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1 P R O C E E D I N G S

2 (10:03 a.m.)

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

6 Mr. Clement.

7 ORAL ARGUMENT OF PAUL D. CLEMENT

8 ON BEHALF OF THE PETITIONER

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

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15 expressly withdrawn or restricted that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

22 Axon is not subject to and does not
23 challenge such an order. Instead, Axon
24 challenges the constitutionality of statutes
25 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? It seems as though we've been down
10 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
5 many preliminary rulings, you know, like real --
6 you know, truly, truly interlocutory rulings of
7 the kind -- you know, it might be evidentiary
8 rulings; it might be discovery rulings.

9 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 -- 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. That's
9 a classic due process claim.

10 That, I think, in almost every other
11 agency action we wait until the end of the
12 review process for the Court to look at. So it
13 seems to be that you're saying this is unfair
14 because I have to go through the process, but
15 going through the process is what due process is
16 all about.

17 I don't understand why you are any
18 different than any other administrative agency
19 petitioner who has to go through the process, a
20 flawed process, and wait until the end to have
21 that corrected.

22 MR. CLEMENT: So, Justice Sotomayor,
23 with respect to due process claims in
24 particular, I don't think we're -- we're arguing
25 for a special rule for this particular agency.

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

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

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

21 MR. CLEMENT: Well, I --

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

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

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

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

15 MR. CLEMENT: Absolutely. But,
16 essentially --

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

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

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

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

14 CHIEF JUSTICE ROBERTS: But those are
15 --

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

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

1 it makes a difference to when they can bring
2 their constitutional or other challenges.

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

8 I think what we've been talking about
9 really goes to the second factor about what it
10 means to be wholly collateral.

11 And I don't really think that's that
12 difficult to apply in the due process context.
13 If you think that the statute as set up just
14 says -- doesn't give you any witnesses and
15 that's going to be true in every single hearing,
16 that seems like a case you ought to be able --

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

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

1 is pretty clear here.

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

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

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

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

1 agency and the agency would proceed.

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

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

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

1 circumstances, then I think it's wholly
2 collateral.

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

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

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

1 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 JUSTICE ALITO: That was --

3 JUSTICE BARRETT: Go ahead, Justice
4 Alito.

5 CHIEF JUSTICE ROBERTS: No.

6 JUSTICE BARRETT: I just wanted to
7 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've been trying for years to get out
19 of the FTC process. We've even offered to walk
20 away from the transaction. So we think just
21 being subjected to their processes as currently
22 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 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. But, to me, that's the way to
15 distinguish Elgin.

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

20 MR. CLEMENT: So I would start with
21 Judge Bumatay's formulation that its structure,
22 existence, and procedure --

23 JUSTICE KAVANAUGH: So let me stop you
24 there. Procedures concerns me because I think
25 that could be wildly open-ended and presents

1 some of the problems that the Chief Justice and
2 others were pointing out. So respond to that.

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

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

25 And this Court rejected that argument

1 and said, no, the citizen gets into court under
2 1331. So I think the formulation with that
3 slight amendment that Judge Bumatay had is the
4 right one for this class of cases.

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

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

18 MR. CLEMENT: I don't think so,
19 Justice Kagan, and that's sort of the beauty of
20 the Thunder Basin factors because, if you're
21 talking about a procedural provision that's put
22 in only by rule and you want to challenge that,
23 I think you could say, well, that's actually
24 within the agency's, you know, competency to
25 fix.

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

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

18 JUSTICE KAGAN: So can I ask just on
19 the -- the actual challenge that you've brought,
20 it seems to me the hardest of the Thunder Basin
21 factors for you is the meaningful review factor,
22 because, you know, basically, what we think
23 about appealing, appeals generally, is you have
24 to wait until the end, and often that's a lot of
25 inconvenience, that's a lot of expense, but

1 we're very stingy in allowing interlocutory
2 appeals as long as you'll get your chance in the
3 end. So what makes this different?

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

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

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

23 So what makes yours different from
24 those?

25 MR. CLEMENT: Well, two things, Your

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

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

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

24 And in this situation, if we have a
25 claim before the agency like our due process

1 claim about the clearance process that is
2 anterior to the agency, the agency has no
3 business deciding it, that doesn't seem
4 analogous to the situation in most of the
5 collateral order cases.

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

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 Justice Thomas, anything further?

