

No. _____

IN THE
Supreme Court of the United States

NATIONAL ASSOCIATION OF
IMMIGRATION JUDGES,
Cross-Petitioner,

v.

DAREN K. MARGOLIN, IN HIS OFFICIAL CAPACITY
AS DIRECTOR OF THE EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW,
Cross-Respondent.

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

**CROSS-PETITION FOR A WRIT OF
CERTIORARI**

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QUESTION PRESENTED

One year after this Court’s decision in *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), the Court exercised jurisdiction over a pre-enforcement challenge to a broad prior restraint on the speech of federal employees filed originally in district court. *United States v. Nat’l Treasury Emps. Union*, 513 U.S. 454 (1995). Cross-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. The court of appeals concluded, however, that under step two of the test articulated in *Thunder Basin*, this kind of challenge can be raised only through the administrative scheme provided by the Civil Service Reform Act (“CSRA”), Pub. L. No. 95-454, 92 Stat. 1111, even though that scheme does not guarantee *any*—let alone meaningful—judicial review of NAIJ’s “here-and-now” 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

Cross-Petitioner in this Court (Plaintiff–Appellant below) is NAIJ. Cross-Respondent in this Court (Defendant–Appellee below) is Daren K. Margolin, in his official capacity as 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.):

National Association of Immigration Judges v. Neal, No. 20-cv-731 (Sept. 21, 2023)

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

National Association of Immigration Judges v. Owen, No. 23-2235 (June 3, 2025)

Supreme Court of the United States:

Margolin v. National Association of Immigration Judges, No. 25A662 (Dec. 19, 2025)

Margolin v. National Association of Immigration Judges, No. 25-767 (Dec. 31, 2025)

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CROSS-PETITION FOR CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals is reported at 139 F.4th 293 and reproduced in the appendix to the government’s petition for a writ of certiorari at App. 1a–32a. The decision of the district court is reported at 693 F. Supp. 3d 549 and is reproduced at App. 72a–124a.

JURISDICTION

The court of appeals entered judgment on June 3, 2025. It denied the government’s petition for rehearing on November 20, 2025. App. 33a. The government’s petition for a writ of certiorari was docketed on December 31, 2025. 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 Cross-Petition Appendix (“Cross-Pet. App.”) 1a–56a.

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 scheme that does not

guarantee *any*—let alone meaningful—judicial review of their 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 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. Yet the Fourth Circuit concluded, under step two of *Thunder Basin*, that NAIJ’s challenge to the policy can be presented only through the CSRA’s administrative review scheme.

The Fourth Circuit recognized that proceeding under the CSRA would not guarantee NAIJ judicial review of its constitutional claims, but it believed that its conclusion was compelled by this Court’s decision in *Elgin v. Department of Treasury*, 567 U.S. 1 (2012). In reality, the court of appeals’ decision dramatically extends *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 like NAIJ’s that 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 creates a clean split with 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. In case after case 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 controlling precedent from the Court. 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 could not be redressed by that review. NAIJ’s challenge brings together both of these problems, but when presented with claims raising paradigmatic “here-and-now” injuries and a scheme that does not guarantee even eventual judicial review of those claims, the Fourth Circuit blinked, reading *Free Enterprise Fund* and *Axon* overly narrowly to accommodate its misinterpretation of *Elgin*.

Review of the Fourth Circuit’s decision is warranted now because it threatens to create a First Amendment black hole. Under the court’s ruling, 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 articulated by the court would reach challenges to policies concerning religion as well, 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.¹

¹ For reasons NAIJ will further explain in its brief in opposition to the government’s certiorari petition, the Court should deny the government’s petition (which concerns the Fourth Circuit’s decision at step one of *Thunder Basin*) and grant NAIJ’s cross-petition (which concerns the Fourth

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 of course 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.’” *See Mims v. Arrow Fin. Serv., LLC*, 565 U.S. 368, 383 (2012) (quoting *Colorado 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. In particular, “when 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, the Court has assessed whether the creation of these procedures evinces an intent to strip district-court jurisdiction over covered

Circuit’s decision at step two). But if the Court grants the former, it is especially important that it grant the latter. *See* Part IV.

