

No. 25-735

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IN THE  
Supreme Court of the United States

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FLOYD D. JOHNSON,  
*Petitioner,*

v.

UNITED STATES CONGRESS,  
*Respondent.*

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*ON WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT*

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**BRIEF AMICUS CURIAE OF THE  
NEW CIVIL LIBERTIES ALLIANCE  
IN SUPPORT OF PETITIONER**

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**INTEREST OF AMICUS CURIAE<sup>1</sup>**

The New Civil Liberties Alliance (“NCLA”) is a nonpartisan, nonprofit civil-rights organization devoted to defending constitutional freedoms from violations by the administrative state. The “civil liberties” of the organization’s name include rights at least as old as the U.S. Constitution itself: jury trial, due process of law, and the right to live under laws made by the nation’s elected lawmakers through constitutionally and statutorily prescribed channels, which is at stake in this appeal. Yet these selfsame rights are also very contemporary—and in dire need of renewed vindication—because Congress, federal administrative agencies, and even sometimes the courts have neglected them for so long.

NCLA aims to defend civil liberties—primarily by reasserting constitutional constraints on the administrative state. Although Americans still enjoy the shell of their Republic, there has developed within it a very different sort of government—a type, in fact, that the Constitution was designed to prevent. This unconstitutional administrative state within the

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<sup>1</sup> Pursuant to Rule 37.6, no party’s counsel authored any part of this brief. No person or entity, other than *amicus curiae* and its counsel, made any monetary contribution to fund the brief’s preparation or submission.

Constitution's United States is the focus of NCLA's concern.

NCLA therefore has a strong interest in the question presented. The government asks this Court to infer that Congress intended to preclude federal district courts from hearing constitutional challenges to veterans' benefits statutes. The language of the Veterans' Judicial Review Act (VJRA) does not support that result, and it would also be inconsistent with a series of other federal statutes. NCLA has a strong interest in ensuring that Courts preserve the separation of powers and protect access to the federal courts to litigate constitutional claims.

### **SUMMARY OF THE ARGUMENT**

By its terms, Section 511(a) of the VJRA channels only claims concerning decisions of the Department of Veterans Affairs (VA) under that statute—not standalone constitutional challenges to the statute itself. If interpreted as a jurisdiction-stripping provision, however, Section 511(a) would be unconstitutional.

Congress cannot delegate judicial power to the Executive Branch, because the Constitution vests judicial power in Article III courts alone. Congress lacks judicial power, and it may lawfully locate such power only in inferior Article III courts. Likewise, the Executive Branch is confined to the exercise of

executive power. No executive officer can constitutionally exercise the judicial power of the United States.

Since 1875, Congress has repeatedly and consistently shown that it considers constitutional challenges to federal statutes to be a distinct and important category of cases, which should generally be litigable in Article III courts. In the face of that rich history of statutory enactments, there is no basis to *infer* Congressional intent to channel such a constitutional challenge exclusively to an administrative forum in the absence of express language so dictating.

*Thunder Basin* and its progeny should be overruled or at least limited to cases that do not involve standalone constitutional challenges to statutes. *Thunder Basin* did not involve a constitutional challenge to a statute, and its broad language is *dicta* where a statute's constitutionality is to be decided. The *Elgin* Court erred by following *Thunder Basin* to find implied jurisdiction-stripping of a constitutional challenge in the civil service context. The longstanding statutory history channeling constitutional challenges to Article III courts was neither briefed nor argued in those cases. *Thunder Basin* also conflicts with other important precedents, including *Frontiero v. Richardson*.

## ARGUMENT

### I. THIS CASE SHOULD BE DECIDED BASED ON THE LANGUAGE OF THE VETERANS' JUDICIAL REVIEW ACT

As Petitioner ably shows, the language of the Veterans' Judicial Review Act (VJRA) does not require standalone constitutional challenges to the statute itself to be routed through administrative tribunals. The VJRA does not withdraw, neither expressly nor impliedly, Congress's grant of jurisdiction to federal district courts over "all civil actions arising under the Constitution." 28 U.S.C. § 1331. This result is supported by consideration of the language of the statute in question, 38 U.S.C. § 511(a) and its predecessor, 38 U.S.C. § 211(a). It is further supported by precedents including this Court's unanimous jurisdictional holding in *Johnson v. Robison*, 415 U.S. 361 (1974).

