No. 21-1239

In The

Supreme Court of the United States

SECURITIES AND EXCHANGE COMMISSION, ET AL.,

Petitioners,

v.

MICHELLE COCHRAN,

Respondent.

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

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether a federal district court has jurisdiction to hear a constitutional challenge to the Securities and Exchange Commission's structure while administrative proceedings are pending.

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INTEREST OF *AMICUS CURIAE*[*]

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It often appears as *amicus* opposing the accumulation of power in any one governmental branch contrary to the Constitution's careful separation of powers. *See, e.g.*, *Lucia v. SEC*, 138 S. Ct. 2044 (2018); *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477 (2010).

Although the Court has coordinated merits briefing for this case and *Axon v. FTC*, 21-86, the question presented here is broader than *Axon*'s. In *Axon*, the Court is considering a narrow question about how to apply the Court's decision in *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994). As WLF explained in its *amicus* brief in that case, lower courts should consider separation-of-powers principles when applying the *Thunder Basin* factors.

The question here, however, is broader. It implicates whether *Thunder Basin* was correctly decided or whether the Court should overturn that precedent. As shown below, all the stare decisis factors this Court considers when deciding whether to overturn precedent support jettisoning *Thunder Basin*. WLF believes that this is the correct outcome. The Court could then dispose of both this case and

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[*] No party's counsel authored any part of this brief. No person or entity, other than WLF and its counsel, paid for the brief's preparation or submission. All parties have filed blanket consents.

Axon based on a correct reading of the Constitution and relevant statutes.

INTRODUCTION

Litigation is not cheap. Whether it occurs before an arbiter, an agency, or a federal court, litigation comes with a high price tag. Unlike the Federal Government—which continues to print money—citizens have scarce resources to risk. (This is even truer today with skyrocketing inflation.) The Securities and Exchange Commission relishes the ability to use its unlimited resources against individuals who must count their pennies. That is why it seeks review of the *en banc* Fifth Circuit's correct decision here.

At bottom, the SEC wants to exercise both executive and legislative power without meaningful review by a federal court. This lack of judicial review violates core separation-of-powers principles.

Although this case arises in the SEC context, many administrative agencies similarly exercise both executive and juridical power. The Federal Trade Commission and the Federal Deposit Insurance Corporation are just two examples. Courts around the country, however, do not decide important constitutional questions about these agencies' structures. Purporting to follow this Court's *Thunder Basin* decision, they leave the issues for later; later never comes. Yet neither Congress nor the President may transfer judicial power to Article II agencies.

The only reason the lower courts continue to punt on constitutional challenges to agency

structures is the Court's decision in *Thunder Basin*. There, the Court set forth a framework for so-called implicit jurisdiction-stripping. Because that decision was incorrect when it was decided—and is still incorrect today—the Court should overturn it and require district courts to entertain these challenges.

STATEMENT

In 2016, the SEC opened administrative proceedings against Michelle Cochran for allegedly violating the Exchange Act. Pet. App. 2a. According to the SEC, she violated the Public Company Accounting Oversight Board's auditing standards. *Id.*

After an administrative hearing, an SEC ALJ found for the SEC, issued a $22,500 penalty, and barred Cochran from practicing before the SEC for five years. *See* Pet. App. 2a-3a. While her case was pending, this Court held that SEC ALJs must be appointed in a manner consistent with the Appointments Clause. *See Lucia*, 138 S. Ct. at 2049. So the SEC remanded for a *de novo* hearing before a new ALJ. Pet. App. 3a.

Because the administrative proceeding still violated the Constitution, Cochran sued, seeking to enjoin the proceeding. Pet. App. 139a-140a. She argued that the for-cause removal restrictions for SEC ALJ's violated the Appointments Clause. *Id.* at 140a.

Applying *Thunder Basin*, the District Court dismissed the case for want of jurisdiction. Pet. App. 139a-144a. A Fifth Circuit panel affirmed the dismissal. *Id.* at 114a-138a.

