry, Your Honor.

4 JUSTICE KAGAN: No, please.

5 MR. GARRE: I just was going to say I
6 think that's a very important distinction that
7 this Court has drawn, for example, in the Carr
8 versus Saul case.

9 JUSTICE KAGAN: I see a bit of a
10 tension in the way you started arguing this case
11 because you've said many times the structural
12 constitutional claims -- the structural
13 constitutional claims are special, different.
14 There's a -- there's a -- a real need for this
15 kind of review.

16 And -- and Thunder Basin, you know, it
17 -- it -- it's really a focus on what kind of
18 claims they are. So Thunder Basin allows you to
19 talk about that. But -- but your statutory
20 argument really does not allow you to talk about
21 that because there's nothing in these statutes
22 that would -- would treat constitutional --
23 structural constitutional claims any differently
24 from any other claims, statutory claims, claims
25 about just evidentiary rulings.

1 So the way you want us to -- to decide
2 this case is going to have ramifications far
3 beyond structural constitutional claims, and,
4 indeed, it's very hard on your interpretation of
5 the statute to see why the nature of the claim
6 would have any relevance at all.

7 MR. GARRE: So I guess, first, I would
8 say we would be comfortable if this Court
9 followed the text of what Congress enacted and
10 held that there was jurisdiction here and
11 perhaps jurisdiction in other cases to be sorted
12 out applying the tools that district courts
13 apply all the time, exhaustion, finality, and
14 whatnot.

15 But the second is I -- I guess I would
16 disagree with the premise of Your Honor's
17 question in the sense that structural
18 constitutional claims are -- are different in --
19 in a way that's meaningful in the statute, for
20 example, as to the relief that you could get in
21 the court of appeals.

22 This statute allows court of appeals
23 to set aside or modify the final order. But, in
24 a structural constitutional claim, that doesn't
25 give you the relief that you're looking for. It

1 wouldn't give us the relief that we're looking
2 for because we're looking for an injunction
3 against this unconstitutional agency action.

4 And my friend, Mr. Stewart's answer on
5 this question, I think, was telling. What he
6 said in that situation is, well, you would get a
7 decision and, you know, on -- on remand, you
8 know, maybe the -- the -- the case that comes
9 out of the Ninth Circuit would have to follow
10 that, you know, which is to say that the agency
11 might not have to follow that with respect to
12 cases in the other circuits.

13 And we're talking, again, about the
14 very existence, the very authority of the
15 decisionmaker to act at all, which is different.

16 JUSTICE KAVANAUGH: So --

17 MR. GARRE: And the fact -- I'm sorry.

18 JUSTICE KAVANAUGH: Keep going. Keep
19 going.

20 MR. GARRE: No, I was just going to
21 say the fact that the statute is limited in
22 terms of the relief that the court of appeals
23 can grant actually, I think, does speak to why
24 these claims were not divested by -- by
25 Congress.

1 JUSTICE KAVANAUGH: Your broader
2 argument, as Justice Kagan points out, would
3 suggest, I think, starting over on how the Court
4 analyzes this whole area. And maybe it's just
5 out of sympathy for the district court judges
6 and court of appeals judges who have to deal
7 with the fallout from that.

8 But isn't a simpler way to deal with
9 this just to -- and maybe this is your narrow
10 argument -- you know, under the wholly
11 collateral factor, a challenge to the structure
12 of the agency is wholly collateral, end of
13 story.

14 MR. GARRE: Well, I mean, with
15 respect, I think the easiest way for the
16 district courts to resolve this is to look at
17 the text of what Congress enacted. We -- we
18 think --

19 JUSTICE KAVANAUGH: No, I know that.
20 But there's a lot -- my point is there's a lot
21 of precedent interpreting that text in Thunder
22 Basin --

23 MR. GARRE: And --

24 JUSTICE KAVANAUGH: -- Elgin, Free
25 Enterprise Fund and going back, and -- and so

1 kind of starting over on all that would create
2 kind of a tsunami of litigation. Maybe that's
3 okay. Maybe it's not. But --

4 MR. GARRE: I don't think --

5 JUSTICE KAVANAUGH: -- your -- your
6 narrower argument, which I'm supporting for
7 purposes of this question, is just, under
8 Thunder Basin factors, under Free Enterprise
9 Fund, and under Elgin, we -- we're on the right
10 side of the line because it's a challenge to the
11 structure of the agency?

12 MR. GARRE: Right. And -- and we --
13 we're ultimately content to win either way, Your
14 Honor.

15 JUSTICE KAVANAUGH: Right.

16 MR. GARRE: But I -- but I do think,
17 on Thunder Basin, one thing that the last almost
18 10 years has shown in the courts of appeals is
19 that Thunder Basin hasn't been particularly
20 helpful to the lower courts in resolving these
21 issues.

22 JUSTICE KAVANAUGH: Right. I think
23 Mr. -- when Mr. Clement said the beauty of the
24 Thunder Basin factors, I -- I definitely cringed
25 because they -- they have not been beautiful for

1 --

2 MR. GARRE: Correct.

3 JUSTICE KAVANAUGH: -- in the lower
4 courts. But, you know, the wholly collateral, a
5 challenge to the structure of the agency, is
6 that one paragraph of Free Enterprise Fund, kind
7 of deals with that.

8 Now you have -- you'll have to respond
9 to what's that other paragraph of Free
10 Enterprise Fund and how would you explain that.
11 But --

12 MR. GARRE: Right. And -- and I think
13 the -- I guess the way that --

14 JUSTICE KAVANAUGH: -- that -- that
15 seems simple enough. I guess what I'm
16 challenging and pushing back on is kind of
17 throwing it all open again after decades of
18 trying to figure out how these claims should be
19 sorted out doesn't -- causes me some concern at
20 least.

21 MR. GARRE: I guess I understand Your
22 Honor's concern. I -- I think it should be
23 addressed by the fact that district courts have
24 been applying the sorts of tools in determining
25 when or whether to exercise jurisdiction for

1 centuries.

2 In Standard Oil, one of -- one of our
3 friends, you know, cases they liked the most is
4 an example of how district courts can apply
5 those tools.

6 And -- and I think, I mean, what we're
7 talking about here is treating this case
8 involving the -- the -- one of the most
9 important questions of the Court's jurisdiction
10 differently than any other statutory
11 interpretation case.

12 I -- I think what we would ask and
13 hope is that this Court make clear the
14 involvement and preeminence of the statutory
15 text in resolving these questions. I think the
16 Thunder Basin factors can be complementary.

17 In some respects, you could take --
18 and Justice Kagan's question earlier, I think,
19 alluded to this -- is, you know, one might
20 plausibly interpret the reference to "any final
21 order" to include a challenge to preliminary
22 orders that wouldn't actually aggrieve someone
23 until they were embodied in a final order.

24 And, in that respect, you know, those
25 sorts of claims would be channeled through the

1 review scheme. But I think, you know, here,
2 fundamentally, this case doesn't sort of fit
3 cleanly within the Thunder Basin paradigm
4 because we're not challenging the kind of agency
5 action that is covered by the alternative review
6 scheme. We're not Elgin. We're not like Elgin.
7 We're not like Thunder Basin in that respect.

8 We're challenging a final -- we are
9 not challenging a final order. We're
10 challenging something that is completely
11 separate from that.

12 JUSTICE KAVANAUGH: Yeah, and that --
13 in that respect, just to add one more, you're
14 like Free Enterprise Fund, and just if you can
15 address the part of Free Enterprise Fund that is
16 more problematic for you.

