SUPREME COURT
OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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AXON ENTERPRISE, INC.,)

Petitioner,)

v.) No. 21-86

FEDERAL TRADE COMMISSION, ET AL.,)

Respondents.)

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Washington, D.C.
Monday, November 7, 2022

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:03 a.m.

APPEARANCES:

PAUL D. CLEMENT, ESQUIRE, Alexandria, Virginia; on behalf of the Petitioner.
MALCOLM L. STEWART, Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondents.

C O N T E N T S

P R O C E E D I N G S

(10:03 a.m.)

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

Mr. Clement.

ORAL ARGUMENT OF PAUL D. CLEMENT

ON BEHALF OF THE PETITIONER

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

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over all civil actions arising under the Constitution, and it is common ground that Congress has never expressly withdrawn or restricted that jurisdiction with respect to the constitutional claims at issue here.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

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

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

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

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

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

provision.

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

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

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

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

JUSTICE THOMAS: Could you take just a

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

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

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

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

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

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

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

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

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

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

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

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

Basin factors.

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

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

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

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

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

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

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

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

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

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

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

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

MR. CLEMENT: Well, I --

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

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

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

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: But those are --

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

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

bring their constitutional or other challenges.

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

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

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

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

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

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

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

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

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

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

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

collateral.

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

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

JUSTICE JACKSON: But I guess --

JUSTICE BARRETT: Mister --

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

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

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

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

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

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

JUSTICE BARRETT: Mr. Clement, can --
MR. CLEMENT: Now there's --
JUSTICE BARRETT: Go ahead, Justice Alito.
JUSTICE ALITO: No.
JUSTICE BARRETT: Okay. I just wanted to know, could you say a little bit about what remedy you want for your black-box claim? Are you arguing that everything needs to go the DOJ track, or are you saying you just want transparency on that claim? Because we've been kind of focused on the removal claim.
MR. CLEMENT: I -- I think either one of those would probably remedy the claim. So, you know, I think we'd ask for what would probably be the most robust remedy, which is send us to DOJ. We want early access to court.
But, if a court fashioned a remedy that said that, okay, we're going to provide transparency to this process, I don't know what it would be, you know, everything sort of A through M goes to DOJ and everything N through Z goes to the FTC, something that would tell the citizenry, okay, there's a rational process by which you're being denied early access to court,

I think that would at least be an available remedy.

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

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

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

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

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

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

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

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

think we should deal with that?

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

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

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

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

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

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

JUSTICE KAVANAUGH: Yeah.

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

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

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

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

JUSTICE KAVANAUGH: And --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

So what makes yours different from those?

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

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

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

claim. It just ruled against you.

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

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Justice Thomas, anything further?

JUSTICE THOMAS: Just briefly.

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Justice Alito?

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

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

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

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

CHIEF JUSTICE ROBERTS: Justice

Sotomayor?

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

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

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

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

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

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

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

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

MR. CLEMENT: Well -- okay.

CHIEF JUSTICE ROBERTS: Justice Kagan?

Justice Gorsuch?

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

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

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

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

Again, what am I missing?

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

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

MR. CLEMENT: -- straightforward.

JUSTICE GORSUCH: Simplistic, we can --

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

(Laughter.)

JUSTICE GORSUCH: Textual maybe? How about that?

MR. CLEMENT: Textual.

JUSTICE GORSUCH: Okay.

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

JUSTICE KAGAN: It could have been

worse.

(Laughter.)

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

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

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

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Justice Kavanaugh?

Justice Barrett?

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

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

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

purpose?

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

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

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

JUSTICE BARRETT: Right.

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

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

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

JUSTICE BARRETT: Jurisdiction to decide jurisdiction?

MR. CLEMENT: Yeah.

JUSTICE BARRETT: Yeah.

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

JUSTICE BARRETT: Thank you.

CHIEF JUSTICE ROBERTS: Justice

Jackson?

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

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

JUSTICE JACKSON: I see.