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 factor “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 was enacted to “provide the people of the United States with a competent, honest, and productive Federal work force reflective of the Nation’s diversity, and to improve the quality of public service.” Pub. L. No. 95-454 § 3(1), 92 Stat. 1112 (1978). To achieve that goal, the Act “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). That framework provides “graduated procedural protections depending on an action’s severity.” *Kloekner v. Solis*, 568 U.S. 41, 44 (2012).

Two parts of the CSRA’s graduated framework are relevant to this case.

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 entitled to judicial review. Under Chapter 23, an employee who suffers a prohibited personnel practice must first 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). If the Special Counsel does so, 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 five fiscal years running from 2020 to 2024, the Special Counsel did not petition the MSPB for corrective action even once. 2024 Off. of Special Couns. Ann. Rep. 16, <https://perma.cc/99XK-D5ZA>.

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. App. 3a. From 1979 to 2022, NAIJ was the certified bargaining representative for all non-supervisory judges. C.A. App. 16–17.² NAIJ was formally decertified on April 15, 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. 3a. 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

² All citations to “App.” refer to Petitioner’s appendix filed in this Court with its Petition for a Writ of Certiorari. All citations to “C.A. App.” refer to the joint appendix the parties filed in the Fourth Circuit.

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.*

Beginning in 2017, however, EOIR issued a series of policies sharply limiting the circumstances in which judges could permissibly 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. Attachment A to the Policy confirms that EOIR considers the general topic of immigration to be “a subject matter that directly relates” to an immigration judge’s duties. *Id.* at 62 (listing examples of “personal capacity” speech that explicitly exclude speech about immigration, including: “moot court judge – not immigration related”; “commencement speaker when topic is unrelated to immigration or official duties”; and “speaking at community, religious, youth, or small social groups . . . and meetings, not directly related to immigration law or advocacy”).

The Policy has had the unsurprising effect of silencing judges on topics that are 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.

Some judges have tried to continue to speak publicly by seeking approval to do so in an official capacity, *id.* at 29–33, but doing so 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 29–33.³

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.* 84a. 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

³ The government’s petition mischaracterizes the Policy as imposing only a requirement of preapproval, *see Pet.* 8, but the government conflates preapproval for *official capacity* speech with the ability of immigration judges to speak in their *personal capacities*. It is the latter that the Policy eliminates with respect to speech concerning immigration or EOIR itself.

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 shortly thereafter. App. 72a–73a, 86a. In September 2023, the district court dismissed NAIJ’s claims, concluding that the CSRA impliedly divested it of jurisdiction to hear NAIJ’s challenge. *Id.* at 124a. NAIJ timely appealed. C.A. App. 111–112.

On June 3, 2025, the Fourth Circuit vacated the district court’s ruling and remanded for further factfinding. App. 1a, 31a–32a. Its analysis followed the two-step framework established by this Court in *Thunder Basin* for evaluating whether Congress impliedly divested district courts of jurisdiction to hear a plaintiff’s claims by enacting an alternative scheme for review. That framework asks, first, whether Congress’s intent to preclude district-court jurisdiction is “fairly discernible in the statutory scheme,” 510 U.S. at 207; and, second, whether the claims at issue “are of the type Congress intended to be reviewed within [the scheme],” *id.* at 212.

