No. 25-735

IN THE

Supreme Court of the United States

FLOYD D. JOHNSON,

Petitioner,

v.

UNITED STATES CONGRESS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR THE NATIONAL TREASURY EMPLOYEES UNION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICUS[1]

The National Treasury Employees Union (NTEU) is a labor organization that represents federal employees in thirty-eight agencies and departments. NTEU has been before this Court often to advocate for federal employee interests, as a party (*see*, *e.g.*, *United States v. NTEU*, 513 U.S. 454 (1995)) and as an *amicus* (*see*, *e.g.*, *Axon Enter., Inc. v. FTC*, 598 U.S. 175 (2023)). NTEU frequently confronts arguments that its constitutional or *ultra vires* claims challenging sweeping Executive action should be channeled out of federal district court and through administrative agencies under the framework set forth in *Thunder Basin Coal Company v. Reich*, 510 U.S. 200 (1994) and its progeny.

SUMMARY OF ARGUMENT

The Eleventh Circuit applied the *Thunder Basin* framework in channeling the facial constitutional claim below out of federal district court. It had no choice but to follow this Court's precedent. But this Court should seize this opportunity to modify that precedent. It should eliminate or modify the implied preclusion framework that it created—a framework that is in tension with federal district courts' express statutory jurisdiction and that courts of appeals struggle to apply.

A. As Justice Gorsuch has advocated, the *Thunder Basin* experiment should be over. Judges should not wrestle with an opaque framework geared towards finding implied preclusion of claims where express statutory jurisdiction exists. That express jurisdiction

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and no person or entity other than *amicus* or its counsel made a monetary contribution to fund the preparation or submission of this brief.

should not be overridden through a set of inferences from the *Thunder Basin* framework.

At a minimum, *Thunder Basin*'s framework should not apply to facial constitutional challenges, as Justices Alito and Kagan have argued, or, in a similar vein, to broad *ultra vires* challenges to Executive Orders. Congress could not have intended federal district courts to be divested of their jurisdiction over these claims so that they could go to administrative agencies that lack the authority to adjudicate them.

B. The views of Justice Gorsuch, as well as that of Justices Alito and Kagan, have taken on greater force in the wake of two developments: this Court's decision in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), and the issuance of an Executive Order that ends the independence of agencies (which this Court's forthcoming decision in *Trump v. Slaughter*, No. 25-332 (argued Dec. 8, 2025), might buttress).

Without the underpinnings of *Chevron* deference and agency independence, *Thunder Basin*'s framework is now completely unmoored. After *Loper Bright*, an agency's proffered interpretation of ambiguity in its organic statute means little. And without agency independence, nothing will be gained from hearing an agency's now-required endorsement of the government's litigation position in administrative proceedings. There will be no agency "expertise," ultimately, that is "brought to bear" on the claims that are channeled. *See Elgin v. Dep't of the Treasury*, 567 U.S. 1, 23 (2012) (quoting *Thunder Basin*, 510 U.S. at 214–15).

These developments nullify any plausible argument that Congress's intent is better discerned through *Thunder Basin*-driven inferences than Congress's explicit grant of statutory jurisdiction. This Court should overrule *Thunder Basin* and its progeny—at

least as to facial constitutional or *ultra vires* challenges to federal statutes or Executive Orders.

ARGUMENT

The *Thunder Basin* Line of Cases Should Be Overruled.

A. *Thunder Basin* and Its Progeny—Particularly *Elgin*—Have Always Rested on Shaky Ground.

1. Justice Gorsuch has referred to the *Thunder Basin* test "as a test we have fabricated"—to ascertain Congress's "intent" when enacting an administrative scheme. *Axon Enter.*, 598 U.S. at 205–206. (Gorsuch, J., concurring). It is, in Justice Gorsuch's view, "a judge-made, multi-factor balancing test" characterized by its "sheer incoherence." *Id.* at 205.

Under *Thunder Basin*'s implied preclusion framework, courts first consider whether Congress created a "comprehensive review process" and then whether the plaintiffs' particular claims were "of the type Congress intended to be reviewed within this statutory structure." *Axon Enter.*, 598 U.S. at 186. For that second prong, courts weigh three guideposts: whether channeling could "foreclose all meaningful judicial review," whether a litigant's claims would be considered "wholly collateral to the statute's review provisions," and whether the claims if pursued first before an administrative agency would be "outside the agency's expertise." *Id.* at 186 (cleaned up).

As Justice Gorsuch has explained, *Thunder Basin*'s implied preclusion construct raises separation of powers concerns:

> Under our Constitution, Congress, and not the Judiciary, defines the scope of federal jurisdiction.