By its terms, Section 511(a) channels only claims concerning the VA's decisions "under" the VJRA—not standalone constitutional challenges to the VJRA itself. 38 U.S.C. § 511(a). It provides:

(a) The Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans.... Subject to subsection (b)

[providing for review in the Board of Veterans Appeals, Court of Appeals for Veterans Claims, and Federal Circuit], *the decision of the Secretary as to any such question* shall be final and conclusive and may not be reviewed by any other official or by any court....”).

38 U.S.C. § 511(a) (emphasis added). In other words, Section 511(a) channels review of decisions of the Secretary of the VA, not review of Congressional enactments.

If the Court rejects Petitioner’s argument and interprets Section 511(a) as a jurisdiction-stripping provision, then it must also reach the issue of whether that provision is constitutional. It is not. Congress cannot evade Article III’s requirements merely by stripping jurisdiction from an Article III court and reassigning it to an administrative agency tribunal. *SEC v. Jarkesy*, 603 U.S. 109 (2024). Were such a move to receive judicial blessing, both Article III and the duty of courts to enforce the Bill of Rights (such as the Seventh Amendment) would be drained of their functions. Further, the whole idea of the Constitution’s structural vesting of distinct powers in each branch would be eviscerated.

## II. CONGRESS CANNOT RELOCATE JUDICIAL POWER FROM FEDERAL COURTS TO AGENCIES

In *SEC v. Jarkesy*, 603 U.S. 109 (2024), the Supreme Court held that “the judicial Power of the United States cannot be shared with the other branches ... Article III could neither serve its purpose in the system of checks and balances nor preserve the integrity of judicial decisionmaking if the other branches of the Federal Government could confer the Government’s judicial Power on entities outside Article III ....” *See Jarkesy*, 603 U.S. at 127-132 (emphasis added) (citations omitted).

Article III of the Constitution provides: “The judicial power of the United States, shall be vested” in the courts. U.S. CONST. art. III, § 1. This phrase is significant. Relocating judicial power, even with explicit statutory authorization, violates Article III’s Vesting Clause, which allows the judicial power of the United States to be exercised only by courts created under that Article. Because only courts—and not Congress—possess “judicial power,” Congress cannot delegate a power it does not itself possess to any other branch. *Jarkesy* squarely forecloses the possibility of Congress’s permissibly divesting courts of Article III jurisdiction.

The principle that the Constitution unambiguously vests judicial power in courts resounds over centuries of case law, from *Marbury v.*

*Madison's* recognition of this demarcation—it is “emphatically the province and duty of the judicial department to say what the law is[.]” 5 U.S. (1 Cranch) 137, 177 (1803)—to cases such as *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995), where the Court held that § 27A of the Exchange Act of 1934 violated the separation of powers. (“Congress cannot vest review of the decisions of Article III courts in officials of the Executive Branch.”).

In *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat) 304 (1816), Justice Story emphasized that the vesting of judicial power in Article III courts is “manifestly designed to be mandatory upon the legislature. Its obligatory force is so imperative, that [C]ongress could not, without a violation of its duty, have refused to carry it into operation.” *Id.* at 328. And it is Congress’s “duty to vest the *whole judicial power*,” *id.* at 330 (emphasis in original), and to do so “in one supreme court, and in such inferior courts as congress may, from time to time, ordain and establish,” *id.* at 328, under Article III of the Constitution. The *Hunter's Lessee* Court was explicit: Congress cannot vest *judicial* power in any body other than courts created under Article III. *Id.* at 330. “[S]uch a construction ... would be utterly inadmissible.” *Id.*