The Fourth Circuit began by acknowledging that, until recently, its analysis of the first step would have been “simple,” based on this Court’s decisions

in *Fausto* and *Elgin*, which “recognized that the CSRA, when functioning as Congress intended, was designed to strip district courts of jurisdiction.” App. 13a–14a. But the court of appeals ultimately concluded that factual developments post-dating oral argument had called into question “the functionality and independence of the MSPB and Special Counsel,” *id.* at 19a–20a, which were critical features of the statutory review scheme Congress had designed, *id.* at 16a. In particular, the court of appeals observed that the President had fired the Special Counsel and the MSPB chair without cause; that the MSPB was deprived of a quorum as a result; and that, in response to lawsuits challenging these terminations, the government had argued that the CSRA’s protections against at-will removal violate the separation of powers. *Id.* at 15a, 19a–20a. 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.* at 19a–20a.⁴

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. *Id.* at 20a (citation omitted). The court began by addressing whether the CSRA applied to NAIJ’s claims. It concluded that Chapter 75 of the Act did

⁴ In the district court, NAIJ has taken the position that the fact-finding ordered by the Fourth Circuit may be accomplished without discovery, through a joint stipulation of facts “along with declarations setting forth any additional facts either party considers to be relevant.” Dist. Ct. Dkt. 104.

not apply to those claims because “no adverse action ha[d] been taken or proposed against [NAIJ’s members],” App. 21a; NAIJ’s members had “neither violated nor intend to violate [the Policy],” *id.* at 22a; 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 23a (quoting 5 U.S.C. § 2301(b)(2)).

Having determined that Chapter 23 provides a “potential avenue” to challenge the Policy, *id.* at 22a, 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 29a. The court acknowledged “that the Special Counsel is afforded leeway regarding which claims to bring to the MSPB,” and that it could exercise that “leeway” to “prevent a claim [like NAIJ’s] from ever reaching the MSPB.” *Id.* at 26a–27a. 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 27a–28a. 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.* at 28a–29a.

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 29a–30a, and that the OSC and the MSPB possess “expertise that may help resolve the claim[s],” *id.* at 30a–31a. 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 31a.

3. The government petitioned the Fourth Circuit for rehearing, which the court of appeals denied by a 9–6 vote on November 20, 2025. *Id.* at 33a–34a. Judge Thacker, joined by Judge King, concurred in the denial of rehearing and expressed her “complete agreement with the panel opinion.” *Id.* at 42a. 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 44a. 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 Judges Agee, Richardson, and Rushing, dissented from the denial of rehearing. 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 59a n.3.

Following the denial of rehearing, the government asked the Fourth Circuit to stay the issuance of its mandate until the deadline for filing a petition for a writ of certiorari in this Court. The Fourth Circuit denied that request. 12/19/2025 Order. On December 5, 2025, the government filed an application to stay the Fourth Circuit’s mandate with this Court. Appl. to Stay Mandate. On December 19, 2025, the Court denied the government’s application without prejudice, concluding that it had not established irreparable harm. *Id.*

On December 23, 2025, the government filed a certiorari petition, arguing that the Fourth Circuit’s conclusion at step one of *Thunder Basin* disregarded this Court’s precedent. *See* Pet. On January 22, 2026, the district court ordered that no hearing in the case would be scheduled until the Supreme

Court addresses the government’s petition. Dist. Ct. Dkt. 105. This cross-petition follows.

REASONS TO GRANT THE CROSS-PETITION

I. The Fourth Circuit’s decision at step two of *Thunder Basin* creates a circuit split.

The Fourth Circuit’s decision at step two of the *Thunder Basin* test creates a clean split with the D.C. Circuit.

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. There, 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. *NTEU*, 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.

Multiple district courts have followed suit. *See, e.g., Turner*, 502 F. Supp. 3d at 369; *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 recently 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.

In the proceedings below, the government argued that *Weaver* has been superseded by *Elgin*. Def. C.A. Br. at 34. 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, and the Court said “no.” Here, by contrast, 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. 22a. As the Fifth Circuit recently 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 at step two of *Thunder Basin* directly conflicts with *Weaver*. But despite that conflict, the Fourth Circuit did not address *Weaver*, or grapple with the fact that its conclusion at step two of *Thunder Basin* 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.”).