> Federal courts have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. That is why we have called it the "true rule" that statutes clearly defining the jurisdiction of the courts must control in the absence of subsequent legislation equally express. And why we have said that jurisdiction conferred by 28 U. S. C. §1331, in particular, should hold firm against mere implications from other laws.
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> . . . But under *Thunder Basin*, courts may refuse individuals their right to a judicial forum based on nothing more than suppositions about implicit congressional intentions. Divesting jurisdiction by mere implication goes from out-of-bounds to the name of the game. Along the way, this Court arrogates to itself a power to control the jurisdiction of lower federal courts that the Constitution reserves to Congress.

Axon Enter., 598 U.S. at 207–08 (Gorsuch, J., concurring) (cleaned up).

In other words, the *Thunder Basin* framework, like the *Chevron* doctrine, is "a judicial invention that require[s] judges to disregard their statutory duties." *See Loper Bright*, 603 U.S. at 411. And its cost is steep for "individuals seeking to vindicate their rights" and "lower courts who deserve better guidance." *Axon Enter.*, 598 U.S. at 216 (Gorsuch, J., concurring).[2]

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[2] Courts of appeals disagree on the weight to give any prong of *Thunder Basin*'s framework and, relatedly, on how to apply its "wholly collateral" prong. The First and Seventh Circuits have treated *Thunder Basin*'s first prong—"meaningful judicial review"—as dispositive; these courts of appeals, in turn, have given the "wholly collateral prong" no real weight. *See Aguilar v. ICE*, 510 F.3d 1, 12 (1st Cir. 2007) (ruling that a claim is wholly collateral only when channeling the claim would foreclose meaningful judicial

"Respectfully, this Court should be done with the *Thunder Basin* project." *Id.* at 217.

2. If this Court does not wish to overrule *Thunder Basin* altogether, despite this plain separation of powers concern, a narrower path exists. As Justice Alito explained on behalf of himself and Justices Kagan and Ginsburg, at a bare minimum, channeling facial constitutional challenges to an administrative agency—as the government advocates for here—is indefensible. This Court should thus, alternatively, rule that its *Thunder Basin* framework does not apply to these types of claims—or to similar claims like *ultra vires* challenges to Executive Orders.

As these three Justices explained, administrative agencies typically do not adjudicate facial constitutional challenges to the laws that they administer. *See Elgin*, 567 U.S. at 24 (Alito, Ginsburg, and Kagan, JJ., dissenting). Such challenges not only lie outside the realm of special agency expertise, but they are also wholly collateral to other types of claims that the agency is empowered to consider. *See id.* And when "the administrative appeals process does not address the kind of constitutional claims at issue, we

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review); *Bebo v. SEC*, 799 F.3d 765, 774 (7th Cir. 2015) (stating that "meaningful judicial review" is the "most critical" factor and that, consequently, even if the underlying claims were wholly collateral, they would still be precluded). The Second, Fourth, and Eleventh Circuits have likewise overemphasized the "meaningful judicial review" prong to such an extent as to render the "wholly collateral" prong irrelevant. *See Tilton v. SEC*, 824 F.3d 276, 282 (2d Cir. 2016); *Bennett v. SEC*, 844 F.3d 174, 183 n.7 (4th Cir. 2016); *Hill v. SEC*, 825 F.3d 1236, 1245 (11th Cir. 2016). In express disagreement with its sister circuits, the D.C. Circuit has declined to hold that *Thunder Basin*'s "meaningful judicial review" prong is dispositive or even the most important factor. *Jarkesy v. SEC*, 803 F.3d 9, 22 (D.C. Cir. 2015). It has instead stated that the *Thunder Basin* factors are "guideposts for a holistic analysis." *Id.*

cannot infer that Congress intended to limit judicial review of these claims to the procedures set forth in the statutory scheme." *See id.* at 30 (cleaned up) (quoting *McNary* v. *Haitian Refugee Center, Inc.*, 498 U.S. 479, 493 (1991)).

These Justices' rationale applies equally to *ultra vires* claims. Just as channeling should not be required when the administrative agency "lacks authority to adjudicate claims . . . which attack the validity of a federal statute as a facial matter" (*id.* at 27), so too when an administrative agency lacks the power to declare a presidential action *ultra vires*. In both cases, channeling claims to an administrative agency that is "completely powerless to consider the merits" simply breeds "inefficiency" and is "needlessly vexing." *Id.* at 28.[3]

* * *

The views of these Justices are more persuasive than ever, as explained below, in the wake of *Loper Bright* and the evisceration of the independence of federal agencies to which claims may be channeled.