To be sure, Congress has significant power over the organization and jurisdiction of the courts. Article III allows Congress to designate the location of part of

the judicial power—but only in “inferior *courts*,” not other bodies. Congress therefore cannot deposit *judicial* power in the BVA, the VA or any other administrative agency. *See id.* at 331 (Congress “might establish one or more inferior courts; [it] might parcel out the jurisdiction among such courts, from time to time, at [its] own pleasure. But the whole judicial power of the United States should be, at all times, vested either in an original or appellate form, in some courts created under [the United States] authority.”); Philip Hamburger, *Nondelegation Blues*, 91 *Geo. Wash. L. Rev.* 1083, 1110-12 (2023).

Because Article I empowers Congress to “constitute Tribunals inferior to the Supreme Court,” U.S. CONST., art. I, § 8 cl. 9, it might be thought that Congress could place the judicial power in “Tribunals” within administrative agencies, which are not inferior courts. But this notion confuses the “courts,” which exercise the judicial power of the United States, with the host of tribunals that do not and cannot exercise that judicial power, such as territorial and District of Columbia courts, which exercise the judicial power, respectively, of the territories and of that district, not that of the United States.<sup>2</sup>

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<sup>2</sup> Congress also has the power to establish a non-Article III court such as the Court of Federal Claims, but only because the United States has sovereign immunity, and may waive it on such terms

This separate power to constitute tribunals does not empower Congress to relocate the judicial power of the United States in bodies that are not inferior courts, such as executive agencies. In *Stern v. Marshall*, the Supreme Court stated that “Article III could neither serve its purpose ... nor preserve the integrity of judicial decisionmaking if the other branches of the Federal Government could confer the Government’s ‘judicial power’ on entities outside Article III.” *Stern v. Marshall*, 564 U.S. 462, 484 (2011). Congress simply cannot shift judicial power from one branch to another—especially not to the prosecutor! That danger was expressly articulated at the Founding. “[T]here is no liberty, if the power of judging be not separated from the legislative and executive powers.” The Federalist No. 78, at 523 (Alexander Hamilton) (Cooke ed. 1961).

**III. SINCE 1875, CONGRESS HAS EXPRESSED ITS LONGSTANDING AND PERSISTENT INTENT THAT CONSTITUTIONAL CHALLENGES OF FEDERAL LAWS BE LITIGATED IN ARTICLE III COURTS**

Over the past 150 years, Congress passed numerous laws specifically addressing constitutional

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as it deems fit. See, e.g., *Stern v. Marshall*, 564 U.S. 462, 489 (2011), *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1856).

challenges to federal statutes as a distinct category of cases, and then *expressly channeling* them. Without exception, through many reformulations and over many decades, these laws channeled such challenges *within* the Article III court system, to federal courts rather than administrative tribunals.

Of course, Congress has passed specific laws from time to time explicitly channeling review of certain issues to administrative tribunals or purporting to strip Article III courts of specific pieces of jurisdiction. *See, e.g.*, Emergency Price Control Act of 1942, ch. 26, § 204, 56 Stat 23 (Providing that price regulations under the Act could only be challenged by timely protest to agency Administrator, with direct right of appeal to a newly created three-judge Article III Emergency Court of Appeals with all the powers of a district court, save the power to issue an injunction against the Act or any price schedule thereunder). *See also Lockerty v. Phillips*, 319 U.S. 182 (1943) (upholding Section 204's channeling and jurisdiction stripping provisions). However, explicit, subject-matter-specific channeling provisions tethered to a particular statute are different. The chronology below covers a series of laws treating injunctive and constitutional challenges to statutes as their own distinctive category of cases and channeling them to different types of Article III courts.