After granting rehearing, the *en banc* Fifth Circuit held that the District Court had jurisdiction over Cochran's challenge to the SEC's structure. Pet. App. 5a-32a. The Court decided that it need not apply *Thunder Basin* because Congress had not stripped district courts of jurisdiction merely by having courts of appeals review the SEC's final orders. *Id.* at 6a-16a. But even if Congress intended to strip district courts of jurisdiction over some claims, the Fifth Circuit held that Cochran's "removal power claim is not the type of claim Congress intended to funnel through the Exchange Act's statutory-review scheme." *Id.* at 21a. In reaching this conclusion, the *en banc* court split from ten other courts of appeals in applying *Thunder Basin*. This Court therefore granted the SEC's certiorari petition and agreed to hear this case alongside *Axon*.

SUMMARY OF ARGUMENT

The SEC's conception of *Thunder Basin* denies parties their right to judicial process by giving administrative agencies the ability to decide their own constitutionality. The question presented here gives the Court the chance to right that wrong and overturn its mistaken precedent. All the stare decisis factors support overruling the decision.

A.1. The *Thunder Basin* factors have proven unworkable. Courts struggle to determine whether a party can obtain meaningful judicial review of a challenge to an agency's structure. Most of the review that parties receive is only illusory. But courts have been unable to draw the line between meaningful judicial review and illusory review.

2. Courts have also struggled to determine whether an agency has expertise in a given area. The agency has statutory jurisdiction over a claim only if it has expertise in that area. So courts assume that agencies always have expertise over a question arising in administrative proceedings. Where that expertise ends has stumped courts for years.

3. As to the "wholly collateral" factor, again courts have not crafted a workable test for deciding when a claim is wholly collateral to the administrative proceeding. As many challenges to agency structure would affect an administrative proceeding, the line between wholly collateral claims and those linked to the administrative proceeding is unclear.

4. The *Thunder Basin* test is also not workable as a whole. There is no indication how the factors interact with each other. For example, must all three be satisfied to avoid judicial review? Nor is there guidance on what to do when the factors point in different directions or who has the burden of proof for each factor.

B. *Thunder Basin* was not well-reasoned. Rather than carefully evaluate what factors to consider when deciding whether a party could challenge a Mine Safety and Health Administration order, the Court cited cases from disparate areas. Only later were these citations cobbled together as the *Thunder Basin* factors. The Court's analysis also punted on whether allowing administrative agencies to make these decisions violated core separation-of-powers principles.

C. *Thunder Basin* is out of step with related decisions and recent legal developments. Since the decision, there has been renewed scholarship focusing on the due-process importance of judicial process. This has coincided with many decisions by this Court relying on separation-of-powers principles. As *Thunder Basin* conflicts with these recent legal developments and related decisions, the Court should not hesitate to overturn the decision.

D. Finally, there are no reliance interests in keeping the *Thunder Basin* factors. Congress did not pass judicial-review statutes with the factors in mind. Nor have agencies or parties taken substantive actions based on those factors. Rather, the only reason not to overturn *Thunder Basin* is inertia, which is a woefully inadequate reason to keep an incorrect decision governing our constitutional structure.

ARGUMENT

If this Court agrees with the *en banc* Fifth Circuit's holding that Congress did not strip district courts of subject-matter jurisdiction by granting courts of appeals jurisdiction over appeals from final orders, the inquiry can end there. But if this Court disagrees with that holding, under current precedent it would apply the *Thunder Basin* factors. *Thunder Basin*, however, was wrong when it was decided and is still wrong today. Thus, the Court should overrule *Thunder Basin* if it reaches that issue.

THE COURT SHOULD OVERRULE *THUNDER BASIN*.