16 JUSTICE THOMAS: Just briefly.

17 Mr. Clement, there's a lot of
18 discussion about reaching a final order and then
19 assuming, I guess, an appeal.

20 What percentage of these cases
21 actually go to a cease-and-desist order and what
22 percentage actually are appealed?

23 MR. CLEMENT: So I think -- I mean, I
24 don't have the exact denominator, I'm afraid, so
25 I can't tell you. The overwhelming majority of

1 these cases do settle out in the process, and so
2 there's no appeal.

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

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

13 CHIEF JUSTICE ROBERTS: Justice Alito?

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

23 MR. CLEMENT: So, Justice Alito, I
24 guess what I would say is, you know, if you want
25 to sort of save the Thunder Basin factors, I

1 think you would construe them as being helpful
2 guideposts to discern the underlying legislative
3 intent.

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

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

23 CHIEF JUSTICE ROBERTS: Justice
24 Sotomayor?

25 JUSTICE SOTOMAYOR: Mr. Clement,

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

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

12 MR. CLEMENT: So, Justice Sotomayor, I
13 --

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

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

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

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

6 MR. CLEMENT: Well -- okay.

7 CHIEF JUSTICE ROBERTS: Justice
8 Gorsuch?

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

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

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

24 In that circumstance, then perhaps we
25 would make you wait and consider all these

1 prudential factors about interfering with agency
2 proceedings. Again, what am I missing?

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

8 JUSTICE GORSUCH: Is simplistic -- no,
9 go ahead. Go ahead.

10 MR. CLEMENT: Straightforward.
11 Straightforward.

12 JUSTICE GORSUCH: Simplistic, we can
13 --

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

16 (Laughter.)

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

19 MR. CLEMENT: Textual.

20 JUSTICE GORSUCH: Okay.

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

24 JUSTICE KAGAN: It could have been
25 worse.

1 (Laughter.)

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

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

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

23 And if one of those or two of those
24 actually aren't satisfied, then probably you're
25 going to get tripped up by ripeness or

1 exhaustion or something. So it would be a
2 cleaner world. It would be a simpler world, a
3 more textual world to go that route.

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

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

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

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

25 So another way of sort of answering

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

7 CHIEF JUSTICE ROBERTS: Justice
8 Kavanaugh?

9 Justice Barrett?

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

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

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

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

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

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

20 JUSTICE BARRETT: Right.

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

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

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

10 JUSTICE BARRETT: Jurisdiction to
11 decide jurisdiction?

12 MR. CLEMENT: Yeah.

13 JUSTICE BARRETT: Yeah.

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

22 JUSTICE BARRETT: Thank you.

23 CHIEF JUSTICE ROBERTS: Justice
24 Jackson?

25 JUSTICE JACKSON: Yes. Mr. Clement,

1 did I misunderstand you to say that your client
2 has not received a cease -- cease-and-desist
3 order? Is there such an order at issue here? I
4 mean, not at issue. Did you get a
5 cease-and-desist order, your client?

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

10 JUSTICE JACKSON: I see.

11 MR. CLEMENT: So we haven't gotten
12 that. I mean --

13 JUSTICE JACKSON: But you are in the
14 active agency review process?

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

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

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

25 JUSTICE JACKSON: I see.

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

4 JUSTICE JACKSON: Yes.

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

8 JUSTICE JACKSON: Right.

9 MR. CLEMENT: -- who filed first might
10 matter a lot.

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

20 And so, once you're now in the agency
21 process, I'm concerned about people using the
22 district court jurisdiction to sort of do -- to
23 -- to stay the agency process or do an end run
24 around it. And I'm wondering, why isn't that a
25 legitimate concern, given a statute in which

1 it's pretty clear that once you are in the
2 channel, they've given exclusive review or
3 exclusive jurisdiction to the court of appeals
4 to review a final order of the agency?

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

12 But the second and probably more
13 responsive answer is I think this is why you
14 have to look at the nature of the claim that's
15 being brought, because if you're bringing sort
16 of a claim that's really about the agency
17 process and that's your beef, then I think it's
18 fine to say we're in the channel of review.
19 But, if you're saying this whole agency is
20 unconstitutional or it has no business
21 exercising jurisdiction over this case, you're
22 not in the regulatory channel; you're in the
23 regulatory maw. That's your whole claim, is
24 that we don't belong here at all.

25 JUSTICE JACKSON: And it doesn't

1 matter to you that as a result of making that
2 second kind of claim, you would be
3 terminating -- I mean, I'm with you to the
4 extent that you say I'm making that claim and
5 the point is we -- they have no jurisdiction
6 over me. And, district court, if you agree, I'm
7 out, and the whole thing is over.

