

Supreme Court: The Court Hears Oral Argument on Whether Challenges to the Constitutionality of In-House Agency Enforcement Proceedings Must Wait Until Agency's Final Order Is Issued (Securities Law Alert)

11.21.22



(Article from *Securities Law Alert*, November 2022)

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On November 7, 2022, the Supreme Court heard separate oral arguments in [SEC v. Cochran](#), No. 21-1239, and [Axon Enterprise v. FTC](#), No. 21-86. At issue in both actions is whether those facing agency action before administrative law judges (ALJs) may immediately challenge the constitutionality of the in-house enforcement proceedings in federal district court—on the alleged basis that ALJs have “a blatant constitutional defect, dual-layered protection from removal”—or whether they must wait until the agency issues a final order and thereafter appeal that order to a circuit court.

In *Axon Enterprise*, the company was facing an FTC antitrust investigation and sued in federal district court, claiming that the FTC’s in-house administrative proceedings violated its due process and equal protection rights and that the agency’s ALJ was unconstitutionally protected from removal. Axon Enterprise alleged that the district court had subject matter jurisdiction under 28 U.S.C. Section 1331 because its claims arose under federal law. The Ninth Circuit upheld the lower court’s dismissal of the case on the grounds that the judicial review section of the FTC Act “impliedly barred” district court jurisdiction under the general grant to Section 1331. *Axon Enter. v. FTC*, 986 F.3d 1173 (9th Cir. 2021). The Ninth Circuit explained that in 15 U.S.C. Section 45(c) the FTC Act provides “a detailed overview of how the FTC can issue complaints and carry out administrative proceedings” and how respondents who are subject to an FTC cease-and-desist order can obtain review in a circuit court of appeals.^[1] The Ninth Circuit noted that Section 45(c) “is almost identical to the statutory review provision in the SEC Act, which other circuits have held shows a fairly discernible intent to strip district court jurisdiction.”

In *Cochran*, a CPA accused by the SEC of failure to comply with auditing standards in violation of the Exchange Act similarly filed an action in the district court to challenge the SEC’s use of ALJs in its administrative proceedings. As had the district court in *Axon Enterprises*, the district court dismissed the case finding it lacked jurisdiction under 28 U.S.C. Section 1331. On appeal, however, the Fifth Circuit reversed, setting up a circuit split. The Fifth Circuit held that the constitutionality of the ALJs could be challenged in district court before an administrative adjudication because the Exchange Act’s statutory review provision 15 U.S.C. Section 78y(a)(1)^[2] did not “explicitly or implicitly strip” the district court of federal question jurisdiction to hear structural constitutional claims challenging SEC administrative proceedings. *Cochran v.*

Both Axon Enterprise and Cochran argued that the text of the FTC Act’s and Exchange Act’s statutory review provisions did not expressly limit the district court’s jurisdiction. They further argued that if those Acts were read to implicitly strip the district courts of federal question jurisdiction to hear constitutional challenges, then they may face a years-long delay until the administrative process concludes to raise their constitutional challenges and would have no remedy for being forced to face allegedly unconstitutional enforcement proceedings in the first place.

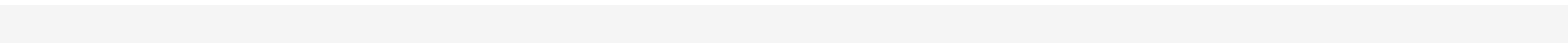
During the *Axon Enterprise* oral argument, Justice Gorsuch emphasized the broad nature of the district courts’ jurisdiction under 28 U.S.C. Section 1331, stating that “1331 says that district courts have jurisdiction over these claims absent any other consideration. And, normally, we consider district courts bound to exercise their jurisdiction when they have a claim.” Justice Gorsuch then stated that “the FTC Act that says cease-and-desist orders can be reviewed in the courts of appeals rather than the district courts.” Pointing out that there is no cease-and-desist order here, Justice Gorsuch concluded, “I would have thought that might have been the end of the game” Similarly, in the *Cochran* oral argument, Justice Alito focused on the text of the Exchange and FTC Acts, pointing out that “these two statutes don’t even say exclusive jurisdiction.” He appeared to question whether it was appropriate to “infer it’s exclusive.” Justice Alito continued to question whether the Court should further “infer that, except for some categories, some subcategory of cases, this not only gives the courts of appeals exclusive jurisdiction, but it precludes jurisdiction that district courts would have under 1331.”

With respect to the Axon Enterprise’s argument about a prejudicial delay, Justice Alito inquired, “What sense does it make for a claim that goes to the very structure of the agency having to go through the administrative process?” The government’s attorney responded that doing so avoids piecemeal litigation and forces a party to bring all of its challenges at the same time. Weighing the practical consequences of allowing challenges to proceed in district court, Justice Kavanaugh similarly commented in the *Cochran* oral argument that the “upside” of permitting such lawsuits would be “more certainty, more clarity quicker about a basic fundamental question about the constitutionality of the agency itself or the agency’s structure itself.”

Chief Justice Roberts also questioned why an agency would be better suited than a district court to consider such structural claims. The government’s attorney suggested that “the agency could explain, for instance, why from its perspective it was either a good or a bad characteristic to have ALJ’s with for-cause removal protection.” Chief Justice Roberts responded by stating, “It sounds to me like you’re just saying the agency might write a brief, presumably, defending the structure of the agency, which it can do when the case goes before the district court.”

[1] “Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside.”

[2] “A person aggrieved by a final order of the Commission entered pursuant to this chapter may obtain review of the order in the United States Court of Appeals for the circuit in which he resides or has his principal place of business, or for the District of Columbia Circuit, by filing in such court, within sixty days after the entry of the order, a written petition requesting that the order be modified or set aside in whole or in part.”



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