B. *Thunder Basin* and Its Progeny Make Even Less Sense Without *Chevron* Deference.

Thunder Basin and its progeny are premised, in significant part, on the idea that agency might have "expertise" that could be "brought to bear" on the claims before it. *See Elgin*, 567 U.S. at 23 (quoting

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[3] Courts often discuss whether presidential action exceeds constitutional or statutory authority in the same breath. *See, e.g.*, *PFLAG, Inc. v. Trump*, 769 F. Supp. 3d 405, 428 (D. Md. 2025) (reviewing executive orders "to determine whether they were issued within the President's constitutional powers or any powers delegated to him by Congress").

Thunder Basin, 510 U.S. at 214–15). On this theory, channeling claims to an administrative agency give a federal court, on review, the benefit of the agency's expertise, particularly as it relates to its organic statute.

For decades, including at the time that *Thunder Basin* issued, this set-up meant providing the agency with the initial opportunity to interpret its organic statute. Then, if that agency decision was appealed to a federal court of appeals, that court would apply *Chevron* deference and "uphold the agency's interpretation as long as that interpretation is one of the permissible interpretations the agency could have selected." *Joy Techs. v. Secretary of Labor*, 99 F.3d 991, 995 (10th Cir. 1996) (citing *Chevron* and *Thunder Basin*).

That mode of analysis is defunct after *Loper Bright,* 603 U.S. at 412–413. A federal court cannot give *Chevron* deference to an agency's interpretation of the statute that it administers, leaving little reason to channel a claim to that agency in the first place. *See id*.

Loper Bright underscores that it is federal courts, not administrative agencies, that have the independent duty to say what the law is. *See* 603 U.S. at 400. In eliminating *Chevron* deference, the Court emphasized that judges "police the outer statutory boundaries" of congressional delegations to agencies and that they are perfectly capable of doing so without help from the agency. *Id.* at 404.

Loper Bright is thus inconsistent with *Thunder Basin* and its progeny's preference for an initial agency decision that—in practice at the time *Thunder Basin* issued—would have allowed for *Chevron* deference on statutory ambiguities in subsequent judicial review.

C. The End of Independent Agencies Removes Any Plausible Argument for Maintaining *Thunder Basin* and Its Progeny.

The agency independence on which *Thunder Basin*'s framework is based is now gone. Agencies to which claims are channeled are no longer free to deviate from the governing Administration's legal position. The heads of those agencies could be fired for doing so. Agencies will thus be limited to endorsing the government's litigation position.

Congress intended for its administrative schemes to be administered by independent agencies. Removing that independence destroys the entire premise of channeling. And it is another reason that channeling can no longer be based on the notion that an agency might have "expertise" that could be "brought to bear" on the claims before it. *See Elgin*, 567 U.S. at 23 (quoting *Thunder Basin*, 510 U.S. at 214–15).

1. Independent agencies are no longer so. President Trump issued an Executive Order announcing "Presidential supervision and control of the entire executive branch." Exec. Order No. 14,215, 90 Fed. Reg. 10,447, § 1 (Feb. 18, 2025). Under the Order, all Executive Branch employees must follow the President's or the Attorney General's opinions on "matter[s] of law." *Id.* § 7.

The Order explicitly extends this mandate to "so-called" independent agencies. *Id.* § 1; *see also* §§ 2(b), 5. Such agencies will be under the authority of the Office of Management and Budget, whose director shall establish "performance standards and management objectives for independent agency heads[.]" *Id.* § 4.

Consistent with this view of unfettered control over independent agencies, the President has summarily fired the heads of several formerly independent agencies appointed by his predecessor.[4] The legality of these executive actions may be solidified in *Slaughter*, No. 25-332. That case will decide whether to uphold statutory removal protections for Federal Trade Commission members, and the Court's reasoning will likely extend to members of other independent agencies. *See, e.g.*, Brief for the Petitioners at 37, *Trump v. Slaughter*, No. 25-332 (U.S. Oct. 10, 2025) (broadly challenging the lawfulness of remedies preventing the removal of executive officers).

2. It is untenable to argue, without the essential ingredient of independence, that Congress intended for these agencies to decide claims that would otherwise be adjudicated in federal district court. Congress premised those agencies' functions on their independence.