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

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

23 But then, if you think about our
24 removal claims, what we're basically saying is
25 we shouldn't be sent to the agency at all as it

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

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 Mr. Stewart.

17 ORAL ARGUMENT OF MALCOLM L. STEWART
18 ON BEHALF OF THE RESPONDENTS

19 MR. STEWART: Mr. Chief Justice, and
20 may it please the Court:

21 It is a longstanding principle of
22 administrative law that courts will not
23 intervene in an ongoing agency proceeding until
24 that proceeding culminates in a rule or order
25 that imposes sanctions or determines legal

1 rights or obligations.

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

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

20 But this Court has repeatedly rejected
21 similar arguments both in the agency review
22 context and in applying the collateral order
23 doctrine. The Court, therefore, should hold
24 that the district court lacked jurisdiction over
25 this suit.

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

5 I welcome the Court's questions.

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

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

23 And imagine for a second that this
24 sentence appeared as the second sentence of the
25 FTC Act review provision and you had the first

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

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

14 JUSTICE GORSUCH: Mr. Stewart?

15 MR. STEWART: Yes.

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

25 MR. STEWART: Well, actually --

1 JUSTICE GORSUCH: Is that your
2 argument?

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

8 JUSTICE GORSUCH: Well --

9 MR. STEWART: -- to the manner in
10 which the proceeding was --

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

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

25 What do you say to those two -- two

1 arguments?

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

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

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

20 JUSTICE GORSUCH: I'm not concerned
21 about what the plaintiff's saying. I'm
22 concerned about where is the agency action that
23 would implicate 704? That 704, the sentence you
24 rely on, speaks of agency action being
25 reviewable upon the final order.

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

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

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

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

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

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

20 And, in this case, the thing that the
21 agency was about to do, because, as Mr. Clement
22 said, the suit was filed a few hours before the
23 proceeding was commenced, the thing that Mr.
24 Clement is complaining about is the fact that an
25 administrative adjudication was commenced.

1 Had there been no adjudication
2 commenced, perhaps Axon could have found other
3 --

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

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

9 JUSTICE GORSUCH: We don't have any of
10 those things?

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

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

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

25 JUSTICE GORSUCH: All right. Let me

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

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

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

15 JUSTICE GORSUCH: I'm going to take
16 that as a yes.

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

23 The question is, what does that
24 subsume? And, I mean, you might be using the
25 APA as kind of an analogy to help you answer

1 that question, but you can answer that question
2 without the APA. Normally, in our legal system,
3 we understand that when you give exclusive
4 jurisdiction to a court as to a final order it
5 also subsumes a whole lot of interlocutory
6 things leading up to it.

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

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

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

20 CHIEF JUSTICE ROBERTS: Doesn't -- no,
21 go ahead.

22 JUSTICE KAGAN: Go ahead.

23 CHIEF JUSTICE ROBERTS: Doesn't Free
24 Enterprise stand as a pretty insurmountable
25 barrier to your argument?

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

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

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

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

22 And the Court said in Abbott Labs we
23 were dealing with judicial review of regulations
24 and the rules imposed legal obligations, you
25 could get penalties, you could be subjected to

1 penalties if you violated them.

2 And in that circumstance --

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

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

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

20 MR. STEWART: Yes, but the point was
21 their -- their challenge was to an ongoing
22 investigation that affected them on the ground.
23 It had only an attenuated and speculative
24 connection to any potential SEC adjudication.

25 Here, the challenge is directed

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

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

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

20 MR. STEWART: Well, I think Mr.
21 Clement, with -- with respect, was going back
22 and forth between two arguments. That is, he
23 said in this case our claim is systemic. We're
24 not arguing about anything that will happen in
25 any particular adjudication. We're arguing

1 about the way that the Commission is structured
2 and the way that its proceedings take place
3 generally.

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

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

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

21 But the only injunctive relief it
22 sought, the only tangible change in the agency's
23 behavior that it sought was terminate the ALJ
24 proceedings, enjoin the administrative
25 adjudication.

