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IN THE SUPREME COURT OF THE UNITED STATES

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AXON ENTERPRISE, INC., )

Petitioner, )

v. ) No. 21-86

FEDERAL TRADE COMMISSION, ET AL., )

Respondents. )

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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 10:03 a.m.

APPEARANCES:

PAUL D. CLEMENT, ESQUIRE, Alexandria, Virginia; on behalf of the Petitioner.

MALCOLM L. STEWART, Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondents.

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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 21-86, Axon Enterprise versus FTC.

Mr. Clement.

ORAL ARGUMENT OF PAUL D. CLEMENT

ON BEHALF OF THE PETITIONER

MR. CLEMENT: Mr. Chief Justice, and may it please the Court:

Congress has expressly granted district courts original jurisdiction over all civil actions arising under the Constitution, and it is common ground that Congress has never expressly withdrawn or restricted that jurisdiction with respect to the constitutional claims at issue here. Instead, all that Congress has done expressly is to give additional jurisdiction to the courts of appeals to a person subject to an FTC cease-and-desist order.

Axon is not subject to and does not challenge such an order. Instead, Axon challenges the constitutionality of statutes that insulate agency officials from presidential

1 removal and the clearance process by which Axon  
2 is denied access to the courts.

3           Nonetheless, the government insists  
4 that the grant of additional jurisdiction to the  
5 courts of appeals over orders not at issue here  
6 impliedly precludes jurisdiction that Congress  
7 expressly conferred.

8           That argument does not follow from any  
9 explicit statutory text, and the three factors  
10 that this Court has fashioned to decide the  
11 reach of implied preclusion all favor district  
12 court jurisdiction here, just as in *Free*  
13 *Enterprise Fund*.

14           First, any review mechanism that  
15 delays judicial review of a here-and-now  
16 constitutional injury until it has come and went  
17 does not provide meaningful review. Second, the  
18 constitutional claims here are wholly collateral  
19 to the merits of any particular contested  
20 acquisition. And, third and finally, not only  
21 does the agency lack expertise in these  
22 constitutional issues, it is wholly outside its  
23 authority to declare itself unconstitutional or  
24 strike down removal restrictions on ALJs that  
25 are located in an entirely separate statutory

1 provision.

2           Simply put, there's nothing in the  
3 statutory text nor the Thunder Basin factors  
4 that provides a basis for finding in two express  
5 grants of jurisdiction an elimination of the  
6 jurisdiction for the claims at issue here.

7           JUSTICE THOMAS: Mr. Clement -- Mr.  
8 Clement, is this case distinguishable from Free  
9 Enterprise? We -- it seems as though we've been  
10 down this road.

11           MR. CLEMENT: We don't think it is  
12 distinguishable from Free Enterprise, Justice  
13 Thomas. Obviously, some lower courts have  
14 disagreed with us on that. But I don't think  
15 there's any material basis for distinguishing  
16 the two, especially when you look at the nature  
17 of the claims here.

18           The nature of the claims here are  
19 structural claims. They go to the very  
20 existence of the agency. And those are wholly  
21 collateral to the merits of any acquisition.  
22 Those claims are beyond the competence of the  
23 agency. And the agency is not in a position to  
24 provide meaningful relief.

25           JUSTICE THOMAS: Could you take just a

1 minute to set out just more specifically why the  
2 agency could not consider these constitutional  
3 claims within its structure? What -- I think  
4 you have to start by saying what it actually  
5 does and what would be reviewed at the appellate  
6 level after the agency issues an order.

7 MR. CLEMENT: Sure. So, if you start  
8 with the -- the typical case, where the agency  
9 builds an administrative record that informs  
10 their position on a particular transaction, all  
11 of the claims here are sort of cross-cutting or  
12 may be even logically anterior to any of that  
13 process.

14 One of the due process claims goes to  
15 the clearance process by which a transaction  
16 goes before the FTC rather than the Justice  
17 Department, and that claim obviously doesn't  
18 really focus on FTC agency action, but it  
19 focuses on executive branch action that's beyond  
20 the FTC.

21 And then, as to the more structural  
22 claims, I mean, those are beyond the competence  
23 of the agency for two reasons. One, no agency  
24 has the authority to declare itself  
25 unconstitutional. But, if you think about the

1 double for-cause removal restriction on the ALJs  
2 in particular, I mean, the most logical way to  
3 remedy that violation, at least following the  
4 logic of Free Enterprise Fund, would be to  
5 declare the second layer of for-cause removal  
6 provisions unconstitutional. But that second  
7 layer of provisions is in Title 5, 5 U.S.C.  
8 7521. It's not in the FTC Act.

9           So the idea that the FTC could declare  
10 another act of Congress in a different title of  
11 the U.S. Code unconstitutional is completely  
12 beyond its ken, but, of course, that's exactly  
13 what district courts do on a day-to-day basis  
14 exercising jurisdiction under Section 1331.

15           JUSTICE KAGAN: May I ask, Mr.  
16 Clement, about the scope of your argument?  
17 Because sometimes, as you just responded to  
18 Justice Thomas's question, you're focused very  
19 specifically on the constitutional claims at  
20 issue in this case, and, in particular, the  
21 Thunder Basin analysis lends itself to that kind  
22 of focus.

23           You have other arguments in your  
24 brief, the -- you know, sometimes you call them  
25 the plain text arguments or just about the way



1 1331 and the review provisions interact, which  
2 would seem to go much further, would seem to  
3 sweep in not just constitutional claims but  
4 statutory claims and would seem to sweep in many  
5 preliminary rulings, you know, like real -- you  
6 know, truly, truly interlocutory rulings of the  
7 kind -- you know, it might be evidentiary  
8 rulings, it might be discovery rulings.

9           So some of those statutory arguments  
10 would seem to extend way beyond the -- the  
11 constitutional claims at issue here. So which  
12 are you really arguing?

13           MR. CLEMENT: So, Justice Kagan, I'm  
14 really arguing to win this case on the Thunder  
15 Basin factors. That seems to be the  
16 straightforward way to win the case.

17           If I can just say a moment about the  
18 broader arguments, I think, if you look at the  
19 statutes, if the Court were drawing on a clean  
20 slate, I would probably say the right way to  
21 decide these cases is, of course, there's  
22 jurisdiction, and there's a whole host of  
23 non-jurisdictional doctrines, like ripeness and  
24 exhaustion, that would probably get you to  
25 almost the exact same result as the Thunder

1 Basin factors.

2           So, if I were a law professor, I might  
3 quibble that these factors that the Court has  
4 come up with for jurisdiction really should go  
5 to non-jurisdictional factors and these cases  
6 should be resolved on B-6 rather than B-1, but  
7 I'm not a law professor. I'm here to represent  
8 a client. And I think our client wins well  
9 under the Thunder Basin factors. So we're happy  
10 to win on -- on those factors.

11           JUSTICE SOTOMAYOR: Counsel, almost  
12 any administrative process could be called  
13 collateral on constitutional issues, whether  
14 it's tax review, as in Elgin, or it's  
15 immigration issues. All of those petitioners  
16 are required to go through administrative  
17 processes, despite the fact that most of those  
18 agencies can't reach constitutional issues.

19           So I don't know what makes this  
20 situation different, other than perhaps -- and  
21 I'm not sure about this -- the existence of the  
22 adjudicatory body, the fact that the A -- your  
23 removal clause challenge.

24           But all of the other due process  
25 challenges seem to be the quintessential

1 process-dependent claim. You can't get more  
2 intertwined than that.

3 Your argument seems to be saying that  
4 any due process claim counts. What about the  
5 claim in the companion case, Cochran, that there  
6 has been -- that has been abandoned, that the  
7 SEC violated her due process rights by failing  
8 to follow its own rules and procedures?

9 That's a classic due process claim  
10 that, I think, in almost every other agency  
11 action we wait until the end of the review  
12 process for the Court to look at.

13 So it seems to be that you're saying  
14 this is unfair because I have to go through the  
15 process. But going through the process is what  
16 due process is all about. I don't understand  
17 why you are any different than any other  
18 administrative agency petitioner who has to go  
19 through the process, a flawed process, and wait  
20 until the end to have that corrected.

21 MR. CLEMENT: So, Justice Sotomayor,  
22 with respect to due process claims in  
23 particular, I don't think we're -- we're arguing  
24 for a special rule for this particular agency.  
25 As I look at the Court's cases -- and they go

1 all the way back to Mathews v. Eldridge and  
2 McNary, so this, you know, would apply in  
3 immigration cases as well -- the distinction  
4 that the Court has drawn is between  
5 cross-cutting due process claims that don't in  
6 any way depend on the circumstances of a  
7 particular case.

8           So, if you think essentially on its  
9 face that the statute doesn't provide due  
10 process, then that does seem like a claim that  
11 is wholly collateral to the merits of any  
12 particular --

13           JUSTICE SOTOMAYOR: Well, what about  
14 if you win? You don't care how you win,  
15 meaning, once you're in a case, if you've been  
16 given inadequate process, but you still win,  
17 you're not going to -- you're going to suffer  
18 the litigation costs, et cetera, but it doesn't  
19 really matter what basis you win on.

20           MR. CLEMENT: Well, I --

21           JUSTICE SOTOMAYOR: This -- this just  
22 gives you another hole in the -- in your pocket,  
23 another card in your pocket that you can play if  
24 you lose.

25           MR. CLEMENT: I don't think that's

1 quite right, Justice Sotomayor, which is, you  
2 know, this isn't a case like Elgin, where  
3 there's a review process for losing your federal  
4 job and all the plaintiffs wanted was their  
5 federal job back.

6 This is not a situation where all we  
7 want is to not have a cease-and-desist order.

8 JUSTICE SOTOMAYOR: Oh, it is because  
9 your complaint asked the district court to  
10 enjoin the FTC and its Commissioners from  
11 pursuing an administrative enforcement action.  
12 Your motion for a preliminary injunction asked  
13 for the same thing.

14 MR. CLEMENT: Absolutely. But that's  
15 actually --

16 JUSTICE SOTOMAYOR: So it is tied to  
17 the proceeding very directly.

18 MR. CLEMENT: It's tied to the  
19 proceeding, but it's not tied to a  
20 cease-and-desist order in the same way as the  
21 challenge in Elgin. We believe that we suffer a  
22 here-and-now constitutional injury just from  
23 being subjected to an unconstitutional agency  
24 process with respect to the removal  
25 restrictions, and we think we suffer an injury

1 the second that we are assigned to the FTC  
2 rather than the Justice Department and  
3 effectively denied any early access to court.  
4 Those are the claims we want to bring.

5 They're not the claim that, like, we  
6 wanted to have three witnesses and we only got  
7 two and, gee whiz, if the ALJ would have just  
8 given us one more witness, that would have  
9 satisfied due process. Those are the kind of  
10 claims that are not wholly collateral, and those  
11 are the kind of claims that belong in the  
12 administrative process.

13 CHIEF JUSTICE ROBERTS: But those are  
14 --

15 JUSTICE BARRETT: So what's the remedy  
16 that you -- sorry, go ahead.

17 CHIEF JUSTICE ROBERTS: I was just  
18 going to say that the examples you gave are  
19 pretty extreme to make your point, but it  
20 strikes me that your -- your distinction between  
21 structural constitutional claims and the  
22 particular due process claims in the proceeding  
23 is going to be hard to draw in a large number of  
24 cases, particularly if you -- you prevail and  
25 people -- it makes a difference to when they can

1 bring their constitutional or other challenges.

2 MR. CLEMENT: Well, with respect, Mr.  
3 Chief Justice, I don't know that that's the  
4 case. I mean, all we're asking for, as I  
5 stressed with Justice Kagan, is an application  
6 of the Thunder Basin factors.

7 I think what we've been talking about  
8 really goes to the second factor about what it  
9 means to be wholly collateral. And I don't  
10 really think that's that difficult to apply in  
11 the due process context. If you think that the  
12 statute as set up just says -- doesn't give you  
13 any witnesses and that's going to be true in  
14 every single hearing, that seems like a case you  
15 ought to be able --

16 CHIEF JUSTICE ROBERTS: Well, that's  
17 again -- yeah, sure, but that's an easy case. I  
18 mean, anytime you get multi-factors, as in  
19 Thunder Basin, the application is going to be  
20 difficult in, I think, many cases.

