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P R O C E E D I N G S

(11:35 a.m.)

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

Mr. Garre.

ORAL ARGUMENT OF GREGORY G. GARRE  
ON BEHALF OF MICHELLE COCHRAN

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

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

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

The SEC acts as prosecutor, judge,

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

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

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

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

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

5 I welcome the Court's questions.

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

11 Now that's --

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

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

1 court of appeals set aside that order.

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

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

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

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

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

25 And -- and I think --

1 JUSTICE KAGAN: Mister --

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

4 JUSTICE KAGAN: No, please.

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

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

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

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

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

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

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



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

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

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

17           JUSTICE KAVANAUGH: So --

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

19           JUSTICE KAVANAUGH: Keep going. Keep  
20 going.

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

1 Congress.

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

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

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

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

24 MR. GARRE: And --

25 JUSTICE KAVANAUGH: -- Elgin, Free

1 Enterprise Fund and going back, and -- and so  
2 kind of starting over on all that would create a  
3 kind of a tsunami of litigation. Maybe that's  
4 okay. Maybe it's not. But --

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

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

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

16 JUSTICE KAVANAUGH: Right.

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

23 JUSTICE KAVANAUGH: Right. I think  
24 Mr. -- when Mr. Clement said the beauty of the  
25 Thunder Basin factors, I -- I definitely cringed

1 because that -- they -- they have not been  
2 beautiful for --

3 MR. GARRE: Right.

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

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

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

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

22 MR. GARRE: I -- I guess I -- I  
23 understand Your Honor's concern. I -- I think  
24 it should be addressed by the fact that district  
25 courts have been applying the sorts of tools in

1 determining when or whether to exercise  
2 jurisdiction for centuries.

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

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

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

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

25 And, in that respect, you know, those

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

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

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

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

1 essentially to default in her administrative  
2 proceeding.

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

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

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

1 less in the practical sense.

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

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

25 MR. GARRE: Right.



1 JUSTICE KAGAN: So I take even that  
2 collateral point to be not -- not quite the --  
3 the -- the -- not answering the collateral  
4 question.

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

10 JUSTICE KAGAN: I guess I should say  
11 Free Enterprise Fund --

12 MR. GARRE: -- that this is wholly  
13 collateral.

14 JUSTICE KAGAN: -- doesn't go as far  
15 as you want it to go.

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

25 I mean, that's certainly -- I mean, I

1 -- I took the government not really to be  
2 fighting too hard on wholly collateral or agency  
3 expertise. I mean, I think tthey -- they  
4 largely focused, to the extent they go into a  
5 Thunder Basin analysis, on the opportunity for a  
6 meaningful judicial review.

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

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

19 MR. GARRE: Right.

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

22 MR. GARRE: I think -- I mean, first  
23 of all, it -- you're before an Article III  
24 court. You're -- you're not before an  
25 administrative decision-maker that is not

1 independent, protected with the protections of  
2 Article III. And I think -- and that's --  
3 that's important. We're talking about  
4 individuals who are hauled before administrative  
5 agencies, who ultimately want to present their  
6 claim to an Article III court.

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

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

22           And, here, as the government pointed  
23 out, when it did want a bifurcation with  
24 temporary cease-and-desist orders, the Congress  
25 made an exception, sending back to the district

1 court. So I think that really shows you that  
2 when Congress wants to send something else, it  
3 knows how to. That's what it did in the CSRA  
4 review scheme.

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

11 MR. GARRE: So I think --

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

24 MR. GARRE: Sure. So --

25 JUSTICE SOTOMAYOR: And give me some

1 sort of special damage that you're suffering --

2 MR. GARRE: Sure.

3 JUSTICE SOTOMAYOR: -- under your --  
4 under that definition.

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

10 JUSTICE SOTOMAYOR: I'm sorry, which  
11 case?

12 MR. GARRE: Carr versus Saul dealt  
13 with the -- the --

14 JUSTICE SOTOMAYOR: Remind me of what  
15 it said.

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

1 including the Free Enterprise Fund case.

2 In terms of why they're different,  
3 Your Honor, we're suffering by -- by the mere  
4 fact of having to proceed before an  
5 unconstitutional agency decision-maker inflicts  
6 what this Court called a here-and-now injury  
7 that exists wholly apart from the ultimate  
8 outcome of that proceeding. And that's  
9 different from almost any other type of  
10 preliminary challenge you could imagine --

11 JUSTICE SOTOMAYOR: But, if there's a  
12 --

13 MR. GARRE: -- to that proceeding.

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

22 MR. GARRE: So I --

23 JUSTICE SOTOMAYOR: -- with the  
24 process --

25 MR. GARRE: Right.

1 JUSTICE SOTOMAYOR: -- that Congress  
2 has given to the agency to conclude that matter.

3 MR. GARRE: So I think this Court has  
4 recognized that structural constitutional claims  
5 are different in terms of how they inflict  
6 injury that's separate and unique. And the  
7 other point I would say is, in order to get  
8 meaningful redress of that injury, you need an  
9 injunction that stops the proceedings, forcing  
10 you -- that -- that prevents you from having to  
11 undergo them again.

12 And that's different from a case  
13 where, even if you've suffered a due process  
14 violation based on the particular application of  
15 a rule or a statute, you could get relief from  
16 that, getting relief from the order. That's not  
17 true with respect to this unique class of  
18 constitutional claims here.

