No. _____

IN THE

Supreme Court of the United States

NATIONAL ASSOCIATION OF IMMIGRATION JUDGES,

Petitioner,

v.

SIRCE E. OWEN, IN HER OFFICIAL CAPACITY AS ACTING DIRECTOR OF THE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

One year after it decided *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), this Court exercised jurisdiction over a pre-enforcement challenge to a broad prior restraint on the speech of federal employees that was filed originally in district court. *United States v. Nat'l Treasury Emps. Union* (*NTEU*), 513 U.S. 454 (1995). Petitioner here, the National Association of Immigration Judges ("NAIJ"), brought a similar pre-enforcement challenge to an across-the-board policy restricting the speech of the nation's immigration judges, but the Fourth Circuit held—after a detour on another issue, *Margolin v. NAIJ*, No. 25-767 (May 26, 2026), *rev'd summarily*, *NAIJ v. Owen*, 139 F.4th 293 (4th Cir. 2025)—that NAIJ was required to raise its challenge through the review scheme established by the Civil Service Reform Act ("CSRA"). It reached that conclusion even though the scheme does not guarantee judicial review of NAIJ's constitutional claims, let alone review that could redress their "here-and-now" First Amendment injuries. *Axon Enter., Inc. v. FTC*, 598 U.S. 175, 191 (2023).

The question presented is whether the CSRA impliedly strips federal district courts of jurisdiction over a pre-enforcement challenge to a broad prior restraint on the speech of federal employees, even where:

(a) the challenge could not be raised at all under the CSRA's review scheme;

(b) the CSRA's review scheme would not guarantee judicial review of the challenge in any event, because the availability of judicial review would turn entirely on agency officials' unfettered and unreviewable discretion; and

(c) any judicial review would come too late to remedy the "here-and-now" injuries caused by the prior restraint.

PARTIES TO THE PROCEEDING

Petitioner in this Court (Plaintiff–Appellant below) is NAIJ. Respondent in this Court (Defendant–Appellee below) is Sirce E. Owen, in her official capacity as Acting Director of the Executive Office for Immigration Review ("EOIR").

RULE 29.6 DISCLOSURE STATEMENT

NAIJ has no parent corporation and no publicly held company owns 10 percent or more of its stock.

RELATED PROCEEDINGS

United States District Court (E.D. Va.):

NAIJ v. Neal, No. 20-cv-731 (Sept. 21, 2023)

United States Court of Appeals (4th Cir.):

NAIJ v. Owen, No. 23-2235 (Aug. 19, 2026)

Supreme Court of the United States:

Margolin v. NAIJ, No. 25A662 (Dec. 19, 2025)

Margolin v. NAIJ, No. 25-767 (May 26, 2026)

NAIJ v. Margolin, No. 25-1009 (May 26, 2026)

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PETITION FOR CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals is not reported. It is available at 2026 WL 2428750 and reproduced at Appendix ("App.") 4a. The decision of the district court is reported at 693 F. Supp. 3d 549 and reproduced at App. 93a.

The Fourth Circuit's prior opinion is reported at 139 F.4th 293 and reproduced at App. 16a. This Court's opinion summarily reversing that prior opinion and remanding for further proceedings is reported at 608 U.S. 339 and reproduced at App. 7a.

JURISDICTION

The court of appeals entered judgment on August 19, 2026. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are included at App. 153a–202a.

INTRODUCTION

This case presents a circuit split on a recurring issue of exceptional importance: whether federal employees may file pre-enforcement challenges to prior restraints on their speech directly in district court, or whether, instead, they must proceed

through an administrative review scheme that does not guarantee *any*—let alone meaningful—judicial review of their time-sensitive constitutional claims.

The policy that gave rise to this suit categorically prohibits immigration judges from speaking publicly in their personal capacities about immigration law or policy or about the agency that employs them. It is a quintessential prior restraint—the kind of speech restriction whose very existence this Court has recognized intimidates parties into silence and cries out for immediate judicial relief. *See City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 759 (1988); *cf. First Choice Women's Res. Ctrs., Inc. v. Davenport*, 608 U.S. 174, 192–95 (2026). But on remand following this Court's summary reversal of the panel's prior decision—which called into question whether the CSRA continues to channel *any* claims—the Fourth Circuit affirmed the district court's ruling that NAIJ's claims are of the type Congress intended to be channeled through the statutory scheme.

Although the Fourth Circuit did not explain its reasons for this affirmance, they are presumably the reasons it gave for this same conclusion in its pre-remand opinion. The Fourth Circuit there recognized that proceeding under the CSRA would not guarantee NAIJ judicial review of its constitutional claims, but concluded that NAIJ was nonetheless required to do so by this Court's decision in *Elgin v. Department of Treasury*, 567 U.S. 1 (2012). In reality, the panel's decision dramatically extended *Elgin*'s reach. In *Elgin*, the Court held that federal employees who challenge their

termination—an employment action for which the CSRA indisputably guarantees judicial review—cannot evade the scheme by arguing that a federal statute is unconstitutional. But *Elgin* did not address pre-enforcement claims that, like NAIJ's, do not challenge a CSRA-covered action; nor did the case involve "here-and-now" constitutional injuries for which the statute provided no guarantee of judicial review. *Axon*, 598 U.S. at 191.

The Fourth Circuit's decision directly conflicts with a decision of the D.C. Circuit, and it also breaks with a long line of cases, including from this Court, exercising jurisdiction over simple pre-enforcement challenges to prior restraints on federal-employee speech. In *Weaver v. U.S. Information Agency*, the D.C. Circuit expressly rejected the argument that the CSRA strips jurisdiction over "a simple pre-enforcement attack on a regulation restricting employee speech." 87 F.3d 1429, 1435 (D.C. Cir. 1996). The court relied in part on this Court's decision in *NTEU*, issued just one year after *Thunder Basin*, in which the Court exercised jurisdiction over a similar prior-restraint challenge without once mentioning the possibility of CSRA preclusion. Instead, the Court resolved the plaintiffs' claims on the merits, holding that a ban on the acceptance of honoraria by federal employees was an unconstitutional prior restraint. Ever since, lower courts have treated it as settled law that federal employees may challenge policies imposing prior restraints on their speech in district court, so long as they are not in reality targeting a covered sanction for non-compliance.

It is bad enough that the Fourth Circuit's decision implies that one of this Court's seminal public-employee speech cases was wrongly decided. But the decision also directly conflicts with more recent Supreme Court precedent. In *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010), the Court held that a plaintiff should not have to raise their claims administratively when there is no guarantee of judicial review at the end of the road, and in *Axon* the Court held that even a guarantee of judicial review at some point is not enough where a plaintiff suffers from "here-and-now" injuries that cannot be redressed by that review. Requiring NAIJ to proceed through the CSRA would bring together both of these problems: NAIJ's claims raise paradigmatic "here-and-now" injuries, and the CSRA does not guarantee even eventual judicial review of those claims.

