No. 21-86

IN THE

Supreme Court of the United States

AXON ENTERPRISE, INC.,
Petitioner,

v.

FEDERAL TRADE COMMISSION, ET AL.,
Respondent.

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

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

JULIE M. WILSON*
General Counsel
PARAS N. SHAH
Associate General Counsel for Litigation
ALLISON C. GILES
Assistant Counsel

NATIONAL TREASURY EMPLOYEES UNION
800 K St., N.W., Suite 1000
Washington, D.C. 20001
(202) 572-5500
Julie.Wilson@nteu.org

* Counsel of Record
Counsel for *Amicus Curiae*

Mosaic - (301) 927-3800 - Cheverly, MD

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

Statutes

Other

INTEREST OF THE AMICUS[1]

The National Treasury Employees Union (NTEU) is a federal sector labor organization that represents employees in thirty-four federal agencies and departments nationwide. Reflecting its keen interest in protecting employee rights, NTEU has been before this Court multiple times, both as a party (*see*, *e.g.*, *United States v. NTEU*, 513 U.S. 454 (1995); *NTEU v. Von Raab*, 489 U.S. 656 (1989)), and as an *amicus* (*see*, *e.g.*, *Babb v. Wilkie*, 140 S. Ct. 1168 (2020); *Gilbert v. Homar*, 520 U.S. 924 (1997)).

NTEU represents federal employees pursuant to the Civil Service Reform Act of 1978 (CSRA), which "comprehensively overhauled the civil service system." *Lindahl v. OPM*, 470 U.S. 768, 773 (1985). Consistent with the CSRA's "integrated scheme of administrative and judicial review," *United States v. Fausto*, 484 U.S. 439, 445 (1988), NTEU has litigated numerous matters through the federal labor administrative scheme that Congress established.

NTEU has also pursued federal district court challenges seeking to enjoin federal policies as unconstitutional or *ultra vires*. Some of these challenges have been allowed to proceed in court. But others have been channeled to the administrative process.

Accordingly, NTEU and the broader federal sector labor community have a strong interest in the proper

---

[1] Pursuant to Supreme Court Rule 37.2(a), the parties have provided blanket consent to the filing of all *amicus* briefs. 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.

application of the channeling doctrine. NTEU submits this brief to explain how courts of appeals, including the Ninth Circuit in its decision below, are misapplying *Thunder Basin Coal Co. v Reich*, 510 U.S. 200 (1994), to foreclose district-court claims that Congress did not intend to be channeled through an administrative process.

SUMMARY OF ARGUMENT

Under *Thunder Basin*'s implied preclusion framework, courts are supposed to consider three guideposts to determine whether a claim must be channeled to an administrative agency: whether channeling "could foreclose all meaningful judicial review," whether a litigant's claims would be considered "wholly collateral to a statute's review provisions," and whether the claims if pursued first before an administrative agency would be "outside the agency's expertise." 510 U.S. at 212-13.

As the Ninth Circuit's decision below illustrates, courts of appeals are misapplying—and in need of this Court's guidance on—*Thunder Basin*'s framework in three ways. These mistakes matter because *Thunder Basin* was intended to provide a roadmap to discerning congressional intent. When lower courts apply *Thunder Basin* erroneously to deprive federal courts of jurisdiction over a claim, it means congressional intent is being ignored and courts are being divested of their proper role in resolving important issues, including constitutional challenges.

First, the Ninth Circuit and other courts of appeals have applied *Thunder Basin*'s "meaningful judicial review" prong too strictly. Instead of considering whether meaningful judicial review "*could*" be foreclosed, courts of appeals frequently misstate the *Thunder Ba-*

sin framework and hold litigants to the much more onerous standard of proving that meaningful judicial review "would" definitively be foreclosed if the litigants proceeded through the administrative scheme.

Second, courts of appeals disagree on how much weight to give to *Thunder Basin*'s "wholly collateral" prong. Some courts of appeals, such as the Ninth Circuit, effectively give it no weight at all. And even the courts of appeals that do address this prong often shortchange it by merging it with the "meaningful judicial review" prong. This inevitably leads to channeling, even where the claims in the lawsuit are claims that the administrative agency will not even consider on the merits.

Third, courts of appeals, including the Ninth Circuit below, often minimize a key teaching of *Thunder Basin*: that channeling might be unwarranted if a plaintiff can show that independent and irremediable harm will be suffered from the delays associated with proceeding through the administrative process. This Court should remind the courts of appeals that, under *Thunder Basin*, such harm must be seriously weighed in a channeling analysis.