21 MR. CLEMENT: I mean, look, there are  
22 going to be edge cases to be sure. And I guess  
23 I would -- you know, this is where I would sort  
24 of remind you that the statutory text actually  
25 is pretty clear here.

1           And if we're going to have a rule for  
2 the edge cases, I'd rather live in a republic  
3 where the -- where the rule for the edge cases  
4 was we err on the side of giving the citizen  
5 early access to the courts as opposed to erring  
6 on the side of deferring judicial review.

7           I mean, the Court could provide a  
8 different presumption, I suppose, to help with  
9 the edge cases, but I'd prefer it if it was a  
10 presumption that was in favor of judicial  
11 review.

12           After all, Congress did pass 1331 that  
13 does seem to promise the people that if you have  
14 a problem with the constitutionality of  
15 government action, you can get early access to  
16 court to sort it out.

17           JUSTICE JACKSON: But, Mr. Clement,  
18 why doesn't -- why doesn't whether or not it's  
19 wholly collateral turn to some extent on the  
20 remedy that you're asking for? It would seem to  
21 me that one way to think about the  
22 collateralness of this is whether, when you're  
23 done with it, the claim that you want to bring  
24 in district court, you would go back to the  
25 agency and the agency would proceed.



1           I think that in a situation in which  
2 you have the type of claim, maybe some of your  
3 removal claims with respect to the ALJ, for  
4 example, if the remedy is just give us a new  
5 ALJ, then there's the -- there's a concern that  
6 what is happening by allowing citizens to go to  
7 the district court is that they're sort of  
8 superintending the agency process, whereas you  
9 could say -- and, therefore, you could say it's  
10 not wholly collateral in the same way as if you  
11 went over and the remedy was to terminate the  
12 agency process.

13           So why -- why can't -- why shouldn't  
14 we be thinking about the collateral nature of  
15 this based on the remedy that you're asking for?

16           MR. CLEMENT: So two things, Justice  
17 Jackson. First of all, I think the most sort of  
18 straightforward way to think about whether it's  
19 wholly collateral is does it turn on the facts  
20 of the particular case or is it a claim that  
21 would be the same no matter what the facts of  
22 the particular transaction is or the particular  
23 immigration circumstances of an individual. And  
24 if it really doesn't matter on your  
25 circumstances, then I think it's wholly

1 collateral.

2 To your point about the remedy,  
3 though, I think that favors us, especially on  
4 the removal claim, because I -- I think the  
5 problem is there are cases where the remedy you  
6 want is really just to have your federal job  
7 back or the mine safety board order vacated.

8 And in those situations, maybe it  
9 makes sense to say, yeah, if you're in the  
10 process that leads to an order and at the end of  
11 the order you can get it vacated, that's good  
12 enough. That's a meaningful judicial remedy.

13 JUSTICE JACKSON: But I guess --

14 JUSTICE BARRETT: Mister --

15 JUSTICE JACKSON: -- maybe I'm not so  
16 clear. I meant a remedy that does not have you  
17 returning to the agency in any respect so that  
18 your claim is such that, you know, the core  
19 constitutional claim this agency doesn't have  
20 power over me, you can go to the district court  
21 because, if you win, then the agency is done.

22 What I'm concerned about is the  
23 interpretation that allows you to take certain  
24 claims over to the district court and have it  
25 impact the agency -- ongoing agency proceeding

1 in a way that makes it unclear that that's what  
2 Congress intended in terms of saving 1331.

3 MR. CLEMENT: So I guess I would just  
4 amend your observation. I mean, I think you're  
5 right that if you have a remedy that says I  
6 ought to be completely immune from this agency's  
7 actions at all, that's something that does seem  
8 like it should be able to go forward in district  
9 court.

10 But I think, if you have a claim  
11 that's effectively I shouldn't be in front of  
12 this agency at all as currently structured, that  
13 is equally a claim that doesn't belong in front  
14 of the agency. And I think -- as I indicated to  
15 Justice Thomas, I think it's particularly clear  
16 when you start thinking about the right remedy  
17 for the double for-cause removal restriction  
18 here.

19 Now, obviously, you could remedy a  
20 double for-cause removal restriction by  
21 invalidating either layer of removal, but if a  
22 court were to follow the pattern of Free  
23 Enterprise Fund, you'd get rid of the second  
24 layer of removal restrictions, and those are in  
25 5 U.S.C. 7521.

1 JUSTICE BARRETT: Mr. Clement, can --

2 MR. CLEMENT: Now there's --

3 JUSTICE BARRETT: Go ahead, Justice  
4 Alito.

5 JUSTICE ALITO: No.

6 JUSTICE BARRETT: Okay. I just wanted  
7 to know, could you say a little bit about what  
8 remedy you want for your black-box claim? Are  
9 you arguing that everything needs to go the DOJ  
10 track, or are you saying you just want  
11 transparency on that claim? Because we've been  
12 kind of focused on the removal claim.

13 MR. CLEMENT: I -- I think either one  
14 of those would probably remedy the claim. So,  
15 you know, I think we'd ask for what would  
16 probably be the most robust remedy, which is  
17 send us to DOJ. We want early access to court.

18 But, if a court fashioned a remedy  
19 that said that, okay, we're going to provide  
20 transparency to this process, I don't know what  
21 it would be, you know, everything sort of A  
22 through M goes to DOJ and everything N through Z  
23 goes to the FTC, something that would tell the  
24 citizenry, okay, there's a rational process by  
25 which you're being denied early access to court,

1 I think that would at least be an available  
2 remedy.

3 But, obviously, we got stuck -- you  
4 know, we lost at the threshold here, so we  
5 didn't get to the point of electing our  
6 remedies.

7 JUSTICE BARRETT: Do you think that's  
8 a weaker case for immediate pre-enforcement  
9 action in district court than the removal claim?

10 MR. CLEMENT: I mean, I suppose by one  
11 tick on the scale, sure. I mean, the -- the  
12 claims that go to the very existence of the  
13 agency are the structure of the agency as it's  
14 currently structured got -- have to be in my  
15 view the strongest possible claims, but I think  
16 a due process claim that actually attacks a  
17 decision that's anterior to the whole agency  
18 process would be, you know, pretty high on the  
19 list as well.

20 If I could say one thing about why I  
21 think, in addition to the existential nature of  
22 the kind of removal claim, why that's such a  
23 strong case is, if you sort of think about,  
24 like, the theory for why it is that, like, a  
25 challenge to kind of early agency action doesn't

1 go to federal court, it must be, I think, on the  
2 theory that, well, until it gets to the Article  
3 III court, there's at least supervision by the  
4 Article II branch that provides the citizen with  
5 some protection of their liberty.

6 So, if your whole claim is that the  
7 Article II supervision being provided by the  
8 President is insufficient, then you're really  
9 saying I don't have any protection the whole  
10 time this stays before the executive branch.  
11 And that really does seem like a claim that  
12 almost uniquely belongs in district court, and  
13 then it gets resolved one way or another.

14 JUSTICE KAVANAUGH: Can I ask you  
15 about Free Enterprise Fund in particular?  
16 Because Judge Lee in the opinion in the Ninth  
17 Circuit really tried to carefully parse Elgin  
18 and Free Enterprise Fund.

19 What do you do with the part of Free  
20 Enterprise Fund that emphasized the fact that it  
21 was at the investigation stage and that would be  
22 the only way -- that, therefore, there would be  
23 no way ever to get judicial review of the claim  
24 at issue there? I guess it's the one paragraph  
25 on 490 of Free Enterprise Fund. How do you

1 think we should deal with that?

2 MR. CLEMENT: Well, I -- I think you  
3 should deal with it by sort of applying it here  
4 and saying, actually, it's on all fours with  
5 that situation. I mean, obviously, in Free  
6 Enterprise, because of the structure there, you  
7 had the unique sort of dynamic that, you know,  
8 there was a complaint about the Board's  
9 activity, and the review mechanism dealt with  
10 the Commission's activity.

11 But, with respect to the idea that the  
12 only real way you could get review for the  
13 here-and-now injury that the -- the Free  
14 Enterprise Fund was suffering was to sort of  
15 precipitate a contempt sanction and go to court  
16 immediately, that's exactly our situation. Our  
17 beef here isn't limited to the cease-and-desist  
18 order. We're -- we've been trying for years to  
19 get out of the FTC process. We've even offered  
20 to walk away from the transaction. So we think  
21 just being subjected to their processes as  
22 currently structured is our injury.

23 The only way we can try to get that  
24 remedied is exactly what the situation was in  
25 Free Enterprise Fund. We can try to resist any

1 cooperation with the FTC, sort of get ourselves  
2 in contempt and see if they did something to  
3 bring us to federal court. But this Court has  
4 said you don't have to bet the farm in that kind  
5 of way.

6 JUSTICE KAVANAUGH: And -- and your  
7 distinction of Elgin I want to explore briefly.  
8 So, if you were bringing a claim challenging the  
9 constitutionality of the statute that was being  
10 investigated or -- or the basis for the  
11 investigation/enforcement action, you couldn't  
12 -- or what's your answer to whether you could  
13 bring a challenge like that in district court?

14 MR. CLEMENT: Well, maybe the easier  
15 way is to just articulate how I would  
16 distinguish Elgin, and then maybe, if --

17 JUSTICE KAVANAUGH: Yeah.

18 MR. CLEMENT: -- if that doesn't  
19 answer your question, I'm happy to respond.

20 But, to me, the critical thing in  
21 Elgin was the party was challenging the very  
22 government action that the review mechanism was  
23 set up to provide a special avenue for review.  
24 So it was the challenge to adverse major  
25 employment action. And what the Court held, I



1 think correctly, is it doesn't matter what your  
2 theory is. It can be a cross-cutting  
3 constitutional theory, but if you're challenging  
4 the exact same adverse major employment action,  
5 you have to go through the process.

6 So, if we were -- like, if we waited  
7 until the very end of this process and  
8 challenged the cease-and-desist order, I think  
9 then we'd be on all fours with Elgin. And I  
10 actually think, no matter what our theory was at  
11 that point, we'd have to bring it in the court  
12 of appeals. We couldn't at that late stage  
13 challenge the cease-and-desist order itself in  
14 district court.

15 JUSTICE KAVANAUGH: And --

16 MR. CLEMENT: But, to me, that's the  
17 way to distinguish Elgin.

18 JUSTICE KAVANAUGH: -- and then one  
19 last one. What's your exact formulation of the  
20 rule? So a challenge to the structure of the  
21 agency, I think, is covered. Anything beyond  
22 that?

23 MR. CLEMENT: So I would start with  
24 Judge Bumatay's formulation that its structure,  
25 existence, and procedures --

1                   JUSTICE KAVANAUGH: So let me stop you  
2 there. "Procedures" concerns me because I think  
3 that could be wildly open-ended and presents  
4 some of the problems that the Chief Justice and  
5 others were pointing out. So respond to that.

6                   MR. CLEMENT: It -- it concerns me as  
7 well, which is why I was about to say, by  
8 "procedures," I think he meant the kind of  
9 cross-cutting procedures that don't turn on the  
10 circumstances of any particular case. And I  
11 think that sort of -- that actually explains  
12 some of the pre-Thunder Basin cases, like McNary  
13 and Mathews v. Eldridge.

14                   But I did want to add one important  
15 point. That describes the basic universe of  
16 situations that you're dealing with, these kind  
17 of, like, specialized appellate court review  
18 regimes, but there are other situations where  
19 you get into district court under 1331 despite  
20 the government making a Thunder Basin argument,  
21 and a great example of that is the first Sackett  
22 case back in 2012, because there you had a  
23 situation where the government, relying on  
24 Thunder Basin, was telling the citizen: Hey,  
25 wait, you can't get into court to challenge this

1 determination. You have to wait until we bring  
2 an enforcement action.

3 And this Court rejected that argument  
4 and said, no, the citizen gets into court under  
5 1331. So I think the formulation with that  
6 slight amendment that Judge Bumatay had is the  
7 right one for this class of cases.

8 JUSTICE KAGAN: I think that the --  
9 the gloss you put on the procedures language  
10 doesn't go all that far. I mean, even if you  
11 say it's a challenge to a procedure that extends  
12 to all cases, I mean, you know, agencies have a  
13 lot of procedures, just as courts do.