Review of the Fourth Circuit's decision is warranted now because it threatens to create a First Amendment black hole. Under the Fourth Circuit's application of *Thunder Basin*, administrations of both political parties could enact sweeping prior restraints on the speech of federal employees without any guarantee of judicial review. And the implications extend beyond free speech, because the same rule would reach challenges to policies concerning religion, including policies that deny employees religious accommodations or restrict their private observances of religious practice. This Court charted a different path in *NTEU*, and in the decades since, lower courts have correctly followed its lead. The Court's intervention is urgently needed

to ensure a uniform approach to this important question of federal law and to protect the First Amendment rights of federal employees.

STATEMENT OF THE CASE

I. Legal Background

1. Congress has expressly provided that federal district courts have jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. While Congress may limit jurisdiction it has expressly granted, the default rule is that when a statute expressly grants jurisdiction, "that express legislation must control, in the absence of subsequent legislation equally express." *Rosencrans v. United States*, 165 U.S. 257, 262 (1897). Moreover, this Court has recognized that jurisdiction conferred by § 1331 in particular "should hold firm against 'mere implication flowing from subsequent legislation.'" *Mims v. Arrow Fin. Serv., LLC*, 565 U.S. 368, 383 (2012) (quoting *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 808–09 (1976)).

Notwithstanding these principles, this Court has sometimes inferred congressional intent to silently take away jurisdiction that § 1331 expressly confers. "[W]hen Congress has create[d] procedures designed to permit agency expertise to be brought to bear on particular problems," *Free Enter. Fund*, 561 U.S. at 489 (citation modified), the Court has assessed whether the creation of these procedures evinces an intent to strip district-court jurisdiction over certain

claims. In doing so, it has asked whether the "statutory scheme displays a 'fairly discernible' intent to limit jurisdiction, and [if so, whether] the claims at issue 'are of the type Congress intended to be reviewed within th[e] statutory structure.'" *Id.* (quoting *Thunder Basin*, 510 U.S. at 207).

Three considerations guide that inquiry: namely, "could precluding district court jurisdiction 'foreclose all meaningful judicial review' of the claim"; "is the claim 'wholly collateral to [the] statute's review provisions'"; and "is the claim 'outside the agency's expertise.'" *Axon*, 598 U.S. at 186 (quoting *Thunder Basin*, 510 U.S. at 212–13). The first consideration "recognizes that Congress rarely allows claims about agency action to escape effective judicial review." *Id.*; *see also Thunder Basin*, 510 U.S. at 215–16 n.20 (recognizing the "serious constitutional question" that would arise if an agency statute were construed to preclude meaningful judicial review of a constitutional claim (citation omitted)). The second and third "reflect in related ways the point of special review provisions—to give the agency a heightened role in the matters it customarily handles, and can apply distinctive knowledge to." *Axon*, 598 U.S. at 186.

2. The CSRA "comprehensively overhauled the civil service system" by creating a "new framework for evaluating adverse personnel actions against [federal employees]." *Lindahl v. OPM*, 470 U.S. 768, 773–74 (1985); *see* Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978). The statute's framework provides "graduated procedural protections depending on an action's severity."

Kloeckner v. Solis, 568 U.S. 41, 44 (2012). Two parts of this graduated framework are relevant here.

First, Chapter 23 of the CSRA governs review of "prohibited personnel practice[s]," which are "the least severe employment actions the Government can take." *Feds for Med. Freedom v. Biden*, 63 F.4th 366, 370–71 (5th Cir. 2023) (citing 5 U.S.C. § 2302(b)), *cert. granted, judgment vacated*, 144 S. Ct. 480 (2023). Prohibited personnel practices are an enumerated set of acts that federal employers may not take against covered employees, including any "personnel action" in violation of the "merit system principles." 5 U.S.C. § 2302(b). One such principle is that employees should be treated "with proper regard for their . . . constitutional rights." *Id.* § 2301(b)(2). A "personnel action," in turn, is defined as one of twelve employment actions—such as an "appointment," "promotion," "disciplinary or corrective action," or "other significant change in . . . working conditions"—taken "with respect to an employee." *Id.* § 2302(a)(2)(A).

Because prohibited personnel practices are relatively minor, employees who suffer them are not guaranteed judicial review. Under Chapter 23, an employee who suffers a prohibited personnel practice may file a complaint with the Office of Special Counsel ("OSC"). 5 U.S.C. § 1214(a)(1)(A). If the Special Counsel concludes that "there are reasonable grounds to believe that a prohibited personnel practice has occurred," *id.*, he must report that conclusion to the employing agency, *id.* § 1214(b)(2)(B). If after some unspecified "reasonable period of time" the agency does not take

corrective action, the Special Counsel "*may* petition the [MSPB]." *Id.* § 1214(b)(2)(C) (emphasis added). Final orders of the MSPB are reviewable before the Federal Circuit. *Id.* § 1214(c). But if the Special Counsel concludes that the complaint lacks merit, or if he exercises his discretion to decline to petition the MSPB for any reason, the employee cannot seek judicial review and is simply "out of luck." *Krafsur v. Davenport*, 736 F.3d 1032, 1034 (6th Cir. 2013).

During the six fiscal years running from 2020 to 2025, the Special Counsel petitioned the MSPB for corrective action only once. *See 2024 Off. of Special Couns. Ann. Rep.* 16 (2024), https://perma.cc/99XK-D5ZA (no petitions between 2020 and 2024); *2025 Off. of Special Couns. Ann. Rep.* 16 (2025), https://perma.cc/78RV-7BD7 (one petition in 2025).

Second, Chapter 75 provides for the review of "adverse actions," which are "the most-severe employment actions." *Feds for Med. Freedom*, 63 F.4th at 371 (citing 5 U.S.C. §§ 7502, 7512(1)–(5)). These include removals, suspensions, reductions in grade or pay, and certain furloughs. 5 U.S.C. §§ 7501–7504, 7512(1)–(5). An employee who is suspended for less than fourteen days is entitled to notice, the opportunity to respond, representation by an attorney, and a written decision. *Id.* § 7503(b)(1)–(4). An employee who suffers any other Chapter 75 action receives these same protections, *id.* § 7513(b), and may also appeal directly to the MSPB, *id.* § 7513(d). Employees may seek judicial review of final orders of the MSPB before the Federal Circuit. *Id.* § 7703(b)(1)(A).