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

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

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

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

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

we filed our complaint.

JUSTICE JACKSON: I see.

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

JUSTICE JACKSON: Yes.

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

JUSTICE JACKSON: Right.

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

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

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

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

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

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

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

that we don't belong here at all.

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

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

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

But then, if you think about our

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Stewart.

ORAL ARGUMENT OF MALCOLM L. STEWART

ON BEHALF OF THE RESPONDENTS

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

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

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

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

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

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

that the district court lacked jurisdiction over this suit.

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

I welcome the Court's questions.

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

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

And imagine for a second that this

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

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

JUSTICE GORSUCH: Mr. Stewart?

MR. STEWART: Yes.

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

APA to discern that. Is that right?

MR. STEWART: Well, actually --

JUSTICE GORSUCH: Is that your argument?

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

JUSTICE GORSUCH: Well --

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

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

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

agency action.

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

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

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

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

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

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

MR. STEWART: In this case, it --

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

MR. STEWART: In -- in this --

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

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

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

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

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

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

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

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

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

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

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

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

insulated from removal.

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

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

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

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

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

The question is, what does that

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

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

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

JUSTICE KAGAN: May -- may I ask --

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

JUSTICE KAGAN: Go ahead.

CHIEF JUSTICE ROBERTS: Doesn't Free

Enterprise stand as a pretty insurmountable barrier to your argument?

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

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

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

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

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

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

And in that --

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

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

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

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

connection to any potential SEC adjudication.

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

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

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

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

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

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

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

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

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

proceedings, enjoin the administrative adjudication.

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

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

MR. STEWART: No, that's fine.

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

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

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

MR. STEWART: We think that we win

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE ALITO: Do you think that --

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

JUSTICE ALITO: Do you think that

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

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

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

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

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

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

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

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

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

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

administrative process?

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

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

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

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

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

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

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

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

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

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

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

advantage rather than a disadvantage of requiring agency processes.

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

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

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

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

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

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

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

MR. STEWART: No.

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

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

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

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

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

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

MR. STEWART: But --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

private conduct outside the scope of the proceedings themselves.

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

CHIEF JUSTICE ROBERTS: You can finish your thought.

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

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

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

CHIEF JUSTICE ROBERTS: Thank you.

Justice Thomas?

JUSTICE THOMAS: Mr. Stewart, I'm

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

MR. STEWART: I think the ALJ --

JUSTICE THOMAS: And particularly the constitutional claims.

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

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

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

course of the proceedings.

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

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

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

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

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

JUSTICE THOMAS: Thank you.

CHIEF JUSTICE ROBERTS: Justice Alito?

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

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

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

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

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

MR. STEWART: I mean, I --

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

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

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

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

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

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

JUSTICE ALITO: Okay. Thank you.

CHIEF JUSTICE ROBERTS: Justice Sotomayor?

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

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

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

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

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

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

would use after your benefits claim was finally resolved.

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

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

MR. STEWART: Okay. Sorry.

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

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

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

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

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

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

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

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

JUSTICE SOTOMAYOR: Thank you.

CHIEF JUSTICE ROBERTS: Justice Kagan?

Justice Gorsuch?

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

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

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

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

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

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

be interested in your response.

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

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

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

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

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

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

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

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

JUSTICE KAVANAUGH: Thank you.

CHIEF JUSTICE ROBERTS: Justice Barrett?

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

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

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

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

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

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

because they could always come at us some other direction.

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

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

JUSTICE BARRETT: Thanks.

CHIEF JUSTICE ROBERTS: Justice Jackson?

Thank you, counsel.

MR. STEWART: Thank you.

CHIEF JUSTICE ROBERTS: Rebuttal, Mr. Clement?

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

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

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

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

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

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

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

constitutional claims is fundamentally different.

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

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

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

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

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

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

Now that brings us to the Thunder

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

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

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

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

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

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

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

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

And, lastly, the government says,

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

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

Thank you.

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

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