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

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

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

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

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

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

23 MR. STEWART: We think that we win
24 under Thunder Basin. I -- I think, you know,
25 Mr. Clement thought that the Court in Thunder

1 Basin was tilting the scales against the
2 claimants.

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

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

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

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

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

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

18 MR. STEWART: We think Thunder Basin
19 supports us. That is, the first factor is
20 meaningful review available through the -- the
21 special review provision. That maps on
22 precisely to the APA language about inadequacy
23 of review. And we say this is adequate because,
24 at the end of the day, if a court agrees with
25 their constitutional theory, it can set aside

1 the final order issued by the --

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

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

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

20 JUSTICE ALITO: Do you think that --

21 JUSTICE KAGAN: I mean, I don't
22 understand --

23 JUSTICE ALITO: Do you think that
24 meaningful review means no review? Do you think
25 a party gets meaningful review if, unless at the

1 end of the administrative proceeding, it can't
2 get any review of its claim?

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

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

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

19 And the district court said no, and
20 the question was, is that immediately appealable
21 under the collateral order doctrine? And the
22 Court said no collateral order review, that if
23 these materials are introduced at trial and
24 that's later determined to be error, you can get
25 vacatur of the judgment and that's good enough.

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

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

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

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

25 MR. STEWART: I think we would say two

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

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

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

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

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

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

21 MR. STEWART: Well, we -- we actually
22 have a case out of the Fifth Circuit in Jarkesy
23 in which the court recently denied -- the Fifth
24 Circuit recently denied rehearing en banc, in
25 which the Fifth Circuit has held that two layers

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

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

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

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

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

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

23 MR. STEWART: Well, as we've said in
24 our brief, mandamus review is available in
25 extreme cases. And so, for instance, if an

1 agency in the -- had simply flouted Seila Law
2 and -- or, I'm sorry, had flouted Lucia and in
3 the wake of Lucia had continued to conduct
4 adjudications through ALJs who had not been
5 appointed in conformity with the Appointments
6 Clause, then mandamus review could have been
7 granted.

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

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

20 MR. STEWART: No.

21 JUSTICE GORSUCH: -- what if Mr.
22 Clement had simply styled this as a mandamus
23 petition, suggesting that the FTC had acted
24 wholly without jurisdiction, which is a classic
25 mandamus argument, because of all of our

1 mountain of precedent with respect to two layers
2 of removal?

3 MR. STEWART: He certainly could have
4 made that argument. I -- I --

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

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

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

16 MR. STEWART: But --

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

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

24 JUSTICE GORSUCH: Well, that's -- that
25 -- I think that's the nature of his argument,

1 that the two layers of removal is clear and
2 indisputable.

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

4 JUSTICE GORSUCH: Let's suppose it
5 were. Let's -- he could do that.

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

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

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

22 JUSTICE GORSUCH: Why -- why -- why
23 does the APA preclude 1331 but not all writs?

24 MR. STEWART: Again, I don't think of
25 it as the APA precluding. The APA confirms the

1 inference that the court of appeals is the only
2 court to exercise review.

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

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

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

21 On expertise, the Court in Free
22 Enterprise Fund, whatever distinctions there
23 might be as between Free Enterprise Fund and
24 this case, the Court in Free Enterprise Fund
25 just says you lose on expertise.

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

9 So why aren't those two pretty easy
10 wins for Mr. Clement?

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

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

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

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

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

19 JUSTICE KAGAN: And -- and if -- if I
20 just sort of cut to the -- to the core of your
21 argument, you seem to be saying something like
22 it's not collateral if it arose from an
23 enforcement proceeding, but almost everything is
24 going to arise from an enforcement proceeding.
25 That -- you're basically making the collateral

1 inquiry do no work at all.

2 MR. STEWART: I think where there is a
3 difference between asking did it arise from the
4 -- well, did it arise from the enforcement
5 proceeding and was it directed at the
6 enforcement proceeding.

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

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

19 And those could be viewed as
20 collateral because even though they are
21 contingent the dependency of an adjudication,
22 they are still not part of the process by which
23 the adjudication is resolved. They affect
24 private conduct outside the scope of the
25 proceedings themselves.

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

5 CHIEF JUSTICE ROBERTS: You can finish
6 your thought.

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

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

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

21 CHIEF JUSTICE ROBERTS: Thank you.
22 Justice Thomas?

23 JUSTICE THOMAS: Mr. Stewart, I am
24 interested in what that review would look like
25 before the FTC. How would they consider Mr.

1 Clement's claims here?

2 MR. STEWART: I think the ALJ --

3 JUSTICE THOMAS: And particularly the
4 constitutional claims.

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

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

22 So the justification was, for
23 deferring review was not that the Court expected
24 the agency to shed more light on it in the
25 course of the proceedings.

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

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

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

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

1 remedy, what statutory provisions could be
2 severed, et cetera.