II. Factual and Procedural Background

1. NAIJ is a non-partisan, non-profit voluntary association of immigration judges formed to promote the independence, dignity, professionalism, and efficiency of the U.S. immigration courts. C.A. App. 16.[1] From 1979 to 2022, NAIJ was the certified bargaining representative for all non-supervisory judges. *Id.* at 16–17. NAIJ was formally decertified in April 2022, but it remains a voluntary association of immigration judges and continues to have hundreds of dues-paying members. *Id.*

Immigration judges are employees of EOIR, an agency within the Department of Justice. App. 18a. In addition to their official responsibilities, many immigration judges are also active members of their civic communities who wish to speak to the public in their roles as private citizens.

Prior to 2017, immigration judges regularly spoke at local and national conferences, guest lectured at universities and law schools, and participated in immigration law trainings—all in their personal capacities, and all without interfering with the work of EOIR. C.A. App. 19. While approval was required for these activities, immigration judges routinely received that approval so long as they included a disclaimer stating that the views they presented were their own and not those of EOIR. *Id.*

[1] Citations to "C.A. App." refer to the joint appendix filed in the Fourth Circuit.

Beginning in 2017, however, EOIR issued a series of policies sharply limiting the circumstances in which immigration judges could engage in private speech. The currently operative policy ("Policy") categorically prohibits immigration judges from speaking about immigration or EOIR in their personal capacities. *Id.* at 56–62. It does so by deeming "official capacity" all speech concerning "agency policies, programs, or a subject matter that directly relates to [immigration judges'] official duties." *Id.* at 57.

The Policy has had the unsurprising effect of silencing immigration judges on topics of substantial public interest. Many of NAIJ's members wish to contribute to public and scholarly discourse concerning developments in immigration policy, but the Policy prevents them from doing so. For example, the Policy prevents them from presenting at law schools and conferences, and from writing for legal journals and other publications, about issues ranging from court procedure to their own personal experiences as judges. *Id.* at 28–29, 35–36. The result is to deny the public access to important insights from those with direct knowledge of how the immigration system operates. *See, e.g.*, *id.* at 34–36; *cf.* Chief Justice John G. Roberts, *2019 Year-End Report on the Federal Judiciary* 4 (2019), https://perma.cc/33LJ-PL6V (imploring judges "to continue their efforts to promote public confidence in the judiciary, . . . through civic outreach").

Some immigration judges have tried to continue to speak publicly by seeking approval to do so in an official capacity, C.A. App. 29–33, but speaking in an

official capacity requires them to act as spokespeople for the agency. *See id.* at 57 (explaining that employees who speak in an "official capacity" do so "on behalf of the agency"). And as a mouthpiece for the agency, judges must share only the agency's official positions—they may not share their personal views. *See, e.g.*, *id.* at 29–33.

2. NAIJ filed this lawsuit and a motion for a preliminary injunction in 2020, arguing that earlier iterations of the Policy violated the First and Fifth Amendments. *See* App. 107a. The district court denied NAIJ's motion, holding that the Federal Service Labor-Management Relations Statute impliedly divested it of jurisdiction over NAIJ's claims because NAIJ was, at that time, a certified bargaining representative that could raise bargaining disputes through the statutory scheme. *NAIJ v. McHenry*, 477 F. Supp. 3d 466, 471–72 (E.D. Va. 2020). The Fourth Circuit initially affirmed, *see NAIJ v. Neal*, No. 20-1868, 2022 WL 997223, at *2 (4th Cir. Apr. 4, 2022), but then vacated its ruling after NAIJ was formally decertified, *see NAIJ v. Neal*, No. 20-1868, 2022 WL 2045339, at *1 (4th Cir. June 7, 2022).

Following its decertification, NAIJ filed the operative complaint (the second amended complaint), which the government moved to dismiss. App. 94a. In September 2023, the district court dismissed NAIJ's claims, holding that they must be raised through the CSRA's administrative review scheme. *Id.* at 149a–150a. Applying the two-step test established by *Thunder Basin*, the court concluded, first, that Congress's intent to preclude

district-court jurisdiction is "fairly discernible" in the CSRA, *id.* at 123a, and, second, that NAIJ's claims are "of the type intended to be reviewed through the statutory scheme," *id.* at 123a–124a, 149a.

NAIJ appealed. C.A. App. 111–112. In June 2025, the Fourth Circuit vacated the district court's ruling and remanded for further factfinding. App. 16a–17a, 49a. The court began by acknowledging that, until recently, its analysis of the first step of the *Thunder Basin* test would have been "simple," because this Court had already held in *Elgin* that the CSRA evinced Congress's intent to preclude district-court jurisdiction over certain employment-related claims. *Id.* at 29a–30a. But the court of appeals concluded that factual developments post-dating oral argument had called into question whether the CSRA was functioning as Congress intended. *Id.* at 30a–36a. These developments, the court said, might require a "new examination of Congressional intent" to strip district-court jurisdiction over claims covered by the CSRA. *Id.* at 36a. The court therefore remanded to the district court with instructions "to conduct a factual inquiry [into] whether the CSRA continues to provide a functional adjudicatory scheme." *Id.*

The court then proceeded to the second step of the *Thunder Basin* framework and considered whether NAIJ's claims "are of the type Congress intended to be reviewed" through the CSRA. App. 37a (citation omitted). The court began by addressing whether the CSRA covered NAIJ's claims. It determined that Chapter 75 of the Act did

not apply because "no adverse action ha[d] been taken or proposed against [NAIJ's members]," *id.* at 38a; NAIJ's members had "neither violated nor intend to violate [the Policy]," *id.* at 39a and "[g]overnment employees are not required to 'bet the farm by taking violative action' in order to bring a constitutional challenge to an agency policy," *id.* (quoting *Free Enter. Fund,* 561 U.S. at 490). The court concluded, however, that NAIJ's members could challenge the Policy under Chapter 23 of the CSRA. The court reasoned that Chapter 23 prohibits federal employers from taking a "personnel action" in violation of the merit system principles, and that the Policy "fit[] that definition" because it could "constitute a significant change in working conditions that NAIJ alleges was adopted without 'proper regard for [its members'] constitutional rights.'" *Id.* at 40a (alteration in original) (quoting 5 U.S.C. § 2301(b)(2)).