The Constitution grants federal courts jurisdiction over nine types of cases or controversies. U.S. Const. art. III, § 2, cl. 1; *see* Erwin Chemerinsky, *Federal Jurisdiction* 260 (4th ed. 2003). To exercise federal jurisdiction, district courts must have both constitutional and statutory jurisdiction. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998). When both prerequisites are satisfied, "federal courts" have a "general duty to exercise the jurisdiction that is conferred upon them." *Hamdan v. Rumsfeld*, 548 U.S. 557, 589 (2006) (cleaned up).

No one disputes that the District Court could exercise constitutional jurisdiction over Cochran's complaint. The real question is whether Congress stripped the District Court of statutory jurisdiction to hear this case.

The lower courts have understood this Court's precedent to require a two-step analysis to decide whether Congress stripped district courts of jurisdiction. First, courts ask whether Congress's intent to deprive district courts of jurisdiction over certain claims is "fairly discernible in the statutory scheme." *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 351 (1984) (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 157 (1970)). If the answer is "yes" the second step of the analysis is whether the claims are the *type* that Congress wanted to remove from the district courts' jurisdiction.

Courts examine the three *Thunder Basin* factors when making this determinization. First, will a litigant "as a practical matter be able to obtain

meaningful judicial review" of its claim? *Thunder Basin*, 510 U.S. at 213 (quoting *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991)). Second, can the agency use its expertise when deciding the issue? *See id.* at 212 (citation omitted). And third, are the claims "wholly collateral" to the case's merits? *Id.* (quoting *Heckler v. Ringer*, 466 U.S. 602, 618 (1984)).

District courts and courts of appeals often apply the *Thunder Basin* factors when determining whether federal courts can decide a pre-enforcement challenge. But they should do so no longer. *Thunder Basin* was wrong when it was decided and is still wrong today. The Court should thus explicitly overrule it.

Under this Court's current stare decisis jurisprudence, it should overrule *Thunder Basin*. The Court considers several factors when deciding whether to overrule a case. The factors include the decision's "workability"; *Montejo v. Louisiana*, 556 U.S. 778, 792 (2009), the "quality of the decision's reasoning; its consistency with related decisions; legal developments since the decision; and reliance on the decision." *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485, 1499 (2019) (citations omitted). These factors all support overruling *Thunder Basin*.

A. The *Thunder Basin* Factors Are Unworkable.

1. Whether a defendant receives initial judicial review turns on the administrative agency's choice of forum. Many agencies can choose to enforce laws through administrative proceedings or suits in district court. *See, e.g.*, 15 U.S.C. §§ 45(b) and 53(b)

(FTC); 78u(d) and 78u-2 (SEC). If the agency decides to proceed in district court, then the defendant gets immediate judicial review of its constitutional claims. But if the agency opens an administrative enforcement action, the lower courts have held that the defendant may not access Article III courts until the administrative proceeding concludes. This rule extends not only to merits issues but also to challenges to the agency itself, or its administrative proceedings.

The meaningful-judicial-review factor has proven unworkable. Courts merely rubber-stamp the agency's choice of forum. For example, the Seventh Circuit held that the SEC's decision to pursue administrative proceedings foreclosed judicial review of constitutional claims. *See Bebo v. SEC*, 799 F.3d 765, 769-72 (7th Cir. 2015). Similarly, the Eleventh Circuit has held that if parties need not "bet the farm" to raise their constitutional challenges, then this factor weighs against review in district courts. *Hill v. SEC*, 825 F.3d 1236, 1248 (11th Cir. 2016).

Other courts pay lip service to the meaningful-judicial-review factor. *See, e.g.*, *Bennett v. SEC*, 844 F.3d 174, 184-86 (4th Cir. 2016). These decisions show that the meaningful-judicial-review factor is unworkable. *Cf.* Caleb Nelson, *Adjudication in the Political Branche*s, 107 Colum. L. Rev. 559, 590 (2007) (explaining how courts cannot provide meaningful judicial review in these cases).