17 MR. GARRE: Sure. So we -- we think
18 that the better reading of that is that the
19 Court was just responding to the government's
20 argument and that Ms. Cochran is in the same
21 position as the plaintiff in the Free Enterprise
22 Fund case in the sense that the only way that
23 she could guarantee that she could get to an
24 Article III court to raise her claim is
25 essentially to default in her administrative

1 proceeding.

2 In that respect, she does have to bet
3 the farm because, you know, although it's
4 unlikely given the -- the agency's track record,
5 if she won on the merits -- of course, we
6 believe that she shouldn't -- but, if she won,
7 she wouldn't be able to present her structural
8 constitutional claim to a court of appeals ever.

9 And, again, I mean, just on the
10 meaningful judicial relief, I wanted to
11 emphasize this point that Mr. Clement made in
12 rebuttal. Here, it's not clear that getting
13 relief at the end of the day is going to be
14 relief at all for this type of constitutional
15 claim because the way to get relief for a
16 structural constitutional violation is to
17 immediately enjoin the agency proceedings so
18 that you don't have to go through them.

19 I mean, under this Court's decisions
20 in Collins versus Yellen, it's at least much
21 more challenging to get relief retrospectively,
22 which underscores why waiting to the end of the
23 proceeding, you know, years down the line is not
24 meaningful in the constitutional sense, much
25 less in the practical sense.

1 JUSTICE KAGAN: Can -- can I take you
2 back to Free Enterprise Fund following along
3 Justice Kavanaugh's question? I mean, there's
4 some awfully good language in Free Enterprise
5 Fund for you on the collateral point, as well as
6 on the expertise point. And the collateral
7 point is very intuitive to me here, so maybe it
8 doesn't really matter what Free Enterprise Fund
9 says about it.

10 But -- but I take even the first
11 paragraph to be just responding to the
12 government's argument. In other words, it was
13 the strange situation in Free Enterprise Fund
14 where they're objecting to the Board, but
15 there's no -- but -- but you have to get to the
16 Commission. And so they say -- and so -- and so
17 the government says, well, just, you know, seek
18 Commission review. And the first thing that the
19 Court says, before the second paragraph even, in
20 the first paragraph is: Well, that would be
21 really strange just to seek Commission review
22 when your beef is not with the Commission's
23 rules.

24 MR. GARRE: Right.

25 JUSTICE KAGAN: So I take even that

1 collateral point to be not -- not quite the --
2 not answering the collateral question.

3 MR. GARRE: Well, I think -- and
4 that's -- if you don't think that you're bound
5 by Free Enterprise Fund on that point, then --
6 then that's fine, but we think that -- that, by
7 far, the better position is --

8 JUSTICE KAGAN: I guess I should say
9 Free Enterprise Fund --

10 MR. GARRE: -- that this is wholly
11 collateral.

12 JUSTICE KAGAN: -- doesn't go as far
13 as you want it to go.

14 MR. GARRE: Well, we think that the
15 Fifth Circuit was right in saying that it
16 ultimately controls. We're not -- we're not
17 disputing that there are factual differences
18 between the case. We don't think that they --
19 they call for a different understanding or
20 conclusion on any of the Thunder Basin factors
21 if this -- if that's how this Court resolves the
22 case.

23 I mean, that's certainly -- I mean, I
24 took the government not really to be fighting
25 too hard on wholly collateral or agency

1 expertise. I mean, I think that they largely
2 focused, to the extent they go into a Thunder
3 Basin analysis, on the opportunity for a
4 meaningful judicial review.

5 And I -- and I think, as I indicated
6 earlier, forcing individuals to -- to go through
7 this unconstitutional proceeding with the chance
8 that they could ultimately get to an Article III
9 court is not meaningful judicial review in any
10 sense.

11 JUSTICE KAGAN: And -- and if I could
12 just repeat the question that I asked Mr.
13 Clement, how is it different from a person
14 having a subject matter jurisdiction claim in a
15 court? In other words, this is the wrong court;
16 I shouldn't be in this court at all.

17 MR. GARRE: Right.

18 JUSTICE KAGAN: And we -- we save that
19 until the end. How is this different?

20 MR. GARRE: I think -- I mean, first
21 of all, it -- you're before an Article III
22 court. You're not before an administrative
23 decisionmaker that is not independent, protected
24 with the protections of Article III. And I
25 think -- and that's -- that's important. We're

1 talking about individuals who are hauled before
2 administrative agencies, who ultimately want to
3 present their claim to an Article III court.

4 And the other difference, of course,
5 is subject matter jurisdiction, although, you
6 know, protected in -- in some respects under the
7 Constitution, here, we're talking about
8 constitutional violations. And this Court has
9 -- has always, going back hundreds of years,
10 recognized the historic role of district courts
11 in being open to hear and redress government --
12 unconstitutional government action, particularly
13 of the structural type.

14 JUSTICE SOTOMAYOR: I'm still not sure
15 why. I thought that the whole purpose of a
16 special review scheme, especially one that puts
17 review in an agency, is to consolidate rather
18 than bifurcate review of agency action.

19 And, here, as the government pointed
20 out, when it did want a bifurcation with
21 temporary cease-and-desist orders, Congress made
22 an exception, sending back to the district
23 court. So I think that really shows you that
24 when Congress wants to send something else, it
25 knows how to. That's what it did in the CSRA

1 review scheme.

2 So I don't -- unlike Elgin, I have a
3 hard time thinking why the nature of the
4 constitutional claim would deprive the parties
5 and the -- or the district court of -- of clear
6 guidance that that should go through the scheme.

7 MR. GARRE: So I think --

8 JUSTICE SOTOMAYOR: I still don't
9 understand. Is there something special about
10 structural constitutional claims? And I don't
11 really know what they are because, for you, it's
12 easy. It's removal. Okay? But your colleague,
13 Mr. Clement, wants to go broader on what
14 structural is. And I don't really see how you
15 divide that out from just regular due process
16 claims. But maybe you can give me a clearer
17 definition than I've received so far in the case
18 law or from Mr. Clement on what structural means
19 to you.

20 MR. GARRE: Sure. So --

21 JUSTICE SOTOMAYOR: And give me some
22 sort of special damage that you're suffering --

23 MR. GARRE: Sure.

24 JUSTICE SOTOMAYOR: -- under your --
25 under that definition.

1 MR. GARRE: So, on structural
2 constitutional claims, I'd point you to the
3 Court's decision in Carr versus Saul, in which
4 it recognized the class of claims of structural
5 constitutional claims and cited --

6 JUSTICE SOTOMAYOR: I'm sorry, which
7 case?

8 MR. GARRE: Carr versus Saul dealt
9 with the -- the --

10 JUSTICE SOTOMAYOR: Remind me of what
11 it said.

12 MR. GARRE: In that case, the Court
13 held that you didn't have to exhaust
14 Appointments Clause challenges before
15 administrative agencies, that you could bring
16 that independent -- bring that in -- in Article
17 III court. And because of the -- the -- the
18 unique nature of structural constitutional
19 claims among other considerations, but in
20 discussing structural constitutional claims, the
21 Court cited numerous cases of examples,
22 including the Free Enterprise Fund case.

