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 OF THE INSTITUTE FOR JUSTICE AS AMICUS CURIAE SUPPORTING PETITIONER

Robert E. Johnson
INSTITUTE FOR JUSTICE
16781 Chagrin Blvd., #256
Shaker Heights, OH 44120

Jared McClain
Counsel of Record
Sophia Henderson
INSTITUTE FOR JUSTICE
901 N. Glebe Rd.
Suite 900
Arlington, VA 22203
(703) 682-9320
jmcclain@ij.org

Counsel for Amicus Curiae

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The Institute for Justice ("IJ") is a nonprofit, public-interest law firm committed to defending the essential foundations of a free society and securing the constitutional protections necessary to ensure individual liberty. Central to that mission is advocating for an engaged judiciary that is willing to exercise its constitutional duty to adjudicate cases and controversies, enjoin constitutional violations, and hold government officials accountable when they violate individuals' constitutional rights.

IJ submits this brief because the doctrine of implied jurisdiction stripping—particularly as it has developed in the lower courts—implicates IJ's mission to promote an engaged judiciary capable of securing Americans' essential constitutional rights. Applying *Thunder Basin* and its progeny, courts often decline to exercise jurisdiction based on an amorphous balancing of "factors" that are divorced from statutory text. When courts cede their jurisdiction based on that type of policy balancing, they improperly insulate agencies from judicial review and frustrate meaningful and timely enforcement of constitutional rights. Such applications of *Thunder Basin* are particularly troubling in the types of cases that IJ litigates, which

[1] Pursuant to this Court's Rule 37.6, Amicus affirms that no party or counsel for a party authored this brief in whole or part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than Amicus, its members, or counsel made a monetary contribution to its preparation or submission.

often involve civil penalties and other sanctions that implicate traditional common law property rights.

As Petitioner urges, the Court should eschew any such multi-factor balancing in this case. Instead, the Court should take this opportunity to make clear that *Thunder Basin* does not authorize the lower courts to cede jurisdiction based on policy judgments divorced from the statutory text.

SUMMARY OF ARGUMENT

In the opening brief, Petitioner urges the Court to decide this case by applying the express text of the relevant statutes—rather than the multi-factor test that courts have spun out of this Court's decision in *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200 (1994). Amicus agrees.

Congress has conferred broad jurisdiction on the federal courts to decide questions of federal law, including to enforce individual constitutional rights. See 28 U.S.C. 1331. Courts should not lightly decline to exercise jurisdiction that Congress has expressly granted, and courts certainly should not override that express grant of jurisdiction based on a malleable multi-factor balancing test. Instead, courts should demand textual evidence of Congress' intent to withdraw jurisdiction that is no less clear and explicit than the text that confers jurisdiction in the first place.

To the extent there is any exception to this focus on statutory text, it is this: As a matter of constitutional avoidance, courts should be even more hesitant to read statutes as divesting jurisdiction when such

an interpretation would deprive individuals of "meaningful judicial review" of their constitutional claims. See *Thunder Basin*, 510 U.S. at 212–213. Such caution is particularly appropriate in cases where government seeks to impose penalties or other sanctions that threaten individuals' traditional common law rights to life, liberty, and property. See *Axon Enter., Inc.* v. *FTC*, 598 U.S. 175, 190–191 (2023); see also *id.* at 198 (Thomas, J., concurring). Claims that implicate traditional private rights properly belong in the Article III courts. Assuming that jurisdiction can even be limited, Congress must make its intent unequivocal. And even in cases without private rights at stake, Congress must still provide a clear statement to withdraw its prior grant of jurisdiction.

Unfortunately, however, the lower courts instead treat *Thunder Basin* as an invitation to decline jurisdiction by balancing considerations beyond the text. In doing so, courts have turned the principle of constitutional avoidance on its head—disclaiming a grant of jurisdiction based on a policy judgment that jurisdiction is not necessary to secure "meaningful judicial review." In that way, *Thunder Basin*'s concern that courts not limit jurisdiction in a way that would frustrate judicial review has become a roving mandate to decline to exercise the jurisdiction that Congress has conferred.