The circuit split created by the Fourth Circuit warrants this Court’s intervention now. A substantial percentage of the nation’s federal employees live in the D.C. and Fourth Circuits, and yet they are now 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* Part III, and that can add months or years of pointless delay while the irreversible harms to their First Amendment rights mount.

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

The Fourth Circuit’s decision at step two of *Thunder Basin* 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 scheme of review 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 at the end of 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 irreparable 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 from the “here-and-now” injuries to their right to speak, or to the public’s right to hear from them.

The Fourth Circuit attempted to distinguish *Axon* by interpreting the case to apply only to “‘structural constitutional’ challenge[s].” *See* App. 27a–28a. But as explained below, *see infra* Part III, the Fourth Circuit disregarded 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. Because that is true when a federal employee files a pre-enforcement challenge to a policy imposing a prior restraint on their speech, the Fourth Circuit’s decision conflicts with this Court’s decision in *Axon*.

2. The Fourth Circuit’s decision at step two 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. The Fourth Circuit concluded that NAIJ could challenge the Policy under Chapter 23 of the CSRA, App. 29a, 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 at step two of *Thunder Basin* 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. 23a. 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.” *Kloekner 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.

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 five fiscal years running from 2020 to 2024, the Special Counsel did not file *any* petitions for corrective action with the MSPB. 2024 Off. of Special Couns. Ann. Rep. 16, <https://perma.cc/99XK-D5ZA>. 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 claims. 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. 26a–27a, but suggested that NAIJ could refile its case in district court if it failed to obtain judicial review through the Special Counsel. *Id.* at 27a–28a. 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 an administrative 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”).⁵

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 factor of the *Thunder Basin* inquiry 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

⁵ Notably, the Fourth Circuit offered no guarantee that a district court *would* have jurisdiction to hear NAIJ’s claims once it had run the CSRA’s gauntlet. See App. 26a–27a. (stating simply that “[t]hat is not . . . the posture of the case”). Nor did it identify when precisely NAIJ would be deemed to have sufficiently exhausted its remedies.

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.

The Fourth Circuit distinguished the facts of *Axon* but failed to grapple with its logic. App. 27a–28a. In *Axon*, the Court 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 EOIR’s 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 first *Thunder Basin* consideration—whether inferring congressional intent to strip district-court jurisdiction could foreclose meaningful judicial review—thus weighs strongly in favor of finding jurisdiction.

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. *Elgin*, 567 U.S. at 22. 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 in applying the *NTEU* framework for assessing the constitutionality of prior restraints on public employees.

The remaining two factors thus also point in the direction of finding jurisdiction, but even if they did not, the first consideration 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 the unfettered discretion to deny judicial review altogether. If left in place, the Fourth Circuit's conclusion would 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 ruling, 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 and 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, the Fourth Circuit’s ruling 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 v. Plain Dealer Publ’g Co.*, 486 U.S. 750, 759 (1988), 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.

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 cross-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 cross-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, observing 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.” App. 31a. And resolving the question in NAIJ’s favor would fully resolve the legal dispute on appeal and render moot the government’s petition.

Moreover, the cross-petition offers a much narrower ground for decision than the government’s petition. The government’s petition raises consequential questions about the implications for administrative channeling of the loss of OSC and MSPB independence. No court has yet ruled on that issue, and it would be exceedingly unusual for this Court to be the first. The cross-petition, in contrast, would require this Court only to make explicit what was implicit in its ruling in *NTEU*—that pre-enforcement challenges to prior restraints on federal-employee speech may proceed directly in district court. If the Court does so, then it may vacate the Fourth Circuit’s decision and remand for further proceedings without the need for any court in this case to express an opinion on the question of whether the CSRA continues to satisfy step one of the *Thunder Basin* framework.

CONCLUSION

The Court should grant this cross-petition.