23 In terms of why they're different,
24 Your Honor, we're suffering by -- the mere fact
25 of having to proceed before an unconstitutional

1 agency decisionmaker inflicts what this Court
2 called a here-and-now injury that exists wholly
3 apart from the ultimate outcome of that
4 proceeding. And that's different from almost
5 any other type of preliminary challenge you
6 could imagine --

7 JUSTICE SOTOMAYOR: But, if there's a
8 --

9 MR. GARRE: -- to that proceeding.

10 JUSTICE SOTOMAYOR: -- if there's a
11 due process violation of any kind in a
12 proceeding, whether it's a violation of a
13 regulation or a violation of not enough notice
14 or not enough clarity, those things, routinely,
15 we -- certainly, in court cases, we leave to the
16 end. But I don't know why we should be
17 permitting district court interference --

18 MR. GARRE: So I --

19 JUSTICE SOTOMAYOR: -- with the
20 process that Congress has given to the agency to
21 conclude that matter.

22 MR. GARRE: So I think this Court has
23 recognized that structural constitutional claims
24 are different in terms of how they inflict
25 injury that's separate and unique. And the

1 other point I would say is, in order to get
2 meaningful redress of that injury, you need an
3 injunction that stops the proceedings, forcing
4 you -- that prevents you from having to undergo
5 them again.

6 And that's different from a case
7 where, even if you've suffered a due process
8 violation based on the particular application of
9 a rule or a statute, you could get relief from
10 that, getting relief from the order. That's not
11 true with respect to this unique class of
12 constitutional claims here.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 Justice Thomas?

16 Justice Alito?

17 Anything further, Justice Sotomayor?

18 Justice Gorsuch?

19 JUSTICE GORSUCH: Just a couple quick
20 questions, I hope. First, the government relies
21 heavily on 704 of the APA, and I'd just like to
22 give you a chance to address that.

23 MR. GARRE: So the APA
24 non-jurisdictional arguments are waived in our
25 case. They weren't addressed below. That's --

1 that's point one.

2 Second, I mean, we're not bringing an
3 APA cause of action. Our -- our cause of action
4 is the traditional one that this Court
5 recognized in Free Enterprise Fund. So it's not
6 clear to me that the APA limits would apply at
7 all.

8 And, third, I mean, ultimately, we
9 agree with Mr. Clement that -- that the APA
10 doesn't strip jurisdiction any more than the SEC
11 Act does. And that's ultimately what the
12 government would be saying, is that, you know,
13 Congress granted this jurisdiction in 1331, the
14 SEC Act didn't take it away, but, lo and behold,
15 10 years later, in a different provision that,
16 you know, didn't talk about jurisdiction,
17 really, Congress, you know, stripped this
18 traditional historic class of jurisdiction.

19 And we don't think that that's a fair
20 reading of the statute.

21 JUSTICE GORSUCH: And, second, I
22 wanted you to explain how you thought Thunder
23 Basin interacted, properly understood, with a
24 plain reading of these statutes.

25 MR. GARRE: So we would -- we would

1 start with the text of the statute. We think
2 that the Thunder Basin factors in some ways
3 could be relevant in thinking about what --
4 whether Congress actually intended to strip
5 jurisdiction. I mean, for example, where you're
6 talking about something that is wholly
7 collateral, where the agency doesn't have
8 expertise to address, it would be unusual to
9 think that Congress, you know, forced parties to
10 go through the administrative proceeding to --
11 before getting judicial review on that.

12 So -- so, in that respect, we think
13 the factors could inform the Court's analysis of
14 what Congress intended and -- and supplement a
15 textual inquiry, but we think, you know,
16 ultimately, Congress says what it means and
17 means what it said and that here, as the Fifth
18 Circuit concluded, the textual analysis is quite
19 straightforward.

20 JUSTICE GORSUCH: The textual analysis
21 here, you know, it says final orders are
22 reviewable in the court of appeals. And we
23 don't have one of those.

24 MR. GARRE: Correct.

25 JUSTICE GORSUCH: I -- I could

1 understand maybe a world in which we would look,
2 if we had a final order, to Thunder Basin
3 factors to see whether, nonetheless, there
4 should be room for a district court proceeding.

5 MR. GARRE: And I -- and I think that
6 --

7 JUSTICE GORSUCH: And I think that may
8 be what happened in Thunder Basin. I just want
9 to give you a chance to react to that.

10 MR. GARRE: I think that's exactly
11 right, Your Honor, that -- that really, if you
12 look at Thunder Basin and Elgin, what they say
13 is you look first to whether you're challenging
14 an agency action that is the subject of an
15 exclusive judicial review scheme.

16 And at that point or if you -- if you
17 say yes, then you can engage in the Thunder
18 Basin analysis to see whether, nevertheless, the
19 district courts would still have jurisdiction
20 over that claim.

21 So we don't -- we don't get past that
22 first stage here because we're not challenging
23 the agency -- any agency action covered by an
24 exclusive judicial statutory scheme. We're not
25 challenging the final order.

1 CHIEF JUSTICE ROBERTS: Justice
2 Kavanaugh?

3 Justice Barrett?

4 Justice Jackson?

5 JUSTICE JACKSON: Yes. So I -- I
6 guess you could also read the statute, as I said
7 at the beginning, to raise the concern that
8 you're not challenging a final order. But, if
9 you read the statute to be Congress's intention
10 to not allow for judicial review while the
11 agency has the issue, then the fact that you're
12 not challenging a final order seems -- seems
13 problematic.

14 But let me -- let me ask you to react
15 to something that Justice Kavanaugh started,
16 helpfully, in the sense that he said, okay, so
17 if we're going to craft an order consistent with
18 your view, we could say that claims that are
19 structural and constitutional are wholly
20 collateral and, therefore, would be allowed to
21 be brought under 1331 jurisdiction.

22 I'm wondering whether, to temper my
23 concern that allowing for 1331 jurisdiction to
24 occur for those structural claims while the
25 agency has the issue, could we also say it has

1 to be structural and constitutional, but it has
2 to be the kind of thing that would permit the
3 district court to completely terminate the
4 agency proceeding so that we don't have, like --
5 we don't have it operating like an interlocutory
6 review of an ongoing agency proceeding, but we
7 have this requirement that the remedy that
8 you're seeking as the person who's bringing the
9 structural claim is to shut the whole thing
10 down.

11 MR. GARRE: Right. I -- I think the
12 answer is yes in the sense that the structural
13 constitutional claims are talking about the
14 class of claims that really are going to the
15 very existent form, inherent nature of the
16 proceeding. So it's hard to imagine where
17 you're making that kind of structural
18 constitutional claim, why you would -- you would
19 have the agency proceeding going forward.

20 I mean, ultimately, I think the
21 district court would have discretion as to
22 whether or not to enjoin the agency proceedings.
23 In our case, the Fifth Circuit enjoined the
24 agency proceedings.

25 JUSTICE JACKSON: But what about the

1 -- what about a removal claim like the one
2 you're bringing? I mean, aren't you just
3 saying, you know, that it's not really a defect
4 in the particular adjudication, it is that if
5 you gave us a different ALJ, one who had his
6 removal protections set up differently, we'd be
7 fine, so if the agency paused and reconfigured
8 the ALJ and then came back to you, they wouldn't
9 have to start again with a new indictment or
10 whatever it is, however they start their
11 proceedings.

12 I mean, aren't you in a way not
13 terminating by bringing a structural claim about
14 ALJ removal processes, they could cure that and
15 just keep going?