It all started with federal question jurisdiction. Under the Constitution, the permissible scope of federal court jurisdiction extends to, *inter alia*, all cases arising under the Constitution and the laws of the United States. U.S. CONST. art. III, § 2. In 1875, Congress passed the Jurisdiction and Removal Act, granting federal question jurisdiction almost co-extensive with that permitted by Article III. It stated that “the circuit courts of the United States *shall* have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds ... five hundred dollars, and *arising under the Constitution* or laws of the United States ...” Jurisdiction and Removal Act of 1875, ch. 137, § 1, 18 Stat. 470 (emphasis added). Later, Congress raised the amount in controversy requirement, before eliminating it in 1980. Act of July 25, 1958, Pub. L. No. 85-554, 7 Stat. 415; Act of October 1, 1976, Pub. L. No. 94-574, § 2, 90 Stat. 2721; Federal Question Jurisdictional Amendments Act of 1980, Pub. L. No. 96-486, 94 Stat. 2369. Today, the federal question jurisdiction statute provides that “district courts *shall* have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.” 28 U.S.C. § 1331 (emphasis added). As Justice Gorsuch has pointed out: “Not *may* have jurisdiction, but *shall*. Not *some* civil actions arising under federal law, but *all*. The federal question

statute is as clear as statutes get[.]” *Axon Enterprise v. FTC and SEC v. Cochran*, 598 U.S. 175, 205 (2023) (Gorsuch, J., concurring).

In 1891, Congress passed the Evarts Act, establishing the modern United States Circuit Courts of Appeals. The Evarts Act carved out some exceptions to the general appellate jurisdiction of the Courts of Appeal by mandating that certain specific, highly significant cases continue to be appealed directly from federal trial courts to the U.S. Supreme Court. Evarts Act, ch. 517, § 5, 26 Stat. 826 (1891). These significant cases included “any case in which the constitutionality of any law of the United States ... is drawn into question.” *Id.*

In 1908, the Supreme Court decided *Ex parte Young*, 209 U.S. 123 (1908), a case involving state railroad tariffs. The *Ex parte Young* Court upheld the power of federal district judges to enjoin the application of state statutes and regulations as violative of the U.S. Constitution. *Ex parte Young*, 209 U.S. at 159. In the decision’s aftermath, many federal district judges granted injunctions against the enforcement of state laws involving railroads, often rapidly and without notice to state officials. 122 Cong. Rec. 8144 (1976). In response, Congress sought to curb these perceived abuses.

The Mann-Elkins Act of 1910 withdrew the authority of any federal justice or judge, acting alone,

to grant an injunction of a state law on federal constitutional grounds. Mann-Elkins Act of 1910, ch. 309, § 17, 61st Cong. 539, 557, Pub. L. No. 61-218, 36 Stat. 539 (1910). Instead, such an injunction could be granted only by majority vote of a panel of three Article III judges (at least one of whom was required to be a Supreme Court justice or circuit judge). *Id.* Appeals from orders of three-judge courts granting or denying interlocutory injunctions in such injunctive cases could be taken directly to the United States Supreme Court as a matter of right. *Id.*

In the Judicial Reform Act of 1937, Congress extended the three-judge court structure to cases seeking injunctions against the application of *federal* statutes on constitutional grounds. Judicial Reform Act of 1937, ch. 754, § 3, 50 Stat. 751. That provision was initially codified at 28 U.S.C. § 380a. The Act required the U.S. Attorney General to be notified of such suits when the United States was not already a party and gave the United States the option to intervene as a party and litigate the constitutionality of the challenged statute. *Id.* Decisions of three-judge courts in cases seeking injunctive relief from federal statutes on constitutional grounds could be appealed directly by right to the Supreme Court on an expedited basis, where they took precedence over all other types of cases. *Id.* at § 2.

Also in 1937, Congress authorized direct appeal to the Supreme Court of *any* federal court decision invalidating an Act of Congress on constitutional grounds, so long as the United States was a party to the suit. *Id.* This provision was not limited to injunctive actions. *See Id.* When the Judicial Code was overhauled in 1948, this law was codified at 28 U.S.C. § 1252. Procedures for three-judge panels were later codified at 28 U.S.C. § 2284. Requirements that injunctive actions asserting constitutional challenges to state and federal statutes go to such panels were codified at 28 U.S.C. §§ 2281 and 2282, respectively.