Having determined that Chapter 23 provides a "potential avenue" to challenge the Policy, *id.* at 43a, the Fourth Circuit next considered the *Thunder Basin* factors. With respect to the first factor, the court concluded that Chapter 23 provided "meaningful judicial review" of NAIJ's claims because NAIJ's members could file a complaint with the OSC, which in turn could petition the MSPB for corrective action. *Id.* at 43a–44a. The court acknowledged "that the Special Counsel is afforded leeway regarding which claims to bring to the MSPB," and that the Special Counsel could exercise that "leeway" to "prevent a claim [like NAIJ's] from ever reaching the MSPB" and, through it, judicial review. *Id.* at 44a. But it read this Court's decision

in *Elgin* as requiring NAIJ's members to bring their claims to the OSC anyway. *Id.* The court also rejected NAIJ's argument that its claims presented the kind of "here-and-now injury" that this Court permitted to proceed directly to district court in *Axon*. *Id.* at 45a–46a. The court stated without extended analysis that the rule announced in *Axon* applies only to a "narrow class of structural constitutional claims," and does not extend to the First Amendment harms caused by a broad prior restraint on speech. *Id.*

Based largely on its determination that NAIJ's challenge could be raised through Chapter 23, the Fourth Circuit also reasoned that NAIJ's claims are not "wholly collateral" to the CSRA's review scheme, *id.* at 46a–48a, and that the OSC and the MSPB possess "expertise that may help resolve the claim[s]," *id.* at 48a–49a. It therefore concluded that, "if the first step of the *Thunder Basin* test is met, then Congress would have intended to strip district court jurisdiction over NAIJ's Chapter 23 claims." *Id.* at 49a.

3. The government petitioned the Fourth Circuit for rehearing, which the court of appeals denied by a 9–6 vote in November 2025. *Id.* at 51a–52a. Judge Thacker, joined by Judge King, concurred in the denial of rehearing, and expressed her "complete agreement with the panel opinion." *Id.* at 61a. She also emphasized the importance of providing NAIJ with an "opportunity for meaningful review of its claim that the constitutional rights of its members are being violated." *Id.* at 63a. And she underscored the default rule that "[c]laims for violation of rights

arising under the United States Constitution are typically brought in federal court," *id.* (citing 28 U.S.C. § 1331), unless "Congress makes clear its intent to strip such jurisdiction from the federal courts through legislation," *id.* (citing *Webster v. Doe*, 486 U.S. 592, 603 (1988)). Judge Quattlebaum, joined by three judges, dissented from the denial of rehearing. *Id.* at 68a. In discussing the *Thunder Basin* framework, the dissent noted that "[a]s a matter of first principles, . . . [e]xamining a statute's text seems like a better way to determine whether Congress has precluded federal courts from hearing certain claims than using judge-made multi-factor tests," but acknowledged it was bound by this Court's precedent. *Id.* at 79a n.3.

4. The government petitioned for certiorari and sought summary reversal, arguing that the Fourth Circuit violated the principle of party presentation by concluding, under step one of *Thunder Basin*, that factual circumstances may have so substantially undermined the functioning of the CSRA that Congress's intent to preclude district-court jurisdiction could no longer be inferred from the scheme. Pet. for a Writ of Certiorari at 20–26, *Margolin v. NAIJ*, 608 U.S. 339 (2026) (No. 25–767). NAIJ opposed the petition. It also cross-petitioned for a writ of certiorari, seeking review of the Fourth Circuit's alternative step-two conclusion that NAIJ's claims fell within the CSRA. Cross-Pet. for a Writ of Certiorari at 1–4, *NAIJ v. Margolin*, No. 25-1009 (May 26, 2026).

This Court granted the government's petition for certiorari, summarily reversed the Fourth Circuit's

judgment based on the party-presentation principle, and remanded for proceedings consistent with its per curiam opinion. App. 7a, 11a–12a. The Court did not address the Fourth Circuit's alternative step-two conclusion, and it denied NAIJ's cross-petition.

On remand, the Fourth Circuit issued a per curiam, unpublished opinion affirming the district court's ruling that NAIJ's claims are of the type that must be raised through the CSRA. *Id.* at 1a; *see also id.* at 4a (amended opinion fixing clerical error). Although the court did not explain its reasons for affirmance, they are presumably the ones the court advanced in support of that conclusion in its now vacated, June 2025 opinion *Id.* at 28a, 37a–49a. The Fourth Circuit's mandate issued on October 13, 2026.

REASONS TO GRANT THE PETITION

I. The Fourth Circuit's decision conflicts with D.C. Circuit precedent.

The Fourth Circuit's decision conflicts with the D.C. Circuit's decision in *Weaver*.

In *Weaver*, the D.C. Circuit expressly rejected the argument that the CSRA impliedly stripped district-court jurisdiction over a prior-restraint challenge virtually identical to NAIJ's. Weaver was a Voice of America employee who challenged a regulation requiring agency employees to submit for prepublication review all speaking, writing, and teaching material on matters of "official concern." 87 F.3d at 1431–32. After being admonished for

violating this requirement, she filed an amended complaint challenging that sanction in addition to the policy. *Id.* at 1432. The court dismissed Weaver's challenge to the admonishment, reasoning that it was remediable under the CSRA as a "prohibited personnel practice." *Id.* at 1432–33. But the court treated her challenge to the policy differently, holding that the district court had jurisdiction over "a simple pre-enforcement attack on a regulation restricting employee speech." *Id.* at 1434. In the court's view, that challenge "st[ood] independently" of any covered sanction for non-compliance, and so it could be filed directly in district court. *Id.*

In reaching this conclusion, the D.C. Circuit relied on this Court's decision in *NTEU*, issued just one year after *Thunder Basin*. *Weaver*, 87 F.3d at 1434. In *NTEU*, the Court exercised jurisdiction over a pre-enforcement challenge to a broad prior restraint on the speech of federal employees without even mentioning the possibility of CSRA preclusion. Instead, the Court resolved the employees' claims on the merits, holding that a ban on honoraria for unofficial speaking and writing engagements was an unconstitutional prior restraint. 513 U.S. at 457. And in doing so, it established the doctrinal framework for assessing the constitutionality of broad ex ante restrictions on the speech of federal employees.

The D.C. Circuit also relied on an earlier en banc decision that the court rendered in the immediate aftermath of *NTEU*. *Weaver*, 87 F.3d at 1434 (citing *Sanjour v. Env't Prot. Agency*, 56 F.3d 85 (D.C. Cir. 1995)). In *Sanjour*, the en banc D.C. Circuit

exercised jurisdiction over a prior-restraint challenge to regulations that prohibited EPA employees from receiving reimbursement from private sources to travel for unofficial speaking engagements that concerned the subject matter of the employees' work. The court invalidated the regulations without the government ever raising the possibility of CSRA preclusion.

The rule in the D.C. Circuit is thus clear: federal employees may proceed directly to district court to file pre-enforcement challenges to prior restraints on their speech. District courts in the D.C. Circuit continue to apply that rule. *See, e.g.*, *Turner v. U.S. Agency for Glob. Media*, 502 F. Supp. 3d 333, 369 (D.D.C. 2020) (relying on *Weaver* in exercising jurisdiction over a First Amendment challenge to employee policies and procedures because the challenge was "distinct from and antecedent to [any] covered personnel action"); *cf. Hardy v. Hamburg*, 69 F. Supp. 3d. 1, 18 (D.D.C. 2014) (applying *Weaver* but declining to exercise jurisdiction because plaintiffs' challenge was not a pre-enforcement one).