This case offers an opportunity to set things right. Petitioner urges this Court to focus on statutory text, and, at least so far, the government appears to agree. See Op. Br. 37–38; BIO 8. The Court should take up that invitation and, in doing so, make clear that the doctrine of "implied jurisdiction stripping" does not

provide courts with free-ranging authority to limit their own jurisdiction by speculating about what Congress might have wanted.

ARGUMENT

I. Courts should not decline jurisdiction based on multi-factor policy balancing.

To prevent the political branches from intruding on individual liberty, Article III imposes on courts a "duty * * * to declare all acts contrary to the manifest tenor of the Constitution void." The Federalist No. 78 (Alexander Hamilton). And Congress, by statute, has conferred broad jurisdiction on Article III courts to fulfill that duty. 28 U.S.C. 1331; see also *Trump* v. *CASA, Inc.*, 606 U.S. 831, 841 (2025). To strip courts of that jurisdiction, Congress must use language that is at least as clear as the language that grants the jurisdiction in the first place. And courts certainly should not strip jurisdiction by drawing an inference through a multi-factor balancing test.

The judicial duty imposed by Article III compels courts to adjudicate cases and controversies arising out of statutory and administrative schemes that violate individuals' constitutional rights. *Bell* v. *Hood*, 327 U.S. 678, 684 (1946) ("[I]t is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution[.]"); see also *Corr. Servs. Corp.* v. *Malesko*, 534 U.S. 61, 74 (2001) ("[I]njunctive relief has long been recognized as the proper means for preventing entities from acting unconstitutionally."). The courts' authority to stop unlawful conduct by governmental officials is an equitable power that

"reflects a long history of judicial review of illegal executive action, tracing back to England." *Armstrong* v. *Exceptional Child Ctr., Inc.*, 575 U.S. 320, 326–327 (2015). When executive action violates the Constitution, equity requires that courts provide a forum to vindicate a plaintiff's rights. See, *e.g.*, *Lucia* v. *SEC*, 585 U.S. 237, 251 (2018) ("'[O]ne who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case' is entitled to relief." (citation omitted)). "Otherwise, the individual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer[.]" *Am. Sch. of Magnetic Healing* v. *McAnnulty*, 187 U.S. 94, 110 (1902).

The Judiciary Act of 1789, which established the lower courts and vested them with jurisdiction over federal questions and diversity suits, "carries out the constitutional right" to a federal forum. *Suydam* v. *Broadnax*, 39 U.S. (14 Pet.) 67, 75 (1840). That grant of jurisdiction imposes a "virtually unflagging" obligation on all federal courts to decide all cases within their jurisdiction. *Lexmark Int'l, Inc.* v. *Static Ctrl. Components*, 572 U.S. 118, 126 (2014) (citation omitted). The judiciary is no more able to "decline the exercise of jurisdiction which is given, than to usurp that which is not given." See *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821). That's why this Court has reiterated, time and again, that federal courts must not "abdicate their authority or duty" and must "proceed to judgment and [] afford redress to suitors before them in every case to which their jurisdiction extends." *New Orleans Pub. Serv., Inc.* v. *Council of City of New Orleans*, 491 U.S. 350, 358–359 (1989) (quoting *Chicot County* v. *Sherwood*, 148 U.S. 529,

534 (1893)); see also *Elgin* v. *Dep't of Treasury*, 567 U.S. 1, 35 (2012) (Alito, J., joined by Ginsburg and Kagan, JJ., dissenting) ("The presumptive power of the federal courts to hear constitutional challenges is well established.").

