

In the Supreme Court of the United States

JEFFREY MOATS,

Petitioner,

v.

NATIONAL CREDIT UNION
ADMINISTRATION BOARD, ET AL.,

Respondents.

*On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit*

**REPLY IN SUPPORT OF PETITION FOR
A WRIT OF CERTIORARI**

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INTRODUCTION

The government’s brief largely sidesteps the questions presented, reducing the case to a narrow dispute to make it appear unworthy of review. But this case presents a straightforward and recurring question: whether Congress may require a litigant alleging a present structural constitutional injury to endure an unconstitutional proceeding before any Article III court may hear his claim. Rather than answering that question, the government recasts this case as an ordinary dispute about channeling review of agency decisions and repeatedly explains that Petitioner Jeffrey Moats may seek review of an eventual agency order. But *Axon* distinguished those two injuries. Moats does not challenge “this or that ruling.” *Axon Enter., Inc. v. FTC*, 598 U.S. 175, 195 (2023). He challenges his “subjection to all agency authority.” *Ibid.* The government never explains why review of an eventual order remedies that distinct injury.

On the statutory question, the government insists that 12 U.S.C. § 1786(k)(1)’s use of jurisdictional language ends the analysis. But that does not answer the question presented. The statute bars courts from reviewing and setting aside agency notices and orders. Moats does not challenge any notice or order. He challenges the constitutional authority of the tribunal itself. And the government offers no reason why that antecedent challenge falls within § 1786(k)(1)’s text. The statute does not contain any language addressing constitutional claims, agency structure, agency authority, or 28 U.S.C. § 1331. Its argument thus rests entirely on a wooden reading of the statute.

The government's constitutional argument fares no better. It never engages with the injury Moats actually alleges. He does not complain about litigation costs, delay, or the risk of an adverse outcome. He alleges a present constitutional injury from being haled before an unlawful tribunal in the first place. This Court has repeatedly recognized that such an injury is complete once the proceeding begins. And this Court has never held that Congress may force a litigant to suffer that injury before any court may decide whether the proceeding is lawful.

At a bare minimum, this Court should hold this petition until it decides *Johnson v. United States Congress*, No. 25-735. *Johnson* addresses whether a specialized statutory review scheme can foreclose district-court jurisdiction over constitutional claims arising under the Equal Protection and Bill of Attainder Clauses. Holding this petition pending *Johnson* is particularly appropriate because this Court has already twice rejected the view that such statutes strip structural constitutional claims from federal district courts. Thus, a decision for the petitioner in *Johnson* could substantially resolve the jurisdictional issue here, while a decision against the petitioner would still leave open the distinct question whether such schemes can foreclose district-court jurisdiction over structural constitutional claims. But the far better course is to grant certiorari now and let Moats obtain effective judicial review.

ARGUMENT

I. The Court Should Grant Certiorari To Decide Whether Congress Explicitly Stripped District Courts Of Jurisdiction Over Structural Constitutional Challenges

The government’s entire statutory argument rests on a single move: label § 1786(k)(1) as an “express” preclusion provision so that *Axon* and *Free Enterprise Fund* drop out of the analysis. BIO.7-9. On that view, once a court encounters jurisdiction-stripping language, its work is over. BIO.6. The government treats structural constitutional claims the same as garden-variety challenges because the statute does not distinguish between them and, according to the government, courts need not either. But that simply assumes the very point in dispute. The question is whether § 1786(k)(1) reaches structural constitutional claims in the first place.

The government’s argument bypasses that threshold inquiry. Section 1786(k)(1) does not broadly prohibit all suits relating to NCUA proceedings. It bars courts from “review[ing], modify[ing], suspend[ing], terminat[ing], or set[ting] aside” any notice or order issued under 12 U.S.C. § 1786 or § 1790d. 12 U.S.C. § 1786(k)(1). Every operative verb concerns judicial review of agency action on the merits. A court “reviews,” “modifies,” and “sets aside” an order by evaluating whether the agency properly exercised its authority in a particular case. Moats seeks none of those things. He does not contend that NCUA misapplied the law, reached the wrong result, or improperly exercised authority Congress validly conferred. Instead, he argues that the tribunal exercising that authority is unconstitutionally structured and thus lacks authority to

proceed. That challenge exists independently of any notice or order eventually issued. The government never explains how a challenge to the tribunal’s constitutional authority becomes a challenge to an agency notice or order.

The statute’s own language reinforces that distinction. Section 1786(k)(1) repeatedly ties its jurisdictional bar to notices and orders issued “under this section or section 1790d.” That language presupposes that the agency lawfully exercised the authority those provisions confer. Because the proceeding is constitutionally defective from the outset, the antecedent question is whether the agency may invoke those statutory powers at all. Nothing in § 1786(k)(1) clearly addresses that question.