ARGUMENT

I. The Ninth Circuit and Other Courts of Appeals Are Misapplying *Thunder Basin*'s "Meaningful Judicial Review" Prong.

Thunder Basin held that courts should consider whether "a finding of preclusion *could* foreclose all meaningful judicial review." 510 U.S. at 212-13 (emphasis added). The Court reiterated this standard in *Free Enterprise Fund v. Public Company Accounting Oversight Board,* stating that "we presume that Congress does not intend to limit jurisdiction if 'a finding

of preclusion *could* foreclose all meaningful judicial review.'" 561 U.S. 477, 489 (2010) (emphasis added).

Yet several courts of appeals have required litigants to show that proceeding through the administrative scheme "*would*," beyond the shadow of a doubt, foreclose meaningful judicial review. These flat misstatements of *Thunder Basin's* framework show that the courts of appeals need this Court to reaffirm the proper standard. *See* 510 U.S. at 212-13.

Otherwise, a court of appeals will channel a claim if it can conjure up a scenario in which that claim could conceivably reach a court of appeals—instead of analyzing, consistent with *Thunder Basin*, whether meaningful judicial review of that claim *could* be thwarted if the plaintiff cannot proceed in district court. Absent this Court's intervention, federal district courts will continue to be improperly divested of their subject matter jurisdiction.

A. Courts of appeals are routinely misstating *Thunder Basin*'s "meaningful judicial review" prong. For example, the D.C. Circuit in *Jarkesy v. U.S. Securities & Exchange Commission* ordered channeling in a case in which it concluded that "'a finding of preclusion' *would* not 'foreclose all meaningful judicial review.'" 803 F.3d 9, 22 (D.C. Cir. 2015) (emphasis added). The Court purported to quote from *Free Enterprise* and *Thunder Basin*, even though those cases stated that the relevant consideration was whether channeling "could"—not "would"—foreclose meaningful judicial review. *See Thunder Basin*, 510 U.S. at 212-13; *Free Enterprise*, 561 U.S. at 489.

Likewise, the First Circuit has stated that preclusion could be avoided if proceeding through the statutory scheme "*would* 'foreclose all meaningful judicial re-

view.'" *Aguilar v. U.S. Imm. & Customs Enf.*, 510 F.3d 1, 12 (1st Cir. 2007) (emphasis added). As the D.C. Circuit did in *Jarkesy*, the First Circuit cited to—but misstated—this Court's holding in *Thunder Basin*. *See id.*

In a similar vein, the Fourth Circuit has selectively quoted *Thunder Basin*'s "meaningful judicial review" prong in a way that alters the *Thunder Basin* standard. Omitting *Thunder Basin*'s "could" language, the Fourth Circuit has stated that its preclusion analysis will "focus on [] whether the statutory scheme 'foreclose[s] all meaningful judicial review.'" *Bennett v. SEC,* 844 F.3d 174, 181 (4th Cir. 2016) (quoting *Thunder Basin*).

The Ninth Circuit's decision below further exemplifies the courts of appeals' misunderstanding and misapplication of *Thunder Basin*'s "meaningful judicial review" prong. The Ninth Circuit acknowledged that petitioner Axon could *only* obtain judicial review of its constitutional claim *if* the Federal Trade Commission (FTC) prevailed in the administrative proceeding and issued a cease and desist order. *Axon Enterprises, Inc v. FTC*, 986 F.3d 1173, 1182 (2021). The Ninth Circuit thereby recognized that Axon would *not* get judicial review of its claim if the FTC did not prevail (or if the administrative proceedings terminated without a final decision from the FTC). Judicial review of Axon's constitutional challenge to the FTC's structure, therefore, *could* be foreclosed. But in conflict with *Thunder Basin*, the Court concluded that the judicial review prong nonetheless weighed in favor of channeling. *Id.*

In contrast to its sister circuits, the Fifth Circuit correctly applied *Thunder Basin*'s "meaningful judicial review" prong in *Cochran v. U.S. Securities & Exchange Commission*, 20 F.4th 194 (5th Cir. 2021) (*en banc*), *petition for cert. filed* (Mar. 11, 2022) (No. 21-1239).

The Court there found that district court jurisdiction over the underlying challenge was not precluded because "enforcement proceedings will not necessarily result in a final adverse order" that would be appealable to a federal appellate court. *Id.* at 209.

B. Courts of appeals' misstatements of this *Thunder Basin* prong are not minor semantic errors. Those misstatements completely alter *Thunder Basin*'s framework. They increase the burden on litigants substantially, giving them the generally impossible-to-meet burden of showing that proceeding through the administrative scheme *would* definitively foreclose meaningful judicial review.

Crucially, the *Thunder Basin* analysis only comes into play if there is an administrative scheme to begin with, such as the CSRA or the FTC Act or the Mine Safety Act. The likelihood of a litigant regulated by one of these administrative schemes showing that it would *never* have the opportunity to bring its claims through the scheme—and that channeling *would* undoubtedly foreclose meaningful judicial review—is incredibly slight. *See Elgin v. U.S. Dep't of Treasury*, 567 U.S. 1, 32 (2012) (Alito, J., dissenting) (preclusion precedent "sets up an odd sequence of procedural hoops for petitioners to jump through"). And, again, it is not what *Thunder Basin* requires.