19 CHIEF JUSTICE ROBERTS: Thank you,  
20 counsel.

21 Justice Thomas?

22 Justice Alito?

23 Anything further, Justice Sotomayor?

24 Justice Gorsuch?

25 JUSTICE GORSUCH: Just a couple quick

1 questions, I hope. First, the government relies  
2 heavily on 704 of the APA, and I'd just like to  
3 give you a chance to address that.

4 MR. GARRE: So the APA  
5 non-jurisdictional arguments are waived in our  
6 case. They weren't addressed below. That's --  
7 that's point one.

8 Second, I mean, we're not bringing an  
9 APA cause of action. Our -- our cause of action  
10 is the traditional one that this Court  
11 recognized in Free Enterprise Fund. So it's not  
12 clear to me that the APA limits would apply at  
13 all.

14 And, third, I mean, ultimately, we  
15 agree with Mr. Clement that -- that the APA  
16 doesn't strip jurisdiction any more than the SEC  
17 Act does. And that's ultimately what the  
18 government would be saying, is that, you know,  
19 Congress granted this jurisdiction in 1331, the  
20 SEC Act didn't take it away, but, lo and behold,  
21 10 years later, in a different provision that,  
22 you know, didn't talk about jurisdiction,  
23 really, Congress, you know, stripped this  
24 traditional historic class of jurisdiction.

25 And we don't think that that's a fair



1 reading of the statute.

2 JUSTICE GORSUCH: And, second, I  
3 wanted you to explain how you thought Thunder  
4 Basin interacted, properly understood, with a  
5 plain reading of these statutes.

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

18 So -- so, in that respect, we think  
19 the factors could inform the Court's analysis of  
20 what Congress intended and -- and supplement a  
21 textual inquiry, but we think, you know,  
22 ultimately, Congress says what it means and  
23 means what it said and that here, as the Fifth  
24 Circuit concluded, the textual analysis is quite  
25 straightforward.

1 JUSTICE GORSUCH: The textual analysis  
2 here, you know, it says final orders are  
3 reviewable in the court of appeals. And we  
4 don't have one of those.

5 MR. GARRE: Correct.

6 JUSTICE GORSUCH: I -- I could  
7 understand maybe a world in which we would look,  
8 if we had a final order, to Thunder Basin  
9 factors to see whether, nonetheless, there  
10 should be room for a district court proceeding.

11 MR. GARRE: And I -- and I think that  
12 --

13 JUSTICE GORSUCH: And I think that may  
14 be what happened in Thunder Basin. I just want  
15 to give you a chance to react to that.

16 MR. GARRE: I think that's exactly  
17 right, Your Honor, that -- that really, if you  
18 look at Thunder Basin and Elgin, what they say  
19 is you look first to whether you're challenging  
20 an agency action that is the subject of an  
21 exclusive judicial review scheme.

22 And at that point or if you -- if you  
23 say yes, then you can engage in the Thunder  
24 Basin analysis to see whether, nevertheless, the  
25 district courts would still have jurisdiction

1 over that claim.

2 So we don't -- we don't get past that  
3 first stage here because we're not challenging  
4 the agency -- any agency action covered by an  
5 exclusive judicial statutory scheme. We're not  
6 challenging the final order.

7 CHIEF JUSTICE ROBERTS: Justice  
8 Kavanaugh?

9 Justice Barrett?

10 Justice Jackson?

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

20 But let me -- let me ask you to react  
21 to something that Justice Kavanaugh started,  
22 helpfully, in the sense that he said, okay, so  
23 if we're going to craft an order consistent with  
24 your view, we could say that claims that are  
25 structural and constitutional are wholly

1 collateral and, therefore, would be allowed to  
2 be brought under 1331 jurisdiction.

3 I'm wondering whether, to temper my  
4 concern that allowing for 1331 jurisdiction to  
5 occur for those structural claims while the  
6 agency has the issue, could we also say it has  
7 to be structural and constitutional, but it has  
8 to be the kind of thing that would permit the  
9 district court to completely terminate the  
10 agency proceeding so that we don't have, like --  
11 we don't have it operating like an interlocutory  
12 review of an ongoing agency proceeding, but we  
13 have this requirement that the remedy that  
14 you're seeking as the person who's bringing the  
15 structural claim is to shut the whole thing  
16 down.

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

1           I mean, ultimately, I think the  
2       district court would have discretion as to  
3       whether or not to enjoin the agency proceedings.  
4       In our case, the Fifth Circuit enjoined the  
5       agency proceedings --

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

18           I mean, aren't you in a way not  
19      terminating by bringing a structural claim about  
20      ALJ removal processes, they could cure that and  
21      just keep going?

22           MR. GARRE: So I don't think they  
23      could cure that in the sense that we're  
24      challenging the constitutionality of all SEC  
25      ALJs because all SEC ALJs are unconstitutionally

1 insulated from removal by the statutes that Mr.  
2 Clement referred to earlier.

3 So, to get redress from that, you  
4 would actually declare the statutes  
5 unconstitutional, and that's ultimately what  
6 we're asking for in this case. You can see it  
7 on page 64 of the Joint Appendix, a declaration  
8 that those statutes are unconstitutional.

9 But those go to the very authority and  
10 existence of the administrative decision-maker  
11 that Ms. Cochran currently faces.

12 CHIEF JUSTICE ROBERTS: Thank you, Mr.  
13 Garre.

14 MR. GARRE: Thank you, Your Honor.

15 CHIEF JUSTICE ROBERTS: Mr. Stewart,  
16 welcome back.

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

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

21 Let me just make a couple of points  
22 first before taking questions.

23 Mr. Garre said that going back to  
24 Marbury versus Madison, courts have been  
25 authorized to grant injunctive relief against

1 unconstitutional governmental action.