In the years since *NTEU* and *Weaver*, other courts have also exercised jurisdiction over pre-enforcement challenges to prior restraints on the speech of federal employees. Indeed, until the Fourth Circuit's decision, that line of lower-court decisions was unbroken. For example, in *Wolfe v. Barnhart*, 446 F.3d 1096 (10th Cir. 2006), the Tenth Circuit exercised jurisdiction to hear an administrative law judge's challenge to a regulation restricting his speech. Again, the government did

not argue that the CSRA stripped jurisdiction, and the court did not raise any such concern on its own.

District courts outside the D.C. Circuit have also followed suit. *See Bakken v. U.S. Mil. Acad.*, 833 F. Supp. 3d 460, 498 (S.D.N.Y. 2026) (exercising jurisdiction over "a simple pre-enforcement attack" on an employee speech policy (quoting *Weaver*, 87 F.3d at 1434)); *Firenze v. NLRB*, No. 12-CV-10880, 2013 WL 639151, at *8 (D. Mass. Jan. 10, 2013) (exercising jurisdiction over a First Amendment challenge to an employee speech rule because "the promulgation . . . of such a rule" was not a covered "personnel action" and "there [was] no allegation that [such an action] ha[d] taken place vis-à-vis the First Amendment claim"); *cf. Tabaddor v. Holder*, 156 F. Supp. 3d 1076, 1083 (C.D. Cal. 2015) (declining to exercise jurisdiction over constitutional claims that were "based *entirely* on actions taken with respect to [the plaintiff employee], not on some guidance or other expression of the challenged recusal-regulation interpretation").

Albeit in a different context, a commanding majority of the en banc Fifth Circuit relied on logic similar to that in *Weaver* in holding that employees could bring a pre-enforcement challenge to the federal COVID-19 vaccine mandate directly in district court, "because the vaccine mandate itself [wa]s not itself a [covered] personnel action—even if a future employer at some future time might take some future action to impose some future personnel action on a future plaintiff who might violate the mandate in the future." *Feds for Med. Freedom*, 63 F.4th at 383. Although the Fifth Circuit's judgment

was ultimately vacated as moot by this Court when the government rescinded the vaccine mandate, *see Biden v. Feds for Med. Freedom*, 144 S. Ct. 480 (2023), the decision remains persuasive. *See, e.g.*, *Bakken*, 833 F. Supp. 3d at 498.

In earlier proceedings before this Court, the government argued that *Weaver* has been superseded by *Elgin*. Br. for Cross-Resp. in Opp. 17, *NAIJ v. Margolin*, No. 25-1009 (May 26, 2026). But *Weaver* is entirely consistent with *Elgin*, which is why district courts in the D.C. Circuit have continued to apply it. *Elgin* held only that the CSRA withdraws jurisdiction when a plaintiff challenges a "covered employment action." *Elgin*, 567 U.S. at 14. The plaintiffs in *Elgin* did challenge a covered action—namely, their terminations—but they did so through the "vehicle" of a facial challenge to the constitutionality of a federal statute. *Id.* at 12. The question was whether that pleading decision altered the preclusion analysis. The Court held that it did not. Here, NAIJ's members have not violated the policy they challenge, and so they have incurred no sanction for non-compliance that they could challenge through the CSRA. App. 39a. As the Fifth Circuit recognized, "*Elgin* did not 'break new ground' regarding implicit preclusion." *Feds for Med. Freedom*, 63 F.4th at 379 (quoting *Cochran v. SEC*, 20 F.4th 194 (5th Cir. 2021)). In fact, it did not "address pre-enforcement challenges at all." *Id.*

The Fourth Circuit's decision directly conflicts with *Weaver*, but despite that conflict, the Fourth Circuit did not address *Weaver*, or grapple with the fact that its conclusion would suggest that *NTEU*—

one of this Court's seminal public-employee speech cases—was wrongly decided. *See Brown Shoe Co. v. United States*, 370 U.S. 294, 307 (1962) ("While we are not bound by previous exercises of jurisdiction in cases in which our power to act was not questioned but was passed sub silentio, neither should we disregard the implications of an exercise of judicial authority assumed to be proper for over 40 years.").

This conflict among the circuits warrants this Court's intervention. A substantial percentage of the nation's federal employees live in the D.C. and Fourth Circuits, and yet they are now effectively subject to two radically different regimes for challenging unconstitutional prior restraints on their speech. Those in the D.C. Circuit may proceed directly to district court. Those in the Fourth Circuit, however, must attempt to navigate an administrative process that does not guarantee judicial review, *see infra* Part III, and that can add months or years of pointless delay while the irreversible harms to their First Amendment rights mount.[2]

[2] Though the Fourth Circuit's recent opinion is unpublished, courts in the circuit are likely to follow it. The opinion reaches the same conclusion that the panel arrived at in its prior opinion, and not a single judge of the court took exception with the prior opinion's step-two analysis in declining to grant rehearing en banc.

II. The Fourth Circuit's opinion conflicts with this Court's decisions in *Axon* and *Free Enterprise Fund*.

The Fourth Circuit's decision cannot be reconciled with this Court's decisions in *Axon* and *Free Enterprise Fund*.

1. In *Axon*, this Court held that plaintiffs need not proceed through an administrative review scheme when they are suffering a "here-and-now" injury that cannot be redressed through after-the-fact appellate review provided by that scheme. The Fourth Circuit's decision conflicts with that holding because it requires NAIJ to raise its First Amendment claims administratively even though the policy NAIJ challenges plainly inflicts "here-and-now" injuries, and even though proceeding through the CSRA would involve significant delay (at best) and thus cause additional First Amendment harms not remediable by any after-the-fact judicial review.

The question in *Axon* was whether the plaintiffs could bring district-court challenges to the constitutionality of administrative enforcement proceedings that had been initiated against them. 598 U.S at 180. Those administrative proceedings were illegitimate, the plaintiffs claimed, because the administrative law judges presiding over their cases had been appointed in violation of the separation of powers. *Id.* at 180–83. Invoking *Thunder Basin,* the government argued that the district courts lacked jurisdiction over the plaintiffs' challenges, because the plaintiffs could raise their constitutional claims

in administrative proceedings and obtain judicial review following those proceedings. *Id.*

In its decision, this Court rejected the government's bid for channeling, because the harm the plaintiffs complained of—being subjected to "an illegitimate proceeding, led by an illegitimate decisionmaker"—was "impossible to remedy once the proceeding [wa]s over, which is when appellate review kicks in." *Id.* at 191. The Court described this harm as a "here-and-now" injury and held that the plaintiffs need not raise their claims administratively because judicial review through the relevant schemes would "come too late to be meaningful." *Id.*

The same is true here. NAIJ challenges a prior restraint on speech—"the most serious and the least tolerable infringement on First Amendment rights." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). "[U]nlike an adverse action taken in response to actual speech," a prior restraint "chills potential speech before it happens." *NTEU*, 513 U.S. at 468. The imposition of such a restraint, even for a short period of time, causes irremediable harms, and those harms plainly cannot be "undone" by the reversal of an agency order—or by any other post-proceeding relief a court of appeals could provide. *Axon*, 598 U.S. at 191.