16 MR. GARRE: So I don't think they
17 could cure that in the sense that we're
18 challenging the constitutionality of all SEC
19 ALJs because all SEC ALJs are unconstitutionally
20 insulated from removal by the statutes that Mr.
21 Clement referred to earlier.

22 So, to get redress from that, you
23 would actually declare the statutes
24 unconstitutional, and that's ultimately what
25 we're asking for in this case. You can see it

1 on page 64 of the Joint Appendix, a declaration
2 that those statutes are unconstitutional.

3 But those go to the very authority and
4 existence of the administrative decisionmaker
5 that Ms. Cochran currently faces.

6 CHIEF JUSTICE ROBERTS: Thank you, Mr.
7 Garre.

8 MR. GARRE: Thank you, Your Honor.

9 CHIEF JUSTICE ROBERTS: Mr. Stewart,
10 welcome back.

11 ORAL ARGUMENT OF MALCOLM L. STEWART ON BEHALF OF THE
12 SECURITIES AND EXCHANGE COMMISSION, ET AL.

13 MR. STEWART: Thank you, Mr. Chief
14 Justice, and may it please the Court:

15 Let me just make a couple of points
16 first before taking questions.

17 Mr. Garre said that going back to
18 Marbury versus Madison, courts have been
19 authorized to grant injunctive relief against
20 unconstitutional governmental action.

21 And it's certainly true that there's a
22 longstanding practice of courts, without
23 explicit statutory authority, granting equitable
24 relief to claimants who would otherwise have no
25 access to judicial review of constitutional

1 claims.

2 But that authority has never been
3 unlimited. It's always been constrained by
4 doctrines about what can you sue about and when
5 can you sue.

6 On pages 47 to 50 of our brief, we
7 cite a series of cases of this Court that stand
8 for the proposition that courts will not
9 intervene in pending agency proceedings until
10 the proceedings culminate in an order or a rule
11 that sets legal obligations, imposes a sanction,
12 et cetera.

13 One of those is Myers versus Bethlehem
14 Shipbuilding. In that case, the shipbuilding
15 company was in NLRB proceedings and said my
16 operations don't have a sufficient connection to
17 interstate or foreign commerce to make me
18 regulable under the National Labor Relations
19 Act.

20 And the Court held that's the kind of
21 claim that has to wait until the end of the
22 administrative proceedings, even though you are
23 asserting a constitutional objection to the
24 exercise of authority over you.

25 Another case is Federal Power

1 Commission versus Metropolitan Edison that we
2 cited. If you look at the relevant page of
3 Metropolitan Edison, you'll see literally a page
4 of string cites to earlier cases decided before
5 1938 that established this principle.

6 Courts don't intervene in pending
7 agency proceedings dating all the way back to a
8 1912 opinion written by Chief Justice Edward
9 White.

10 And so, to us, the most difficult
11 aspect of this came -- of this case is whether
12 the barrier to suit should be viewed as
13 jurisdictional or non-jurisdictional. But the
14 most salient fact is this has never been the
15 kind of thing a person could get immediate
16 review of in court.

17 I welcome the Court's questions.

18 CHIEF JUSTICE ROBERTS: Counsel, in
19 the earlier argument, I think you were making a
20 point about it would not be a waste to send even
21 these structural claims to an agency because the
22 agency could address a number of factors that
23 would go into that type of analysis.

24 MR. STEWART: It -- first, I mean, it
25 would not be a waste for two reasons: First,

1 because the agency could explain, for instance,
2 why from its perspective it was either a good or
3 a bad characteristic to have ALJs with for-cause
4 removal protection.

5 In 2015, the SEC issued an opinion in
6 which it stated that it thought it would not be
7 wise to make ALJs removable at will because it
8 would impair their actual or apparent
9 impartiality. And --

10 CHIEF JUSTICE ROBERTS: Was their --
11 was their position a surprise?

12 MR. STEWART: I -- I think it's
13 important -- I think it is not -- yes, it is, at
14 least a potential surprise. That is, if the SEC
15 Commissioners or the FTC Commissioners said the
16 same thing about themselves, then that would be
17 no surprise.

18 But, under Lucia, the ALJs are now
19 treated as principal -- as officers of the
20 United States. They have to be appointed in
21 conformity with the Appointments Clause. They
22 are being appointed by the Commissioners.

23 And under the usual rule that the
24 appointing authority has removal authority, it
25 would be the SEC Commissioners who removed ALJs

1 if they were removable at will.

2 CHIEF JUSTICE ROBERTS: It sounds to
3 me like you're just saying the agency might
4 write a brief, presumably, defending the
5 structure of the agency --

6 MR. STEWART: Well, the two things we
7 would --

8 CHIEF JUSTICE ROBERTS: -- which it
9 can do when the case goes before the district
10 court.

11 MR. STEWART: I -- I guess the two or
12 three things we are -- would say are, first,
13 yes, we could put these points in our brief, but
14 often the court --

15 CHIEF JUSTICE ROBERTS: Well, my point
16 is, when you send it back, you're saying the
17 agency would -- it would be a valuable thing to
18 send to the agency a claim that the agency is
19 unconstitutionally structured because you'll get
20 the benefit of their views --

21 MR. STEWART: Well --

22 CHIEF JUSTICE ROBERTS: -- which is
23 what you would get if you go to 1331 and we get
24 a brief from the government.

25 MR. STEWART: You -- you would get a

1 brief. But I think, in various contexts, the
2 Court does sometimes distinguish between the
3 opinions that were expressed by the agency
4 officials, the Commissioners, in their own name
5 and the post hoc justifications from agency
6 lawyers.

7 And it would be a self-denying
8 position if the SEC Commissioners said, yes, we
9 are the removing authorities, but we think it is
10 a good thing for us not to be able to remove the
11 ALJs at will because it would compromise their
12 impartiality. That might or might not carry the
13 day, the case at the end of the day, but it
14 would not be self-aggrandizing.

15 But the second thing I would say in
16 terms of would it be a waste of time, and this
17 is what the Court said in Elgin, it's what the
18 Court said in FTC versus Standard Oil, that even
19 if the agency is not going to apply its
20 expertise to the particular practice -- issue
21 that is being argued about now, the agency may
22 still apply its expertise to other subjects that
23 will produce a ruling that will obviate the need
24 for the court to decide the issue at the end of
25 the day.

1 And Mr. Garre --

2 CHIEF JUSTICE ROBERTS: Well, but in
3 -- in -- in Elgin, that argument, I think, would
4 have stronger force because the issues there
5 were intertwined with the -- the constitutional
6 claim. And, as I understand it, that the -- the
7 view of the Court was, just as you're suggesting
8 is true in this case, that they have something
9 to add to it in terms of posturing the -- the --
10 the claim and -- and its interaction with the --
11 the Civil Service Reform Act provisions.

12 But, here, your -- your multiple
13 friends on the other side argue that's not the
14 case at all, that this is a straightforward
15 constitutional claim that would be presented the
16 same way regardless of what the nature of the
17 proceedings were.

18 MR. STEWART: Well, but they are also
19 saying, independent of their arguments that the
20 adjudicators are improperly insulated from
21 removal, that they should not be held liable
22 under the relevant statutes; that is, Axon's
23 complaint initially had a count that sought a
24 declaration that it hadn't violated the
25 antitrust laws.

1 Mr. Garre was just saying that
2 Ms. Cochran believes that she is innocent, and
3 --

4 CHIEF JUSTICE ROBERTS: Well, is that
5 just an alternative basis for relief, or is
6 that, as I understood it to be in Elgin, an
7 intertwined -- that the constitutional claim was
8 intertwined with the jurisdictional -- or not
9 jurisdictional -- the sort of merits of the
10 agency issue?