In 1976, Congress repealed Sections 2281 and 2282, restoring the authority of single federal district judges, acting alone, to hear injunctive actions alleging the unconstitutionality of state and federal statutes. Act of Aug. 12, 1976, Pub. L. No. 94-381, §§ 1-2, 90 Stat. 1119. Three-judge courts were left intact for reapportionment cases. *Id.* at § 3.

Ultimately, the abandonment of the three-judge panel structure for constitutional challenges to statutes was about increasing judicial efficiency and streamlining court operations. S. Rep. No. 94-204, at 4 (1975) (detailing travel required of the extra judges); H.R. Rep. No. 94-1379, at 4 (1976) (“The scarce judicial manpower of the nation is inefficiently used by requiring three judges to convene for work that could be performed by one[.]”). *See also* 122 Cong. Rec.

8143 (1976) (“The circumstances giving rise to the three-judge court statute have disappeared, and States no longer required this kind of protection from the arbitrary actions of a single judge.”)

The repeal of Sections 2281 and 2282 in 1976 didn’t affect 28 U.S.C. § 1252, which still authorized direct appeal to the U.S. Supreme Court of *any* federal court decision holding an act of Congress unconstitutional. That law was repealed in 1988, as part of the continuing shift to discretionary *certiorari* review to relieve the Supreme Court’s burdensome caseload. Supreme Court Case Selections Act of 1988, Pub. L. 100-352, § 1, 102 Stat. 662. Thus, since 1988, Congress has explicitly channeled constitutional challenges to federal statutes back to the regular pathway for Article III cases, bringing them full circle to where they were at the time of *Ex parte Young*. Constitutional challenges are now channeled no differently from other federal question jurisdiction cases under 28 U.S.C. § 1331.

Congress is presumed to be aware of the existing “statutory landscape” and contemporary legal context when it passes a law. *Cannon v. University of Chicago*, 441 U.S. 677 (1979). In light of the statutory history discussed above, it has never made sense for the Court to read into *any* statutory scheme an implied provision stripping trial-level Article III federal courts of jurisdiction to hear standalone

constitutional challenges. Instead, Congress clearly viewed such challenges, generally, as comprising a distinctive and weighty case category, without regard to the specific statutory scheme from which they arose. Whenever Congress explicitly channeled this entire category—injunctive and/or constitutional challenges to federal statutes—it was to various types of Article III courts, never to administrative tribunals.

**IV. THUNDER BASIN AND ITS PROGENY SHOULD BE OVERRULED, AT LEAST INsofar AS THEY APPLY TO STANDALONE CONSTITUTIONAL CHALLENGES OF CONGRESSIONAL STATUTES**

In holding that it lacked jurisdiction to reach the merits of Johnson’s constitutional claim, the Eleventh Circuit Court of Appeals relied on the analytical framework set forth in this Court’s opinion in *Elgin v. Dep’t of the Treasury*, 567 U.S. 1, 9-10 (2012). See *Johnson v. United States Congress*, 151 F.4th 1287, 1293-1295 (2025). *Elgin*, in turn, relied upon and applied this Court’s opinion in *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994). As described below, the logic of *Thunder Basin* and its progeny is deeply flawed as applied to standalone constitutional challenges, and the holdings of those cases should be overturned or cabined in that context.

**A. The Facts of *Thunder Basin* Did Not Support the Broad Wording of the Court’s Opinion in that Case, Much of Which Is Dicta**

In *Thunder Basin*, a coal strip-mine operator sued challenging a *regulation* by the Mine Safety and Health Administration (MSHA) on the ground that it interfered with the mine operator’s *statutory* right under the National Labor Relations Act to exclude union organizers from its property. *Thunder Basin* at 205; 30 CFR § 40.4. It sought a preemptive injunction against MSHA enforcement of the regulation, which required the mining company to post the names and contact information of certain miners’ representatives at the mine. *Thunder Basin*, 510 U.S. at 205.