3 JUSTICE THOMAS: Thank you.

4 CHIEF JUSTICE ROBERTS: Justice Alito?

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

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

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

1 district court.

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

5 MR. STEWART: I mean, I --

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

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

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

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

25 JUSTICE ALITO: But this is really

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

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

16 JUSTICE ALITO: Okay. Thank you.

17 CHIEF JUSTICE ROBERTS: Justice
 18 Sotomayor?

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

1 with Mathews v. Eldridge.

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

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

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

22 And the Court said that's sufficiently
23 collateral to the overall proceedings that you
24 don't have to use the review mechanism that you
25 would use after your benefits claim was finally

1 resolved.

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

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

18 MR. STEWART: Okay. Sorry.

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

1 fact-bound in the same way.

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

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

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

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

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

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

14 JUSTICE SOTOMAYOR: Thank you.

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

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

23 But then Free Enterprise Fund makes
24 clear, and I realize it was two years earlier,
25 that some constitutional claims, you can avoid

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

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

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

23 I think that's what the court of
24 appeals have zeroed in on, exactly that, and I'd
25 be interested in your response.

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

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

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

25 So you could say, well, Free

1 Enterprise Fund was about a challenge to the
2 Board's existence or structure and, therefore,
3 it's collateral.

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

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

20 If you say the crucial part of the
21 opinion was the part that said this is a
22 systemic challenge to the -- kind of the very
23 composition of the agency, you are -- you're
24 introducing a thought that really had -- as an
25 exclusive test or a predominant test, had no

1 grounding in the Court's precedents, and it's
2 very hard to square with constitutional
3 avoidance principles. That is, usually, we
4 would say we'll try particularly hard to avoid
5 constitutional challenges if it's possible to do
6 so. And so it would be peculiar to say at a
7 stage of the proceedings where you couldn't
8 raise any other sort of challenge, you can raise
9 a broad-ranging constitutional challenge to the
10 very composition and structure of the agency.

11 JUSTICE KAVANAUGH: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice
13 Barrett?

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

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

1 to its facts.

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

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

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

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

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

13 JUSTICE BARRETT: Thanks.

14 CHIEF JUSTICE ROBERTS: Justice
15 Jackson?

16 Thank you, counsel.

17 MR. STEWART: Thank you.

18 CHIEF JUSTICE ROBERTS: Rebuttal, Mr.
19 Clement?

20 REBUTTAL ARGUMENT OF PAUL D. CLEMENT
21 ON BEHALF OF THE PETITIONER

22 MR. CLEMENT: Thank you. Just a few
23 points in rebuttal.

24 First of all, my friend on the other
25 side is very focused on the APA and review of

1 agency action, but, of course, here we're not
2 really challenging agency action as such.

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

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

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

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

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

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

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

24 On the back end, we think for all the
25 reasons we've talked about, we're not in this

1 jurisdictional trap because we're not really
2 challenging the agency action.

3 Now, on the difference between the APA
4 factors and the Thunder Basin factors, I mean, I
5 was quite surprised when the government was
6 asked about its argument under the Thunder Basin
7 factors that it seemed to really want to talk
8 about the APA instead.

9 And I sort of took from the whole
10 colloquy that the government's view is that the
11 Thunder Basin factors are kind of a bad gloss or
12 an inadequate gloss on where the APA would get
13 you.

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

23 Now, that brings us to the Thunder
24 Basin factors. Justice Alito asked, you know,
25 are the three factors necessary or sufficient.

1 I don't think when the Court was formulating
2 those three factors, I think they're more
3 guideposts than factors. I don't think they
4 were designed perfectly to be mutually exclusive
5 and collectively exhaustive.

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

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

18 Lastly, on the issue of meaningful
19 relief, I mean, as to the removal claims in
20 particular, I mean, with all due respect to this
21 Court, if you look at what the splintered
22 decisions in the Collins case, when it came to
23 relief for this kind of removal action, when
24 it's retrospective, that seems like a
25 particularly good reason to allow prospective

1 relief and say, look, if an agency is
2 unconstitutionally structured, we shouldn't have
3 to go in there prospectively.

4 Then you don't have to get into all
5 these difficult questions about how to remedy
6 the situation retrospectively.

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

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

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

23 And, lastly, the government says,
24 look, it's every citizen's burden to have to go
25 through these administrative processes before

1 you get judicial review.

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

9 Thank you.

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

12 (Whereupon, at 11:34 a.m., the case
13 was submitted.)

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