11 MR. STEWART: Well, I think the
12 Court's point in Elgin was there was a dispute,
13 for instance, about whether a constructive
14 discharge had occurred. And the MSPB would
15 obviously have expertise in the circumstances
16 that would and would not constitute a
17 constructive discharge.

18 And so, at least with respect to one
19 or more of the plaintiffs, if the MSPB had
20 concluded you were not constructively
21 discharged, that would have obviated the need
22 for a court to decide whether the law providing
23 for male-only registration for the Selective
24 Service was unconstitutional.

25 And the Court said the same thing in

1 Standard Oil, that it didn't expect the agency
2 to devote any more resources to the reason to
3 believe determination.

4 JUSTICE KAVANAUGH: Mr. -- keep going,
5 sorry.

6 MR. STEWART: But it thought that if
7 the -- if the agency determined that Standard
8 Oil was not liable, then there would be no need
9 for judicial review. And Mr. Garre was saying,
10 well, that means I won't have a court entertain
11 my constitutional challenge. But the usual way
12 of reacting to that is it's a good thing if a
13 court doesn't need to decide a constitutional
14 issue because the plaintiff is awarded relief on
15 other grounds.

16 JUSTICE KAVANAUGH: In --

17 JUSTICE SOTOMAYOR: Is -- are the --
18 I'm sorry.

19 JUSTICE KAVANAUGH: Go ahead.

20 JUSTICE SOTOMAYOR: I asked you this
21 before, but I'd like you to pay attention not to
22 the removal provision but to the clearance
23 process, and I know that's not in this case,
24 it's in the other one, the process, clearance
25 process and combined investigator/prosecutor/

1 adjudicatory challenges of the other case.

2 Those are due process challenges.

3 Are they intertwined in the merits in
4 a different way than the removal is?

5 MR. STEWART: I mean, they are not
6 intertwined -- there's no real overlap between
7 the question are those provisions valid and the
8 question did Axon violate the antitrust laws or
9 did Cochran violate the Exchange Act.

10 So you're right that they're not
11 intertwined with the merits provisions. But
12 they are still intertwined with the provisions
13 that govern SEC adjudications and judicial
14 review of SEC adjudications. And I would -- as
15 I was saying in response to -- to Justice Kagan,
16 if you had a dispute about whether an ALJ was
17 right or wrong in excluding particular evidence
18 that was proffered by the respondent in a
19 proceeding, the -- the question whether the
20 rule, the evidentiary rule, had been properly
21 applied might be essentially unconnected to the
22 question did Ms. Cochran violate the securities
23 laws. But it's still the type of issue that we
24 --

25 JUSTICE SOTOMAYOR: Well, I was

1 thinking, on the clearance process rules, the FT
2 -- the agency could tell us or decide to change
3 its rules.

4 MR. STEWART: And, I mean, it could --
5 it could decide to change the rules, but you're
6 right, that's -- that is an issue as to which
7 the agency could surely apply its expertise,
8 could clarify the factors that were used in
9 determining whether to proceed in court or to
10 proceed administratively. It wouldn't have the
11 barrier of a federal statute that it couldn't
12 set aside as unconstitutional. So that's
13 certainly an aspect of the case as to which the
14 agency could exercise its expertise, but -- yes.

15 JUSTICE KAVANAUGH: Mr. Stewart, in
16 thinking about the precedents, I think there are
17 good arguments both ways, as I've indicated in
18 my questions, but then I think there's a broader
19 question that Justice Alito raised earlier that
20 I want to follow up on, which is, what makes the
21 most sense? What makes the most sense for the
22 government? What makes the most sense for the
23 citizens? What makes the most sense for the
24 court system?

25 And I think cutting against your

1 position on that question is you can get more
2 certainty, more clarity quicker about a basic
3 fundamental question about the constitutionality
4 of the agency itself or the agency's structure
5 itself.

6 Now one thing that I would be
7 concerned about that supports you is floodgates,
8 delay, obstruction. But, you know, unless you
9 get -- unless the plaintiffs challenging the
10 procedures get a preliminary injunction, the
11 agency procedures are just going to continue on,
12 and to get a preliminary injunction, they would
13 have to, you know, show likelihood of success.
14 So that would deter, I would think, frivolous
15 claims or claims that are not meritorious.

16 So, on that kind of broad way of
17 thinking about the clarity, the certainty, the
18 speed, isn't that all upside to allowing a
19 challenge to the structure of the agency to go
20 -- to go forward in the district court?

21 MR. STEWART: Let me say two or three
22 things about that. The first is a decision of a
23 district court and even a decision of a circuit
24 court is not going to provide certainty on these
25 issues. And until this Court decides the

1 question, you could have a circuit conflict if
2 you allowed district court review, just as you
3 could have a circuit conflict if you allowed
4 review only at the final --

5 JUSTICE KAVANAUGH: But --

6 MR. STEWART: -- order stage. The --
7 the second --

8 JUSTICE KAVANAUGH: -- as Mr. Clement
9 -- I'll let you get to your second, but as Mr.
10 Clement indicated, we have some examples out
11 there where it's taken seven years or something
12 to wind its way through on the one hand; on the
13 other hand, you know, it could -- it'll move
14 much more quickly if it goes through the PI
15 route and it goes through the district court
16 route to get here. In other words, going --
17 your point, certainty will only be provided by
18 this Court. You'll have certainty sooner under
19 allowing the district court proceedings, rather
20 than, under your approach, certainty from this
21 Court sooner.

22 MR. STEWART: I mean, certainly, a
23 district court could issue a preliminary
24 injunction very quickly, but that wouldn't
25 provide certainty even within the circuit. Even

1 an affirmance by the court of appeals on a
2 likelihood of success standard wouldn't provide
3 a definitive circuit court ruling.

4 And there's really no reason to
5 believe that, systemically, the process of
6 getting a court of appeals ruling is likely to
7 move more quickly if you have district court
8 review and then court of appeals review than if
9 you have agency review and then court of appeals
10 review.

11 JUSTICE KAVANAUGH: Okay. You had a
12 second point.

13 MR. STEWART: The second thing I was
14 going to say is that there is at least -- the
15 regime that we have now is certain agency
16 actions are reviewable and certain agency
17 actions are not reviewable or they are not
18 reviewable until they've kind of crystallized in
19 a final ruling, and you focus on what is the
20 agency action you're challenging, and then you
21 look to the statutes that govern can you get
22 review of that and, if so, in that court.

23 And, certainly, you can have close
24 questions, but that -- that provides a fair
25 amount of determinacy, and I think the regime

1 that you're postulating would create
2 indeterminacy in two different respects.

3 First, we would be -- courts would
4 have to devise rules for determining what is a
5 sufficiently systemic or structural
6 constitutional challenge to qualify. In Free
7 Enterprise Fund, the argument was not just that
8 the PCAO members were improperly insulated from
9 removal. There was also an Appointments Clause
10 challenge which didn't prevail but was to the
11 effect that they had not been constitutionally
12 appointed. And, under that theory, they were
13 unlawfully exercising governmental power, so
14 every aspect of the agency's operations was
15 alleged to be tainted.