Pursuant to this duty, courts must presume they retain jurisdiction to decide cases and controversies under Section 1331 unless a statute strips that jurisdiction "clearly and directly." *Bd. of Governors, FRS* v. *MCorp Fin., Inc.*, 502 U.S. 32, 44 (1991); see also *Verizon Md., Inc.* v. *Pub. Serv. Comm'n*, 535 U.S. 635, 644 (2002) (holding that Congress would "expressly" exclude otherwise applicable jurisdiction if it intended to do so). Congress wouldn't use vague or oblique language when it changes a statutory scheme to delegate more power to agencies. See *West Virginia* v. *EPA*, 597 U.S. 697, 723 (2022). At a minimum, then, any statute that divests courts of jurisdiction should be at least as clear as the statute that grants jurisdiction. See *Rosencrans* v. *United States*, 165 U.S. 257, 262 (1897) ("[S]tatutes clearly defining the jurisdiction of the courts * * * must control[] in the absence of subsequent legislation equally express[.]"). And given the clarity and breadth of the jurisdiction granted by Section 1331, the statutory command must be unmistakable.

This clear-statement rule follows the principle that jurisdictional rules "should be clear." *Grable & Sons Metal Prods., Inc.* v. *Darue Eng'g & Mfg.*, 545 U.S. 308, 321 (2005) (Thomas, J., concurring). "[C]ourts benefit from straightforward rules under which they can readily assure themselves of their power to hear a case." *Hertz Corp.* v. *Friend*, 559 U.S. 77, 94 (2010). Likewise, litigants benefit from clear

rules of law that determine what forums are available for vindicating their rights. *Id.* at 95.

It's also consistent with the principle that courts should not "'speculat[e] about what Congress might have' intended." *Wis. Cent. Ltd.* v. *United States*, 585 U.S. 274, 282 (2018) (citation omitted). Congress knows how to strip federal-question jurisdiction when that's what it intends. See, *e.g.*, *Axon*, 598 U.S. at 208 (Gorsuch, J., concurring in the judgment) (Congress "simply tells us."); *Shalala* v. *Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 10 (2000) (statute expressly provided that "[n]o action * * * shall be brought under section 1331"). Given the "strong presumption" that "Congress will specifically address preexisting law when it wishes to suspend its normal operations in a later statute," courts must presume Section 1331's grant of jurisdiction remains absent a clear and direct statement. Cf. *Epic Sys. Corp.* v. *Lewis*, 584 U.S. 497, 510 (2018) (cleaned up).

If, instead, courts give up jurisdiction without a clear command from Congress, they undermine the Constitution's tripartite structure of powers. After all, when one branch fails to jealously guard its position in the tripartite system, the other branches amass that power. Cf. *Free Enter. Fund* v. *PCAOB*, 561 U.S. 477, 501 (2010). Implied jurisdiction is no exception. See *Axon*, 598 U.S. at 208 (Gorsuch, J., concurring in the judgment). The same is true when the courts cede only their *primary* jurisdiction by declining to decide a ripe constitutional claim because it may, eventually, be subject to judicial review. Cf. *Elgin*, 567 U.S. at 5. In doing so, the courts remove themselves as the check on Executive excesses while giving agencies the first chance to decide issues that they are "obviously

[] unsuited" to resolve. See *Califano* v. *Sanders*, 430 U.S. 99, 109 (1977); see also *Carr* v. *Saul*, 593 U.S. 83, 93 (2021) ("It makes little sense to require litigants to present claims to adjudicators who are powerless to grant the relief requested.").

Against this backdrop, courts should not be declining jurisdiction based on free-floating factors. Courts' "job is to interpret the laws Congress has adopted." *Axon*, 598 U.S. at 209 (Gorsuch, J., concurring in the judgment). That means focusing on the text. This Court should make clear in its decision that the interpretation of jurisdictional statutes is no exception.

II. As a matter of constitutional avoidance, courts sometimes require a particularly clear statement of congressional intent to limit jurisdiction.

While, given the above, courts should require a clear statement as a matter of statutory interpretation, constitutional avoidance permits courts to infer that Congress *did not* strip jurisdiction absent a particularly clear statement of intent.