Unable to locate structural claims in the statute, the government relies on labels. It characterizes § 1786(k)(1) as an “express” preclusion provision and treats that label as dispositive. BIO.7-9. But neither *Axon* nor *Free Enterprise Fund* turned on a formal distinction between express and implicit preclusion. Both confronted comprehensive review schemes and asked whether the claim asserted was the sort of claim Congress intended to funnel through the administrative review process. See *Axon*, 598 U.S. at 186; *Free Enterprise Fund v. PCAOB*, 561 U.S. 477, 489 (2010). The government offers no principled reason why different jurisdictional phrasing should change that inquiry. Under *Axon*, a litigant suffers injury from “subjection to all agency authority,” 598 U.S. at 195, regardless of whether Congress channels review to a court of appeals after a party “follow[s] the agency’s own review process,” *id.* at 185, or provides that “no court shall have jurisdiction” to interfere with agency proceedings, § 1786(k)(1). The nature of the claim

does not change with the syntax of the statute. Yet under the government’s approach, the protections recognized in *Axon* and *Free Enterprise Fund* vanish whenever Congress phrases a channeling provision as a jurisdictional prohibition.

The government’s remaining authorities do not support that result. It cites *MCorp Financial*, BIO.7-8, but that case involved a conventional challenge to an agency order, not a structural constitutional claim. *Bd. of Governors of Fed. Rsrv. Sys. v. MCorp Fin. Inc.*, 502 U.S. 32, 44 (1991); see Pet.21. *Elgin v. Dep’t of Treasury*, 567 U.S. 1 (2012) is similarly inapposite. Pet.21. Federal employees seeking reinstatement fell squarely within the review scheme Congress had established—unlike a claim that the government lacks constitutional authority to subject a regulated party to the proceeding in the first place. Pet.21.

Nor does the government have an answer to the nature of Moats’s injury. It emphasizes that a court of appeals can review final NCUA orders. BIO.8-10. But that assumes the very point in dispute: that reviewing an order later can substitute for reviewing now a claim that the agency lacked authority to act at all. It cannot. As explained in Part II, *Axon* draws a sharp line between injuries that later review can cure and injuries—like this one—that it cannot. 598 U.S. at 191-96.

In the end, the government’s position would allow Congress to eliminate the protections recognized in *Axon* and *Free Enterprise Fund* simply by changing the form of its jurisdictional language. This Court’s cases do not permit such an easy end run around

structural constitutional review. The Court should reject the Fifth Circuit’s contrary reading and grant the petition.

II. The Court Should Grant Certiorari To Decide Whether Congress May Strip District Courts Of Jurisdiction Over Structural Constitutional Claims

Even if Section 1786(k)(1) were clear enough to explicitly strip jurisdiction, the government’s construction would create the very constitutional problem that this Court’s cases have consistently avoided. Pet.26-29. It never engages with the injury Moats actually alleges. Instead, it treats this case as though Moats were complaining about the ordinary burdens of litigation. But Moats is not claiming that the NCUA proceeding is merely costly or inconvenient. His claim is that subjection to a tribunal he contends is unconstitutionally structured is itself the injury—regardless of outcome. That injury is complete the moment the proceeding begins and cannot be undone by anything that happens afterward.

This Court has repeatedly explained that fact. Such proceedings, this Court has said, cause a “here-and-now injury” to affected parties. *Seila Law LLC v. CFPB*, 591 U.S. 197, 212 (2020) (citation modified). *Axon* rests on the same premise, distinguishing injuries arising from “this or that ruling” from injuries arising from “subjection to all agency authority.” 598 U.S. at 195. Eventual review of a final agency order cannot remedy that injury because, by the time that review arrives, the asserted harm has already occurred. *Id.* at 191-92.

The government’s response underscores the problem. It argues that both *Lucia v. SEC*, 585 U.S. 237

(2018), and *SEC v. Jarkesy*, 603 U.S. 109 (2024), show that later appellate review is adequate because the petitioners ultimately obtained relief from adverse agency determinations. BIO.9-10. But neither petitioner obtained—nor could have obtained—relief from being subjected to the challenged proceeding itself. Those cases therefore do not establish that later review can cure the distinct injury alleged here. Indeed, in post-*Axon* litigation, the government has acknowledged that ordinary administrative review is often “ill equipped to hear” Seventh Amendment and ALJ-removal challenges and has affirmatively pointed litigants to federal district court as the appropriate forum for these claims. Complainant’s Response to Respondents’ Motion for Dismissal, *In re Jammi Wilson*, Docket No. 24-J-0029, at 6-8 (U.S. Dep’t Agric. May 2, 2025) (arguing “*Axon* provides Respondents an alternative forum to adjudicate the constitutional challenges raised in their Motion for Dismissal”). That position is difficult to reconcile with the government’s argument here that post hoc appellate review is sufficient.

The right at stake here is thus not a preference for one forum over another. It is a right that, like immunity from suit, is destroyed rather than delayed absent immediate judicial review. Pet.27. If Moats is correct that the NCUA lacks constitutional authority to hale him before its tribunal, no court of appeals can restore the right never to have been hauled before that tribunal once the proceeding has run its course. *Seila Law*, 591 U.S. at 212; *Collins v. Yellen*, 594 U.S. 220, 253 (2021). The government therefore never explains what remedy remains when judicial review comes only after the challenged proceeding has already inflicted the asserted injury.