16 Here, what Mr. Garre is focusing on is
17 the agency adjudications, and it's a significant
18 part of what the SEC does, but it's far from the
19 whole thing that the SEC does. And so the Court
20 would have to develop -- the lower courts would
21 have to develop a framework for determining what
22 is sufficiently structural.

23 And then you'd also have a question,
24 what non-final agent -- agency actions are
25 reviewable for -- immediately? And so you have

1 a very established rule that you can ordinarily
2 get judicial review of a final agency
3 regulation, but if the issue -- if the agency
4 issues a proposed regulation and you think it
5 exceeds its authority under the statute, et
6 cetera, you can't get review of that. You have
7 to get -- wait for review until it is
8 promulgated in final form.

9 But, under Respondents' theory, there
10 would be at least the potential for somebody to
11 say that, well, if the agency officials who were
12 responsible for promulgating the regulation are
13 improperly insulated from removal or if their
14 activities or structure are subject to some
15 other constitutional attack, then we should be
16 able to challenge the agency regulation as soon
17 as it's proposed because, until we know for sure
18 whether the rule will be struck down, we can't
19 make investment decisions, et cetera.

20 It -- it creates indeterminacy, again,
21 not just as to what category of legal theories
22 will get you out of the ordinary rules, but once
23 you've articulated what a court considers to be
24 a structural challenge, what additional
25 categories of non-final agency action can you

1 challenge.

2 JUSTICE ALITO: Can I ask you about
3 your reliance on collateral order doctrine
4 cases? It's not clear to me why the situation
5 here is in any meaningful sense parallel to the
6 situation in a case where a party invokes the
7 collateral order doctrine.

8 In those cases, the basis of
9 jurisdiction that the party is claiming is 1291,
10 which limits jurisdiction, the court of appeals'
11 jurisdiction, to final decisions.

12 In the ordinary sense of the word, the
13 -- the orders that fall within the collateral
14 order doctrine are not final. They're not the
15 last order in the case that finishes everything
16 up. So it's a -- it -- it -- it is an exception
17 to the ordinary meaning of clear statutory
18 language, final decision.

19 Here, you have your APA argument. I
20 understand. But, if we put that aside, the
21 statutory language pushes in the opposite
22 direction because 1331, if you just read it
23 literally, gives the district court jurisdiction
24 over that.

25 So isn't that an -- an answer to your

1 argument that the collateral order -- the
2 considerations in the collateral order doc --
3 that collateral in the collateral order doctrine
4 cases should be read in a way that is similar to
5 Thunder Basin's reference to a collateral case?

6 MR. STEWART: I -- I mean, first, I
7 think the collateral order -- the -- the
8 relevant statutory language in 1291 refers to
9 final decisions, not to final judgments.

10 And the Court in the collateral order
11 decisions has explained that what it has
12 articulated is not an exception to the final
13 decision rule -- rule. It is an interpretation
14 of the term "final decision." And the Court has
15 said ordinarily that is limited to final
16 judgments, but there will be some other orders
17 entered in the course of the proceedings that
18 are not final judgments but that do count as
19 final decisions because they finally resolve an
20 issue having certain characteristics.

21 And the collateral order jurisprudence
22 has -- overlaps substantially with the final --
23 with the Thunder Basin factors. That is, one of
24 the factors is whether this order that you seek
25 to have reviewed immediately is collateral to

1 the merits.

2 Another factor is, would meaningful
3 review be available on appeal? And that
4 overlaps with the -- the first of the Thunder
5 Basin factors.

6 So our argument is not that every jot
7 and tittle of collateral order jurisprudence
8 should be imported into this context. It's that
9 the court in making those determinations has
10 been weighing very similar factors.

11 And the one overarching similarity is
12 that in both agency proceedings like the
13 Bethlehem Shipbuilding case that I referred to
14 earlier and under the collateral order doctrine,
15 litigants have argued time after time review at
16 the end of the day would not be inadequate --
17 would not be adequate because, in the meantime,
18 I will be suffering the burdens that are
19 associated with the proceedings.

20 And time after time, the Court has
21 said that's not a sufficient basis for getting
22 immediate review rather than waiting until the
23 end of the process.

24 The -- the one exception that I noted
25 at the beginning of my first argument was, in

1 the collateral order context, the Court has
2 recognized that orders denying a -- a statutory
3 or constitutional immunity will ordinarily be
4 appealable immediately.

5 And so, under the double jeopardy
6 clause, the -- the right protected by the
7 Constitution is the right not to be placed twice
8 in jeopardy. It is a right not to be tried.

9 JUSTICE ALITO: But, here, in -- in
10 cases like in these two cases and other cases
11 like it, put the APA aside. There is no
12 statutory language that is similar to 1291.

13 What is -- what seems to me to be the
14 -- like 1291 in these cases is simply an
15 inference of congressional intent that you draw
16 from the statutes giving the courts of appeals
17 jurisdiction to review certain orders of the
18 administrative agencies.

19 The statute doesn't even say -- these
20 two statutes don't even say exclusive
21 jurisdiction. So we infer it's exclusive. And
22 not only that, we infer that, except for some
23 categories, some subcategory of cases, this not
24 only gives the courts of appeals exclusive
25 jurisdiction, but it precludes jurisdiction that

1 district courts would have under 1331.

2 MR. STEWART: You know, I said at the
3 outset of this argument that in our view,
4 really, the hardest question is whether Cochran
5 should lose for jurisdictional reasons or should
6 lose on some other basis because Standard Oil
7 makes so clear that the commencement of an
8 agency adjudication is not final agency action.

9 And -- and I -- I agree with you that
10 it would certainly have been a plausible way for
11 the Court to proceed to say that if a statute --
12 if a claim asserts a violation of federal law,
13 then, by definition, it arises under federal
14 law, and, therefore, it falls within the
15 jurisdictional grant of 1331.

16 And if you filed your suit in district
17 court, the district court has jurisdiction, and
18 there are lots of other potential objections to
19 the suit going forward, but jurisdiction is not
20 one of them.

21 That -- that would have been an
22 entirely plausible way for the Court to approach
23 this from the outset. But the Court has
24 repeatedly done the contrary in Thunder Basin,
25 in Elgin, in Hinck versus United States. That

1 was a case involving a statute that granted the
2 tax court authority to review certain challenges
3 to IRS decisions regarding the abatement of
4 interest. And the Court concluded that, yes,
5 the suit that the plaintiff had filed in the
6 Court of Federal Claims fell within the literal
7 coverage of the Court of Federal Claims' grant
8 of jurisdiction and also would have fell within
9 the literal coverage of 1331.

10 But given Congress's evident intent
11 that the tax court be the only available forum,
12 those courts were divested of jurisdiction.

13 Again, you could have come out the --
14 the -- with the same bottom line by saying, yes,
15 there was jurisdiction in the Court of Federal
16 Claims, but the only cause of action that you
17 had was elsewhere and so your suit is dismissed.

18 And in stressing the jurisdictional
19 aspect of this, we have tried to brief and argue
20 the case in -- in the way that this Court has
21 approached similar cases in the past, but,
22 certainly, the -- the part of our brief that
23 addressed a cause of action was intended to make
24 the point that, even if you take the view that
25 -- that Justice Alito has propounded and that

1 Axon and Cochran have endorsed, in which
2 anything that asserts a claim under federal law
3 by definition arises within the district court's
4 jurisdiction, it's a plausible way of
5 approaching it, but the suits still couldn't go
6 forward because they're not challenging anything
7 that you can sue about.