2           And it's certainly true that there's a  
3 longstanding practice of courts, without  
4 explicit statutory authority, granting equitable  
5 relief to claimants who would otherwise have no  
6 access to judicial review of constitutional  
7 claims.

8           But that authority has never been  
9 unlimited. It's always been constrained by  
10 doctrines about what can you sue about and when  
11 can you sue.

12           On pages 47 to 50 of our brief, we  
13 cite a series of cases of this Court that stand  
14 for the proposition that courts will not  
15 intervene in pending agency proceedings until  
16 the proceedings culminate in an order or a rule  
17 that sets legal obligations, imposes a sanction,  
18 et cetera.

19           One of those is Myers versus Bethlehem  
20 Shipbuilding. In that case, the shipbuilding  
21 company was in NLRB proceedings and said my  
22 operations don't have a sufficient connection to  
23 interstate or foreign commerce to make me  
24 regulable under the National Labor Relations  
25 Act.

1           And the Court held that's the kind of  
2 claim that has to wait until the end of the  
3 administrative proceedings, even though you are  
4 asserting a constitutional objection to the  
5 exercise of authority over you.

6           Another case is Federal Power  
7 Commission versus Metropolitan Edison that we  
8 cited. If you look at the relevant page of  
9 Metropolitan Edison, you'll see literally a page  
10 of string cites to earlier cases decided before  
11 1938 that established this principle.

12           Courts don't intervene in pending  
13 agency proceedings dating all the way back to a  
14 1912 opinion written by Chief Justice Edward  
15 White.

16           And so, to us, the most difficult  
17 aspect of this came -- of this case is whether  
18 the barrier to suit should be viewed as  
19 jurisdictional or non-jurisdictional. But the  
20 most salient fact is this has never been the  
21 kind of thing a person could get immediate  
22 review of in court.

23           I welcome the Court's questions.

24           CHIEF JUSTICE ROBERTS: Counsel, in  
25 the earlier argument, I think you were making a



1 point about it would not be a waste to send even  
2 these structural claims to an agency because the  
3 agency could address a number of factors that  
4 would go into that type of analysis.

5 MR. STEWART: It -- first, I mean, it  
6 would not be a waste for two reasons: First,  
7 because the agency could explain, for instance,  
8 why from its perspective it was either a good or  
9 a bad characteristic to have ALJs with for-cause  
10 removal protection.

11 In 2015, the SEC issued an opinion in  
12 which it stated that it thought it would not be  
13 wise to make ALJs removable at will because it  
14 would impair their actual or apparent  
15 impartiality. And --

16 CHIEF JUSTICE ROBERTS: Was their --  
17 was their position a surprise?

18 MR. STEWART: I -- I think it's  
19 important -- I think it is not -- yes, it is, at  
20 least a potential surprise. That is, if the SEC  
21 Commissioners or the FTC Commissioners said the  
22 same thing about themselves, then that would be  
23 no surprise.

24 But, under Lucia, the ALJs are now  
25 treated as principal -- as officers of the

1 United States. They have to be appointed in  
2 conformity with the Appointments Clause. They  
3 are being appointed by the Commissioners.

4 And under the usual rule that the  
5 appointing authority has removal authority, it  
6 would be the SEC Commissioners who removed ALJs  
7 if they were removable at will.

8 CHIEF JUSTICE ROBERTS: It sounds to  
9 me like you're just saying the agency might  
10 write a brief, presumably, defending the  
11 structure of the agency --

12 MR. STEWART: Well, the two things we  
13 would --

14 CHIEF JUSTICE ROBERTS: -- which it  
15 can do when the case goes before the district  
16 court.

17 MR. STEWART: I -- I guess the two or  
18 three things we are -- would say are, first,  
19 yes, we could put these points in our brief, but  
20 often the court --

21 CHIEF JUSTICE ROBERTS: Oh no, when  
22 you -- my point is, when you send it back,  
23 you're saying the agency would -- it would be a  
24 valuable thing to send to the agency a claim  
25 that the agency is unconstitutionally structured

1 because you'll get the benefit of their views --

2 MR. STEWART: Well --

3 CHIEF JUSTICE ROBERTS: -- which is  
4 what you would get if you go to 1331 and you get  
5 a brief from the government.

6 MR. STEWART: You -- you would get a  
7 brief. But I think, in various contexts, the  
8 Court does sometimes distinguish between the  
9 opinions that were expressed by the agency  
10 officials, the Commissioners, in their own name  
11 and the post hoc justifications from agency  
12 lawyers.

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

21 But the second thing I would say in  
22 terms of would it be a waste of time, and this  
23 is what the Court said in Elgin, it's what the  
24 Court said in FTC versus Standard Oil, that even  
25 if the agency is not going to apply its

1 expertise to the particular practice -- issue  
2 that is being argued about now, the agency may  
3 still apply its expertise to other subjects that  
4 will produce a ruling that will obviate the need  
5 for the court to decide the issue at the end of  
6 the day.

7 And Mr. Garre --

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

18 But, here, your -- your multiple  
19 friends on the other side argue that's not the  
20 case at all, that this is a straightforward  
21 constitutional claim that would be presented the  
22 same way regardless of what the nature of the  
23 proceedings were.

24 MR. STEWART: Well, but they are also  
25 saying, independent of their arguments that the

1 adjudicators are improperly insulated from  
2 removal, that they should not be held liable  
3 under the relevant statutes; that is, Axon's  
4 complaint initially had a count that sought a  
5 declaration that it hadn't violated the  
6 antitrust laws.