There is a substantial difference between having meaningful review and having illusory review. *See TXO Prod. Corp. v. All. Res. Corp.*, 509 U.S. 443, 500 (1993) (Kennedy, J., concurring). The judicial

review that lower courts continue to rely on when finding that Congress stripped district courts of jurisdiction over pre-enforcement challenges is merely illusory.

For example, over the past twenty-five years, only two companies have managed to obtain judicial review of an FTC merger decision. *See* Brief for Appellant at 42 n.10, *Axon Enter., Inc. v. FTC*, 986 F.3d 1173 (9th Cir. 2021) (No. 20-15662), 2020 WL 2310605. Once-a-decade review is anything but "meaningful." Yet exactly where is the line between what is meaningful and what is illusionary? Most courts of appeals have held that once-a-decade review is sufficient to satisfy that standard. That is wrong. But it's difficult to say where the line is. Is it once every five years? Once every year? Once a month? There is no principled way to say that some review is meaningful and some is illusory. The inability to say whether review is meaningful is a textbook example of an unworkable standard that must go.

There is a second reason why the meaningful-judicial-review factor is unworkable. The ALJ's removal protections harm Cochran here and now. Even if the SEC were to rule in her favor, that would not remedy the harm. The same is true of the cases from other circuits discussed above. The parties in those cases were harmed by the agency's structure or procedures. They were relegated to losing in the agency and then hoping for ever-so-rare judicial review.

So how does a court measure whether judicial review is meaningful if the fight in the administrative process wastes most of the party's resources? If a

company must file for bankruptcy so it can fight ALJs with unconstitutional for-cause removal protections, is any review meaningful? Of course not. The same is true if an individual must file for bankruptcy. But does someone who must liquidate her 401(k) to pay for the fight receive meaningful judicial review? Or the company that must sell assets at a deep discount to stay afloat? Again, there is no principled way to determine how having to fight in the agency before receiving judicial review affects the meaningful-judicial-review factor. Thus, the first *Thunder Basin* factor is unworkable.

2. The second *Thunder Basin* factor is also unworkable. An agency has statutory jurisdiction over a given case because Congress believes that the agency has expertise in that area. Whether it be the SEC and securities law or the FDIC and banking law, the agency has been given jurisdiction in its area of expertise.

How far does that expertise stretch? The FTC provides a good example. Some antitrust claims are prosecuted by the FTC while others are prosecuted by the Department of Justice. These divisions are ostensibly made because of the similarity in industries. But does the process for dividing antitrust enforcement between the two agencies fall within the agencies' expertise?

True, other examples are clearer. Whether an ALJ's appointment violates the Appointments Clause is outside an agency's expertise. It is also clear that the SEC has expertise over whether a broker is selling unregistered securities. These outliers, however, do not mean that the second *Thunder Basin* factor is

workable. Most of the cases fall somewhere in between. And in those cases, there is no workable standard for deciding whether an agency has expertise over a question.

The unworkability of the second *Thunder Basin* factor is best illustrated by the fact that many courts of appeals don't even address the second factor. *See generally Harkness v. United States*, 727 F.3d 465 (6th Cir. 2013); *Great Plains Coop v. Commodity Futures Trading Comm'n*, 205 F.3d 353 (8th Cir. 2000). This is because the lower courts understand that the factor is unworkable and incapable of principled application.