The *Thunder Basin* Court discussed the provisions of the Federal Mine Safety and Health Act of 1977 (“Mine Act”) in detail. *Id.* at 207. The Mine Act expressly channeled challenges by mine operators to agency enforcement proceedings through the Federal Mine Safety and Health Review Commission, with a deferred, deferential review in federal courts of appeal. *Id.* at 207-208. However, it was facially silent as to whether litigants could bring pre-enforcement challenges to it in federal district court. *Id.* at 208.

Nonetheless, the *Thunder Basin* Court held that the Mine Act’s statutory review scheme “prevents a district court from exercising subject-matter

jurisdiction over a pre-enforcement challenge to the Act.” *Id.* at 202. The Court did not distinguish between types of pre-enforcement challenges. By wording the holding in such confusingly overbroad terms, it obscured crucial differences between statutory and constitutional federal question claims. Those differences were not briefed by the parties in *Thunder Basin*, nor discussed at oral argument. The Court explained its reasoning as follows:

In cases involving delayed judicial review of final agency actions, we shall find that Congress has allocated initial review to an administrative body where such intent is “fairly discernible in the statutory scheme.” Whether a statute is intended to preclude initial judicial review is determined from the statute’s language, structure, and purpose, its legislative history, and whether the claims can be afforded meaningful review.

*Id.* at 207 (internal citations omitted). These considerations became the *Thunder Basin* factors.

Justices Scalia and Thomas concurred in the judgment, writing separately to stress that under the Mine Act channeling provisions, “the penalty for non-compliance can only be imposed in court[.]” *Id.* at 219-221 (Scalia, J., joined by Thomas, J., concurring).

“Were it otherwise,” they reasoned, “the availability of pre-enforcement challenges would have to be the rule rather than the exception, since complying with a regulation later held invalid almost *always* produces the irreparable harm of nonrecoverable compliance costs.” *Id.* The concurrence noted that delayed judicial review of the due process claim was sufficient.

Since then, the *Thunder Basin* doctrine has drawn powerful criticism—for many good reasons. *See, e.g., Axon/Cochran*, 598 U.S. 175, 204-217 (2023) (Gorsuch, J., concurring) (enumerating lengthy list of problems with “*Thunder Basin* project”). *See also* Adam Katz, Note, *Eventual Judicial Review*, 118 COL. L. REV. 1139, 1153 (2018) (equating meaningful and eventual judicial review under *Thunder Basin* unwisely limits the ability of Article III courts to monitor agency constitutionality, and courts should employ standard injunction analysis instead). Nonetheless, courts continue to (mis)apply the broad language of *Thunder Basin* to imply jurisdiction-stripping in a wide variety of settings—including constitutional challenges to statutes that are fundamentally different from the statutory challenge to a regulation originally before the Court in *Thunder Basin*.

Many federal appellate courts have wielded *Thunder Basin* as a sword in recent years, to keep

would-be litigants from having the opportunity to have their claims timely considered on the merits in Article III courts. *See, e.g., Tilton v. SEC*, 824 F.3d 276 (2d Cir. 2016) (federal district court had no subject-matter jurisdiction to hear claim that SEC ALJs were unconstitutionally appointed), *cert. denied*, 582 U.S. 1007 (2017); *accord Bennett v. SEC*, 844 F.3d 174 (4th Cir. 2016); *accord Bebo v. SEC*, 799 F.3d 765 (7th Cir. 2015), *cert. denied*, 577 U.S. 1236 (2016); *accord Hill v. SEC*, 825 F.3d 1236 (11th Cir. 2016); *accord Jarkesy v. SEC*, 803 F.3d 9 (D.C. Cir. 2015); *accord Cochran v. SEC*, 978 F.3d 975 (5th Cir. 2020), *aff'd in part and rev'd in part, en banc*, 20 F.4th 194 (5th Cir. 2021). *See also Axon Enterprise, Inc. v. FTC*, 986 F.3d 1173 (9th Cir. 2021) (Congress divested federal district court of subject-matter jurisdiction to enjoin FTC enforcement action by creating alternative review scheme bypassing district courts and vesting judicial review of agency action in courts of appeals), *rev'd, Axon/Cochran*, 598 U.S. 175 (2023). In *Axon/Cochran*, the Supreme Court unanimously overruled all those precedents, because, as Justice Kagan explained, channeling the constitutional claims through administrative agency determination was “too late to be meaningful[.]” *Axon/Cochran*, 598 U.S. at 191 (2023). The constitutional harm was permanent, unreviewable and irremediable for those litigants.