7           Mr. Garre was just saying that  
8 Ms. Cochran believes that she is innocent, and  
9 --

10           CHIEF JUSTICE ROBERTS: Well, is that  
11 just an alternative basis for relief, or is  
12 that, as I understood it to be in Elgin, an  
13 intertwined -- that the constitutional claim was  
14 intertwined with the jurisdictional -- or not  
15 jurisdictional -- the sort of merits of the  
16 agency issue?

17           MR. STEWART: Well, I think the  
18 Court's point in Elgin was there was a dispute,  
19 for instance, about whether a constructive  
20 discharge had occurred. And the MSPB would  
21 obviously have expertise in the circumstances  
22 that would and would not constitute a  
23 constructive discharge.

24           And so, at least with respect to one  
25 or more of the plaintiffs, if the MSPB had

1 concluded you were not constructively  
2 discharged, that would have obviated the need  
3 for a court to decide whether the law providing  
4 for male-only registration for the Selective  
5 Service was unconstitutional.

6 And the Court said the same thing in  
7 Standard Oil, that it didn't expect the agency  
8 to devote any more resources to the reason to  
9 believe determination.

10 JUSTICE KAVANAUGH: Mr. -- keep going,  
11 sorry.

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

22 JUSTICE KAVANAUGH: In --

23 JUSTICE SOTOMAYOR: Is -- are the --  
24 I'm sorry.

25 JUSTICE KAVANAUGH: Go ahead.

1 JUSTICE SOTOMAYOR: I asked you this  
2 before, but I'd like you to pay attention not to  
3 the removal provision but to the clearance  
4 process, and I know that's not in this case,  
5 it's in the other one, the process, clearance  
6 process and combined investigator/prosecutor/  
7 adjudicatory challenges of the other case.  
8 Those are due process challenges.

9 Are they intertwined in the merits in  
10 a different way than the removal is?

11 MR. STEWART: I mean, they are not  
12 intertwined -- there's no real overlap between  
13 the question are those provisions valid and the  
14 question did Axon violate the antitrust laws or  
15 did Cochran violate the Exchange Act.

16 So you're right that they're not  
17 intertwined with the merits provisions. But  
18 they are still intertwined with the provisions  
19 that govern SEC adjudications and judicial  
20 review of SEC adjudications. And I would -- as  
21 I was saying in response to -- to Justice Kagan,  
22 if you had a dispute about whether an ALJ was  
23 right or wrong in excluding particular evidence  
24 that was proffered by the respondent in a  
25 proceeding, the -- the question whether the

1 rule, the evidentiary rule, had been properly  
2 applied might be essentially unconnected to the  
3 question did Ms. Cochran violate the securities  
4 laws. But it's still the type of issue that we  
5 --

6 JUSTICE SOTOMAYOR: Well, I was  
7 thinking, on the clearance process rules, the FT  
8 -- the agency could tell us or decide to change  
9 its rules.

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

21 JUSTICE KAVANAUGH: Mr. Stewart, in  
22 thinking about the precedents, I think there are  
23 good arguments both ways, as I've indicated in  
24 my questions, but then I think there's a broader  
25 question that Justice Alito raised earlier that



1 I want to follow up on, which is, what makes the  
2 most sense? What makes the most sense for the  
3 government? What makes the most sense for the  
4 citizens? What makes the most sense for the  
5 court system?

6 And I think cutting against your  
7 position on that question is you can get more  
8 certainty, more clarity quicker about a basic  
9 fundamental question about the constitutionality  
10 of the agency itself or the agency's structure  
11 itself.

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

22 So, on that kind of broad way of  
23 thinking about the clarity, the certainty, the  
24 speed, isn't that all upside to allowing a  
25 challenge to the structure of the agency to go

1 -- to go forward in the district court?

2 MR. STEWART: Let me say two or three  
3 things about that. The first is a decision of a  
4 district court and even a decision of a circuit  
5 court is not going to provide certainty on these  
6 issues. And until this Court decides the  
7 question, you could have a circuit conflict if  
8 you allowed district court review, just as you  
9 could have a circuit conflict if you allowed  
10 review only at the final --

11 JUSTICE KAVANAUGH: But it --

12 MR. STEWART: -- order stage. The --  
13 the second --

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

1 than, under your approach, certainty from this  
2 Court sooner.

3 MR. STEWART: I mean, certainly, a  
4 district court could issue a preliminary  
5 injunction very quickly, but that wouldn't  
6 provide certainty even within the circuit. Even  
7 an affirmance by the court of appeals on a  
8 likelihood of success standard wouldn't provide  
9 a definitive circuit court ruling.

10 And there's really no reason to  
11 believe that, systemically, the process of  
12 getting a court of appeals ruling is likely to  
13 move more quickly if you have district court  
14 review and then court of appeals review than if  
15 you have agency review and then court of appeals  
16 review.

17 JUSTICE KAVANAUGH: Okay. You had a  
18 second point.

19 MR. STEWART: The second thing I was  
20 going to say is that there is at least -- the  
21 regime that we have now is certain agency  
22 actions are reviewable and certain agency  
23 actions are not reviewable or they are not  
24 reviewable until they've kind of crystallized in  
25 a final ruling, and you focus on what is the

1 agency action you're challenging, and then you  
2 look to the statutes that govern can you get  
3 review of that and, if so, in that court.

4 And, certainly, you can have close  
5 questions, but that -- that provides a fair  
6 amount of determinacy, and I think the regime  
7 that you're postulating would create  
8 indeterminacy in two different respects.