3. The third factor also provides workability problems. A Fourth Circuit decision provides a good example. The plaintiff, Bennett, argued that her constitutional claim was collateral to the agency proceeding "because it challenge[d] the legality of the forum itself and [did] not seek to affect the merits." *Bennett*, 844 F.3d at 187 (quotation omitted). "[T]his makes conceptual sense" because "[e]ven if she [wa]s successful in" her constitutional challenges, the agency "could still bring a civil enforcement action in district court on the same substantive charges." *Id.*

But the Fourth Circuit ultimately held that this factor weighed against immediate judicial review. It held that "claims are not wholly collateral when they are the vehicle by which [defendants] seek to reverse" agency action. *Bennett*, 844 F.3d at 186 (cleaned up). The First, Second, and D.C. Circuits have held similarly. *See Tilton v. SEC*, 824 F.3d 276, 287-88 (2d Cir. 2016); *Jarkesy v. SEC*, 803 F.3d 9, 22-28 (D.C. Cir. 2015); *Aguilar v. U.S. Immigr. &*

Customs Enf't Div. of Dep't of Homeland Sec., 510 F.3d 1, 13 (1st Cir. 2007).

Under this theory, a federal agency can skirt judicial review of its structure simply by opening an investigation against the party that sues. Even if the investigation lacks any merit, the agency could take years to adjudicate the case. Under these courts' rationales, the third factor weighs against judicial review during the investigation.

The problem once again is that there is no principled way to decide whether an issue is wholly collateral to an ongoing agency proceeding. Almost every court to address the issue has struggled with this unworkable standard. And further guidance by this Court will not make the standard more workable.

At least parties in these cases could raise their collateral arguments in the administrative proceeding. But even when parties cannot raise an issue in an administrative proceeding, lower courts have held that claims a party may raise only before an Article III court are not wholly collateral to the administrative proceeding. *See Massieu v. Reno*, 91 F.3d 416, 424 (3d Cir. 1996).

It is hard to fathom how a claim is not wholly collateral if it cannot be raised in the administrative proceeding. But that is how the lower courts apply the third *Thunder Basin* factor. Again, this shows just how unworkable the three-factor test is.

4. Even if the individual factors were workable, the *Thunder Basin* test is not workable as a whole. How do the factors interact with each other? Must all

three be satisfied? Or, as most circuits have held, does one suffice? If the factors point in different directions, how are they weighed? Finally, who has the burden of proof for each factor?

There is no answer to these questions. So the lower courts can punt to administrative agencies whenever they want by answering or avoiding these questions on a whim. In other words, there are many problems with the factors as a whole besides the individual workability problems. *See Shurtleff v. City of Boston*, 142 S. Ct. 1583, 1598 (2022) (Alito, J., concurring) ("this approach cannot provide a principled way of deciding cases").

* * *

At first blush, the *Thunder Basin* factors seem to be straightforward and easy to apply. But experience has shown that not to be the case. Rather than provide simple inquiries that help determine whether district courts have jurisdiction over a case, all three *Thunder Basin* factors are unworkable. Thus, this stare decisis factor points to overturning that decision.

B. *Thunder Basin* Is Poorly Reasoned.

1. The *Thunder Basin* factors have become synonymous with lower courts' punting important constitutional questions to federal agencies. But a careful review of the decision shows that this may have been an accidental consequence of what the Court saw as a straightforward case.

Thunder Basin was not a case in which a party brought a pre-enforcement challenge to the constitutionality or structure of a federal agency. Rather, a company sued and tried to overturn an MSHA order. *See Thunder Basin*, 510 U.S. at 205. The Court granted review to resolve a split between the Sixth and Tenth Circuits on whether such a pre-enforcement challenge to the order could be brought in federal court.

The Court did not explicitly create a multi-factor test for lower courts to apply when deciding whether Congress stripped them of jurisdiction to hear a case. There is no discussion of a three-part test or various factors. Nor are the three *Thunder Basin* factors even in the same paragraph of the opinion. Rather, the Court cited different cases for disparate considerations it had used when deciding whether a court had subject-matter jurisdiction.

None of the cited cases on which *Thunder Basin* relied actually involved implicit jurisdiction-stripping. Rather, those cases involved statutes that expressly stripped or narrowed district courts' jurisdiction. *See Thunder Basin*, 510 U.S. at 212-13. The factors were therefore part of a much broader statutory-construction analysis about what the explicit jurisdiction-stripping statute meant.