14 And, you know, suppose you claimed  
15 something about the way agencies treated  
16 witnesses or what kinds of witnesses were  
17 allowed or what kinds of cross-examination or  
18 when subpoenas were issued or -- you could just  
19 keep on going. I mean, would all of that go to  
20 a court first?

21 MR. CLEMENT: I don't think so,  
22 Justice Kagan, and that's sort of the beauty of  
23 the Thunder Basin factors because, if you're  
24 talking about a procedural provision that's put  
25 in only by a rule and you want to challenge

1 that, I think you could say, well, that's  
2 actually within the agency's, you know,  
3 competency to fix.

4           If -- if -- but, if Congress passes a  
5 new, like, agency tomorrow and it just says, you  
6 know, the citizen's going to be dragged in front  
7 of there and they're going to be denied any  
8 ability to call any witnesses, I would think  
9 that you would actually want people to be able  
10 to get into court immediately and say: Well,  
11 that's crazy. That -- that -- we should declare  
12 that that restriction is unconstitutional. It  
13 doesn't turn on the circumstances of any  
14 individual's case.

15           So I -- I -- I do think that's the --  
16 the right rule, but, you know -- and I think,  
17 you know, our -- our particular due process  
18 challenge, I think, is a strong case because  
19 it's a step that's anterior to the agency  
20 itself's process.

21           JUSTICE KAGAN: So can I ask just on  
22 the -- the actual challenge that you've brought,  
23 it seems to me that the hardest of the Thunder  
24 Basin factors for you is the meaningful review  
25 factor because, you know, basically, what we

1 think about appealing, appeals generally, is you  
2 have to wait until the end, and often that's a  
3 lot of inconvenience, that's a lot of expense,  
4 but we're very stingy in allowing interlocutory  
5 appeals as long as you'll get your chance in the  
6 end. So what makes this different?

7 MR. CLEMENT: So what makes this  
8 different is that the relief at the end of the  
9 process is -- doesn't really go to the heart of  
10 the constitutional injury, which is being  
11 subject to the unconstitutional agency action.  
12 There's sort of a mix --

13 JUSTICE KAGAN: So I -- I thought you  
14 were going to say that, and I was trying to  
15 think of other examples that are pretty  
16 analogous to it.

17 So I -- I would think that when  
18 somebody claims that a court did not have  
19 subject matter jurisdiction or when somebody  
20 claims that there was no personal jurisdiction  
21 as to that person or a criminal defendant saying  
22 that a prosecutor was unconstitutionally  
23 appointed, all of these are basically saying the  
24 entire process is illegitimate and I should not  
25 have been subject to it.

1                   So what makes yours different from  
2 those?

3                   MR. CLEMENT: Well, two things, Your  
4 Honor. I mean, one, as to the removal, you  
5 know, provisions and the Humphrey's executor  
6 claim for that matter, as to those provisions,  
7 there's a big difference, which is all of the  
8 cases that are already in federal district  
9 court, it's taken as a given that the Article  
10 III judges are legitimate, properly appointed,  
11 properly insulated by good -- you know, good  
12 behavior and all of that.

13                   Whereas, here, on the Article II  
14 claims, we're basically saying that the process  
15 we're stuck in until we get to Article III court  
16 is itself constitutionally deficient as a  
17 structural matter. So that does seem kind of  
18 fundamentally different.

19                   And then, with respect to the other  
20 claims, I mean, nobody says in the situation of  
21 the district court, court of appeals, collateral  
22 order kind of context, nobody says that the  
23 district court is, like, powerless to hear the  
24 claim in the first instance. It's just the  
25 district court's perfectly powerful to hear the

1 claim. It just ruled against you.

2 And in this situation, if we have a  
3 claim before the agency like our due process  
4 claim about the clearance process that is  
5 anterior to the agency, the agency has no  
6 business deciding it, that doesn't seem  
7 analogous to the situation in most of the  
8 collateral order cases.

9 And, of course, even in the collateral  
10 order cases, you do have things like double  
11 jeopardy, where you conceptualize the injury as  
12 really being subject to the procedure or the  
13 proceeding, rather, and I would say that is a  
14 fair description of the claims that we're  
15 bringing.

16 CHIEF JUSTICE ROBERTS: Thank you,  
17 counsel.

18 Justice Thomas, anything further?

19 JUSTICE THOMAS: Just briefly.

20 Mr. Clement, there's a lot of  
21 discussion about reaching a final order and then  
22 assuming, I guess, an appeal.

23 What percentage of these cases  
24 actually go to a cease-and-desist order and what  
25 percentage actually are appealed?

1           MR. CLEMENT: So I think -- I mean, I  
2           don't have the exact denominator, I'm afraid, so  
3           I can't tell you. The overwhelming majority of  
4           these cases do settle out in the process, and so  
5           there's no appeal.

6           It's a relatively small number of  
7           these cases where the party has kind of the  
8           wherewithal to endure the whole process. And  
9           one of the things that does sort of skew the  
10          numbers is that the FTC's position has been that  
11          they essentially won't accept a settlement  
12          unless you forego your appellate rights.

13          And so it is really -- you have to be  
14          very hardy to make yourself all the way through  
15          that process and preserve your objections.

16          CHIEF JUSTICE ROBERTS: Justice Alito?

17          JUSTICE ALITO: Are the so-called  
18          Thunder Basin factors simply inferences about  
19          congressional intent? And if that -- that's  
20          what they are, are they the whole ball game? Is  
21          there anything else that the Court should or  
22          must consider in determining whether, in a case  
23          where we're under the Thunder Basin line of  
24          cases, anything else that's proper for us to  
25          consider or that we must consider?



1                   MR. CLEMENT: So, Justice Alito, I  
2                   guess what I would say is, you know, if you want  
3                   to sort of save the Thunder Basin factors, I  
4                   think you would construe them as being helpful  
5                   guideposts to discern the underlying legislative  
6                   intent.

7                   You know, it's more traditional for  
8                   this Court, of course, to discern legislative  
9                   intent from text. And I think, if you did infer  
10                  legislative intent from text, you would end up  
11                  in a world as I was describing to Justice Kagan  
12                  where you -- you much more readily recognize  
13                  that there's jurisdiction in the district court,  
14                  but then you start applying all these other  
15                  doctrines, like finality and exhaustion.

16                  I can't help but look at the Thunder  
17                  Basin factors and think that the Court was sort  
18                  of cheating a little and sort of front-loading  
19                  some of those non-jurisdictional factors into  
20                  the jurisdictional inquiry, but be that as it  
21                  may, we -- we -- we think you'd probably get to  
22                  almost the same result by applying finality,  
23                  ripeness, primary jurisdiction, all of those  
24                  other doctrines.

25                  CHIEF JUSTICE ROBERTS: Justice

1 Sotomayor?

2 JUSTICE SOTOMAYOR: Mr. Clement,  
3 Justice Thomas asked you a question about the  
4 impetus to settle. That's true in an Article  
5 III court. The number of district court cases  
6 that go on appeal is very small. Very true in  
7 criminal law cases, where most are settled by  
8 plea and most prosecutors require waivers there.

9 So I'm not quite sure that merely  
10 because a good number of cases settle means that  
11 you still don't have an adequate and meaningful  
12 opportunity to raise these claims before a  
13 court, which is what I think Thunder Basin --

14 MR. CLEMENT: So, Justice Sotomayor, I  
15 -- I --

16 JUSTICE SOTOMAYOR: -- Thunder Basin  
17 was based on, which is, if you have a chance to  
18 raise it, that's enough.

19 MR. CLEMENT: So I guess what I would  
20 say is I don't think my answer to Justice Thomas  
21 was meant to subsume all three factors or be a  
22 complete answer, but I do think it's worth  
23 recognizing how anomalous this situation is  
24 because, if you take the case of my client, for  
25 example, they offered basically to walk away

1 from the transaction and infuse the potential  
2 acquisition company with cash.

3 Now it seems to me that if we were in  
4 front of an Article III court and with the  
5 Justice Department prosecuting this --

6 JUSTICE SOTOMAYOR: Now you're getting  
7 to the merits, Mr. Clement. Thank you.

8 MR. CLEMENT: Well -- okay.

9 CHIEF JUSTICE ROBERTS: Justice Kagan?  
10 Justice Gorsuch?

11 JUSTICE GORSUCH: Tell me what I'm  
12 missing. 1331 says that district courts have  
13 jurisdiction over these claims absent any other  
14 consideration. And, normally, we consider  
15 district courts bound to exercise their  
16 jurisdiction when they have a claim.

17 Okay. Then we have the FTC Act that  
18 says cease-and-desist orders can be reviewed in  
19 the courts of appeals rather than the district  
20 courts. Those are the two statutes we have.

21 We don't have a cease-and-desist order  
22 here. I would have thought that might have been  
23 the end of the game and that the Thunder Basin  
24 factors would come in handy if we did have a  
25 cease-and-desist order. In that circumstance,

1 then perhaps we would make you wait and consider  
2 all these prudential factors about interfering  
3 with agency proceedings.

4 Again, what am I missing?

5 MR. CLEMENT: So I don't think you're  
6 missing anything. I think you're going to love  
7 Mr. Garre's argument later today. But what I  
8 would say is I do think, if you go with that  
9 simplistic, you know -- straightforward --

10 JUSTICE GORSUCH: Is simplistic -- no,  
11 go ahead. Go ahead.

12 MR. CLEMENT: -- straightforward.

13 JUSTICE GORSUCH: Simplistic, we can  
14 --

15 MR. CLEMENT: I didn't like  
16 simplistic. Straightforward. If you go --

17 (Laughter.)

18 JUSTICE GORSUCH: Textual maybe? How  
19 about that?

20 MR. CLEMENT: Textual.

21 JUSTICE GORSUCH: Okay.

22 MR. CLEMENT: Straightforward. All of  
23 those words seem to apply. Simplistic was a bad  
24 word choice.

25 JUSTICE KAGAN: It could have been

1 worse.

2 (Laughter.)

3 MR. CLEMENT: But, if you go with that  
4 approach, then I do think that, you know,  
5 district courts are going to have to be ready to  
6 apply a whole bunch of, you know, fairly  
7 well-established doctrines of ripeness and  
8 exhaustion, primary jurisdiction, maybe  
9 abstention. I know, you know, you generally --

10 JUSTICE GORSUCH: Don't they do that  
11 all the time? I mean, maybe that's simplistic,  
12 but --

13 MR. CLEMENT: They -- they do do that  
14 all the time. I don't think it's, like,  
15 entirely kismet, though, that -- if you -- if  
16 you step back and said what would the result be  
17 of applying all of those other  
18 non-jurisdictional doctrines, boy, I think you'd  
19 get to a situation that said they've got a claim  
20 that's wholly collateral, you don't get  
21 meaningful review, and the agency doesn't have  
22 any expertise, that's going to go forward to the  
23 merits in the district court.

24 And if one of those or two of those  
25 actually aren't satisfied, then probably you're

1 going to get tripped up by ripeness or  
2 exhaustion or something. So it would be a  
3 cleaner world. It would be a simpler world, a  
4 more textual world to go that route.

5 But I think you're going to end up in  
6 kind of the same place, which is why, you know,  
7 we're -- we're here happy to win on the Thunder  
8 Basin factors as well.

9 JUSTICE GORSUCH: Okay. And then you  
10 haven't had a chance to address the government's  
11 APA argument. Put aside the waiver or  
12 forfeiture issue. If you could address it on  
13 the merits.

14 MR. CLEMENT: Sure. I mean, we -- we  
15 don't feel like we have anything to fear under  
16 the APA argument. We actually think the APA  
17 gets you to a very similar place. And we do  
18 think the APA is best understood as a  
19 non-jurisdictional argument, one of the many,  
20 and it does basically say, you know, you should  
21 apply a specialized administrative regime but  
22 not where it doesn't provide adequate relief.

23 And we think this is a classic  
24 situation where it doesn't provide adequate  
25 relief.

1           So another way of sort of answering  
2 your first question is to say I suppose you  
3 could get to the Thunder Basin factors just as a  
4 gloss on the APA, but I don't think it would  
5 cause you under any circumstances to say that  
6 these claims can't go forward to the merits in  
7 district court.