Jurisdictional limits that restrict the judiciary's ability to vindicate constitutional rights raise serious constitutional concerns. In *Crowell* v. *Benson*, for example, the Court observed that "[i]n cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function." 285 U.S. 22, 60 (1932); see also *Webster* v. *Doe*, 486 U.S. 592, 603 (1988) (A "'serious constitutional question' [] would arise if a federal statute were

construed to deny any judicial forum for a colorable constitutional claim."); *Johnson* v. *Robison*, 415 U.S. 361, 366 (1974) (barring review of constitutional claim would "raise serious questions concerning the constitutionality of § 211(a)"). So, for instance, in *McNary* v. *Haitian Refugee Center*, this Court permitted a constitutional challenge to an agency procedure to go forward in court despite a statutory limitation on judicial review. 498 U.S. 479, 497 (1991). The Court insisted that Congress must use "more expansive language" if it intends to preclude the courts' consideration of the constitutionality of agency processes. *Id.* at 494.

Thunder Basin invoked such constitutional-avoidance considerations when it stated that courts should ask whether limiting jurisdiction would prevent "meaningful judicial review." 510 U.S. at 212–213. The Court in *Thunder Basin* explained that "[t]his Court previously has upheld district court jurisdiction * * * where a finding of preclusion could foreclose all meaningful judicial review," *ibid.*, and cited a previous decision holding that "statutory language did not evidence an intent to preclude" judicial review where a contrary interpretation would mean "respondents would not as a practical matter be able to obtain meaningful judicial review," *id.* at 213 (quoting *McNary*, 498 U.S. at 496). This concern was a reason to *avoid* stripping jurisdiction—not a suggestion that courts should dismiss ripe constitutional claims whenever there's the potential of eventual judicial review.

These avoidance considerations are particularly weighty when constitutional issues arise in the

context of disputes that implicate traditional common law rights to life, liberty, and property—rights that this Court refers to as private rights. See *Axon*, 598 U.S. at 190–191; see also *id.* at 198 (Thomas, J., concurring). When government seeks to impose civil penalties, for instance, such cases should ordinarily proceed in Article III courts. See *SEC* v. *Jarkesy*, 603 U.S. 109 (2024). By declining to exercise their jurisdiction to enforce constitutional limits in such cases, courts compound the constitutional issues that arise when government adjudicates private rights outside Article III.

Even if judicial review is available at some later time, delayed consideration of claims affecting private rights can raise significant constitutional concerns. After all, a core aspect of due process is the right to a hearing at a meaningful time and in a meaningful manner. See *Fuentes* v. *Shevin*, 407 U.S. 67, 80–82 (1972). That opportunity is not meaningful if a litigant must first endure an unnecessary and unconstitutional administrative process that might never lead to judicial review. As this Court recently highlighted in *Axon*, litigants "lose their rights not to undergo the complained-of agency proceedings if they cannot assert those rights until the proceedings are over." 598 U.S. at 192; see also *Bond* v. *United States*, 564 U.S. 211, 222 (2011) ("[I]ndividuals sustain discrete, justiciable injury from actions that transgress separation-of-powers limitations.").

In many cases, particularly the type of cases that IJ litigates, where government seeks to impose fines or other monetary penalties, that constitutional deprivation is protracted and comes at great personal cost

to the person denied access to the judiciary. That cost "will deter many people from even trying to reach the court of law to which they are entitled." *Axon*, 598 U.S. at 215 (Gorsuch, J., concurring in the judgment). That result is unsurprising, as "[y]ears and fortunes are lost just figuring out where a case belongs." *Ibid.* A system that indefinitely delays consideration of constitutional claims does not provide the meaningful opportunity to be heard that due process requires.

Importantly, however, these concerns only run in one direction: While courts can legitimately avoid interpretations of jurisdictional statutes that would prevent "meaningful judicial review," *Thunder Basin*, 510 U.S. at 212–213, constitutional avoidance does not justify courts declining to exercise their jurisdiction based on a policy judgment that "meaningful judicial review" can be adequately secured in some other way or at some other time. After all, the exercise of jurisdiction does not raise any constitutional concerns that courts must avoid. And in the absence of such constitutional concerns, courts should confine themselves to ordinary principles of statutory interpretation—meaning, primarily, statutory text.