8 And -- and, again, to us, the salient
9 feature of cases like Elgin, whether or not you
10 think it was right to couch this as a
11 jurisdictional problem, is in deciding whether
12 your suit can go forward in the court that you
13 filed it in, we need to look at the agency
14 action you're challenging, not at the legal
15 theory you are asserting as a basis for finding
16 that action invalid.

17 JUSTICE KAGAN: I thought Free
18 Enterprise Fund pretty clearly put the kibosh on
19 your cause of action argument.

20 MR. STEWART: Well, Free Enterprise
21 Fund, as we pointed out in the brief, the PCAOB
22 was not defined to be an agency, so any
23 arguments based on limitations imposed by the
24 APA wouldn't have had purchase.

25 And we -- we don't have -- we don't

1 quarrel with the -- the Free Enterprise Fund
2 court's repetition of the fact that, yes, for a
3 long period of time, courts have had general
4 equitable authority to grant relief designed to
5 ensure that constitutional violations did not go
6 unremedied, even in the absence of express
7 statutory authority.

8 But it's fair -- there's a big
9 difference between saying the courts can step in
10 to fill the gaps, as in Free Enterprise Fund,
11 where the APA didn't apply, or as in some other
12 cases, where Presidential action is at issue and
13 the President is not an APA action.

14 It's very different to say a court can
15 step in and fill the gaps and say the court can
16 provide a cause of action kind of contrary to
17 the dictates of the APA.

18 And, as I said in the first argument,
19 under Section 703, the APA -- we think of an APA
20 suit as a suit in district court kind of under
21 the APA's fallback authorization when no special
22 review provision exists.

23 But the APA also says, when a special
24 review provision does exist, you don't have the
25 option of choosing between that and the district

1 court suit. You have to follow the special
2 review provision, unless it's absent or
3 inadequate.

4 JUSTICE JACKSON: Can I just clarify
5 about the exclusivity of the court of appeals
6 jurisdiction? I thought that was in the
7 statute, once there's a final order. Is that
8 right?

9 MR. STEWART: Once there's a final
10 order, and I think it's once the administrative
11 -- at some stage after the petition for review
12 has been filed, that, I can't remember exactly
13 the procedural step, but up until that time, the
14 agency can amend or clarify its opinion. And at
15 a certain point, the court of appeals
16 jurisdiction becomes final so that the agency no
17 longer has that authority.

18 But -- but that's -- that's not a
19 question of division of responsibility between
20 the court of appeals and the district court.
21 That's a question of at what point does the
22 agency lose the ability to amend its order
23 before the court of appeals reviews it.

24 JUSTICE JACKSON: And is your argument
25 about the district court no longer retaining its

1 jurisdiction under 1331 up and to that point
2 coming from the statute or the APA, or where is
3 it coming from?

4 MR. STEWART: I mean, it's coming from
5 the combination of the S -- of the Exchange Act
6 review provision and the APA. That is, the
7 Exchange Act review provision says the only
8 court that can review the final order is the
9 court of appeals. And the APA says preliminary
10 action is reviewed on review of the final agency
11 action. And so that -- that necessarily means
12 it will be reviewed by the court that has the
13 authority to review the final agency action.

14 JUSTICE SOTOMAYOR: I -- I thought
15 your pages 47 to 50 were saying we don't really
16 need the APA, we just need the agency action
17 that --

18 MR. STEWART: I -- I mean, it is -- it
19 is certainly the case that our -- our 47 to 50
20 included cases that were decided before the APA
21 was enacted, and so the principle that courts
22 would not intervene long predated the APA. And
23 the APA simply confirms that by referring to
24 final agency action in Section 704.

25 But, when -- when we refer to

1 uncodified principles of administrative law,
2 we're met with the legitimate response by our --
3 our opposing counsel that uncodified principles
4 are less useful than enacted statutory text.

5 And so part of our reliance on the APA
6 is to show that these principles are not just
7 uncodified principles; they are actually law
8 enacted by Congress.

9 JUSTICE GORSUCH: Is the APA argument
10 waivable?

11 MR. STEWART: I -- I -- I guess -- we
12 have not waived -- we didn't waive it in --

13 JUSTICE GORSUCH: I -- I understand
14 that. Is it subject -- is it subject to waiver
15 and forfeiture?

16 MR. STEWART: I -- I don't think it is
17 waiver -- waivable. I -- it would be waivable,
18 but I think the Court has often distinguished
19 between waiver of a claim and waiver of an
20 argument in support of a claim. And so I think,
21 to the extent that we were -- are relying on APA
22 provisions to buttress arguments that we have
23 been making all along, that that --

24 JUSTICE GORSUCH: But, in principle,
25 it's not a jurisdictional problem that's not

1 waivable?

2 MR. STEWART: Well, I mean, two --
3 again, the Court has addressed this as a
4 question of subject matter jurisdiction.

5 JUSTICE GORSUCH: I understand that.

6 MR. STEWART: And -- and --

7 JUSTICE GORSUCH: I'm asking for the
8 government's view.

9 MR. STEWART: And -- yes, I think just
10 as we could raise the question of jurisdiction
11 for the first time in the Supreme -- in this
12 Court, that is, if the Court had granted cert to
13 decide a merits question, if we had never
14 challenged jurisdiction before, but we came in
15 and argued there was actually no jurisdiction
16 here, perhaps the Court would DIG the case.

17 JUSTICE GORSUCH: What's -- what's the
18 language in 704 that you view as jurisdictional
19 then?

20 MR. STEWART: It's the language in
21 704 --

22 JUSTICE GORSUCH: I think the sentence
23 says that preliminary, procedural, or
24 intermediate agency action, which is defined and
25 we had that discussion earlier. I won't repeat

1 that.

2 MR. STEWART: That, by its terms,
3 doesn't address jurisdiction, but it does say
4 the court that reviews the final agency decision
5 will be the one that reviews the preliminary
6 steps.

7 JUSTICE GORSUCH: No, let --

8 MR. STEWART: And that has
9 jurisdictional --

10 JUSTICE GORSUCH: If I might finish,
11 Mr. Stewart. It says that preliminary,
12 procedural, or intermediate agency action --
13 query whether we had that here as defined by
14 551 -- or ruling not directly reviewable is
15 subject to review on the review of the final
16 agency action. It doesn't talk about
17 jurisdiction. It doesn't talk about
18 exclusivity. So what do we do about that?

19 MR. STEWART: I mean, it buttresses
20 the point that Justice Kagan was making in the
21 first argument, where she thought -- where she
22 said, wouldn't you ordinarily presume that the
23 court that is going to review the final decision
24 will review preliminary steps along the way?

25 And our point was yes, you would

1 ordinarily presume this, but this is express
2 statutory authorization for it. And to the
3 extent that the question is one of -- of the
4 district court's subject matter jurisdiction,
5 then the fact that it's a new argument can't --

6 JUSTICE GORSUCH: What -- what do
7 about the fact that normally we say that
8 jurisdictional statutes have to be stated
9 clearly and -- and we don't presume that
10 Congress is meaning to create a jurisdictional
11 rule unless it's telling us that? And there's
12 no language like that here.

13 MR. STEWART: Again, Section 704 in
14 and of itself would not have any jurisdictional
15 implications. And the dispute has been about
16 whether the Exchange Act's conferral of
17 authority on the court of appeals to review the
18 --

19 JUSTICE GORSUCH: But 704 itself is
20 not jurisdictional. Is that -- I'm just trying
21 to get the government's view.

22 MR. STEWART: By itself, it would not
23 limit any court's jurisdiction.

24 JUSTICE GORSUCH: Okay.

25 MR. STEWART: But it -- it does

1 address the question which -- it doesn't specify
2 which court should review any category of agency
3 conduct, but it does say in general terms the
4 court that reviews the final decision should
5 review the antecedent steps.