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

22 Here, what Mr. Garre is focusing on is  
23 the agency adjudications, and it's a significant  
24 part of what the SEC does, but it's far from the  
25 whole thing that the SEC does. And so the Court

1 would have to develop -- the lower courts would  
2 have to develop a framework for determining what  
3 is sufficiently structural.

4           And then you'd also have a question,  
5 what non-final agent -- agency actions are  
6 reviewable for -- immediately? And so you have  
7 a very established rule that you can ordinarily  
8 get judicial review of a final agency  
9 regulation, but if the issue -- if the agency  
10 issues a proposed regulation and you think it  
11 exceeds its authority under the statute, et  
12 cetera, you can't get review of that. You have  
13 to get -- wait for review until it is  
14 promulgated in final form.

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

1           It -- it creates indeterminacy, yet  
2           again, not just as to what category of legal  
3           theories will get you out of the ordinary rules,  
4           but once you've articulated what a court  
5           considers to be a structural challenge, what  
6           additional categories of non-final agency action  
7           can you challenge.

8           JUSTICE ALITO: Can I ask you about  
9           your reliance on collateral order doctrine  
10          cases? It's not clear to me why the situation  
11          here is in any meaningful sense parallel to the  
12          situation in a case where a party invokes the  
13          collateral order doctrine.

14          In those cases, the basis of  
15          jurisdiction that the party is claiming is 1291,  
16          which limits jurisdiction, the court of appeals'  
17          jurisdiction, to final decisions.

18          In the ordinary sense of the word, the  
19          -- the orders that fall within the collateral  
20          order doctrine are not final. They're not the  
21          last order in the case that finishes everything  
22          up. So it's a -- it -- it -- it is an exception  
23          to the ordinary meaning of clear statutory  
24          language, final decision.

25          Here, you have your APA argument. I

1 understand. But, if we put that aside, the  
2 statutory language pushes in the opposite  
3 direction because 1331, if you just read it  
4 literally, gives the district court jurisdiction  
5 over that.

6 So isn't that an -- an answer to your  
7 argument that the collateral order -- the -- the  
8 considerations in the collateral order doc --  
9 that collateral in the collateral order doctrine  
10 cases should be read in a way that is similar to  
11 Thunder Basin's reference to a collateral case?

12 MR. STEWART: I -- I mean, first, I  
13 think the collateral order -- the -- the  
14 relevant statutory language in 1291 refers to  
15 final decisions, not to final judgments.

16 And the Court in the collateral order  
17 decisions has explained that what it has  
18 articulated is not an exception to the final  
19 decision rule -- rule. It is an interpretation  
20 of the term "final decision." And the Court has  
21 said ordinarily that is limited to final  
22 judgments, but there will be some other orders  
23 entered in the course of the proceedings that  
24 are not final judgments but that do count as  
25 final decisions because they finally resolve an

1 issue having certain characteristics.

2           And the collateral order jurisprudence  
3 has -- overlaps substantially with the final --  
4 with the Thunder Basin factors. That is, one of  
5 the factors is whether this order that you seek  
6 to have reviewed immediately is collateral to  
7 the merits.

8           Another factor is, would meaningful  
9 review be available on appeal? And that  
10 overlaps with the -- the first of the Thunder  
11 Basin factors.

12           So our -- our argument is not that  
13 every jot and tittle of collateral order  
14 jurisprudence should be imported into this  
15 context. It's that the court in making those  
16 determinations has been weighing very similar  
17 factors.

18           And the one overarching similarity is  
19 that in both agency proceedings like the  
20 Bethlehem Shipbuilding case that I referred to  
21 earlier and under the collateral order doctrine,  
22 litigants have argued time after time review at  
23 the end of the day would not be inadequate --  
24 would not be adequate because, in the meantime,  
25 I will be suffering the burdens that are



1 associated with the proceedings.

2 And time after time, the Court has  
3 said that's not a sufficient basis for getting  
4 immediate review rather than waiting until the  
5 end of the process.

6 The -- the one exception that I noted  
7 at the beginning of my first argument was, in  
8 the collateral order context, the Court has  
9 recognized that orders denying a -- a statutory  
10 or constitutional immunity will ordinarily be  
11 appealable immediately.

12 And so, under the double jeopardy  
13 clause, the -- the right protected by the  
14 Constitution is the right not to be placed twice  
15 in jeopardy. It is a right not to be tried.

16 JUSTICE ALITO: But, here, in -- in  
17 cases like in these two cases and other cases  
18 like it, put the APA aside. There is no  
19 statutory language that is similar to 1291.

20 What is -- what seems to me to be the  
21 -- like 1291 in these cases is simply an  
22 inference of congressional intent that you draw  
23 from the statutes giving the courts of appeals  
24 jurisdiction to review certain orders of the  
25 administrative agencies.

1           The statute doesn't even say -- these  
2 two statutes don't even say exclusive  
3 jurisdiction. So we infer it's exclusive. And  
4 not only that, we infer that, except for some  
5 categories, some subcategory of cases, this not  
6 only gives the courts of appeals exclusive  
7 jurisdiction, but it precludes jurisdiction that  
8 district courts would have under 1331.

9           MR. STEWART: You know, I said at the  
10 outset of this argument that in our view,  
11 really, the hardest question is whether Cochran  
12 should lose for jurisdictional reasons or should  
13 lose on some other basis because Standard Oil  
14 makes so clear that the commencement of an  
15 agency adjudication is not final agency action.

16           And -- and I -- I agree with you that  
17 it would certainly have been a plausible way for  
18 the Court to proceed to say that if a statute --  
19 if a claim asserts a violation of federal law,  
20 then, by definition, it arises under federal  
21 law, and, therefore, it falls within the  
22 jurisdictional grant of 1331.