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APPENDIX

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U.S. Const. amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

5 U.S.C. § 1201

Appointment of members of the Merit Systems Protection Board

The Merit Systems Protection Board is composed of 3 members appointed by the President, by and with the advice and consent of the Senate, not more than 2 of whom may be adherents of the same political party. The members of the Board shall be individuals who, by demonstrated ability, background, training, or experience are especially qualified to carry out the functions of the Board. No member of the Board may hold another office or position in the Government of the United States, except as otherwise provided by law or at the direction of the President. The Board shall have an official seal which shall be judicially noticed. The Board shall have its principal office in the District of Columbia and may have field offices in other appropriate locations.

5 U.S.C. § 1202

Term of office; filling vacancies; removal

(a) The term of office of each member of the Merit Systems Protection Board is 7 years.

(b) A member appointed to fill a vacancy occurring before the end of a term of office of the member's predecessor serves for the remainder of that term. Any appointment to fill a vacancy is subject to the requirements of section 1201. Any new member serving only a portion of a seven-year term in office may continue to serve until a successor is appointed and has qualified, except that such member may not continue to serve for more than one year after the date on which the term of the member would otherwise expire, unless reappointed.

(c) Any member appointed for a 7-year term may not be reappointed to any following term but may continue to serve beyond the expiration of the term until a successor is appointed and has qualified, except that such member may not continue to serve for more than one year after the date on which the term of the member would otherwise expire under this section.

(d) Any member may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office.

5 U.S.C. § 1204

**Powers and functions of the Merit Systems
Protection Board**

- (a)** The Merit Systems Protection Board shall—
- (1)** hear, adjudicate, or provide for the hearing or adjudication, of all matters within the jurisdiction of the Board under this title, chapter 43 of title 38, or any other law, rule, or regulation, and, subject to otherwise applicable provisions of law, take final action on any such matter;
 - (2)** order any Federal agency or employee to comply with any order or decision issued by the Board under the authority granted under paragraph (1) of this subsection and enforce compliance with any such order;
 - (3)** conduct, from time to time, special studies relating to the civil service and to other merit systems in the executive branch, and report to the President and to the Congress as to whether the public interest in a civil service free of prohibited personnel practices is being adequately protected; and
 - (4)** review, as provided in subsection (f), rules and regulations of the Office of Personnel Management.
- (b)**
- (1)** Any member of the Merit Systems Protection Board, any administrative law judge appointed by the Board under section 3105 of this title, and any employee of the Board designated by the

Board may administer oaths, examine witnesses, take depositions, and receive evidence.

(2) Any member of the Board, any administrative law judge appointed by the Board under section 3105, and any employee of the Board designated by the Board may, with respect to any individual—

(A) issue subpoenas requiring the attendance and presentation of testimony of any such individual, and the production of documentary or other evidence from any place in the United States, any territory or possession of the United States, the Commonwealth of Puerto Rico, or the District of Columbia; and

(B) order the taking of depositions from, and responses to written interrogatories by, any such individual.

(3) Witnesses (whether appearing voluntarily or under subpoena) shall be paid the same fee and mileage allowances which are paid subpoenaed witnesses in the courts of the United States.

(c) In the case of contumacy or failure to obey a subpoena issued under subsection (b)(2)(A) or section 1214(b), upon application by the Board, the United States district court for the district in which the person to whom the subpoena is addressed resides or is served may issue an order requiring such person to appear at any designated place to testify or to produce documentary or other evidence. Any failure to obey the order of the court may be punished by the court as a contempt thereof.

(d) A subpoena referred to in subsection (b)(2)(A) may, in the case of any individual outside the territorial jurisdiction of any court of the United States, be served in such manner as the Federal Rules of Civil Procedure prescribe for service of a subpoena in a foreign country. To the extent that the courts of the United States can assert jurisdiction over such individual, the United States District Court for the District of Columbia shall have the same jurisdiction to take any action respecting compliance under this subsection by such individual that such court would have if such individual were personally within the jurisdiction of such court.