There was no indication in *Thunder Basin* that the cited factors comprised a comprehensive list of factors for impliedly stripping jurisdiction. It was only later that the *Thunder Basin* factors became a way for lower courts to abdicate their duty to decide cases and controversies.

Most importantly, *Thunder Basin* did "not consider [the company's Due Process] claim" "because neither compliance with, nor continued violation of, the statute [subjected the company] to a serious prehearing deprivation." *Thunder Basin*, 510 U.S. at 216. With a mere three paragraphs of analysis, the Court therefore dismissed the argument.

Of course, that is not the case in most pre-enforcement challenges to agency structures. For example, in *Axon* the company has been deprived of over $20 million before a hearing on its constitutional claims. The failure of *Thunder Basin* to recognize the serious constitutional problems with allowing courts to punt to federal agencies is another reason that *Thunder Basin* is poorly reasoned.

2. *Thunder Basin*'s analysis tries to divine what Congress intended to do—not what it did. Trying to divine Congress's "unexpressed legislative intent" inevitably turns into an inquiry into "what a wise and intelligent person should have [intended]" and thus what the law "ought to mean." Antonin Scalia, *A Matter of Interpretation* 17-18 (1997). Put another way, "any claim about 'congressional intent' divorced from enacted statutory text is an appeal to mysticism. Short of summoning ghosts and spirits, how are we to know what those in a past Congress might think about a question they never expressed any view on—and may have never foreseen?" *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1991 (2021) (Gorsuch, J., concurring and dissenting).

Just last week, this Court emphasized that "the text of a law controls over purported legislative intentions unmoored from any statutory text."

Oklahoma v. Castro-Huerta, 2022 WL 2334307, *8 (U.S. June 29, 2022). Yet in *Thunder Basin* the Court focused not on Congress's words, but its intent. This highlights another reason why *Thunder Basin* is poorly reasoned.

C. *Thunder Basin* Is Inconsistent With Related Decisions And Recent Legal Developments.

1. *Thunder Basin*'s ignorance of separation-of-powers concerns makes it inconsistent with related decisions and recent legal developments.

Since *Thunder Basin*, scholarship has shown how the Due Process Clause of the Fifth Amendment is grounded in ensuring that parties have access to judicial process—not administrative process. The Constitution prohibits depriving any person of "due process of law." U.S. Const. amend. V. "[A] mass of materials in the early years of the republic equated due process of law with judicial process." Gary Lawson, *Take the Fifth . . . Please!: The Original Insignificance of the Fifth Amendment's Due Process of Law Clause*, 2017 B.Y.U. L. Rev. 611, 630 (2017); *see* Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 Yale L.J. 408, 443 (2010) ("due process of law" commonly referred "to judicial process").

This reflected the understanding of pre-Revolutionary colonists. The colonists thought that "an act of Parliament that purports to abrogate the procedural protections of customary law violates due process." Nathan S. Chapman & Michael W.

McConnell, *Due Process As Separation of Powers*, 121 Yale L.J. 1672, 1700 (2012).

The Fifth Amendment's Due Process Clause therefore protects the right to judicial process. But *Thunder Basin* eliminates this right. The decision allows only administrative review of serious constitutional questions. Such a ruling deprives parties of due process of law.

2. This Court's recent precedent confirms the scholars' view that judicial process is key to due process. "*Free Enterprise Fund* is squarely on point, foreclosing any possibility that" district courts lack jurisdiction to consider challenges to agencies' structures. Pet. App. 10a. The Fifth Circuit relied on this "Court['s] determin[ation] that the Government's theory would foreclose all meaningful judicial review because [15 U.S.C. §] 78y provides only for judicial review of SEC action, and not every [PCAOB] action is encapsulated in a final SEC order or rule." *Id.* at 11a (cleaned up).