23           And if you filed your suit in district  
24 court, the district court has jurisdiction, and  
25 there are lots of other potential objections to

1 the suit going forward, but jurisdiction is not  
2 one of them.

3 That -- that would have been an  
4 entirely plausible way for the Court to approach  
5 this from the outset. But the Court has  
6 repeatedly done the contrary in Thunder Basin,  
7 in Elgin, in Hinck versus United States. That  
8 was a case involving a statute that granted the  
9 tax court authority to review certain challenges  
10 to IRS decisions regarding the abatement of  
11 interest. And the Court concluded that, yes,  
12 the suit that the plaintiff had filed in the  
13 Court of Federal Claims fell within the literal  
14 coverage of the Court of Federal Claims' grant  
15 of jurisdiction and also would have fell within  
16 the literal coverage of 1331.

17 But given Congress's evident intent  
18 that the tax court be the only available forum,  
19 those courts were divested of jurisdiction.

20 Again, you could have come out the --  
21 the -- with the same bottom line by saying, yes,  
22 there was jurisdiction in the Court of Federal  
23 Claims, but the only cause of action that you  
24 had was elsewhere and so your suit is dismissed.

25 And in stressing the jurisdictional

1 aspect of this, we have tried to brief and argue  
2 the case in -- in the way that this Court has  
3 approached similar cases in the past, but,  
4 certainly, the -- the part of our brief that  
5 addressed a cause of action was intended to make  
6 the point that, even if you take the view that  
7 -- that Justice Alito has propounded and that  
8 Axon and Cochran have endorsed, in which  
9 anything that asserts a claim under federal law  
10 by definition arises within the district court's  
11 jurisdiction, it's a plausible way of  
12 approaching it, but the suits still couldn't go  
13 forward because they're not challenging anything  
14 that you can sue about.

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

24           JUSTICE KAGAN: I thought Free  
25 Enterprise Fund pretty clearly put the kibosh on

1 your cause of action argument.

2 MR. STEWART: Well, Free Enterprise  
3 Fund, as we pointed out in the brief, the PCAOB  
4 was not defined to be an agency, so any  
5 arguments based on limitations imposed by the  
6 APA wouldn't have had purchase.

7 And we -- we don't have -- we don't  
8 quarrel with the -- the Free Enterprise Fund  
9 court's repetition of the fact that, yes, for a  
10 long period of time, courts have had general  
11 equitable authority to grant relief designed to  
12 ensure that constitutional violations did not go  
13 unremedied, even in the absence of an express  
14 statutory authority.

15 But it's fair -- there's a big  
16 difference between saying the courts can step in  
17 to fill the gaps, as in Free Enterprise Fund,  
18 where the APA didn't apply, or as in some other  
19 cases, where Presidential action is at issue and  
20 the President is not an APA action.

21 It's very different to say a court can  
22 step in and fill the gaps and say the court can  
23 provide a cause of action kind of contrary to  
24 the dictates of the APA.

25 And, as I said in the first argument,

1 under Section 703, the APA -- we -- we -- think  
2 of an APA suit as a suit in district court kind  
3 of under the APA's fallback authorization when  
4 no special review provision exists.

5 But the APA also says, when a special  
6 review provision does exist, you don't have the  
7 option of choosing between that and the district  
8 court suit. You have to follow the special  
9 review provision, unless it's absent or  
10 inadequate.

11 JUSTICE JACKSON: Can I just clarify  
12 about the exclusivity of the court of appeals  
13 jurisdiction? I thought that was in the  
14 statute, once there's a final order. Is that  
15 right?

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

25 But -- but that's -- that's not a

1 question of division of responsibility between  
2 the court of appeals and the district court.  
3 That's a question of at what point does the  
4 agency lose the ability to amend its order  
5 before the court of appeals reviews it.

6 JUSTICE JACKSON: And is your argument  
7 about the district court no longer retaining its  
8 jurisdiction under 1331 up and to that point  
9 coming from the statute or the APA, or where is  
10 it coming from?

11 MR. STEWART: I mean, it's coming from  
12 the combination of the S -- of the Exchange Act  
13 review provision and the APA. That is, the  
14 Exchange Act review provision says the only  
15 court that can review the final order is the  
16 court of appeals. And the APA says preliminary  
17 action is reviewed on review of the final agency  
18 action. And so that -- that necessarily means  
19 it will be reviewed by the court that has the  
20 authority to review the final agency action.

21 JUSTICE SOTOMAYOR: I -- I thought  
22 your pages 47 to 50 were saying we don't really  
23 need the APA, we just need the agency action  
24 that --

25 MR. STEWART: I -- I mean, it is -- it

1 is certainly the case that our -- our 47 to 50  
2 included cases that were decided before the APA  
3 was enacted, and so the principle that courts  
4 would not intervene long predated the APA. And  
5 the APA simply confirms that by referring to  
6 final agency action in Section 704.

7 But, when -- when we refer to  
8 uncodified principles of administrative law,  
9 we're met with the -- the legitimate response by  
10 our -- our opposing counsel that uncodified  
11 principles are less useful than enacted  
12 statutory text.

13 And so part of our reliance on the APA  
14 is to show that these principles are not just  
15 uncodified principles; they are actually law  
16 enacted by Congress.