As this Court has emphasized, "[t]he timeliness of political speech is particularly important." *Elrod v. Burns*, 427 U.S. 347, 374 n.29 (1976). The ability of federal employees to contribute to currently unfolding debates cannot be regained once lost.

Insights that might be highly valuable to public discussion today become stale with the passage of time. Thus, even assuming that NAIJ could one day access judicial review through the CSRA, *but see infra* Part III, its members could not obtain effective relief addressing the "here-and-now" injuries to their right to speak, or to the public's right to hear from them.

In its prior opinion, the Fourth Circuit attempted to distinguish *Axon* by interpreting the case to apply only to "'structural constitutional' challenge[s]." App. 45a–46a. But as explained below, *see infra* Part III, that interpretation disregards the legal principle that the Court established in *Axon*—namely, that district-court jurisdiction lies when the rights at issue would be "'effectively lost' if review is deferred." *Axon*, 598 U.S. at 192; *see Abramowitz v. Lake*, No. 25-5314, 2026 WL 3398685, at *6 (D.C. Cir. Nov. 10, 2026) (applying *Axon*'s logic to Voice of America head's challenge to attempted removal of him from that post, where removal threatened network's journalistic independence). Because that is true when a federal employee files a pre-enforcement challenge to a policy imposing a prior restraint on their speech, *see Bakken*, 833 F. Supp. 3d at 494–95, the Fourth Circuit's decision conflicts with this Court's decision in *Axon*.

2. The Fourth Circuit's decision also conflicts with *Free Enterprise Fund*, because the decision requires NAIJ to raise its constitutional claims through a statutory scheme that provides no guarantee of judicial review.

In *Free Enterprise Fund*, an accounting firm brought an Article II challenge to the structure of the Public Company Accounting Oversight Board, a regulatory body that operated under the SEC's oversight. The government argued that the Securities Exchange Act's review scheme impliedly stripped district-court jurisdiction over the firm's constitutional claims, but the Court disagreed, because the scheme did not provide a guarantee of judicial review. *Free Enter. Fund*, 561 U.S. at 489–90. As the Court later observed in *Axon*, although the firm was the subject of a Board investigation, not every Board action "culminates in a Commission action—which alone the statute makes reviewable in a court of appeals." *Axon*, 598 U.S. at 188 (discussing *Free Enter. Fund*, 561 U.S. at 490). That meant that, "absent district court jurisdiction, [the firm] might never have had judicial recourse." *Id.* at 190.

This case is on all fours with *Free Enterprise Fund*. In its since vacated decision, the Fourth Circuit concluded that NAIJ could challenge the Policy under Chapter 23 of the CSRA. App. 37a. But even if this were the case—and it is not, *see infra* Part III—NAIJ still would not have a guaranteed pathway to judicial review. That is because the CSRA provides for judicial review only of final orders of the MSPB, but under Chapter 23, complaints filed with the OSC reach the MSPB only if the Special Counsel determines, in his sole and unreviewable discretion, to petition the Board for corrective action. *See infra* Part III; 5 U.S.C. § 1214(b)(2)(C). The Special Counsel may therefore block judicial review of NAIJ's claims simply by declining to bring those

claims to the Board. And NAIJ would have no recourse if he did so.

III. The Fourth Circuit erred in concluding that NAIJ's First Amendment prior-restraint claims must be raised through the CSRA.

The Fourth Circuit erred in concluding that Congress intended to withdraw district-court jurisdiction over a simple pre-enforcement challenge to a prior restraint on the speech of federal employees. The "text, structure, and purpose" of the CSRA, *Elgin*, 567 U.S. at 10, do not support that conclusion, because the prior restraint NAIJ challenges is not a CSRA-covered employment action. And each of the considerations that this Court uses to assess congressional intent in this context points decisively in the other direction: stripping district-court jurisdiction over NAIJ's claims "could foreclose all meaningful judicial review"; NAIJ's claims are "wholly collateral" to the CSRA's scheme; and the claims are "outside the agency's expertise." *Thunder Basin*, 510 U.S. at 212–13.

1. Inferring Congress's intent to strip district-court jurisdiction "could foreclose all meaningful judicial review" of NAIJ's First Amendment challenge to a broad prior restraint on the speech of the nation's immigration judges. This is so for three independent reasons.

First, NAIJ cannot obtain *any* judicial review through the CSRA's scheme because the prior restraint it challenges is not a CSRA-covered action.

As this Court recognized in *Elgin*, the CSRA provides judicial review of an employee's claim only if the employee is challenging a "covered employment action." 567 U.S. at 14. But here, NAIJ is not challenging a covered action. As a result, neither the MSPB nor the Federal Circuit would have jurisdiction over NAIJ's claims, and so NAIJ could not obtain any—let alone meaningful—judicial review through the statutory scheme. *See id.* at 18–19.

The Fourth Circuit disagreed, concluding that NAIJ could challenge EOIR's policy as a "significant change in . . . working conditions," one of the twelve "personnel actions" challengeable under Chapter 23 of the statute as a "prohibited personnel practice." App. 40a. But this reading of the statute is at odds with the CSRA's text, structure, and purpose.

The text of Chapter 23 authorizes challenges to individual personnel decisions, not to blanket policies like the one NAIJ challenges. *Feds for Med. Freedom*, 63 F.4th at 375. This is clear from the statute's definition of "personnel actions," which ends with a proviso limiting its reach to actions taken "with respect to *an employee*." 5 U.S.C. § 2302(a)(2)(A) (emphasis added). That limiting clause would be meaningless if Chapter 23 authorized employees to challenge any policy on the books, even if it had never been applied to them.