8           CHIEF JUSTICE ROBERTS: Justice  
9 Kavanaugh?

10           Justice Barrett?

11           JUSTICE BARRETT: Just a quick  
12 question. So Justice Kagan asked you about  
13 interlocutory appeals, and it's true they're  
14 disfavored in all the contexts in which Justice  
15 Kagan was saying.

16           I had been thinking about those too as  
17 I was reading your brief and thinking about your  
18 argument. I want to ask you if I'm making this  
19 distinction in -- in the right way.

20           When we are talking about appeals or  
21 interlocutory appeals from district court to the  
22 court of appeals, we're talking about 1292 and  
23 finality under 1292 and exceptions to what can  
24 be final. So, you know, is it a collateral  
25 order? Could we treat it as final for that

1 purpose?

2 But this isn't that, really, because  
3 we're not asking whether it's final or  
4 collateral in that sense of finality. And we're  
5 not talking about looking at 1292 in a  
6 definition of final. A pre-enforcement  
7 challenge isn't interlocutory in that sense  
8 because there's no appeal from any kind of order  
9 that's been made, right?

10 So what are we supposed to draw --  
11 because, I mean, I had some of those same  
12 questions in my mind too. What are we supposed  
13 to draw from that context of interlocutory  
14 appeal? Nothing or something?

15 MR. CLEMENT: Well, I think you can  
16 draw something, which is I -- I do think even in  
17 that context, although it's focused on a  
18 different question, there is this concept of  
19 whether the claim you're bringing is collateral  
20 from the merits.

21 JUSTICE BARRETT: Right.

22 MR. CLEMENT: And I -- I do think  
23 that's a useful thing to borrow and bring over  
24 to this context, but I also think, as -- as I --  
25 as I said to Justice Kagan, it's also important



1 to recognize the differences in the context  
2 because, in an Article III court, when you have  
3 some claim that doesn't qualify for the  
4 collateral order doctrine, you've still gotten a  
5 ruling by a properly structured entity that has  
6 -- has every competence to decide the issue in  
7 your favor.

8 We don't have issues where we concede  
9 that the district court doesn't have any ability  
10 to consider the issue, but you're still stuck in  
11 --

12 JUSTICE BARRETT: Jurisdiction to  
13 decide jurisdiction?

14 MR. CLEMENT: Yeah.

15 JUSTICE BARRETT: Yeah.

16 MR. CLEMENT: Yeah. We don't accept  
17 that notion. I mean, so -- so you already are  
18 in a much better position if you're in district  
19 court. Again, our -- you know, the thrust of  
20 our complaint is we would love to be in district  
21 court fighting the bona fides of this  
22 acquisition. So I do think it's a different  
23 context.

24 JUSTICE BARRETT: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Jackson?

2 JUSTICE JACKSON: Yes. Mr. Clement,  
3 did I misunderstand you to say that your client  
4 has not received a cease -- cease-and-desist  
5 order? Is there such an order at issue here? I  
6 mean, not at issue. Did you get a  
7 cease-and-desist order, your client?

8 MR. CLEMENT: No. The  
9 cease-and-desist order, for purposes of the  
10 statutory review provision, is the culmination  
11 of the FTC process.

12 JUSTICE JACKSON: I see.

13 MR. CLEMENT: So we haven't gotten  
14 that. I mean --

15 JUSTICE JACKSON: But you are in the  
16 active agency review process, right?

17 MR. CLEMENT: Well, it's a little bit  
18 complicated because we did get a stay of the  
19 process pending this case out of the Ninth  
20 Circuit.

21 JUSTICE JACKSON: Absent that stay,  
22 the agency had decided that they were going to  
23 go forward with respect to your client?

24 MR. CLEMENT: Not on the morning that  
25 we filed our complaint. On the afternoon that

1 we filed our complaint.

2 JUSTICE JACKSON: I see.

3 MR. CLEMENT: And, you know, look, I  
4 -- I don't know -- for purposes of the argument  
5 I'm making today --

6 JUSTICE JACKSON: Yes.

7 MR. CLEMENT: -- I don't know that  
8 anything turns on that. For some of these  
9 non-jurisdictional doctrines, like abstention --

10 JUSTICE JACKSON: Right.

11 MR. CLEMENT: -- who filed first might  
12 matter a lot.

13 JUSTICE JACKSON: But can -- can I  
14 just explore that, though, because I'm wondering  
15 why anything doesn't turn on that. In other  
16 words, when the agency decides to go forward, I  
17 would assume they're sort of in -- you're in the  
18 channel then of agency review, as opposed to  
19 cases like Free Enterprise Fund, where they were  
20 just in the investigative world and they hadn't  
21 decided.

22 And so, once you're now in the agency  
23 process, I'm concerned about people using the  
24 district court jurisdiction to sort of do -- to  
25 -- to stay the agency process or do an end run

1 around it. And I'm wondering, why isn't that a  
2 legitimate concern, given a statute in which  
3 it's pretty clear that once you are in the  
4 channel, they've given exclusive review or  
5 exclusive jurisdiction to the court of appeals  
6 to review a final order of the agency?

7 MR. CLEMENT: So two kinds of answers,  
8 Justice Jackson. The first is, I mean, you  
9 know, generally, for jurisdictional purposes,  
10 it's the situation at the time of the filing of  
11 the complaint that matters. So, even if you're  
12 going to draw this distinction, I think we're on  
13 the right line.

14 But the second and probably more  
15 responsive answer is I think this is why you  
16 have to look at the nature of the claim that's  
17 being brought, because if you're bringing sort  
18 of a claim that's really about the agency  
19 process and that's your beef, then I think it's  
20 fine to say we're in the channel of review.

21 But, if you're saying this whole  
22 agency is unconstitutional or it has no business  
23 exercising jurisdiction over this case, you're  
24 not in the regulatory channel; you're in the  
25 regulatory maw. That's your whole claim, is

1 that we don't belong here at all.

2 JUSTICE JACKSON: And it doesn't  
3 matter to you that as a result of making that  
4 second kind of claim, you would be  
5 terminating -- I mean, I'm with you to the  
6 extent that you say I'm making that claim and  
7 the point is we -- they have no jurisdiction  
8 over me, and, district court, if you agree, I'm  
9 out, and the whole thing is over.

10 What I'm concerned about is drawing a  
11 line that involves you returning to the agency  
12 after you've made a claim in district court,  
13 because then it seems like the district court is  
14 being used to superintend the agency process  
15 rather than making the very kind of claim you  
16 say you want to make in this case.

17 MR. CLEMENT: But, if you think about  
18 our two claims -- or, you know, we had three  
19 claims. Depends how you number them. But, if  
20 you think about our claim that we shouldn't be  
21 in the FTC at all, that seems to fit your  
22 paradigm. The relief we could get there, at  
23 least one of the forms of relief we could get,  
24 is essentially to be sent to the DOJ.

25 But then, if you think about our

1 removal claims, what we're basically saying is  
2 we shouldn't be sent to the agency at all as it  
3 is currently structured. The agency can't help  
4 us with that claim. They're powerless to do  
5 anything about the claim. But the district  
6 court isn't, and what the district court could  
7 do is -- I mean, here, they port us out on  
8 jurisdiction, but if it granted the merits, it  
9 could say, you know, you're right, 5 U.S.C. 7521  
10 is unconstitutional. ALJs can be removed by the  
11 MSPB at will. And in that world, now you're  
12 back to the agency. But you're -- you're, in  
13 our view, back at a different agency where we at  
14 least kind of know who to complain about if we  
15 think we're being mistreated by the ALJs.

16 CHIEF JUSTICE ROBERTS: Thank you,  
17 counsel.

18 Mr. Stewart.

19 ORAL ARGUMENT OF MALCOLM L. STEWART

20 ON BEHALF OF THE RESPONDENTS

21 MR. STEWART: Mr. Chief Justice, and  
22 may it please the Court:

23 It is a longstanding principle of  
24 administrative law that courts will not  
25 intervene in an ongoing agency proceeding until

1 that proceeding culminates in a rule or order  
2 that imposes sanctions or determines legal  
3 rights or obligations.

4 Consistent with that principle, the  
5 FTC Act review provisions governing  
6 adjudications authorize court of appeals review  
7 only of the final Commission orders that  
8 terminate the proceedings. The APA confirms  
9 that this review mechanism is exclusive and  
10 further confirms that antecedent steps taken  
11 during the adjudications are subject to review  
12 on the review of the final agency action. Those  
13 provisions, taken together, make clear that  
14 district courts have no authority to entertain  
15 constitutional challenges to the Commission's  
16 conduct of agency adjudications.

17 Axon argues that review of final  
18 Commission orders will provide inadequate relief  
19 because it will not protect it from the burdens  
20 associated with the administrative proceedings  
21 themselves.

22 But this Court has repeatedly rejected  
23 similar arguments both in the agency review  
24 context and in applying the collateral order  
25 doctrine. The Court, therefore, should hold

1 that the district court lacked jurisdiction over  
2 this suit.

3 In the alternative, the Court should  
4 hold that Axon lacks a valid cause of action  
5 because the commencement of a Commission  
6 adjudication is not immediately reviewable.

7 I welcome the Court's questions.

8 JUSTICE THOMAS: Would you at least  
9 give us your clearest textual argument? As  
10 Justice Gorsuch mentioned, you have the FTC Act  
11 and you have 1331. Could you make -- could you  
12 at least argue textually why there is no  
13 jurisdiction as between those two statutes?

14 MR. STEWART: I -- I guess the other  
15 thing I would point to, Justice Thomas, is the  
16 APA and specifically 5 U.S.C. 704, which is  
17 reproduced at page 1a of the appendix to our  
18 brief, and -- and the relevant sentence for  
19 these purposes is: "A preliminary, procedural,  
20 or intermediate agency action or ruling not  
21 directly reviewable is subject to review on the  
22 review of the final agency action." And the  
23 Court in FTC versus Standard Oil discussed the  
24 implications of this provision.

25 And imagine for a second that this



1 sentence appeared as the second sentence of the  
2 FTC Act review provision and you had the first  
3 sentence with words to the effect that a person  
4 who receives a cease-and-desist order may file a  
5 petition for review in the court of appeals, and  
6 then the second sentence said preliminary steps  
7 taken during the adjudication shall be reviewed  
8 on review of the final agency action.

9           That would be powerful evidence that  
10 Congress intended any review of the antecedent  
11 steps to occur in the court of appeals when the  
12 final cease-and-desist order is issued. And the  
13 language doesn't have any less salience by  
14 virtue of the fact that it appears in the APA  
15 instead. The whole --

16           JUSTICE GORSUCH: Mr. Stewart?

17           MR. STEWART: Yes.

18           JUSTICE GORSUCH: So, if I understand  
19 your -- your answer, and I'm sorry to interrupt  
20 you, but I -- I just want to make sure I  
21 understand, 1331 grants jurisdiction to district  
22 courts. The FTC Act grants jurisdiction to  
23 courts of appeals for cease-and-desist orders.  
24 There's no withdrawal jurisdiction anywhere in  
25 those statutes, and so you ask us to turn to the

1 APA to discern that. Is that right?

2 MR. STEWART: Well, actually --

3 JUSTICE GORSUCH: Is that your  
4 argument?

5 MR. STEWART: -- I think the APA  
6 confirms that the provision governing review of  
7 final cease-and-desist orders is intended to  
8 cover not only the final order itself but any  
9 challenge --

10 JUSTICE GORSUCH: Well --

11 MR. STEWART: -- to the manner in  
12 which the proceeding was --

13 JUSTICE GORSUCH: -- okay. So we're  
14 on to the APA now. We're past the FTC Act. And  
15 what do you say first to the argument that --  
16 that that contention by the government was  
17 forfeited or waived?

18 And, second, what do you say to the  
19 argument that the sentence you're pointing to in  
20 704 speaks to an agency action that's not  
21 directly reviewable, is subject to review on the  
22 final agency order, final agency action, and an  
23 agency action is defined as a rule, an order, a  
24 license, a sanction, or relief? And we have  
25 none of those things here. So we don't have

1 agency action.

