



Antitrust / Consumer Protection/FTC ADVISORY ■

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Supreme Court Allows Constitutional Challenges to Structure of Federal Trade Commission While Enforcement Action Pending

by [Adam Biegel](#) and [Brandon Abrams](#)

On April 14, 2023, the U.S. Supreme Court unanimously [held](#) that district courts have jurisdiction to hear structural challenges to the constitutionality of administrative agencies while an agency enforcement action is pending. Although litigants have always had the ability to raise these arguments, it was unclear prior to the decision in *Axon Enterprise Inc. v. Federal Trade Commission (consolidated with Cochran v. Securities and Exchange Commission)* whether a party had to wait until the administrative proceeding concluded before raising the claims in federal court.

The decision clears the way for the plaintiff in the case to immediately attack the constitutionality of the administrative litigation process of the Federal Trade Commission (FTC), which is a key tool for aggressive antitrust and consumer protection enforcement under FTC Chair Lina Khan.

Background and Procedural History

In *Axon*, the FTC filed an administrative complaint challenging the acquisition by Axon Enterprise, a manufacturer of body cameras, of its competitor, Viewu, as a violation of federal antitrust law. Before the complaint could be heard by an FTC administrative law judge (ALJ), which is a cost— and time—intensive process, Axon sued the FTC in a federal district court in Arizona and argued that the structure and operations of the FTC's administrative law process were unconstitutional. The FTC brings dozens of Part III administrative cases annually to challenge a wide variety of competition and consumer protection issues, from mergers and anticompetitive conduct to deceptive marketing and advertising practices.

In its complaint, Axon challenged multiple elements of the FTC process, including its “clearance process” for dividing merger investigations with the Department of Justice Antitrust Division, the limited ability of the FTC's ALJ to be removed from his duties except for cause, and the alleged lack of protection the FTC provides for litigants' Fifth Amendment due process rights (given that the agency both brings and hears appeals of the administrative cases it prosecutes). As a result of these shortcomings, Axon noted, the FTC almost always wins the cases it brings in its administrative court.

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The Arizona district court dismissed Axon's suit based on lack of jurisdiction, concluding that the suit could not proceed pending resolution of the administrative proceeding. On appeal, the Ninth Circuit affirmed the dismissal, finding that "Axon's constitutional challenges fell within the FTC Act's scheme," which the Ninth Circuit held allows the FTC to review such challenges and displace district courts' federal question jurisdiction to hear such claims. The Supreme Court agreed to review the decision along with a conflicting decision of the en banc Fifth Circuit in *Cochran*, which held that a constitutional challenge to the Securities and Exchange Commission (SEC) administrative processes could proceed in federal court prior to the conclusion of the SEC's administrative proceedings.

Supreme Court Decision

The Supreme Court applied the factors outlined in *Thunder Basin Coal Co. v. Reich*,¹ including whether precluding jurisdiction would "foreclose all meaningful judicial review of the claim," whether the claim was "wholly collateral" to the statute's review provisions, and whether the "claim is outside the agency's expertise." After applying these factors, the Court held that district courts have the authority to address a party's constitutional challenges to an agency's administrative scheme while administrative proceedings are pending against that same party.

Justice Elena Kagan, writing for the Court, noted the "review schemes set out in the ... FTC Act do not displace district court jurisdiction over Axon's ... far reaching constitutional claims." Justice Kagan stressed that the party's "challenges are fundamental, even existential. They maintain in essence that the agencies, as currently structured, are unconstitutional in much of their work."

Justice Neil Gorsuch, who concurred only in the judgment of the Court, opined that courts should not apply the factors laid out in *Thunder Basin* but should, instead, simply ask whether Congress carved out an exception to the court's jurisdiction.

Justice Clarence Thomas wrote a separate concurring opinion that touched on the merits of Axon's constitutional challenges to the FTC, expressing skepticism that Congress intended to vest administrative agencies like the FTC with adjudicatory power.

These opinions provide additional evidence that some on the Supreme Court would likely support challenges to the authority of some administrative agencies.

Impact

While the *Axon* decision does not decide the merits of the constitutional challenge to the FTC's structure, it expedites the determination of that challenge and others that may follow. A holding requiring parties to see the cost—and time—intensive administrative process to resolution before bringing these types of constitutional challenges would likely have discouraged such challenges.

¹ 510 U.S. 200 (1994)

Following the Supreme Court decision, *Axon* has indicated it will pursue its constitutional challenge in the trial court. And other parties have followed suit, with Illumina Inc. indicating the day after the *Axon* decision that it will raise constitutional challenges in its appeal to the Fifth Circuit following the FTC's decision to block Illumina's acquisition of Grail. Walmart also recently continued to raise these arguments in response to the agency's enforcement action in federal court in Chicago alleging that the retailer knew and facilitated fraudulent money transfers.

While *Axon* does not alter or invalidate the structure of the FTC or any other administrative agency, it accelerates the speed with which federal courts can hear challenges to the federal government's administrative processes. And if, on remand, the FTC were to lose certain enforcement tools as a result of an adverse judicial decision, as it did in *AMG Capital Management LLC v. Federal Trade Commission*,² it is unclear whether Congress would step in to reinstate them.

It will be important to watch how the *Axon* decision impacts the FTC's enforcement decisions. Will the FTC bring fewer challenges through its internal administrative process? Or will the FTC look instead to litigate more in district courts, where its power to obtain equitable monetary relief such as restitution and disgorgement has [already been substantially eroded](#)? Regardless, by eliminating the need for potential litigants to spend time and money to fully adjudicate their underlying disputes before raising constitutional challenges, *Axon* is likely to invite additional challenges to the structure of administrative agencies like the FTC.

For additional insights related to the *Axon* case, please refer to the advisory from our Securities Litigation colleagues, "[Supreme Court Securities Law Roundup – The *Axon* Decision and Oral Argument in *Slack v. Pirani*](#)."

² 141 S. Ct. 1341 (2021)

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