III. Lower courts cannot apply free-floating factors predictably.

Unfortunately, courts have lost sight of the need for clear statutory text to strip jurisdiction—and, instead, treat *Thunder Basin* (and this Court's later decision in *Elgin*) as a roving license to decline jurisdiction based on judges' policy views. Under this view of *Thunder Basin*, courts disclaim jurisdiction over constitutional claims when Congress has not clearly or

expressly stripped the courts of primary jurisdiction over constitutional claims.

Even worse, courts have seized on *Thunder Basin*'s recognition that courts should hesitate to restrict jurisdiction when doing so would foreclose "meaningful judicial review" and use it to restrict jurisdiction (without any attention to statutory text) if there's a chance that courts could decide the constitutional issues eventually. This Court's recognition that courts should exercise caution when limiting jurisdiction has, instead, become a way for courts to decline jurisdiction without congressional authorization.

Consider the application of *Thunder Basin* that this Court reversed in *Axon*. Despite this Court's earlier decision in *Free Enterprise Fund* rejecting jurisdiction stripping, 561 U.S. at 489–491, as well as the many other reasons not to infer jurisdiction stripping, the first six circuit courts to apply the *Thunder Basin* factors all favored abdication. See *Cochran* v. *SEC*, 969 F.3d 507 (5th Cir. 2020); *Bennett* v. *SEC*, 844 F.3d 174 (4th Cir. 2016); *Hill* v. *SEC*, 825 F.3d 1236 (11th Cir. 2016); *Tilton* v. *SEC*, 824 F.3d 276 (2d Cir. 2016); *Jarkesy* v. *SEC*, 803 F.3d 9 (D.C. Cir. 2015); *Bebo* v. *SEC*, 799 F.3d 765 (7th Cir. 2015). In other words, half the circuits applied the *Thunder Basin* factors, and each one declined to exercise jurisdiction until the Fifth Circuit went *en banc* in *Cochran*. 20 F.4th 194, 212 (5th Cir. 2021) (en banc).

Those decisions show how the *Thunder Basin* factors operate as a license for courts to deprive themselves of jurisdiction. Courts reason that the "meaningful review" factor favors jurisdiction stripping so long as there is some eventual opportunity for judicial

review. *Tilton*, 824 F.3d at 286–287; *Bebo*, 799 F.3d at 774; *Jarkesy*, 803 F.3d at 27. They reason that challenges to agency procedures are not "wholly collateral" because the point of any such challenge is to "prevail in the proceeding." *Tilton*, 824 F.3d at 288; see also *Jarkesy*, 803 F.3d at 23. And they hold that constitutional issues implicate "agency expertise" because those issues are embedded in regulatory schemes—or because other issues might moot the constitutional claim. *Jarkesy*, 803 F.3d at 29; see also *Tilton*, 824 F.3d at 290; *Bebo*, 799 F.3d at 772–773. Under this rationale, courts can withhold jurisdiction over challenges to almost any administrative scheme that eventually allows for judicial review when an agency action involves some other issue implicating the agency's expertise (so, all of them).

Post-*Axon*, lower courts have continued to infer jurisdiction stripping to dispose of claims based on policy factors disconnected from statutory text. See, *e.g.*, *VHS Acquisition Subsidiary No. 7* v. *NLRB*, 805 F. Supp. 3d 1, 7–9 (D.D.C. 2024); *Millennia Hous. Mgmt.* v. *HUD*, 783 F. Supp. 3d 1051, 1061–1066 (N.D. Ohio 2025); *NCRNC, LLC* v. *Kennedy*, 786 F. Supp. 3d 496, 502–508 (N.D.N.Y. 2025); *Lemelson* v. *SEC*, 793 F. Supp. 3d 1, 8 (D.D.C. 2025), *dismissed as moot*, No. 25-5208, 2026 WL 479090 (D.C. Cir. Feb. 17, 2026); *Nexstar Media, Inc. Grp.* v. *NLRB*, 746 F. Supp. 3d 464, 470–473 (N.D. Ohio 2024). These cases applied *Thunder Basin* in the context of agency action that implicates core private rights—namely, agency proceedings to impose monetary liability—and declined jurisdiction based on analysis of *Thunder Basin*'s multi-factor policymaking test.