2           What do you say to those two -- two  
3 arguments?

4           MR. STEWART: I think -- as -- as to  
5 the first point, I don't think that our court of  
6 appeals brief quoted the specific sentence from  
7 the APA. We did make the argument in the court  
8 of appeals that what they are challenging is not  
9 final agency action to begin with because, under  
10 Standard Oil, the commencement of agency  
11 proceedings is not reviewable at all. So that  
12 argument has been preserved.

13           The second thing I would say is I  
14 think that agency action is at issue in this  
15 case; that is, Mr. Clement said what we're  
16 really challenging is the composition of the  
17 agency or the question of whether it's  
18 constitutionally structured.

19           But, obviously, as a matter of Article  
20 III, a plaintiff couldn't get into court simply  
21 by saying the relevant statutory --

22           JUSTICE GORSUCH: I'm not concerned  
23 about what the plaintiff's saying. I'm  
24 concerned about where is the agency action that  
25 would implicate 704. That 704, the sentence you

1     rely on, speaks of agency action being  
2     reviewable upon the final order.

3             MR. STEWART: In this case, it --

4             JUSTICE GORSUCH: And, here, where is  
5     the agency action? Under 551, I think it's  
6     paragraph 13 maybe --

7             MR. STEWART: In -- in this --

8             JUSTICE GORSUCH: -- it defines agency  
9     action, and I'm just struggling to see where  
10    that's present in this case.

11            MR. STEWART: In this case, it is the  
12    commencement of the FTC's administrative  
13    adjudication, the commencement by the FTC and  
14    the assignment of that proceeding to an ALJ.

15            And the point I was making is a  
16    plaintiff can't get into court simply by saying  
17    the statute is unconstitutional because the  
18    agency is improperly structured. In order to  
19    have Article III standing, the plaintiff would  
20    have to say the agency is doing something or is  
21    about to do something that injures me.

22            And, in this case, the thing that the  
23    agency was about to do, because, as Mr. Clement  
24    said, the suit was filed a few hours before the  
25    proceeding was commenced, the thing that Mr.

1 Clement is complaining about is the fact that an  
2 administrative adjudication was commenced.

3 Had there been no adjudication  
4 commenced, perhaps Axon could have found other  
5 --

6 JUSTICE GORSUCH: Do we have -- do we  
7 have here a rule, an order, a license, a  
8 sanction, or relief?

9 MR. STEWART: Well, the whole thing  
10 that -- we don't have that, and that's why --

11 JUSTICE GORSUCH: We don't have any of  
12 those things?

13 MR. STEWART: But that's why -- that  
14 is why we don't have final agency action, but if  
15 Mr. -- if --

16 JUSTICE GORSUCH: Well, we can have an  
17 interim order. That -- I mean, there are all  
18 sorts of interim orders and interim relief that  
19 an agency could grant that would constitute  
20 agency action under that definition.

21 MR. STEWART: If the Commission had  
22 given no indication that it intended to commence  
23 an administrative adjudication against Axon,  
24 then Axon would clearly have lacked standing to  
25 raise the claim that the ALJs were improperly

1 insulated from removal.

2 JUSTICE GORSUCH: All right. Let me  
3 see if I just have a summary of it. Textually,  
4 putting aside other things, we don't have  
5 anything in the FTC Act, we don't have anything  
6 in 1331, we have to go to the APA, we have to  
7 find that you didn't waive it, and we have to  
8 agree with your understanding of what an agency  
9 action is. Is that right?

10 MR. STEWART: Well, you certainly have  
11 to agree that a plaintiff needs to identify an  
12 agency action in order to challenge the  
13 composition or structure of the agency, but I  
14 think that is basic administrative law.

15 I don't think any litigant or Justice  
16 on the Court would say that the --

17 JUSTICE GORSUCH: I'm going to take  
18 that as a yes.

19 JUSTICE KAGAN: I don't understand why  
20 you have to go to the APA, Mr. Stewart. I mean,  
21 you have a statutory provision that says there's  
22 jurisdiction over these cease-and-desist or  
23 other final orders in the courts of appeals,  
24 that jurisdiction is exclusive.

25 The question is, what does that

1 subsume? And, I mean, you might be using the  
2 APA as kind of an analogy to help you answer  
3 that question, but you can answer that question  
4 without the APA that, normally, in our legal  
5 system, we understand that when you give  
6 exclusive jurisdiction to a court as to a final  
7 order it also subsumes a whole lot of  
8 interlocutory things leading up to it.

9 MR. STEWART: I would agree that we  
10 would -- we don't need the APA, that this would  
11 be the logical inference to be drawn from the  
12 provision that authorizes court of appeals  
13 review of final Commission orders. I think it  
14 is more than an analogy because the APA is not  
15 simply a statute that covers district court  
16 suits in circumstances where no special review  
17 provision exists.

18 The APA covers, provides basic rules  
19 of the road even for review of agency action  
20 under a special review provision.

21 JUSTICE KAGAN: May -- may I ask --

22 CHIEF JUSTICE ROBERTS: Doesn't -- no,  
23 go ahead.

24 JUSTICE KAGAN: Go ahead.

25 CHIEF JUSTICE ROBERTS: Doesn't Free

1 Enterprise stand as a pretty insurmountable  
2 barrier to your argument?

3 MR. STEWART: No, I think there are  
4 three distinctions between this case and Free  
5 Enterprise Fund.

6 The first is the Court in Free  
7 Enterprise Fund stressed that, in order to  
8 trigger an SEC adjudication and thereby get  
9 judicial review under the Exchange Act review  
10 provision, the Free Enterprise Fund would have  
11 had to deliberately committed a violation and  
12 subjected itself to penalties.

13 And this Court invoked MedImmune,  
14 which, in turn, summarizes a long line of this  
15 Court's decisions that say we really strain to  
16 provide judicial review that is not contingent  
17 on committing a violation and subjecting  
18 yourself to penalties.

19 And the Court in Standard Oil  
20 addressed this point where the Court was  
21 explaining why the requirement to participate in  
22 the adjudication itself was different from what  
23 was at issue in Abbott Labs.

24 And the Court said in Abbott Labs we  
25 were dealing with judicial review of



1 regulations, and the rules imposed legal  
2 obligations, you could get penalties, you could  
3 be subjected to penalties if you violated them.

4 And in that --

5 CHIEF JUSTICE ROBERTS: I -- I thought  
6 it was pretty clear in -- in that opinion that  
7 the availability, the grant of judicial  
8 jurisdiction in other forums wouldn't be read as  
9 an implied removal of jurisdiction in 1331.

10 MR. STEWART: Well, the other thing  
11 that was different about Free Enterprise Fund  
12 was that in that case, people were not -- the  
13 plaintiff was not complaining about removal  
14 protections that attached to SEC officials who  
15 conducted the adjudications. They were  
16 complaining about the removal protections for  
17 the PCAOB members, and there was only a kind of  
18 --

19 CHIEF JUSTICE ROBERTS: Oh, no, but  
20 the -- the Board's activities were fully under  
21 the supervision of the agency.

22 MR. STEWART: Yes, but the point was  
23 their -- their challenge was to an ongoing  
24 investigation that affected them on the ground.  
25 It had only an attenuated and speculative

1 connection to any potential SEC adjudication.

2 Here, the challenge is directed  
3 specifically at the adjudication itself, and, as  
4 I say, it could -- the people -- people to  
5 challenge the removal protections for FTC ALJs  
6 that have standing only if they were involved in  
7 an actual or imminent FTC adjudication.

8 The other thing I'd say is, in Elgin,  
9 which was decided two years after Free  
10 Enterprise Fund, the Court said we don't  
11 distinguish for purposes of an exclusive review  
12 provision between different types of  
13 constitutional claims. And --

14 CHIEF JUSTICE ROBERTS: Well, in  
15 Elgin, you understand the response from your  
16 friends on the other side that the claims there  
17 were intertwined with the proceeding itself  
18 before the Commission while, in this case, it  
19 doesn't matter what the Commission's going to do  
20 under the -- your friend's claim. It's still  
21 unconstitutionally constituted.

22 MR. STEWART: Well, I think Mr.  
23 Clement, with -- with respect, was going back  
24 and forth between two arguments. That is, he  
25 said in this case our claim is systemic. We're

1 not arguing about anything that will happen in  
2 any particular adjudication. We're arguing  
3 about the way that the Commission is structured  
4 and the way that its proceedings take place  
5 generally.

6 But then, when he was asked to discuss  
7 Elgin, he acknowledged that, yes, the claim in  
8 that case was that the federal statute that  
9 provides for mail-only Selective Service  
10 registration was unconstitutional. That was the  
11 nature of the Elgin plaintiffs' claims.

12 And he said it doesn't matter that  
13 their legal theory was broad and sweeping. What  
14 matters is that they asserted that legal theory  
15 as a vehicle for trying to get their own jobs  
16 back.

17 And we think he was right when he was  
18 talking about Elgin. But we think that the same  
19 thing is true here. What Axon is complaining  
20 about is the fact that they are in an  
21 administrative adjudication, and their complaint  
22 sought certain forms of declaratory relief.

23 But the only injunctive relief it  
24 sought, the only tangible change in the agency's  
25 behavior that it sought was terminate the ALJ

1 proceedings, enjoin the administrative  
2 adjudication.

3 And so, under Elgin, the fact that  
4 their constitutional basis for seeking that  
5 relief is broad and sweeping doesn't mean that  
6 they can get any court -- into court any sooner  
7 than they could get into court --

8 JUSTICE KAGAN: May I step back for --  
9 unless -- do you have a sentence finisher there?

10 MR. STEWART: No, that's fine.

11 JUSTICE KAGAN: I guess I was pretty  
12 surprised when I read your brief, Mr. Stewart,  
13 because, you know, three times in the last  
14 couple of decades we've confronted a case like  
15 this one and three times we've used Thunder  
16 Basin to decide it.

17 And your brief doesn't talk about  
18 Thunder Basin until page 51, and it doesn't use  
19 -- it doesn't talk about Thunder Basin at all in  
20 your summary of the argument.

21 And I guess I read your brief and I'm  
22 trying to figure out, do you think you lose  
23 under Thunder Basin? Because I thought Thunder  
24 Basin was the law here.

25 MR. STEWART: We think that we win

1 under Thunder Basin. I -- I think, you know,  
2 Mr. Clement thought that the Court in Thunder  
3 Basin was tilting the scales against the  
4 claimants.

5 I think the Thunder Basin perhaps  
6 could have been written even more vigorously if  
7 it said certain things that we are treating as  
8 implications are, in fact, buttressed by the  
9 text of the APA.

10 And so, for instance, the Court has  
11 said repeatedly when Congress provides for a  
12 comprehensive and specific review mechanism  
13 governing a particular class of agency conduct,  
14 we will often infer from that detail and  
15 specificity that it is intended to be exclusive  
16 and that review through an alternative district  
17 court mechanism is unavailable.

18 And so what we intended to be an  
19 important point in our brief was that is not  
20 just an inference. The APA actually says that.  
21 And on the same page of the appendix to our  
22 brief, 5 U.S.C. 703 says the form of proceeding  
23 for judicial review is the special statutory  
24 review proceeding relevant to the subject matter  
25 in a court specified by statute or, in the

1 absence or inadequacy thereof, any applicable  
2 form of legal action.

3 And so, again, the APA actually says,  
4 if there is a special statutory review mechanism  
5 and if it is not inadequate, then you have to  
6 use that. You can only use the fallback review  
7 mechanism in district court in the absence or  
8 inadequacy of a special review mechanism.

9 So we were trying to respond to the  
10 argument that Thunder Basin is on thin ice  
11 because it's all implication by saying no, there  
12 is specific language in the APA that says the  
13 same thing.

14 JUSTICE JACKSON: But what about the  
15 argument that Thunder Basin either supports you  
16 just on its actual elements or doesn't? I --  
17 I'm trying to understand your argument with  
18 respect to the collateral nature or not of the  
19 claims that are being made in this case.