As exhaustively explained by the Fifth Circuit in its en banc decision in *Feds for Medical Freedom*, the canon of *ejusdem generis* supports this interpretation. 63 F.4th at 375–76. The phrase "any other significant change in . . . working conditions" appears in a residual clause following a list of eleven "typical, everyday" individual employment actions—actions like the decision to "promote or reassign a single employee." *Id.* The only reference in the list to anything broader than an individual employment decision is the use of the term "policy" in romanette (xi), which refers to the "implementation or enforcement of any nondisclosure policy, form, or agreement." 5 U.S.C. § 2302(a)(2)(A)(xi). The Fourth Circuit cited this as evidence that Congress intended Chapter 23 to cover challenges to employee-speech policies, App. 24a, but it confirms the opposite. Like the other enumerated actions, the "implementation or enforcement" of a nondisclosure agreement "with respect to an employee" is plainly an individual personnel decision. *Id.* § 2302(a)(2)(A).

This reading is also consistent with the CSRA's structure, which "provides graduated procedural protections depending on an [employment] action's severity." *Kloeckner v. Solis*, 568 U.S. at 44. Because prohibited personnel practices under Chapter 23 are relatively "minor" as compared with adverse actions under Chapter 75, they do not entitle affected employees to judicial review. *Pinar v. Dole*, 747 F.2d 899, 911–12 (4th Cir. 1984); *see also, e.g.*, *Weaver*, 87 F.3d at 1434; *Feds for Med. Freedom*, 63 F.4th at 370. A policy that suppresses the speech of hundreds or potentially thousands of federal employees on

matters of public interest can hardly be described as "minor." *See Neb. Press*, 427 U.S. at 559.

This reading is reinforced by the CSRA's purpose, which is "to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration." *United States v. Fausto*, 484 U.S. 439, 445 (1988). Treating any policy that "affect[s] how [employees] interact with their [employer]" as a covered personnel action, App. 42a (citation omitted), threatens to upset this balance by "sweeping every employer-employee interaction into the CSRA's reach and 'strip[ping] jurisdiction over every claim any federal employee could ever bring.'" *Bakken*, 833 F. Supp. 3d. at 492 (quoting *Feds for Med. Freedom*, 63 F.4th at 374).

Second, even if the policy were actionable under Chapter 23, the statute would not guarantee judicial review, because the availability of such review would turn on the unfettered discretion of agency officials.

Judicial review under the CSRA is available only for final orders of the MSPB, 5 U.S.C. § 1214(c), but a Chapter 23 complaint can reach the MSPB only if the Special Counsel decides—in his sole and unreviewable discretion—to petition the MSPB for corrective action, *id.* § 1214(b)(2)(C). Accordingly, NAIJ and its members could not obtain judicial review of any Chapter 23 complaint unless the Special Counsel decided to allow that review.

This is at best an uncertain path, and at worst an illusory one. During the six fiscal years running from

2020 to 2025, the Special Counsel petitioned the MSPB for corrective action only once. *See supra* p. 8. And if the President can fire the Special Counsel at will, as he claims the authority to do, he can ensure that the holder of that office always buries even meritorious constitutional challenges to policies he'd like to insulate from judicial review. The "narrowness" of this pathway to review—"and the fact any review at all turns on the unreviewable discretion of Government officials"—makes clear that the CSRA fails to afford NAIJ an avenue of review that is "meaningful." *Feds for Med. Freedom*, 63 F.4th at 380.

The Fourth Circuit acknowledged this problem, *see* App. 44a, but suggested that NAIJ could seek judicial review if it failed to obtain relief through the Special Counsel. *Id.* Accepting this sleight of hand, however, would rewrite *Thunder Basin*. That case establishes a jurisdictional bar, not a requirement of administrative exhaustion. That is why the question under *Thunder Basin* is whether "Congress's creation of a 'comprehensive review process' . . . oust[s] district courts of jurisdiction." *Axon*, 598 U.S. at 186 (quoting *Thunder Basin*, 510 U.S. at 208). That is why the most important consideration in that inquiry is whether "a finding of preclusion could foreclose all meaningful judicial review." *Thunder Basin*, 510 U.S. at 212–13. And that is why this Court has permitted plaintiffs to seek immediate judicial review when a statutory scheme fails to guarantee eventual review in a court of appeals. *See Axon*, 598 U.S. at 190 (explaining that the problem in *Free Enterprise Fund* was that "absent district

court jurisdiction, [Petitioner] might never have had judicial recourse").[3]

If the Fourth Circuit were correct, instead, that any difficulty in obtaining judicial review through an administrative scheme could be remedied by returning to district court, then the first *Thunder Basin* factor would be a dead letter. And federal employees would be required to run the gauntlet of the CSRA's administrative hurdles, even where there is *no* reason to believe doing so would yield Federal Circuit review. That is simply not the law.

Third and finally, even if NAIJ could raise its claims under Chapter 23, and even if the Special Counsel permitted judicial review of those claims, that review would come too late to remedy the "here-and-now" injuries to the First Amendment rights of NAIJ's members and of the listening public. *Axon*, 598 U.S. at 191. As explained above, NAIJ's members suffer from "here-and-now" injuries like the plaintiffs in *Axon*, *id.*, because they challenge a prior restraint that chills their speech and deprives the public of their insights on issues of substantial public concern, *see supra* Part II.

In its prior opinion, the Fourth Circuit distinguished the facts of *Axon* but failed to grapple with its logic. App. 45a–46a. In *Axon*, the Court

[3] Notably, the Fourth Circuit offered no guarantee that a district court *would* have jurisdiction to hear NAIJ's claims if the OSC declined to petition the MSPB. *See* App. 44a (stating simply that "[t]hat is not . . . the posture of the case"). Nor did it say how long NAIJ would have to wait on the OSC before being deemed to have exhausted its remedies.

made clear that the plaintiffs were suffering a "here-and-now" injury because the injury they faced—"subjection to an illegitimate proceeding, led by an illegitimate decisionmaker"—could not be remedied after the fact, "when appellate review kick[ed] in." 598 U.S. at 191. As the Court explained, "[a] proceeding that has already happened cannot be undone." *Id.*

The injuries inflicted by the Policy similarly cannot be undone. Whatever relief a court of appeals could afford NAIJ, it could not give its members the ability to go back in time and contribute to time-sensitive debates that have now subsided. The opportunity to inform *those* debates, once lost, cannot be regained.

The Court's recent decision in *First Choice* confirms this logic. That case concerned a state subpoena demanding the identities of a nonprofit organization's financial supporters. Because the subpoena was not self-executing, the state argued that the organization could seek federal court review only after the state had compelled enforcement of the subpoena in state court. The Court rejected that argument because, like NAIJ's members, the organization was already suffering an "objectively reasonable chill" to its First Amendment rights. 608 U.S. at 191, 195. There, as here and in *Axon*, the "availability of federal court review on the back end [could not] provide[] the plaintiff[] an adequate remedy." *Id.* at 195 (cleaned up).