(e)

(1)

(A) In any proceeding under subsection (a)(1), any member of the Board may request from the Director of the Office of Personnel Management an advisory opinion concerning the interpretation of any rule, regulation, or other policy directive promulgated by the Office of Personnel Management.

(B)

(i) The Merit Systems Protection Board may, during an investigation by the Office of Special Counsel or during the pendency of any proceeding before the Board, issue any order which may be necessary to protect a witness or other individual from harassment, except that an agency (other than the Office of Special Counsel) may not request any such order with regard to

an investigation by the Office of Special Counsel from the Board during such investigation.

(ii) An order issued under this subparagraph may be enforced in the same manner as provided for under paragraph (2) with respect to any order under subsection (a)(2).

(2)

(A) In enforcing compliance with any order under subsection (a)(2), the Board may order that any employee charged with complying with such order, other than an employee appointed by the President by and with the advice and consent of the Senate, shall not be entitled to receive payment for service as an employee during any period that the order has not been complied with. The Board shall certify to the Comptroller General of the United States that such an order has been issued and no payment shall be made out of the Treasury of the United States for any service specified in such order.

(B) The Board shall prescribe regulations under which any employee who is aggrieved by the failure of any other employee to comply with an order of the Board may petition the Board to exercise its authority under subparagraph (A).

(3) In carrying out any study under subsection (a)(3), the Board shall make such inquiries as may be necessary and, unless otherwise

prohibited by law, shall have access to personnel records or information collected by the Office of Personnel Management and may require additional reports from other agencies as needed.

(f)

(1) At any time after the effective date of any rule or regulation issued by the Director of the Office of Personnel Management in carrying out functions under section 1103, the Board shall review any provision of such rule or regulation—

(A) on its own motion;

(B) on the granting by the Board, in its sole discretion, of any petition for such review filed with the Board by any interested person, after consideration of the petition by the Board; or

(C) on the filing of a written complaint by the Special Counsel requesting such review.

(2) In reviewing any provision of any rule or regulation pursuant to this subsection, the Board shall declare such provision—

(A) invalid on its face, if the Board determines that such provision would, if implemented by any agency, on its face, require any employee to violate section 2302(b); or

(B) invalidly implemented by any agency, if the Board determines that such provision, as it has been implemented by the agency through any personnel action taken by the agency or through any policy adopted by the agency in conformity with such provision, has

required any employee to violate section 2302(b).

(3) The Director of the Office of Personnel Management, and the head of any agency implementing any provision of any rule or regulation under review pursuant to this subsection, shall have the right to participate in such review.

(4) The Board shall require any agency—

(A) to cease compliance with any provisions of any rule or regulation which the Board declares under this subsection to be invalid on its face; and

(B) to correct any invalid implementation by the agency of any provision of any rule or regulation which the Board declares under this subsection to have been invalidly implemented by the agency.

(g) The Board may delegate the performance of any of its administrative functions under this title to any employee of the Board.

(h) The Board shall have the authority to prescribe such regulations as may be necessary for the performance of its functions. The Board shall not issue advisory opinions. All regulations of the Board shall be published in the Federal Register.

(i) Except as provided in section 518 of title 28, relating to litigation before the Supreme Court, attorneys designated by the Chairman of the Board may appear for the Board, and represent the Board, in any civil action brought in connection with any

function carried out by the Board pursuant to this title or as otherwise authorized by law.

(j) The Chairman of the Board may appoint such personnel as may be necessary to perform the functions of the Board. Any appointment made under this subsection shall comply with the provisions of this title, except that such appointment shall not be subject to the approval or supervision of the Office of Personnel Management or the Executive Office of the President (other than approval required under section 3324 or subchapter VIII of chapter 33).

(k) The Board shall prepare and submit to the President, and, at the same time, to the appropriate committees of Congress, an annual budget of the expenses and other items relating to the Board which shall, as revised, be included as a separate item in the budget required to be transmitted to the Congress under section 1105 of title 31.