20 MR. STEWART: We think Thunder Basin  
21 supports us. That is, the first factor is  
22 meaningful review available through the -- the  
23 special review provision. That maps on  
24 precisely to the APA language about inadequacy  
25 of review. And we say this is adequate because,

1 at the end of the day, if a court agrees with  
2 their constitutional theory, it can set aside  
3 the final order issued by the --

4 JUSTICE JACKSON: What about  
5 collateral? Isn't that the hardest part for  
6 you?

7 MR. STEWART: I don't think it is  
8 because the Thunder Basin test refers to  
9 collateral to the review provisions. And in our  
10 view, this is really the least collateral thing  
11 you can imagine; that is, the very thing -- it  
12 is not like in Thunder Basin or in Elgin, where  
13 the plaintiff was complaining about something  
14 that happened in the world, the requirement that  
15 the employer post a notice in Thunder Basin or  
16 the termination from employment in Elgin, and  
17 then the question was, do you have to go through  
18 this review scheme?

19 Here, the review scheme is the precise  
20 thing that they are complaining about. They are  
21 saying --

22 JUSTICE ALITO: Do you think that --

23 JUSTICE KAGAN: I mean, I don't  
24 understand --

25 JUSTICE ALITO: Do you think that

1 meaningful review means no review? Do you think  
2 a party gets meaningful review if, unless at the  
3 end of the administrative proceeding, it can't  
4 get any review of its claim?

5 MR. STEWART: I think, if it can't get  
6 review of the claim, that would be correct, but  
7 if --

8 JUSTICE ALITO: Sure. Then it has no  
9 review. So what does the word "meaningful" add  
10 to it?

11 MR. STEWART: I mean, I -- I think  
12 what the Court is -- what the statute -- or what  
13 the Court is perhaps getting at is in  
14 circumstances, for instance, like Digital  
15 Equipment. Digital Equipment involved a -- a  
16 situation in which the defendant said -- I'm  
17 sorry, a better case would be Mohawk, where the  
18 question was, should materials that were  
19 arguably subject to the attorney-client  
20 privilege be turned over?

21 And the district court said no, and  
22 the question was, is that immediately appealable  
23 under the collateral order doctrine? And the  
24 Court said no collateral order review, that if  
25 these materials are introduced at trial and



1 that's later determined to be error, you can get  
2 vacatur of the judgment and that's good enough.

3 And the Court acknowledged that  
4 wouldn't undo the whole harm of turning over  
5 privileged materials because the privilege was  
6 against disclosure at all, not simply about the  
7 introduction in court proceedings, but this is  
8 good enough. And I think similarly here.

9 And to -- to kind of proceed directly  
10 to the -- the argument that Axon is making, the  
11 prime argument as to why review at the end of  
12 the day wouldn't be adequate is that it wouldn't  
13 save them from the burdens of the proceeding.  
14 They would still get review only after having  
15 gone through the ALJ and Commission  
16 adjudication.

17 And that's the kind of argument that  
18 the Court has rejected time after time. In FTC  
19 versus Standard Oil, the claim was there was an  
20 inadequate evidentiary basis for commencing the  
21 adjudication in the first place.

22 JUSTICE ALITO: Let me ask a question  
23 that -- that is simplistic perhaps. What sense  
24 does it make for a claim that goes to the very  
25 structure of the agency having to go through the

1 administrative process?

2 MR. STEWART: I think we would say two  
3 things, and I'll say what I really believe to be  
4 the less important point first. The first is  
5 the SEC -- I'm sorry, the FTC Commissioners  
6 probably don't have anything about their own  
7 removal protections that a court would find  
8 useful, but the Commissioners do have expertise  
9 in the way that the adjudications are conducted.  
10 And so they could say it might seem like a black  
11 box to someone else, but here are the criteria  
12 that we use to determine which cases will go to  
13 court or which cases --

14 JUSTICE ALITO: Well, I'm talking  
15 about -- let's take the removal -- the removal  
16 claim. That's really what I'm thinking of to  
17 start out.

18 MR. STEWART: I -- I would say two  
19 things. The first is, even as to that, the FTC  
20 Commissioners could say here are what we think  
21 of as the advantages and disadvantages of  
22 removal protections for our ALJs. And the  
23 court -- the agency couldn't declare the statute  
24 unconstitutional, so it couldn't provide relief  
25 on that ground at the end of the day, but it

1 could still provide something that could be  
2 useful to a reviewing court.

3 But the main practical advantage, the  
4 main reason we think it makes sense are the  
5 reasons that the Court identified in *FTC versus*  
6 *Standard Oil*. First, you avoid piecemeal  
7 litigation. If there's ultimately a  
8 cease-and-desist order entered, it may well be  
9 that Axon will want to challenge it not just on  
10 the ground that various officials had improper  
11 removal protections but also on the ground that  
12 there was no antitrust violation or that the ALJ  
13 committed some error in the conduct of the  
14 proceedings.

15 And as the Court said in *Standard Oil*,  
16 by deferring review until the end of the day, we  
17 ensure that all of those challenges can be  
18 consolidated in a single proceeding.

19 JUSTICE ALITO: But this argument  
20 about the -- the removal status of ALJs hangs  
21 over everything the agency is doing. Isn't it  
22 in your interest to get this decided?

23 MR. STEWART: Well, we -- we actually  
24 have a case out of the Fifth Circuit in *Jarkesy*  
25 in which the court recently denied -- the Fifth

1 Circuit recently denied rehearing en banc, in  
2 which the Fifth Circuit has held that two layers  
3 of removal protections for the ALJs do violate  
4 the Constitution. And so we do have a prospect  
5 of getting that to the court and getting final  
6 resolution now, and that's the way that these  
7 issues have been decided recently in cases like  
8 *Seila Law*, *Arthrex*, *Noel Canning*. You had  
9 systemic challenges to the way that agency  
10 adjudications were conducted, but the Court has  
11 always resolved those challenges in the context  
12 of an appeal from an actual agency adjudication.

13 And to go -- to go back to -- to your  
14 prior question, the second thing that the Court  
15 said in *Standard Oil* as an advantage of  
16 deferring review, in addition to the fact that  
17 you avoid piecemeal litigation, is that  
18 sometimes the agency adjudication will culminate  
19 in a way that makes judicial review unnecessary.

20 And so, for instance, if the FTC  
21 ultimately agrees with *Axon* that there was no  
22 antitrust violation here or that it's been  
23 sufficiently cured, the Court would not need to  
24 weigh in. And the Court in *Standard Oil* pointed  
25 out that has traditionally been seen as an

1 advantage rather than a disadvantage of  
2 requiring agency processes.

3 CHIEF JUSTICE ROBERTS: Given that  
4 laundry list of cases where the government  
5 didn't prevail, and I gather the one in the  
6 Fifth Circuit as well, doesn't that underscore  
7 the need for direct -- a direct proceeding to  
8 raise the constitutional claim rather than  
9 waiting however many years before the agency?

10 MR. STEWART: I mean, it -- it is --  
11 this is true of deferral of review generally  
12 in -- both in the collateral order doctrine and  
13 in the agency review context, that, yes, when a  
14 challenge has been found to be meritorious, we  
15 will almost always say, looking back on it, it  
16 would have saved people time and trouble if  
17 there had been a more expeditious --

18 CHIEF JUSTICE ROBERTS: Well, that's  
19 the case with respect to one, but this is a  
20 series of cases that are a constellation around  
21 some fairly basic propositions. And to have it  
22 go over and over and over again, it does make  
23 the case about the need for direct resolution of  
24 a related claim pretty strong.

25 MR. STEWART: Well, as we've said in

1 our brief, mandamus review is available in  
2 extreme cases. And so, for instance, if an  
3 agency in the -- had simply flouted Seila Law  
4 and -- or, I'm sorry, had flouted Lucia and in  
5 the wake of Lucia had continued to conduct  
6 adjudications through ALJs who had not been  
7 appointed in conformity with the Appointments  
8 Clause, then mandamus review could have been  
9 granted.

10 But I think it would be perilous to  
11 try to identify a class of systemic challenges  
12 that, from recent experience, we think are  
13 sufficiently likely to proceed that they should  
14 go to -- to the front of the line.

15 JUSTICE GORSUCH: Isn't that a little  
16 awkward, though, that we -- we would think that  
17 the APA or -- or whatever precludes 1331  
18 jurisdiction to resolve these claims, but it  
19 doesn't preclude All Writs Act jurisdiction in  
20 the district court to bring these claims? I  
21 mean --

22 MR. STEWART: No.

23 JUSTICE GORSUCH: -- what if Mr.  
24 Clement had simply styled this as a mandamus  
25 petition, suggesting that the FTC had acted

1 wholly without jurisdiction, which is a classic  
2 mandamus argument, because of all of our  
3 mountain of precedent with respect to two layers  
4 of removal?

5 MR. STEWART: He certainly could have  
6 made that argument. I -- I --

7 JUSTICE GORSUCH: And so then we would  
8 have been in district court, and that would have  
9 been okay?

10 MR. STEWART: No. First, the mandamus  
11 petition would have had to be filed in the court  
12 of appeals. That is the All Writ -- 1651  
13 authorizes courts to issue writs in aid of their  
14 jurisdiction. And we cited a couple of cases --

15 JUSTICE GORSUCH: Okay. So he would  
16 have been in the court of appeals, but he could  
17 have gotten to a court immediately --

18 MR. STEWART: But --

19 JUSTICE GORSUCH: -- you would agree,  
20 to raise his claim if he had simply styled it  
21 under the All Writs Act rather than under 1331?

22 MR. STEWART: The only claim that he  
23 could have raised under mandamus would have been  
24 that he had a clear and indisputable right to  
25 this relief. And I think that even --

1 JUSTICE GORSUCH: Well, that's -- that  
2 -- I think that's the nature of his argument,  
3 that the two layers of removal is clear and  
4 indisputable.

5 MR. STEWART: It -- it can't be --

6 JUSTICE GORSUCH: Let's suppose it  
7 were. Let's -- he could do that.

8 MR. STEWART: Oh, if it were clear and  
9 undisputable, if the Court in Free Enterprise  
10 Fund had said and our holding about double  
11 for-cause removal applies to adjudicative  
12 officials as well, he would have a clear and  
13 indisputable right to relief.

14 Now the Court in Free Enterprise Fund  
15 did the opposite of that. It said we are  
16 specifically reserving the question whether  
17 adjudicative officials are to be treated  
18 differently.

19 He -- - he -- Mr. Clement may win on  
20 that argument in -- in the fullness of time, but  
21 I don't think he could plausibly have told a  
22 court of appeals on a request for mandamus that  
23 he had a clear and undisputable right to that.

24 JUSTICE GORSUCH: Why -- why -- why  
25 does the APA preclude 1331 but not All Writs?



1           MR. STEWART: Again, I don't think of  
2 it as the APA precluding. The APA confirms the  
3 inference that the court of appeals is the only  
4 court to exercise review.

5           And, in general, the court of appeals  
6 jurisdiction is limited to the final  
7 cease-and-desist order. But we cited two cases  
8 at page 50 of our brief that say when the All  
9 Writs Act refers to issuing writs in aid of your  
10 jurisdiction, that can mean not only an actual  
11 pending appeal but a potential appeal.

12           And so the court that could review the  
13 cease-and-desist order has a form of ancillary  
14 jurisdiction to -- to superintend the  
15 administrative process to the extent of being  
16 able to step in if there is really an egregious  
17 deviation from appropriate practice.

18           JUSTICE KAGAN: Mr. Stewart, go --  
19 going back to Thunder Basin, I told Mr. Clement  
20 that I thought his worst factor was meaningful  
21 review. I -- I think that the other two factors  
22 are pretty darn bad for you.

23           On expertise, the Court in Free  
24 Enterprise Fund, whatever distinctions there  
25 might be as between Free Enterprise Fund and

1 this case, the Court in Free Enterprise Fund  
2 just says you lose on expertise.

3           Then, on collateral, I mean, I think  
4 just the ordinary understanding of what we --  
5 what we mean when we use that term is, is it  
6 unrelated to the essence or the subject matter  
7 of the dispute, and -- and a claim that goes to  
8 the legitimacy of the agency structure as a  
9 whole is completely unrelated to the subject  
10 matter of the suit.

11           So why aren't those two pretty easy  
12 wins for Mr. Clement?

13           MR. STEWART: I think, as to the --  
14 even as to the expertise factor, the SEC may  
15 have lacked expertise regarding the way in which  
16 the PC -- the -- the removal protections for the  
17 PCAOB officers, but it certainly has expertise  
18 in the way SEC adjudications are conducted.