Take the Civil Service Reform Act, Pub. L. No. 95-454, 92 Stat. 1111 (1978), as an example. That Act created several federal agencies to which claims are often channeled through *Thunder Basin*'s framework. Critically, though, Congress intended for the Civil Service Reform Act to strip district courts of jurisdiction because federal employees were otherwise able to receive adequate review of their claims through "a strong and independent" adjudication system. S. Rep. No. 95-969, at 6–7 (1978).

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[4] *See, e.g.*, *Harris v. Bessent*, 160 F.4th 1235 (D.C. Cir. 2025), *petition for cert. filed*, No. 25-1110 (U.S. Mar. 17, 2026); *Grundmann v. Trump*, No. 25-5165 (D.C. Cir. Feb. 4, 2026) (remanding with instructions to dismiss challenge to removal); *Dellinger v. Bessent*, No. 25-5028 (D.C. Cir. Feb. 15, 2025) (dismissing appeal of temporary restraining order for lack of jurisdiction).

Through the Act, Congress created the Merit Systems Protection Board to adjudicate employment disputes "independent" of any control or direction by the President. *Id*. The Board was to be "insulated from the kind of political pressures that [had] led to violations of merit principles in the past." *Id.* at 7. Indeed, "[a]bsent such a mandate for independence for the Merit Board," it was unlikely Congress would have granted another agency—a non-independent one, the Office of Personnel Management—the powers it did elsewhere in the Act. *Id.*

Similarly, the Act established "an independent Federal labor relations authority" to obtain "the resolution of disputes by the intervention of neutral, independent, third parties . . . ." 124 Cong. Rec. H8466–68 (daily ed. Aug. 11, 1978). This "creation of an *independent* and neutral Federal labor relations authority to administer the Federal labor management program" was a conscious deviation from what had previously existed: a Federal Labor Relations Council "composed of three administration officials . . . none of whom can be considered neutral. *Id.* (emphasis added). Congress created the Authority—and insulated "[A]uthority members from unwarranted 'Saturday night' removals"—to ensure that federal labor relations would be "free from bias toward either party." *Id*.

Through the Act, Congress likewise created an Office of Special Counsel (OSC) designed to be "independent" of any control or direction by the President. S. Rep. No. 95-969, at 6–7. OSC "is an independent federal investigative and prosecutorial agency" that handles whistleblower claims against the federal government, among others. U.S. Off. of Special Counsel, *Our Agency and Mission*, https://osc.gov/about/about/ (last visited June 1, 2026).

Instead of retaining the independence that Congress intended for them to have, the Board, the Authority, and OSC—now—"must follow the President's or the Attorney General's opinions on "matter[s] of law." Exec. Order No. 14,215 § 7. And the President has left little doubt that this edict will have teeth: He has fired, without cause, the heads of each of these agencies (among others), each of whom was appointed by the other political party. *See supra* note 4.

* * *

This example shows that applying the *Thunder Basin* factors to infer whether Congress intended to channel claims to these agencies is now pointless. Congress could not have anticipated that the independence of these agencies would be nullified. It is less defensible than ever to divest federal district courts of their *express* statutory jurisdiction based on a *Thunder Basin inference* when the entire basis of Congress's administrative construct has been voided.

D. Judges Do Not Need *Thunder Basin* and Its Progeny to Assess Subject Matter Jurisdiction.

Justice Gorsuch has explained that district courts must independently ascertain the meaning of judicial review statutes to figure out if they carve out an exception to their federal question jurisdiction under § 1331, rather than resorting to the judge-made *Thunder Basin* test. *Axon Enter.*, 598 U.S. at 209–11 (Gorsuch, J., concurring). *Loper Bright* reinforces that judges are of course equipped for—indeed, charged with—such statutory interpretation. *See* 603 U.S. at 400.

Alternatively, as Justices Alito, Ginsburg, and Kagan have explained, "the most sensible rule would be to allow initial judicial review of constitutional

claims that attack the validity of a statute based on its inherent characteristics, not as a result of how the statute has been applied. That line is bright enough. . . ." *Elgin*, 567 U.S. at 35 (Alito, Ginsburg, and Kagan, JJ., dissenting). The same would hold true for a facial constitutional or *ultra vires* challenge to an Executive Order.

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Thunder Basin has outlived its underlying bases. It should be overruled. At a minimum, its framework should not be used to deprive federal district courts of their express statutory jurisdiction over facial constitutional or *ultra vires* challenges to federal statutes or Executive Orders, like the claim raised here.

CONCLUSION

For the foregoing reasons and for those set forth in the Petitioner's brief, NTEU respectfully requests that this Court reverse the Eleventh Circuit's decision below.

Respectfully submitted,

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