Courts of appeals' unsanctioned modification of *Thunder Basin*'s "meaningful judicial review" standard also conflicts with this Court's "established practice . . . to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution." *Elgin*, 567 U.S. at 25 (Alito, J., dissenting) (*quoting Bell v. Hood*, 327 U.S. 678, 684 (1948)). This jurisdiction is being undermined—not "sustain[ed]"—each time that a court of appeals im-

permissibly makes it more difficult for the *Thunder Basin* factors to be satisfied. *See* 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws . . . ."); *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996) ("We have often acknowledged that federal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress.").

In sum, this Court should use this case to provide the courts of appeals, including the Ninth Circuit, with a sorely needed reminder that *Thunder Basin* asks courts to evaluate only whether meaningful judicial review "could" be foreclosed if the litigant's claims were channeled to an administrative agency—not whether the litigant's claims necessarily "would" be altogether foreclosed by proceeding through the administrative scheme.

II. Courts of Appeals Disagree on How Much Weight to Give *Thunder Basin*'s "Wholly Collateral" Prong. The Ninth Circuit and Other Courts of Appeals Effectively Ignore It.

A. Courts of appeals, including the Ninth Circuit, are in discord about how to evaluate the second prong of the *Thunder Basin* test: whether a litigant's claims are "wholly collateral to a statute's review provisions." 510 U.S. at 212 (internal quotation marks omitted). Many courts of appeals, such as the Ninth Circuit, effectively read this prong out of the *Thunder Basin* framework entirely.

The First, Second, Fourth, Seventh, Ninth, and Eleventh Circuits, in varying ways, have treated *Thunder Basin*'s first prong—"meaningful judicial review"—as dispositive. These court of appeals, in

turn, have given the "wholly collateral prong" no real weight.

- The First Circuit has deprived "wholly collateral" of any independent meaning whatsoever. In its view, a claim is wholly collateral only when channeling the claim would foreclose meaningful judicial review. *See Aguilar*, 510 F.3d at 12.

- The Seventh Circuit has stated that, even if a claim is wholly collateral to the statute's review provisions, it does not matter. In its view, meaningful judicial review is the "most critical" factor. *See Bebo v. SEC*, 799 F.3d 765, 774 (7th Cir. 2015). It held that even if the underlying claims could reasonably be described as wholly collateral, they would still be precluded because the "meaningful judicial review" prong had been met. *Id.*

- The Ninth Circuit in the proceedings below similarly stated its view that the "meaningful judicial review" prong is dispositive. While the Ninth Circuit analyzed the *Thunder Basin* prongs at surface level, it explicitly stated that the "presence of meaningful judicial review is enough to find that Congress precluded district court jurisdiction over the type of claims" at issue. *See Axon Enterprise,* 986 F.3d at 1187.

- 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 Bennett*, 844 F.3d at 183 n.7 (meaningful judicial review is "the most important factor"); *Hill v. SEC*, 825 F.3d 1236, 1245 (11th Cir. 2016) (meaningful judicial review is "the most critical thread"); *Tilton v. SEC*, 824 F.3d 276, 282 (2d Cir. 2016)

(meaningful judicial review is "the 'most important' *Thunder Basin* factor").

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*, 803 F.3d at 22. It has stated instead that the *Thunder Basin* factors are "guideposts for a holistic analysis." *Id.*

This Court should resolve the disagreement among the courts of appeals, and it should do so in a way that does not render *Thunder Basin*'s "wholly collateral" prong superfluous. The Court should make clear that the "wholly collateral" prong must be given weight, as the plain language of *Thunder Basin* requires, and that it must be weighed similarly with *Thunder Basin*'s other two prongs.

B. In a related vein, this Court should clarify what "wholly collateral" means. The Ninth Circuit's decision below exemplifies the way in which most of the courts of appeals have effectively deprived this term of meaning, even when they purport to weigh it.

As the Ninth Circuit recognized, Axon's constitutional claim regarding the FTC's structure had no analytical overlap with the merits of the antitrust proceeding that the FTC was considering. *Axon Enterprise*, 986 F.3d at 1185. Indeed, the court of appeals acknowledged that the FTC could not even *consider* Axon's constitutional claim that the structure of the FTC violated the President's Article II powers. *Id.* at 1183. The Ninth Circuit nonetheless concluded that Axon's claim was *not* wholly collateral to the administrative scheme. *Cf. Elgin*, 567 U.S. at 29-30 (Alito, J., dissenting) (facial constitutional claims should be con-

sidered collateral to the types of claims the agency was empowered to consider).