19           But the second thing I would say is,  
20 if this were a challenge, for instance, to a  
21 rule of evidence that bound the ALJ and the rule  
22 -- and it was being attacked on the ground that  
23 it violated due process because it didn't allow  
24 the respondent in the proceeding a sufficient  
25 opportunity to rebut the agency's charges, we

1 would surely say that challenge has to go  
2 through the administrative scheme.

3           It may -- whether the due process  
4 challenge succeeds may be unrelated to the  
5 merits of any particular allegation that a  
6 regulated party has violated the FTC Act, but  
7 it's still -- it is still not collateral to the  
8 review provisions because it goes to the way in  
9 which the administrative adjudication will be  
10 conducted.

11           And -- and, here, we have basically  
12 the same thing, that -- oh -- oh, the challenge  
13 to the removal protections for the FTC  
14 Commissioners is a little bit different because  
15 the FTC does a lot of other things.

16           If the Commission issued a rule, then  
17 the rule could be challenged on the ground that  
18 the Commissioners were unlawfully protected from  
19 removal. That kind of challenge is not  
20 inherently linked to an injury --

21           JUSTICE KAGAN: And -- and if -- if I  
22 just sort of cut to -- to the core of your  
23 argument, you seem to be saying something like  
24 it's not collateral if it arose from an  
25 enforcement proceeding. But almost everything

1 is going to arise from an enforcement  
2 proceeding. That -- you're basically making the  
3 collateral inquiry do no work at all.

4 MR. STEWART: I think we're -- there's  
5 a difference between asking did it arise from  
6 the -- well, did it arise from the enforcement  
7 proceeding and was it directed at the  
8 enforcement proceeding.

9 For instance, the statute that governs  
10 the SEC, the Exchange Act, authorizes the SEC to  
11 issue temporary cease-and-desist orders that  
12 constrain the regulated parties' conduct while  
13 the adjudication is ongoing.

14 And that -- that may be -- and the  
15 Exchange Act specifically provides for district  
16 court review of those orders because they  
17 require the party to do more than participate in  
18 the proceedings themselves. They constrain the  
19 parties' freedom of movement outside the  
20 proceedings.

21 And those could be viewed as  
22 collateral because even though they are  
23 contingent on the pendency of an adjudication,  
24 they are still not part of the process by which  
25 the adjudication is resolved. They affect

1 private conduct outside the scope of the  
2 proceedings themselves.

3 I will say one other thing about the  
4 Court's collateral review doctrine -- collateral  
5 order doctrine, that both in the agency -- I'm  
6 sorry.

7 CHIEF JUSTICE ROBERTS: You can finish  
8 your thought.

9 MR. STEWART: Both in the agency  
10 review context and in the collateral order  
11 context, really, the only exception the Court  
12 has recognized to the general principle that you  
13 can't get out of it simply by invoking the  
14 burdens of the proceedings, the only exception  
15 to that principle is claims of immunity.

16 So the Court has said adverse rulings  
17 on the double jeopardy clause, on state  
18 sovereign immunity, on qualified immunity, they  
19 can be appealed immediately, but other claims  
20 that would terminate the proceedings can't.

21 What we have here is at the furthest  
22 -- furthest extreme from a claim of immunity.

23 CHIEF JUSTICE ROBERTS: Thank you.

24 Justice Thomas?

25 JUSTICE THOMAS: Mr. Stewart, I'm

1 interested in how -- what that review would look  
2 like before the FTC. How would they consider  
3 Mr. Clement's, Petitioner's, claims here?

4 MR. STEWART: I think the ALJ --

5 JUSTICE THOMAS: And particularly the  
6 constitutional claims.

7 MR. STEWART: Probably the ALJ  
8 wouldn't consider them at all. And the FTC, if  
9 it proceeded to that point, if there was an  
10 appeal to the FTC, he's right that they could --  
11 the FTC couldn't declare a federal statute  
12 unconstitutional, but it could say here are what  
13 we think of as the strengths and weaknesses of  
14 giving removal protections to the ALJs, coming  
15 at it from a -- their perspective, coming at it  
16 from a position of expertise.

17 The -- the corollary point I would  
18 make, in FTC versus Standard Oil, the Court said  
19 we don't anticipate that the agency in the  
20 course of the administrative proceedings will  
21 reconsider its original determination that there  
22 was reason to believe a violation had occurred.

23 So the justification was -- for  
24 deferring review was not that the Court expected  
25 the agency to shed more light on it in the

1 course of the proceedings.

2 JUSTICE THOMAS: And the -- the  
3 remedy, I assume, that they would like is an  
4 injunction against having to appear before an --  
5 a Commission or an ALJ they think is  
6 unconstitutionally appointed.

7 So how would they get that remedy at  
8 the appellate court level?

9 MR. STEWART: I -- I mean, I think  
10 they would -- I think the remedy they would be  
11 entitled to at the appellate court level would  
12 be vacatur of the cease-and-desist order. And  
13 if the court of appeals said our rationale for  
14 vacating the cease-and-desist order is that we  
15 think that the ALJs are unconstitutionally  
16 insulated from removal, that would effectively  
17 preclude the FTC from using the adjudicative  
18 method in any case that could be appealed to the  
19 Eighth Circuit, unless and until -- yeah, unless  
20 -- I'm sorry, the Ninth Circuit, unless and  
21 until the removal protection was eliminated.

22 Now, if the case ever reached this  
23 Court and the Court said it was right to vacate  
24 the cease-and-desist order because we agree that  
25 the ALJs had an unconstitutional removal

1 protection, this Court could specify what's the  
2 remedy, what statutory provisions could be  
3 severed, et cetera.

4 JUSTICE THOMAS: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice Alito?

6 JUSTICE ALITO: On the Thunder Basin  
7 factors, does Axon have to win on all three, do  
8 you have to win on all three, or is the  
9 appropriate course to balance how they -- how  
10 they end up?

11 MR. STEWART: I mean, I think, if Axon  
12 won on Factor 1, that would be sufficient under  
13 the APA because the APA, the provision I was  
14 referring to earlier, Section 703, says the form  
15 of proceeding is the special statutory review  
16 proceeding, except -- or in the absence or  
17 inadequacy thereof any form of action in  
18 district court.

19 And so I think the implication of that  
20 is, if Axon prevailed at the first Thunder Bay  
21 factor, if it showed that the -- there was no  
22 meaningful relief at the end of the day, that  
23 would be tantamount to saying the administrative  
24 -- the specified statutory review provision is  
25 inadequate for purposes of this sort of claim.



1 And -- and that would facilitate suit in  
2 district court.

3 JUSTICE ALITO: Okay. Suppose they  
4 lose on the first factor but win on the other  
5 two. What happens?

6 MR. STEWART: I mean, I --

7 JUSTICE ALITO: You say they have to  
8 -- they have to win on all three?

9 MR. STEWART: I mean, I think the  
10 first factor under the text of the APA is the  
11 most important factor because it says you use  
12 the special statutory review procedure unless  
13 it's inadequate.

14 Another category of cases that I  
15 haven't mentioned in which the collateral factor  
16 could be relevant is suppose that at the same  
17 time Axon had a pending adjudication the  
18 Commission issued a rule, a regulation that  
19 caused Axon separate harm.

20 There is a separate provision of the  
21 FTC Act that authorizes court of appeals review  
22 of regulations, and that sort of dispute would  
23 clearly be collateral to the adjudication. It  
24 would be a step -- a legal dispute between the  
25 regulated party and the same agency.

1                   JUSTICE ALITO: But this is really  
2 kind of a simple question, and maybe Mr. Clement  
3 will also address it when he -- when he delivers  
4 his rebuttal. Does Axon have to win on all  
5 three? Do you have to win on all three? Or can  
6 either of you win if one or more factors go in  
7 one direction and the other factor or factors go  
8 in the other direction?

9                   MR. STEWART: I -- I -- I'm not trying  
10 to be obstreperous, but I think it would depend  
11 on the rationale for holding that this is not  
12 collateral. That is, if you say so long as it  
13 is unrelated to the merits of the -- the claim,  
14 then it is collateral, even if it is a tack on  
15 the way that the adjudication will be conducted.  
16 I don't think that would be sufficient.

17                   JUSTICE ALITO: Okay. Thank you.

18                   CHIEF JUSTICE ROBERTS: Justice  
19 Sotomayor?

20                   JUSTICE SOTOMAYOR: I -- I have a  
21 question about Mathews versus Eldridge. The  
22 Ninth Circuit held, and it makes some sense to  
23 me, that "wholly collateral" should be  
24 understood to mean not the procedural vehicle  
25 that a party is using to reverse the agency act

1 -- decision. But that definition doesn't fit  
2 with Mathews v. Eldridge.

3 I think -- I could be wrong, and you  
4 can correct me -- that Mathews v. Eldridge talks  
5 about what's meaningful, correct?

6 MR. STEWART: Yes. And, I mean,  
7 Mathews versus Eldridge dealt with a very  
8 specific fact pattern: Individuals who had been  
9 receiving Social Security disability benefits  
10 were informed that they were -- that the  
11 relevant agency considered them no longer to be  
12 disabled, and, therefore, their benefits would  
13 be terminated.

14 And the specific complaint in Mathews  
15 versus Eldridge was my benefits were terminated  
16 before I received a hearing. They were still  
17 entitled to a hearing down the road, and they  
18 could get retroactive benefits if their benefits  
19 were terminated, and then, at the end of the  
20 day, they were found to be entitled. But there  
21 would be an interruption of the stream of  
22 benefits.

23 And the Court said that's sufficiently  
24 collateral to the overall proceedings that you  
25 don't have to use the review mechanism that you

1 would use after your benefits claim was finally  
2 resolved.

3 But I think that case really has a  
4 close resemblance to the collateral -- I mean  
5 the temporary cease-and-desist order that I  
6 mentioned earlier; that is, sometimes you have  
7 situations where you have an ongoing proceeding,  
8 and then you have a dispute about what rules  
9 will apply while the proceeding continues,  
10 before the proceeding resolved. And the  
11 claimants in -- the Court said in Mathews versus  
12 Eldridge the claimant -- the claimants didn't  
13 have any problem with the totality of the  
14 proceedings that would be used to make a final  
15 determination of what they got, the benefits.  
16 What --

17 JUSTICE SOTOMAYOR: Mr. Stewart, I --  
18 I have a separate part of this question.

19 MR. STEWART: Okay. Sorry.

20 JUSTICE SOTOMAYOR: I think that there  
21 are three claims, constitutional claims, here.  
22 One is the removal. And I really -- whether or  
23 not they like the double renewal or not, they  
24 could advise us about that. In an adjudication,  
25 that's a pure legal question, okay? Pure

1 constitutional legal question. It's rarely  
2 fact-bound in the same way.

3 That's different than the clearance  
4 process and combined investigator/prosecutor/  
5 adjudicator claims, which they call their due  
6 process claims. And I think the Chief was  
7 right, where you draw that line is really hard  
8 to draw.

9 So tell me what the agency could tell  
10 us about the other two that counsels waiting  
11 until the end.

12 MR. STEWART: Well, I mean, the first  
13 thing we would say about the -- kind of the  
14 black-box claim, the contention that there is  
15 either not a sufficient process or not a  
16 sufficiently transparent process for deciding  
17 when we go to court and when we commence agency  
18 proceedings, that's kind of at the farthest  
19 removed from any contention that the precedents  
20 of this Court have more or less decided it and  
21 so it's a waste of time.

22 The -- I guess what we would say is  
23 the attempt to distinguish among these claims is  
24 contrary to the Court's precedents. That is,  
25 Elgin was decided two years after Free

1 Enterprise Fund, and the Court said it would be  
2 unproductive and confusing to try to distinguish  
3 among constitutional claims in order to  
4 determine which can go forward immediately and  
5 which have to wait until the end of the day,  
6 that what the focus ought to be on is, what  
7 agency action are you challenging and what  
8 relief are you seeking?

9 And, here, they're challenging the  
10 commencement of an adjudication. They're  
11 seeking an injunction against the adjudication.  
12 And it doesn't matter what their different  
13 theories of relief are. Those are the salient  
14 points for purposes of when they get into court.