As in cases decided before *Axon*, these courts still turn the "meaningful judicial review" factor on its head—treating that factor as a reason to decline jurisdiction whenever jurisdiction might instead be exercised through some other procedure at some other time. On this view, a litigant can be forced to proceed through an agency proceeding simply because judicial review may be available once that proceeding is over. See, *e.g.*, *VHS Acquisition*, 805 F. Supp. 3d at 8 (party "can contest any consequential damages at a circuit court"); *Millennia Hous.*, 783 F. Supp. 3d at 1065 ("[I]f the ALJ decides against Plaintiffs and imposes a monetary penalty, that decision may be appealed to the HUD Secretary and then to the appropriate court of appeals."); *NCRNC*, 786 F. Supp. 3d at 505 ("If the Second Circuit agrees with Plaintiff that the Seventh Amendment applies to CMPs * * * Plaintiff can ask the court to vacate the civil penalty order[.]"); *Lemelson*, 793 F. Supp. 3d at 8 ("If a court of appeals agrees with Lemelson's Seventh Amendment argument, he can ask that court to vacate the Commission's decision.").

These decisions flip the first *Thunder Basin* factor so it almost always favors declining jurisdiction. Indeed, one court has described a "chorus of post-*Jarkesy* district court opinions holding that the relevant statutory procedures for challenging final administrative orders provide a sufficient opportunity for 'meaningful review' of any Seventh Amendment defense." *Lemelson*, 793 F. Supp. 3d at 9–10 (cleaned up). Courts still reach this conclusion even though this Court in *Axon* held that "being subjected to unconstitutional agency authority—a proceeding by an unaccountable ALJ" is "a here-and-now injury" that is

"impossible to remedy once the proceeding is over" because a "proceeding that has already happened cannot be undone." 598 U.S. at 191 (cleaned up).

Similarly, in the hands of lower courts the "wholly collateral" factor can always be turned to support abdication of jurisdiction—as challenges to agency proceedings are always in some sense bound up with those proceedings. So, for instance, courts reason that Seventh Amendment challenges to agency proceedings are not "collateral" because the requirement to hold a jury trial arises at some point in the course of the agency proceeding. See, *e.g.*, *VHS Acquisition*, 805 F. Supp. 3d at 8 (reasoning that party was "protesting allegedly *ultra vires* actions taken in the underlying proceedings"); *NCRNC*, 786 F. Supp. 3d at 507 ("[T]he applicability—or inapplicability—of the Seventh Amendment is inextricably intertwined with the administrative process.").

The third *Thunder Basin* factor, "agency expertise," has likewise been applied to favor abdication of jurisdiction over constitutional claims. Some courts acknowledge that "questions of constitutional law fall outside the expertise of the administrative agencies," but they nonetheless reason that this factor cannot be "[t]aken literally," as on its face it "would create a far broader exception to statutory review." *Millenia Hous.*, 783 F. Supp. 3d at 1066; see also *NCRNC*, 786 F. Supp. 3d at 507; *Lemelson*, 793 F. Supp. 3d at 10. Other courts have found an agency has expertise by citing *Elgin* for the idea that agencies can decide constitutional questions, too. See *VHS Acquisition*, 805 F. Supp. 3d at 9.

These courts conclude that the agency-expertise factor applies so long as a constitutional question is in some way "intertwined with the question that is before the ALJ." *NCRNC*, 786 F. Supp. 3d at 507. On this view, agency expertise is implicated so long as "agency action might shed light on the constitutional question." *Lemelson*, 793 F. Supp. 3d at 10 (citation omitted). It should be no surprise then that these courts tend to find that an agency having expertise is a reason to decline jurisdiction.