17 JUSTICE GORSUCH: Is the APA argument  
18 waivable?

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

21 JUSTICE GORSUCH: I -- I understand  
22 that. Is it subject -- is it subject to waiver  
23 and forfeiture?

24 MR. STEWART: I -- I don't think it is  
25 waiver -- waivable. But -- I -- it would be



1 waivable, but I think the Court has often  
2 distinguished between waiver of a claim and  
3 waiver of an argument in support of a claim.  
4 And so I think, to the extent that we were --  
5 are relying on APA provisions to buttress  
6 arguments that we have been making all along,  
7 that that --

8 JUSTICE GORSUCH: But, in principle,  
9 it's not a jurisdictional problem that's not  
10 waivable?

11 MR. STEWART: Well, I mean, two --  
12 again, the Court has addressed this as a  
13 question of subject matter jurisdiction.

14 JUSTICE GORSUCH: I -- I understand  
15 that.

16 MR. STEWART: And -- and --

17 JUSTICE GORSUCH: I'm asking for the  
18 government's view.

19 MR. STEWART: And -- yes, I think just  
20 as we could raise the question of jurisdiction  
21 for the first time in the Supreme -- in this  
22 Court, that is, if the Court had granted cert to  
23 decide a merits question, if we had never  
24 challenged jurisdiction before, but we came in  
25 and argued there was actually no jurisdiction

1 here, perhaps the Court would DIG the case.

2 JUSTICE GORSUCH: What's -- what's the  
3 language in 704 that you view as jurisdictional  
4 then?

5 MR. STEWART: It's the language in  
6 704 --

7 JUSTICE GORSUCH: I think the sentence  
8 says that "preliminary, procedural, or  
9 intermediate agency action," which is defined  
10 and we had that discussion earlier. I won't  
11 repeat that.

12 MR. STEWART: That, by its terms,  
13 doesn't address jurisdiction, but it does say  
14 the court that reviews the final agency decision  
15 will be the one that reviews the preliminary  
16 steps.

17 JUSTICE GORSUCH: No, let -- okay --

18 MR. STEWART: And that has  
19 jurisdictional --

20 JUSTICE GORSUCH: If I might finish,  
21 Mr. Stewart. It says that "preliminary,  
22 procedural, or intermediate agency action" --  
23 query whether we had that here as defined by  
24 551 -- "or ruling not directly reviewable is  
25 subject to review on the review of the final

1 agency action." It doesn't talk about  
2 jurisdiction. It doesn't talk about  
3 exclusivity. So what do we do about that?

4 MR. STEWART: I mean, it -- it --  
5 buttresses the point that Justice Kagan was  
6 making in the first argument, where she thought  
7 -- where she said, wouldn't you ordinarily  
8 presume that the court that is going to review  
9 the final decision will review preliminary steps  
10 along the way?

11 And our point was yes, you would  
12 ordinarily presume this, but this is express  
13 statutory authorization for it. And to the  
14 extent that the question is one of -- of the  
15 district court's subject matter jurisdiction,  
16 then the fact that it's a new argument can't --

17 JUSTICE GORSUCH: What -- what do  
18 about the fact that normally we say that  
19 jurisdictional statutes have to be stated  
20 clearly and -- and we don't presume that  
21 Congress is meaning to create a jurisdictional  
22 rule unless it's telling us that? And there's  
23 no language like that here.

24 MR. STEWART: Again, Section 704 in  
25 and of itself would not have any jurisdictional

1       implications.  And the dispute has been about  
2       whether the Exchange Act's conferral of  
3       authority on the court of appeals to review the  
4       --

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

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

10                  JUSTICE GORSUCH:  Okay.

11                  MR. STEWART:  But it -- it does  
12       address the question which -- it doesn't specify  
13       which court should review any category of agency  
14       conduct, but it does say in general terms the  
15       court that reviews the final decision should  
16       review the antecedent steps.

17                  And as I said in the first part of the  
18       argument, if this were the second sentence in  
19       the Exchange Act review provision, we would  
20       think of it as powerful evidence that a review  
21       of the initiation of the proceeding could take  
22       place only on review of the final order.

23                  CHIEF JUSTICE ROBERTS:  Thank you,  
24       counsel.

25                  Justice Thomas, anything further?

1 Anything further?

2 JUSTICE KAVANAUGH: Yes, one question.  
3 On Justice Gorsuch's questions, how relevant is  
4 703, which is the provision -- you referenced it  
5 earlier -- that says "the form of proceeding for  
6 judicial review is the special statutory review  
7 proceeding relevant to the subject matter in a  
8 court." Is that relevant at all?

9 MR. STEWART: Oh, it's highly relevant  
10 because what the Court has often said in cases  
11 like Thunder Basin is that when Congress creates  
12 a detailed, specific scheme for review of a  
13 particular category of agency action, we will  
14 often infer that Congress intended that scheme  
15 to be exclusive and that no other court will be  
16 able to review the same agency action.

17 And that language from 703 provides  
18 express statutory confirmation of that -- that  
19 inference. It says the form of proceeding for  
20 -- "the form of proceeding" -- definite  
21 article -- "for judicial review is the special  
22 statutory review proceeding relevant to the  
23 subject matter" -- which, here, everyone agree  
24 -- agrees is the Exchange Act review scheme --  
25 "in a court specified by statute" -- which is

1 the court of appeals -- "or, in the absence or  
2 inadequacy thereof, any applicable form of legal  
3 action." And so it does contemplate that  
4 district court would --

5 JUSTICE KAVANAUGH: Inadequacy it  
6 contemplates?

7 MR. STEWART: Inadequacy.

8 JUSTICE KAVANAUGH: Yeah.

9 MR. STEWART: It contemplates that in  
10 many instances -- the word "absence"  
11 contemplates that with respect to many types of  
12 agency conduct, there won't be a special  
13 statutory review provision. And it also  
14 contemplates that sometimes there might be one,  
15 but it will be inadequate for a particular type  
16 of claim.