6 And as I said in the first part of the
7 argument, if this were the second sentence in
8 the Exchange Act review provision, we would
9 think of it as powerful evidence that a review
10 of the initiation of the proceeding could take
11 place only on review of the final order.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 Justice Thomas, anything further?

15 Anything further?

16 JUSTICE KAVANAUGH: Yes, one question.
17 On Justice Gorsuch's questions, how relevant is
18 703, which is the provision -- you referenced it
19 earlier -- that says the form of proceeding for
20 judicial review is the special statutory review
21 proceeding relevant to the subject matter in a
22 court. Is that relevant at all?

23 MR. STEWART: Oh, it's highly relevant
24 because what the Court has often said in cases
25 like Thunder Basin is that when Congress creates

1 a detailed, specific scheme for review of a
2 particular category of agency action, we will
3 often infer that Congress intended that scheme
4 to be exclusive and that no other court will be
5 able to review the same agency action.

6 And that language from 703 provides
7 express statutory confirmation of that -- that
8 inference. It says the form of proceeding for
9 -- "the form of proceeding" -- definite
10 article -- "for judicial review is the special
11 statutory review proceeding relevant to the
12 subject matter" -- which, here, everyone agrees
13 is the Exchange Act review scheme -- "in a court
14 specified by statute" -- which is the court of
15 appeals -- "or, in the absence or inadequacy
16 thereof, any applicable form of legal action."
17 And so it does contemplate that district court
18 would --

19 JUSTICE KAVANAUGH: Inadequacy it
20 contemplates?

21 MR. STEWART: Inadequacy.

22 JUSTICE KAVANAUGH: Yeah.

23 MR. STEWART: It contemplates that in
24 many instances -- the word "absence"
25 contemplates that with respect to many types of

1 agency conduct, there won't be a special
2 statutory review provision. And it also
3 contemplates that sometimes there might be one,
4 but it will be inadequate for a particular type
5 of claim.

6 CHIEF JUSTICE ROBERTS: Justice
7 Barrett?

8 Justice Jackson?

9 JUSTICE JACKSON: Can I just clarify,
10 because I was very interested in your argument
11 that there may still be other bases for
12 thwarting the claims that are being brought in
13 this case, and I just want to make sure that I
14 understand what you mean by that.

15 As I see what you're saying, that the
16 very structural constitutional claims that the
17 plaintiffs would like to bring in district
18 court, you would read the statutes here,
19 jurisdictionally maybe, to allow them to bring
20 it under 1331, but when you got into district
21 court, the government might point to the APA to
22 say there's no final agency action, so you can't
23 proceed under those claims. Is that right?

24 MR. STEWART: I think that's right,
25 although I would say more generally the -- the

1 logical thrust of the textual argument on the
2 other side, and -- and, really, the logical
3 thrust of Justice Alito's question, was 1331
4 confers jurisdiction, it encompasses any suit
5 arising under federal law, the Exchange Act
6 review provision doesn't specifically divest
7 that jurisdiction, and, therefore, the district
8 court has -- has at least jurisdiction to
9 entertain the claim.

10 That -- that logic would apply not
11 just to structural constitutional challenges but
12 would apply to any claim as like the one in
13 Standard Oil that was based on a federal
14 statute. And so, at that point, we would say
15 that wouldn't have been an implausible reading
16 of the jurisdictional statute, but once you
17 surmounted the -- the pretty easy jurisdictional
18 hurdle, we would still be able to interpose
19 final agency action objections, et cetera.

20 Now I -- I take the thrust of the
21 argument on the other side to be that structural
22 constitutional challenges are not simply
23 challenges that fall within the 1331
24 jurisdiction but challenges that can actually be
25 brought in court and that will surmount any

1 other types of non-jurisdictional challenges
2 because it's uniquely important that they be
3 adjudicated quickly.

4 If -- if I've misunderstood Mr.
5 Garre's argument, he can correct me, but I took
6 their argument to be, with respect to structural
7 constitutional claims, not just that the
8 district court would have jurisdiction but that
9 the court would be obligated to decide them on
10 the merits.

11 JUSTICE GORSUCH: I'm sorry, may I?

12 CHIEF JUSTICE ROBERTS: Yeah,
13 certainly.

14 JUSTICE GORSUCH: I apologize for this
15 last question, but you brought up 703 for the
16 first time here a moment ago, and as I
17 understand that provision, it says with respect
18 to statutes that do provide a form of review --
19 you used that, and, here, we have one that
20 speaks of final orders, final orders, nothing
21 else. And in the absence of a statute that
22 speaks to that -- that question, you normally
23 proceed as you would in any court of competent
24 jurisdiction. Is that right?

25 MR. STEWART: You would proceed in

1 what other -- whatever court was otherwise --

2 JUSTICE GORSUCH: Competent
3 jurisdiction?

4 MR. STEWART: -- competent -- for
5 jurisdictional purposes.

6 JUSTICE GORSUCH: Yeah.

7 MR. STEWART: Now there was --

8 JUSTICE GORSUCH: Right, for
9 jurisdictional purposes.

10 MR. STEWART: But, here --

11 JUSTICE GORSUCH: Okay. Thank you.

12 Thank you.

13 CHIEF JUSTICE ROBERTS: Rebuttal, Mr.
14 Garre?

15 REBUTTAL ARGUMENT OF GREGORY G. GARRE

16 ON BEHALF OF MICHELLE COCHRAN

17 MR. GARRE: Thank you, Mr. Chief
18 Justice.

19 I think it's telling that my friend
20 had very little to say about the actual text of
21 78y of the SEC Act and that, instead, his
22 argument has migrated towards non-jurisdictional
23 arguments based on the APA. Those arguments can
24 be and have been waived here. I think they're
25 irreconcilable with Free Enterprise Fund itself,

1 and they provide no basis for holding that there
2 -- the district courts lack jurisdiction over
3 this important class of claims.

4 I heard my friend complaining about
5 the -- the difficulties of determining whether
6 or not a claim is a structural constitutional
7 claim or drawing the line in the district court.
8 We don't think that that will be difficult at
9 all. This Court has already talked about and
10 discussed and is familiar with the concept of
11 structural constitutional violations.

12 That's a line that -- that can be
13 drawn. But, to be clear, to the extent that
14 there are any practical problems with that, they
15 pale in comparison with the practical hardships
16 that individuals face in being subjected to
17 years of proceeding before an unconstitutional
18 administrative decisionmaker before they can get
19 before an Article III court to -- to raise a
20 blatant constitutional defect with those
21 decisionmakers.

22 Congress knows how to strip
23 jurisdiction when it wants to. There are scores
24 of statutes in which Congress has explicitly
25 stripped jurisdiction, including district court

1 jurisdiction.

2 Congress did not do so either in the
3 SEC Act or anything else that the government has
4 pointed to. District courts have jurisdiction
5 that they have long exercised to protect against
6 these unconstitutional agency decisionmakers.

7 We ask that the Court affirm the
8 judgment below.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel. The case is submitted.

11 (Whereupon, at 12:45 p.m., the case
12 was submitted.)

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Official - Subject to Final Review

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