Free Enterprise Fund is not the only recent case in which the Court has explained the importance of separation of powers. In *Lucia*, for example, the Court held that SEC ALJs are inferior officers whom the President, a court, or an agency head must appoint. 138 S. Ct. at 2051-55. So separation-of-powers issues do not disappear in the SEC context. Rather, they are still important and must be respected by courts. This includes providing parties with judicial process—not just administrative process. But the *Thunder Basin* factors deny parties this constitutional guarantee.

More recently, the Court conceded that its older decisions failed to appreciate the importance of separation-of-powers principles. Since *Thunder Basin* was decided, "the Court has come 'to appreciate more fully'" separation-of-powers principles. *Egbert v. Boule*, 142 S. Ct. 1793 (slip. op. at 6) (2022) (quoting *Hernández v. Mesa*, 140 S. Ct. 735, 741 (2020)).

This recognition that separation-of-powers principles are central to any structural analysis shows how *Thunder Basin* is incongruous with recent developments. It now stands as an outlier in how federal courts vindicate our constitutional structure. There is no mention of the separation of powers in *Thunder Basin*, much less an acknowledgement of its importance.

3. *Thunder Basin* also departs from the Court's federal-question-jurisdiction jurisprudence. For over 125 years, the Court has hesitated to find that Congress implicitly stripped federal courts of subject-matter jurisdiction. *See Rosecrans v. United States*, 165 U.S. 257, 262 (1897). This means that federal-question jurisdiction "should hold firm against 'mere implication flowing from subsequent legislation.'" *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 383 (2012) (quoting *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 808, 809 n.15 (1976)).

Yet in *Thunder Basin* the Court created a test that allows lower courts to find that they have been implicitly stripped of federal-question jurisdiction over important issues. This conflicts with the general rule that Congress does not strip federal courts of jurisdiction without saying so. Thus, this stare decisis factor supports overruling the decision.

D. There Are No Reliance Interests.

Finally, there are no reliance interests here. First, "judge-made rule[s]" like the *Thunder Basin* factors rarely involve reliance when "experience has pointed up the precedent's shortcomings." *Pearson v. Callahan*, 555 U.S. 223, 233 (2009).

Second, Congress did not craft the statutory language giving courts of appeals jurisdiction over challenges to SEC enforcement action based on the *Thunder Basin* factors. *See* Securities Exchange Act of 1934, ch. 404, § 25, 48 Stat. 881, 901-02 (codified as amended at 15 U.S.C. § 78y(a)(1)). In other words, the SEC's judicial review provision was not written to satisfy *Thunder Basin*'s test for stripping district courts of subject-matter jurisdiction over challenges to the SEC's structure.

The same is true for other statutes too. For example, Congress passed the FTC's judicial review provision eighty years before the Court's decision in *Thunder Basin*. *See* Clayton Act, ch. 323, § 11, 38 Stat. 730, 734-35 (1914) (codified as amended at 15 U.S.C. § 71(c)). This too shows that Congress did not rely on the *Thunder Basin* factors when deciding which claims could be brought only in the courts of appeals.

True, some district courts have declined to hear challenges to agency structures because of the *Thunder Basin* factors. But this does not mean that there are genuine reliance interests militating against overrunning that decision. For those cases still on appeal, an appellate court can vacate the

district court's order and remand for further proceedings.

There is nothing in how executive agencies operate or how regulated parties act that relies on the *Thunder Basin* factors. The only thing that will change is whether the district courts will properly exercise jurisdiction over challenges to agencies' structures or whether they will improperly punt those decisions to the agencies. Thus, this factor supports overruling *Thunder Basin*.

* * *

The test that courts apply when determining whether they have subject-matter jurisdiction over a class of cases implicates foundational separation-of-powers issues. While Congress cannot overrule *Thunder Basin*, this Court can. And it should do so to reaffirm that separation-of-powers principles must be at the forefront of any analysis of our constitutional structure.

CONCLUSION

This Court should affirm.

Respectfully submitted,

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