17 CHIEF JUSTICE ROBERTS: Justice  
18 Barrett?

19 Justice Jackson?

20 JUSTICE JACKSON: Can I just clarify,  
21 because I was very interested in your argument  
22 that there may still be other bases for  
23 thwarting the claims that are being brought in  
24 this case, and I just want to make sure that I  
25 understand what you mean by that.

1           As I see what you're saying, that the  
2 very structural constitutional claims that the  
3 plaintiffs would like to bring in district  
4 court, you would read the statutes here,  
5 jurisdictionally maybe, to allow them to bring  
6 it under 1331, but when you got into district  
7 court, the government might point to the APA to  
8 say there's no final agency action, so you can't  
9 proceed under those claims. Is that right?

10           MR. STEWART: I think that's right,  
11 although I would say more generally the -- the  
12 logical thrust of the textual argument on the  
13 other side, and -- and, really, the logical  
14 thrust of Justice Alito's question, was 1331  
15 confers jurisdiction, it encompasses any suit  
16 arising under federal law, the Exchange Act  
17 review provision doesn't specifically divest  
18 that jurisdiction, and, therefore, the district  
19 court has -- has at least jurisdiction to  
20 entertain the claim.

21           That -- that logic would apply not  
22 just to structural constitutional challenges but  
23 would apply to any claim as like the one in  
24 Standard Oil that was based on a federal  
25 statute. And so, at that point, we would say

1 that wouldn't have been an implausible reading  
2 of the jurisdictional statute, but once you  
3 surmounted the -- the pretty easy jurisdictional  
4 hurdle, we would still be able to interpose  
5 final agency action objections, et cetera.

6 Now I -- I take the thrust of the  
7 argument on the other side to be that structural  
8 constitutional challenges are not simply  
9 challenges that fall within the 1331  
10 jurisdiction but challenges that can actually be  
11 brought in court and that will surmount any  
12 other types of non-jurisdictional challenges  
13 because it's uniquely important that they be  
14 adjudicated quickly.

15 If -- if I've misunderstood Mr.  
16 Garre's argument, he can correct me, but I took  
17 their argument to be, with respect to structural  
18 constitutional claims, not just that the  
19 district court would have jurisdiction but that  
20 the court would be obligated to decide them on  
21 the merits.

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

23 CHIEF JUSTICE ROBERTS: Yeah,  
24 certainly.

25 JUSTICE GORSUCH: I'm sorry. I



1 apologize for this last question, but you  
2 brought up 703 for the first time here a moment  
3 ago, and as I understand that provision, it says  
4 with respect to statutes that do provide a form  
5 of review -- you used that, and, here, we have  
6 one that speaks of final orders, final orders,  
7 nothing else. And in the absence of a statute  
8 that speaks to that -- that question, you  
9 normally proceed as you would in any court of  
10 competent jurisdiction. Is that right?

11 MR. STEWART: You would proceed in  
12 what other -- whatever court was otherwise --

13 JUSTICE GORSUCH: Competent  
14 jurisdiction?

15 MR. STEWART: -- competent -- for  
16 jurisdictional purposes.

17 JUSTICE GORSUCH: Yeah.

18 MR. STEWART: Now there was --

19 JUSTICE GORSUCH: Right, for  
20 jurisdictional purposes.

21 MR. STEWART: But -- but, here --

22 JUSTICE GORSUCH: Okay. Thank you.

23 Thank you.

24 CHIEF JUSTICE ROBERTS: Rebuttal, Mr.  
25 Garre?

1 REBUTTAL ARGUMENT OF GREGORY G. GARRE

2 ON BEHALF OF MICHELLE COCHRAN

3 MR. GARRE: Thank you, Mr. Chief

4 Justice.

5 I think it's telling that my friend  
6 had very little to say about the actual text of  
7 78y of the SEC Act and that, instead, his  
8 argument has migrated towards non-jurisdictional  
9 arguments based on the APA. Those arguments can  
10 be and have been waived here. I think they're  
11 irreconcilable with Free Enterprise Fund itself,  
12 and they provide no basis for holding that there  
13 -- the district courts lack jurisdiction over  
14 this important class of claims.

15 I heard my friend complaining about  
16 the -- the difficulties of determining whether  
17 or not a claim is a structural constitutional  
18 claim or drawing the line in the district court.  
19 We don't think that that will be difficult at  
20 all. This Court has already talked about and  
21 discussed and is familiar with the concept of  
22 structural constitutional violations.

23 That's a line that -- that can be  
24 drawn. But, to be clear, to the extent that  
25 there are any practical problems with that, they

1 pale in comparison with the practical hardships  
2 that individuals face in being subjected to  
3 years of proceeding before an unconstitutional  
4 administrative decision-maker before they can  
5 get before an Article III court to -- to raise a  
6 blatant constitutional defect with those  
7 decision-makers.

8 Congress knows how to strip  
9 jurisdiction when it wants to. There are scores  
10 of statutes in which Congress has explicitly  
11 stripped jurisdiction, including district court  
12 jurisdiction.

13 Congress did not do so either in the  
14 SEC Act or anything else that the government has  
15 pointed to. District courts have jurisdiction  
16 that they have long exercised to protect against  
17 these unconstitutional agency decision-makers.

18 We ask that the Court affirm the  
19 judgment below.

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

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

24  
25

## Official

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