**B. The *Elgin* Court Erred by Applying  
*Thunder Basin* to a Standalone  
Constitutional Challenge**

In *Elgin*, this Court relied on *Thunder Basin* to find that district courts had no jurisdiction to hear a constitutional challenge to 5 U.S.C. § 3328, which precludes men who have not registered for the draft from working in Executive Branch agencies. *Elgin*, 567 U.S. 1, 7 (2012). Claimants, male non-registrants fired for their status, had argued that the statute was facially unconstitutional because it discriminated on the basis of sex and functioned as a bill of attainder. *Id.* The district court dismissed the former employees' claims on the merits. *Id.* at 8. The First Circuit Court of Appeals vacated, remanding with instructions to dismiss the claims for lack of jurisdiction. *Id.* Relying heavily on overbroad language in *Thunder Basin*, the majority affirmed, finding the text and structure of the CSRA to support implied preclusion of district court jurisdiction over petitioners' claims. *Id.* at 11-12. The majority noted that petitioners sought to carve out an exception "for facial or as-applied constitutional challenges to federal statutes," but found no support *in the language of the CSRA* for such an exception. *Id.* at 12-13 (emphasis added).

But the majority looked in the wrong place for such support. Had it looked instead to the 150 years of statutory history discussed above, it would have

found ample support for petitioners' position. Sadly, the parties never raised that statutory history in their briefing, nor was it discussed at oral argument.

Justices Alito, Ginsburg and Kagan dissented. Applying the *Thunder Basin* framework, they pointed out the practical absurdities that would be created by channeling facial constitutional claims through the Merit Systems Protection Board ("MSPB") (which was powerless to adjudicate them) to the Federal Circuit (which could not take evidence on them). *Elgin*, 567 U.S. at 24-26, 32-33 (2012) (Alito, J., joined by Ginsburg & Kagan, JJ., dissenting). They noted that *Thunder Basin* had involved statutory rather than constitutional claims but did not argue that fact should remove *Elgin* from the *Thunder Basin* doctrine. *Id.* at 31-32. Instead, they argued the *Thunder Basin* factors cut against finding implied jurisdiction-stripping because the constitutional claims at issue were outside the MSPB's area of expertise and wholly collateral to the type of dispute the agency was authorized to hear. *Id.* at 26.

Recent holdings of this Court call into question other aspects of *Elgin*. *Elgin* says this Court has left open the question "whether the oft-stated principle that agencies cannot declare a statute unconstitutional is truly a matter of jurisdiction." *Elgin*, 567 U.S. at 17. That observation fails to take into account this Court's unanimous jurisdictional

holding in *Free Enter. Fund v. PCAOB*, 561 U.S. 477 (2010): “Petitioners’ constitutional claims are also outside the Commission’s *competence* and expertise.” (emphasis added). More recently, that jurisdictional holding was unanimously reaffirmed in *Axon/Cochran*: “Axon’s constitutional challenge to the combination of prosecutorial and adjudicative functions is of a piece—similarly distant from the FTC’s ‘competence and expertise.’” *Axon/Cochran*, 598 U.S. at 194. “The Commission knows a good deal about competition policy, but nothing special about the separation of powers. For that reason, ... ‘agency adjudications are generally ill suited to address structural constitutional challenges’—like those maintained here.” *Id.* at 194-95 (citations omitted).