That unqualified conclusion illustrates how courts of appeals have deprived the "wholly collateral" prong of meaning. Under the Ninth Circuit's mode of analysis, every claim that has some relation to the administrative scheme will fail to qualify as "wholly collateral" under *Thunder Basin*.

This Court should provide the lower courts with additional guidance on *Thunder Basin*'s "wholly collateral" prong. Unless a claim challenges a discrete agency action, it should be considered wholly collateral to the underlying statute's review provisions.

III. The Ninth Circuit and Other Courts of Appeals Should be Reminded that Whether Plaintiffs Would Suffer Independent and Irremediable Harm from the Delays Associated with Proceeding Through the Administrative Scheme is an Indispensable Factor in Channeling Analysis.

As this Court held in *Thunder Basin*, a proper channeling analysis will weigh whether the litigant might suffer an independent and irremediable harm from having to proceed through the administrative process before their claim receives judicial review. Courts of appeals such as the Ninth Circuit have given this consideration improperly short shrift.

A. *Thunder Basin* held that where the litigant would suffer independent harm from the delays associated with channeling—harm that could not be remedied through the scheme—this can support a finding that the claim is "wholly collateral" to the administrative scheme. 510 U.S. at 212-13. For this point, *Thun-*

der Basin relied on this Court's prior decision in *Mathews v. Eldridge*, 424 U.S. 319 (1976), where the Court had held that the petitioner's procedural-due-process claim did not have to be channeled through the administrative scheme in part because "the petitioner had made a colorable showing that full post deprivation relief could not be obtained." *Thunder Basin*, 510 U.S. at 213.

Courts of appeals have also held that, in such a circumstance, meaningful judicial review would be foreclosed by proceeding through the administrative scheme. *See, e.g.*, *Berkley v. Mountain Valley Pipeline, LLC*, 896 F.3d 624, 631 (4th Cir. 2018) ("plaintiffs are denied meaningful review when they are subject to 'some additional and irremediable harm beyond the burdens associated with the dispute resolutions process.'") (internal citations omitted); *Tilton,* 824 F.3d at 286 ("[T]he Supreme Court has concluded that post-proceeding judicial review would not be meaningful because the proceeding itself posed a risk of some additional and irremediable harm beyond the burdens associated with the dispute resolution process.").

B. Regardless of the *Thunder Basin* prong under which it is considered, this Court should remind the lower courts that they must seriously weigh independent and irremediable harm that litigants will suffer if they are forced to go through the administrative process instead of directly to an Article III court to challenge an unconstitutional or *ultra vires* government action. The Ninth Circuit's decision below shows the need for this instruction.

The Ninth Circuit gave only cursory consideration to the independent and irremediable harm that Axon would incur from channeling. The Court described Axon's alleged harm as the burden of proceeding

through the dispute resolution process. *Axon Enterprise*, 986 F.3d at 1182.

Axon's harm, however, is not the mere administrative inconvenience of having to go through the FTC enforcement proceedings (and lose) before it can be heard on its claim that the structure of the agency is unconstitutional. Rather, Axon's alleged harm is the continued and increasingly severe "here-and-now" injury of laboring under a substantial, broad unconstitutional scheme. *See Axon Enterprise*, 986 F.3d at 1193 n.3 (Bumatay, J., dissenting). This alleged injury might persist for years as Axon works its way up the administrative scheme, with the hope of eventually reaching an Article III court. If Axon is correct that the structure of the FTC is unconstitutional, it will be regulated for a prolonged period of time by a governmental entity acting "in excess of [its] delegated governmental power," *id.*, and Axon will not be able to recover for that harm. *See also Bennett*, 844 F.3d at 184-85 (wrongly minimizing Bennett's injury, which was being forced to proceed through an unconstitutional process, as the mere expense and burden of administrative proceedings).

As Judge Bumatay explained in his *Axon* dissent, "liberty is at stake," and it will continually be lost during the pendency of the administrative process in a way that cannot be fully remedied. *See Axon Enterprise*, 986 F.3d at 1195 n.3 (quoting *Free Enterprise Fund*, 561 U.S. at 513). An ongoing, systemic violation of constitutional rights should qualify as an independent and irremediable harm that warrants consideration in a channeling analysis.

CONCLUSION

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

Respectfully submitted,

JULIE M. WILSON*
General Counsel
PARAS N. SHAH
Associate General
Counsel for Litigation
ALLISON C. GILES
Assistant Counsel

NATIONAL TREASURY
EMPLOYEES UNION
800 K St., N.W., Suite 1000
Washington, D.C. 20001
(202) 572-5500
Julie.Wilson@nteu.org

* Counsel of Record
Counsel for *Amicus Curiae*

May 16, 2022