2. The remaining *Thunder Basin* considerations also weigh strongly in favor of finding jurisdiction.

NAIJ's claims are wholly collateral to the CSRA because they are not a "vehicle" by which federal employees are seeking "to reverse" a CSRA-covered personnel action. *Cf. Elgin*, 567 U.S. at 22. In its prior opinion, the Fourth Circuit analogized this case to *Elgin*, but unlike the terminations the plaintiffs sought to reverse there, the Policy is not "the type of personnel action regularly adjudicated by the MSPB and the Federal Circuit within the CSRA scheme." *Id.* In fact, it is not a covered personnel action at all, for the reasons already explained.

Unsurprisingly, then, the CSRA does not afford the type of relief sought by NAIJ. *Cf. Elgin*, 567 U.S. at 22. The relief the CSRA typically affords includes "reinstatement, backpay, and attorney's fees," *id.*—that is, remedies tailored to "individual grievances regarding individual personnel actions," *Feds for Med. Freedom*, 63 F.4th at 381—not declaratory or injunctive relief against agency-wide policies that affect hundreds or thousands of employees, *id.* Counsel is not aware of any case, nor has the government pointed to one in this litigation, "where [the Special Counsel] agreed in [his] unreviewable discretion to petition the MSPB for relief that remotely resembles what [NAIJ] request[s] here." *Id.*

NAIJ's claims are also outside the Special Counsel's and MSPB's expertise because they are purely constitutional claims involving the right of federal employees to speak in their personal capacities and the right of the public to hear what they have to say. *Cf. Axon*, 598 U.S. at 194 (holding

that the plaintiffs' claims were outside the FTC's expertise because they "raise[d] 'standard questions of administrative' and constitutional law" (quoting *Free Enter. Fund*, 561 U.S. at 491)). To counsel's knowledge, neither the Special Counsel nor Board has *ever* had occasion to address the constitutionality of a far-reaching prior restraint. Nor are they equipped to assess the impact of the Policy on the interests of "both potential audiences and a vast group of present and future employees in a broad range of present and future expression," *NTEU*, 513 U.S. at 468, as courts are required to do when applying the *NTEU* framework for assessing the constitutionality of prior restraints on public employees.

The last two *Thunder Basin* factors thus also point in the direction of finding jurisdiction, but even if they did not, the first factor would be dispositive, because, as this Court has repeatedly recognized, a "serious constitutional question" would arise if an agency statute were construed to preclude meaningful judicial review of a constitutional claim. *Thunder Basin*, 510 U.S. at 215 n.20.

IV. The question presented is exceptionally important, and this case is an excellent vehicle to resolve it.

1. The question of whether federal employees may go to district court to file pre-enforcement challenges to prior restraints on their speech has far-reaching implications for public discourse important to our democracy. The Fourth Circuit proposed that federal employees could lodge these

challenges under the CSRA through a Chapter 23 complaint, but even if one assumes that a complaint about a broad prior restraint can be made under that chapter, following that path would give agency officials unfettered discretion to deny judicial review altogether. The Fourth Circuit's conclusion threatens to create a First Amendment black hole—allowing each new administration to impose prior restraints on the speech of federal employees without any guarantee of judicial review of those restraints.

Under the Fourth Circuit's decision, the federal government could categorically forbid federal employees from engaging in even private speech about gun rights, health care, vaccines, university admissions, or the war in Gaza—and judicial review of these brazenly unconstitutional policies would come only with the blessing of an agency official, and only after protracted and futile administrative proceedings.

The government could similarly suppress the free exercise of religion by federal employees. Agencies could promulgate policies denying religious accommodations or restricting private observances of religious practice. And again, judicial review would be contingent on the Special Counsel, who could choose—in his unfettered discretion—to deny review or to delay it indefinitely.

Without the assurance of judicial review, federal employees would be left with a Hobson's choice—suppress their own speech or religious exercise to avoid the penalty of non-compliance, or violate the

policy and incur the kind of serious sanction that would give rise to a guarantee of judicial review. This is no real choice at all, which is why this Court has made clear that "requir[ing] plaintiffs to 'bet the farm . . . by taking the violative action' before 'testing the validity of the law'" is not "a 'meaningful' avenue of relief." *Free Enter. Fund*, 561 U.S. at 490–91 (citation omitted).

Even if eventual judicial review of prior restraints were guaranteed, however, requiring employees to bring their challenges through the CSRA would still impose intolerable costs on First Amendment freedoms. Prior restraints like the policy NAIJ challenges here cause "here-and-now" injuries that cannot be undone by any after-the-fact judicial review afforded by the CSRA's scheme. *See supra* Part II. In its prior-restraint cases, this Court has repeatedly affirmed the rule that, when a statute imposes a licensing scheme on speech, "courts must entertain an immediate facial attack on the law," *City of Lakewood*, 486 U.S. at 759, and that they must do so "whether or not [the challenger has] applied for a license" under the scheme, *Freedman v. Maryland*, 380 U.S. 51, 56 (1965). The logic of these cases is that immediate review is necessary because the "mere existence" of a prior restraint "intimidates parties into censoring their own speech." *City of Lakewood*, 486 U.S. at 757.

The same is true of prior restraints on federal-employee speech. Requiring federal employees to submit to a scheme of prior restraint in order to challenge it creates the risk that "judicial review

may be too little and too late." *Freedman*, 380 U.S. at 57; *cf. First Choice*, 608 U.S. at 195–96.

As explained above, this Court itself charted a different path in the immediate aftermath of *Thunder Basin* when it exercised jurisdiction over a pre-enforcement challenge to a prior restraint on the speech of federal employees. *NTEU*, 513 U.S. at 457. Other courts including the D.C. Circuit have followed this Court's lead. *See supra* Part I. Review of the question presented by the petition is of critical importance to bringing the Fourth Circuit back into line and to ensuring the enforceability of the First Amendment rights of federal employees.

2. This case also provides an excellent vehicle to resolve the question presented by the petition. It cleanly presents the question of whether a simple pre-enforcement challenge to a prior restraint on the speech of federal employees may proceed in district court. The question does not turn on any disputed facts. The Fourth Circuit resolved the question unambiguously and categorically against NAIJ by affirming the district court's ruling that NAIJ's challenge is the type of challenge that Congress intended to channel to the CSRA. App. 28a, 49a.

The Court denied NAIJ's prior cross-petition seeking review of this question, but this petition now presents the question much more cleanly. The Fourth Circuit's earlier opinion broadly held that the CSRA no longer channels *any* claims. The Court vacated that ruling, and so the only ruling from the court below that is operative is the one that NAIJ now petitions the Court to review—namely, whether

pre-enforcement prior-restraint challenges like NAIJ's must be brought through the CSRA even though they are not guaranteed any—let alone meaningful—judicial review through that statute's administrative review scheme.

CONCLUSION

The Court should grant this petition.

Respectfully submitted,

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