In short, it is too late in the day to consider this an open question. To the extent that *Thunder Basin* or *Elgin* has been interpreted otherwise, this court should end that confusion.

And *Axon* tells us that there can be no meaningful judicial review.

**C. The *Thunder Basin* and *Elgin* Courts Overlooked Statutory History Showing Congress Expressly Channeled Constitutional Challenges to Federal Statutes into Article III Courts, Not Administrative Forums**

The *Thunder Basin* and *Elgin* Courts didn't find language expressly channeling standalone constitutional challenges to Congressional statutes to Article III courts, because they weren't looking in the right place. That language isn't in the Mine Act, the CSRA or the VJRA. Instead, as shown above, it's in a venerable series of statutes passed throughout the nineteenth and twentieth centuries. Those statutes were all previously codified in Title 28 of the U.S. Code, but through a quirk of how codification works, most of them aren't there anymore. This is not because Congress wanted to channel constitutional challenges to administrative tribunals—it didn't. Ironically, it is because Congress sought to make federal district courts *more* open to such cases and make their appeal processes *more routine*. Unless the relevant session laws are reviewed chronologically, Congress's strong pattern of always explicitly channeling constitutional challenges of statutes to Article III Courts, rather than administrative tribunals, is hard to see.

#### **D. *Thunder Basin* Conflicts with Other Important Precedents**

If the *Thunder Basin* factors were truly jurisdictional, all federal courts would be obliged to analyze them in every case with the possibility of parallel agency proceedings, *sua sponte*. *Axon/Cochran*, 598 U.S. at 209 n. 2 (2023) (Gorsuch, J., concurring). Of course, the Court has not done so.

Petitioner's brief cites *Frontiero v. Richardson*, which famously announced the intermediate scrutiny standard for sex discrimination claims under the Equal Protection Clause. *See Frontiero v. Richardson*, 411 U.S. 677 (1973). Notably, the Court would never have reached the merits of that landmark case if it had applied a *Thunder Basin* type analysis.

*Frontiero* was a standalone constitutional challenge under 28 U.S.C. § 1331 to two statutes concerning military pay, which worked together to discriminate against female servicemembers. One gave male servicemembers a "with dependent rate" pay allowance upon proof of marriage; the other required female servicemembers to show that their husbands were economically dependent on them before they could collect the same allowance.

At that time, statutes had already channeled military pay disputes to administrative tribunals. *See* 31 U.S.C. §§ 71, 74 and 82(d) (1970); (General

Accounting Office had authority to settle and adjust claims against the U.S. Government, implementing Comptroller General decisions); 10 U.S.C. § 1552 (1970) (Board of Correction of Military Records (BCMR) had authority to correct erroneous determinations of whether service members had dependents, and direct retroactive payment of pay and benefits accordingly); and 28 U.S.C. § 1491 (1970) (United States Court of Claims had jurisdiction under the Tucker Act to hear claims against the United States, including concerning military records and pay). Although the government vigorously litigated Lieutenant Frontiero's case and asserted multiple defenses to her claims, neither it nor the Courts themselves raised a *Thunder Basin* style jurisdiction-stripping argument.

And, why would they have? To do so would have been absurd. The litigants and the Courts alike were immersed in Congress's express channeling of constitutional claims about federal statutes to specific types of Article III courts. The parties litigated the case to a three-judge court under Section 2282, and went before the Supreme Court on direct appeal rather than a *writ of certiorari*.

## CONCLUSION

For all the reasons discussed above and in Petitioner's brief, the decision of the Eleventh Circuit Court of Appeals should be reversed and the case remanded to the district court. Further, the district court should be instructed to allow Johnson to amend the complaint to substitute the Secretary of the VA as the defendant and then address the merits of Johnson's standalone constitutional challenge to 38 U.S.C. § 5313(a)(1).

Respectfully submitted,

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