The government's attempt to chip away at other precedents similarly fails. It quotes *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991), for the proposition that Congress "could easily" have "used broader language" to channel review. BIO.10 (quoting 498 U.S. at 494). But that statement had nothing to do with whether Congress may constitutionally require plaintiffs to await the conclusion of individual proceedings before obtaining review. The Court was addressing a threshold statutory-interpretation question about whether 8 C.F.R. § 210(e)'s reference to review of "a determination" was broad enough to encompass the plaintiffs' procedural and practice-based challenges. *McNary*, 498 U.S. at 491-92. The Court answered no, contrasting § 210(e)'s narrow language with other statutes Congress had drafted to sweep more broadly. *Id.* at 494. Having concluded that § 210(e) did not reach the plaintiffs' claims in the first place, the Court did not decide whether Congress could constitutionally channel such claims through individual proceedings and postpone review until those proceedings concluded. Indeed, when the Court later confronted the adequacy of exactly that kind of channeling for the plaintiffs' systemic claim, it held that requiring review through individual proceedings would be "tantamount to a complete denial of judicial review." *Id.* at 496-97. The government does not address this holding at all.

The government's attempt to cabin *Robison* and *Salfi* to statutes that eliminate all review, BIO.10-11, also doesn't work. See *Johnson v. Robison*, 415 U.S. 361 (1974); *Weinberger v. Salfi*, 422 U.S. 749 (1975). The constitutional concern in both decisions was not the quantity of available review but whether any review could actually redress the claim asserted. See

Salfi, 422 U.S. at 762 (suggesting that “absolutely no judicial consideration of the issue” would “raise[] a serious constitutional question of the validity of the statute as so construed”). A structural claim that a tribunal is unconstitutionally constituted is, by its nature, a challenge to the government’s authority to subject a party to that tribunal. And again, *Axon* recognizes that this injury cannot be remedied. 598 U.S. at 192. Thus, a scheme that permits judicial review only after the injury has occurred raises the same constitutional concern that animated *Robison* and *Salfi*.

That is ultimately the problem with the government’s position. The government cannot identify a single decision in which this Court has held that jurisdiction-stripping language may require a litigant to endure a structural constitutional injury before any court may hear the claim. A review scheme that guarantees judicial review only after a “here-and-now” constitutional injury has already occurred eliminates the right altogether. The best courts can do is substitute a different remedy for a different wrong: review of an adverse outcome instead of protection against being subjected to an unconstitutional tribunal in the first instance. Whatever Congress intended, Article III does not permit that substitution. The petition should be granted.

III. The Questions Presented Are Important, And This Case Is An Excellent Vehicle To Resolve Them

The government does not dispute that the questions presented are important. It instead minimizes their significance by asserting that Moats “will have the opportunity to raise his constitutional claims in a court of appeals.” BIO.11. If that argument sounds

familiar, it should. The government pressed the same argument in *Axon*. Resp.Br.13-16 (arguing that “claims of constitutional errors” can be raised on appeal). The Court resoundingly rejected that argument because of “the nature of the claims and accompanying harms”—the here-and-now injury of “subjection to an unconstitutionally structured decisionmaking process.” *Axon*, 598 U.S. at 192. Nothing in the government’s brief distinguishes the harms here from the ones in *Axon*.

The government also does not deny that this case is a clean jurisdictional vehicle. The court of appeals decided a pure jurisdictional question—no factual disputes affect the analysis. And because the lower court addressed only jurisdiction, this Court can resolve the question cleanly without becoming entangled in the merits of Moats’s underlying constitutional claims.

The government’s split argument is no more persuasive. The government stresses that no circuit split exists. BIO.11. But one court confronted materially similar preclusion language and concluded that it did not foreclose structural constitutional claims. *Burgess v. FDIC*, 639 F. Supp. 3d 732, 742 (N.D. Tex. 2022) (finding that § 1818(i)(1) did not explicitly or implicitly preclude jurisdiction over constitutional claims because “[t]he statute makes no mention of constitutional claims”), *rev’d*, *Burgess v. Whang*, 152 F.4th 579 (5th Cir. 2025). The subsequent reversal does not eliminate the underlying question whether *Axon* permits immediate judicial review of structural constitutional claims notwithstanding statutory preclusion language. That multiple circuits have misread the principles behind *Axon* only underscores the need for this Court to intervene. Otherwise, parties asserting structural constitutional claims must endure lengthy,

costly administrative proceedings before any court decides whether those proceedings are even constitutional. The Court should take the opportunity to resolve that important question.

If the Court declines to grant review now, it should at minimum hold this petition until it issues its opinion in *Johnson v. United States Congress*, No. 25-735. But *Johnson* provides an additional reason to grant, not deny. Both cases ask whether specialized review schemes divest courts of jurisdiction over constitutional claims. See Pet.34. And because of “the structural nature of petitioner’s claims,” BIO.12, this case presents the cleaner and more consequential vehicle. A decision against the plaintiff in *Johnson* would still leave open the distinct question whether such schemes can foreclose district-court jurisdiction over structural constitutional claims.

CONCLUSION

The Court should grant the petition for certiorari, or at a minimum hold it for *Johnson*.

Respectfully submitted,

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