15 JUSTICE SOTOMAYOR: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice Kagan?  
17 Justice Gorsuch?

18 JUSTICE KAVANAUGH: On Elgin, you  
19 emphasize that the Court said that just because  
20 it's a constitutional claim doesn't mean that  
21 you have to go -- that you can avoid the agency  
22 review process. That case definitely helps you.  
23 No doubt about it.

24 But then Free Enterprise Fund makes  
25 clear, and I realize it was two years earlier,

1 that some constitutional claims, you can avoid  
2 the agency process, namely, I think, on 490,  
3 claims going to the Board's existence. And --  
4 and I think where the confusion has come in in  
5 the courts of appeals, and the courts of appeals  
6 have been very explicit about trying to figure  
7 out the distinction between Free Enterprise Fund  
8 and Elgin, is that next paragraph of Free  
9 Enterprise Fund, which was responding to the  
10 government's argument that, oh, you could just  
11 get review afterwards anyway.

12 And the Court said: No, not in this  
13 particular circumstance because the court --  
14 because the plaintiff was challenging the  
15 investigation itself and there might not be a  
16 final sanction.

17 And the question's really, if you're  
18 just sticking within the precedent, you know, is  
19 that last -- is that second paragraph in Free  
20 Enterprise Fund, is that just responding to the  
21 government's argument, or is that setting forth  
22 a condition that is necessary before you can  
23 avoid the agency review process?

24 I think that's what the court of  
25 appeals have zeroed in on, exactly that, and I'd

1 be interested in your response.

2 MR. STEWART: I mean, I don't know  
3 that it's -- I think the Court in Free  
4 Enterprise Fund in the paragraph you refer to,  
5 the idea that in order to trigger an SEC  
6 adjudication, you would have to commit a  
7 violation deliberately and subject yourself to  
8 penalties, I think that's really the -- the  
9 heart of the opinion.

10 And I think, in that respect, it was  
11 not announcing anything new. It was drawing on  
12 a long line of precedent that said --

13 JUSTICE KAVANAUGH: But -- but one  
14 could say the heart of the opinion -- and to  
15 follow up on Justice Alito's question, the --  
16 the Court really emphasizes the wholly  
17 collateral factor, and one could say that the  
18 heart of the opinion is the paragraph before,  
19 where, in responding to the government's  
20 argument, the Court says but Petitioners object  
21 to the Board's existence, not to any of its  
22 auditing standards. Petitioners' general  
23 challenge to the Board is collateral to any  
24 Commission orders or rules from which review  
25 might be sought.



1                   So you could say, well, Free  
2     Enterprise Fund was about a challenge to the  
3     Board's existence or structure, and, therefore,  
4     it's collateral.

5                   MR. STEWART: I guess the two things I  
6     would say are, first, Elgin did come two years  
7     after Free Enterprise Fund, and it said don't  
8     distinguish among constitutional claims. And  
9     that would be a peculiar thing to say if the  
10    Court thought it had announced the other  
11    principle.

12                  But the other thing I would say is, to  
13    the extent that you read the MedImmune  
14    paragraph, the bet-the-farm paragraph, as the  
15    heart of the opinion, then the case was drawing  
16    on a very longstanding, well-established body of  
17    doctrine. It was articulating a principle that  
18    the Court had articulated time and again, that  
19    regulated parties should not have to commit  
20    violations in order to get judicial review.

21                  If you say the crucial part of the  
22    opinion was the part that said this is a  
23    systemic challenge to the -- kind of the very  
24    composition of the agency, you are -- you're  
25    introducing a thought that really had -- as an

1 exclusive test or a predominant test, had no  
2 grounding in the Court's precedents, and it's  
3 very hard to square with constitutional  
4 avoidance principles. That is, usually, we  
5 would say we'll try particularly hard to avoid  
6 constitutional challenges if it's possible to do  
7 so. And so it would be peculiar to say at a  
8 stage of the proceedings where you couldn't  
9 raise any other sort of challenge, you can raise  
10 a broad-ranging constitutional challenge to the  
11 very composition and structure of the agency.

12 JUSTICE KAVANAUGH: Thank you.

13 CHIEF JUSTICE ROBERTS: Justice  
14 Barrett?

15 JUSTICE BARRETT: So I have a question  
16 about meaningful review, although it -- it  
17 overlaps a little bit with the collateral point.

18 So, on page 36 of his brief, Mr.  
19 Clement points out that Axon's beef is not that  
20 it must pay an invalid fine or should not lose a  
21 job on an unconstitutional basis, like the  
22 claims in Thunder Basin and Elgin, that the  
23 relief that it's seeking, you know, isn't going  
24 to get it off the hook from liability altogether  
25 for either a constitutional reason or some

1 reason related to the application of the statute  
2 to its facts.

3 Now Justice Sotomayor pointed out  
4 earlier that even a -- a structural challenge to  
5 the agency is a means of escaping from an  
6 ultimate order. It's -- it's a challenge that  
7 you can make to get out from under it. But I  
8 take Mr. Clement's point to be that, listen, the  
9 most we get is a do-over. So this isn't just  
10 about having to endure the expense and the  
11 inconvenience of proceedings before we can  
12 ultimately challenge them and get relief. It's  
13 that the relief that we get in the end isn't an  
14 ultimate out from liability, but it's simply  
15 saying, if you want to come after us again, you  
16 have to do it in a properly constituted agency.

17 Is that an argument that you find  
18 persuasive on the meaningful review point?

19 MR. STEWART: I -- I -- I don't  
20 because they -- they -- if anything, you would  
21 think it would cut the other way. If anything,  
22 you would say -- think that they would be  
23 arguing getting this particular cease-and-desist  
24 order set aside wouldn't provide adequate relief  
25 because -- it wouldn't provide meaningful relief

1 because they could always come at us some other  
2 direction.

3 I -- I think it -- still, in  
4 determining whether it's adequate relief, the  
5 only real reason they've said this would be  
6 inadequate is we will have to go through the  
7 proceeding itself if we wait -- have to wait for  
8 a cease-and-desist order in order to get  
9 judicial review.

10 And the Court has said in a variety of  
11 contexts that's not a sufficient basis either  
12 for avoiding the limits on judicial review of  
13 agency action or for getting immediate review  
14 under the collateral order doctrine.

15 JUSTICE BARRETT: Thanks.

16 CHIEF JUSTICE ROBERTS: Justice  
17 Jackson?

18 Thank you, counsel.

19 MR. STEWART: Thank you.

20 CHIEF JUSTICE ROBERTS: Rebuttal, Mr.  
21 Clement?

22 REBUTTAL ARGUMENT OF PAUL D. CLEMENT  
23 ON BEHALF OF THE PETITIONER

24 MR. CLEMENT: Thank you. Just a few  
25 points in rebuttal.

1           First of all, my friend on the other  
2 side is very focused on the APA and review of  
3 agency action, but, of course, here, we're not  
4 really challenging agency action as such.

5           We are challenging the  
6 constitutionality of statutes that insulate  
7 agency officials from presidential removal, and  
8 we're challenging the assignment process, the  
9 clearance process that actually precedes any  
10 agency action by the FTC.

11           My friend loves the Standard Oil case,  
12 but the Standard Oil case, of course, is a  
13 finality case. It's not, strictly speaking, a  
14 jurisdictional case. And it also illustrates  
15 how different this case is from that.

16           In that case, what Standard Oil's beef  
17 was about was about the initiation of a  
18 complaint. They said we're so innocent from all  
19 of this you shouldn't have even initiated a  
20 complaint.

21           Well, of course, that is unripe -- an  
22 unripe challenge because that agency action is  
23 very specific to that individual company and  
24 will eventually be merged into the final agency  
25 action. But what we have in these cross-cutting

1 constitutional claims is fundamentally  
2 different.

3           Now my friend also invoked this  
4 argument in the briefs, this kind of standing  
5 jurisdiction trap until you have an agency  
6 action you don't have standing. Then, as soon  
7 as you do, you're stuck in the agency forever  
8 until they let you out.

9           That's sort of wrong on both ends, I  
10 think. I mean, first of all, if we have a  
11 reasonable belief that we're about to be subject  
12 to agency action that we think is  
13 unconstitutional, the government would have to  
14 come in in response to our complaint and say,  
15 well, they have no reasonable risk, that's  
16 speculative.

17           I don't think they could have done  
18 that the morning we filed our complaint when  
19 they were going to initiate action later that  
20 day. And if we'd done it three weeks earlier or  
21 four weeks earlier, we would still have standing  
22 to bring the claim. It doesn't depend on the  
23 agency action. It depends on a meaningful  
24 possibility that we're going to be subjected to  
25 government action.

1           And on the back end, we think, for all  
2 the reasons we've talked about, we're not in  
3 this jurisdictional trap because we're not  
4 really challenging the agency action.

5           Now, on the difference between the APA  
6 factors and the Thunder Basin factors, I mean, I  
7 was quite surprised when the government was  
8 asked about its argument under the Thunder Basin  
9 factors that it seemed to really want to talk  
10 about the APA instead, and I sort of took from  
11 the whole colloquy that the government's view is  
12 that the Thunder Basin factors are kind of a bad  
13 gloss or an inadequate gloss on where the APA  
14 would get you.

15           And maybe, you know, that starts to  
16 make me think that maybe the straightforward way  
17 of approaching this is right if I kind of  
18 thought the best thing you could say about the  
19 Thunder Basin factors is they sort of get you  
20 where you would get with the APA anyway, so it's  
21 kind of no harm, no foul, but if even the  
22 government thinks that that's not the right  
23 gloss on the APA, maybe we should just stick  
24 with the text.

25           Now that brings us to the Thunder

1 Basin factors. Justice Alito asked, you know,  
2 are the three factors necessary or sufficient.  
3 I don't think -- when the Court was formulating  
4 those three factors, I think they're more  
5 guideposts than factors. I don't think they  
6 were designed perfectly to be mutually exclusive  
7 and collectively exhaustive.

8 I think, if you look at the way this  
9 Court applied them, they tend to kind of all go  
10 in a sweep one way or the other. Either all  
11 three factors go together one way, or all three  
12 factors go the other way.

13 I suppose, if there were a case of a  
14 true, like, you know, kind of tie or a tossup,  
15 I'd like to think that the tie would go to the  
16 citizen and to judicial review and to the text  
17 of 1331 and that the tie wouldn't go to being  
18 sucked into administrative action that you're  
19 challenging as unconstitutional.

20 Lastly, on the issue of meaningful  
21 relief, I mean, as to the removal claims in  
22 particular, I mean, with all due respect to this  
23 Court, if you look at what the splintered  
24 decisions in the Collins case, when it came to  
25 relief for this kind of removal action, when



1     it's retrospective, that seems like a  
2     particularly good reason to allow prospective  
3     relief and say, look, if an agency is  
4     unconstitutionally structured, we shouldn't have  
5     to go in there prospectively. And then you  
6     don't have to get into all these difficult  
7     questions about how to remedy the situation  
8     retrospectively.

9             Second, just on the government's  
10     response about the Jarkesy case, if you -- if  
11     you really think about the answer there, there  
12     is a constitutional problem that I think has  
13     been glaring since this Court decided the Lucia  
14     case in the October term 2017.

15             The government's response is you might  
16     be able to review that question in October '23  
17     if and only if the government decides to file a  
18     cert petition.

19             From the perspective of those subject  
20     to this unconstitutional action, that's not good  
21     enough. We should be able to go into court  
22     under 1331 and get an immediate answer as to  
23     whether or not the writing is on the wall and  
24     the structure is unconstitutional.

25             And, lastly, the government says,

1 look, it's every citizen's burden to have to go  
2 through these administrative processes before  
3 you get judicial review.

4 I don't think that's right if the  
5 administrative agency is alleged to be  
6 unconstitutional or you're alleged to have to go  
7 in front of the wrong agency. That should not  
8 be the burden of citizenship, particularly given  
9 the clarity with which 1331 promises judicial  
10 review.

11 Thank you.

12 CHIEF JUSTICE ROBERTS: Thank you,  
13 counsel. The case is submitted.

14 (Whereupon, at 11:34 a.m., the case  
15 was submitted.)

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## Official - Subject to Final Review

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