The mischief caused by this policy-driven approach to jurisdiction is further illustrated by the Fourth Circuit's decision in *National Association of Immigration Judges* v. *Owen*, 139 F.4th 293, 305 (4th Cir. 2025), which held that the interpretation of one jurisdictional provision should be revised based on post-enactment developments that (in the Fourth Circuit's view) raised "questions as to whether the [statute's] adjudicatory scheme continues to function as intended." This Court recently reversed in a per curiam opinion, and Justice Thomas wrote separately to note that the Fourth Circuit's reasoning "bears little resemblance to legal interpretation." *Margolin* v. *Nat'l Ass'n of Immigr. Judges*, 608 U.S. __, 2026 WL 1463466, at *3 (May 26, 2026) (Thomas, J., concurring). Such free-floating policy analysis is, however, exactly what the *Thunder Basin* approach invites.

The malleability of *Thunder Basin* is confirmed, as well, by the briefing in this case. For the most part, the government (like Petitioner) has disclaimed reliance on the *Thunder Basin* factors, but the Brief in Opposition nonetheless discusses how the government thinks the factors work. See BIO 13–15. And it

does so in a way that echoes the type of analysis discussed above: According to the government, "meaningful judicial review" is available because the claims can be resolved later in the Federal Circuit; the claims are not "wholly collateral" because they bear on the outcome of the agency proceeding; and even "agency expertise" favors abdication of jurisdiction because the agency has "expertise on other matters" beyond the constitutional question directly at issue. *Ibid.* That is exactly the type of reasoning that the lower courts adopt when relying on *Thunder Basin* to abdicate jurisdiction.

IV. This case provides an opportunity to refocus courts' jurisdictional analysis on statutory text.

In this case, Petitioner argues that there is no need for this Court to apply the *Thunder Basin* factors, and that this Court should instead simply apply the relevant statutory text. See Op. Br. 37–38. At least at the cert stage, the government took the same tack. See BIO 13. As both parties thus appear to agree, the Court should take this case as an opportunity to refocus the jurisdictional analysis on statutory text, rather than policy balancing.

In doing so, moreover, the Court should make clear that balancing free-floating factors cannot limit the jurisdiction vested in the federal courts. Petitioner argues that *Thunder Basin* is inapplicable here because Congress has expressly addressed the scope of the courts' jurisdiction in 38 U.S.C. 511(a). See Op. Br. 37–38. And the government likewise suggests that *Thunder Basin* is inapplicable to a "statute (like the

VJRA) that *explicitly* precludes such jurisdiction." BIO 13 (emphasis in original). These arguments suggest that there is something special about the jurisdictional provisions at issue in this case that provides an extra reason to focus on statutory text. But, as explained above, statutory text should always be the focus of the Court's jurisdictional analysis, and this Court need not point to anything special about these statues to justify its reliance on the statutory text. The Court should instead make clear that it focuses on statutory text because that is always the appropriate focus.

It's time for a simplified approach. Courts should never infer that Congress stripped jurisdiction absent an express statutory command. Years of trying shows that lower courts cannot predictably balance three amorphous policy factors to speculate about whether they retain their jurisdiction over constitutional claims. A decision denouncing jurisdiction-stripping-by-policy-balancing would ensure that courts remain fully available to vindicate constitutional rights and would ensure that the political branches adhere to their structural constraints.

CONCLUSION

The Court should use its statutory analysis in this case to make clear that jurisdiction must turn on the text, not free-floating policy balancing.

Respectfully submitted,

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Jared McClain
Counsel of Record
Sophia Henderson
INSTITUTE FOR JUSTICE
901 N. Glebe Rd., Ste. 900
Arlington, VA 22203
(703) 682-9320
jmcclain@ij.org

Robert E. Johnson
INSTITUTE FOR JUSTICE
16781 Chagrin Blvd., #256
Shaker Heights, OH 44120

Counsel for Amicus Curiae