(l) The Board shall submit to the President, and, at the same time, to each House of the Congress, any legislative recommendations of the Board relating to any of its functions under this title.

(m)

(1) Except as provided in paragraph (2) of this subsection, the Board, or an administrative law judge or other employee of the Board designated to hear a case arising under section 1215, may require payment by the agency where the prevailing party was employed or had applied for employment at the time of the events giving rise to the case of reasonable attorney fees incurred

by an employee or applicant for employment if the employee or applicant is the prevailing party and the Board, administrative law judge, or other employee (as the case may be) determines that payment by the agency is warranted in the interest of justice, including any case in which a prohibited personnel practice was engaged in by the agency or any case in which the agency's action was clearly without merit.

(2) If an employee or applicant for employment is the prevailing party of a case arising under section 1215 and the decision is based on a finding of discrimination prohibited under section 2302(b)(1) of this title, the payment of attorney fees shall be in accordance with the standards prescribed under section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)).

(n) The Board may accept and use gifts and donations of property and services to carry out the duties of the Board.

5 U.S.C. § 1211

Establishment

(a) There is established the Office of Special Counsel, which shall be headed by the Special Counsel. The Office shall have an official seal which shall be judicially noticed. The Office shall have its principal office in the District of Columbia and shall have field offices in other appropriate locations.

(b) The Special Counsel shall be appointed by the President, by and with the advice and consent of the Senate, for a term of 5 years. The Special Counsel may continue to serve beyond the expiration of the term until a successor is appointed and has qualified, except that the Special Counsel may not continue to serve for more than one year after the date on which the term of the Special Counsel would otherwise expire under this subsection. The Special Counsel shall be an attorney who, by demonstrated ability, background, training, or experience, is especially qualified to carry out the functions of the position. A Special Counsel appointed to fill a vacancy occurring before the end of a term of office of the Special Counsel's predecessor serves for the remainder of the term. The Special Counsel may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office. The Special Counsel may not hold another office or position in the Government of the United States, except as otherwise provided by law or at the direction of the President.

5 U.S.C. § 1214

Investigation of prohibited personnel practices; corrective action

(a)

(1)

(A) The Special Counsel shall receive any allegation of a prohibited personnel practice and shall investigate the allegation to the extent necessary to determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken.

(B) Within 15 days after the date of receiving an allegation of a prohibited personnel practice under paragraph (1), the Special Counsel shall provide written notice to the person who made the allegation that—

(i) the allegation has been received by the Special Counsel; and

(ii) shall include the name of a person at the Office of Special Counsel who shall serve as a contact with the person making the allegation.

(C) Unless an investigation is terminated under paragraph (2), the Special Counsel shall—

(i) within 90 days after notice is provided under subparagraph (B), notify the person who made the allegation of the status of the investigation and any action taken by

the Office of the Special Counsel since the filing of the allegation;

(ii) notify such person of the status of the investigation and any action taken by the Office of the Special Counsel since the last notice, at least every 60 days after notice is given under clause (i); and

(iii) notify such person of the status of the investigation and any action taken by the Special Counsel at such time as determined appropriate by the Special Counsel.

(D) No later than 10 days before the Special Counsel terminates any investigation of a prohibited personnel practice, the Special Counsel shall provide a written status report to the person who made the allegation of the proposed findings of fact and legal conclusions. The person may submit written comments about the report to the Special Counsel. The Special Counsel shall not be required to provide a subsequent written status report under this subparagraph after the submission of such written comments.

(2)

(A) If the Special Counsel terminates any investigation under paragraph (1), the Special Counsel shall prepare and transmit to any person on whose allegation the investigation was initiated a written statement notifying the person of—

(i) the termination of the investigation;

(ii) a summary of relevant facts ascertained by the Special Counsel, including the facts that support, and the facts that do not support, the allegations of such person;

(iii) the reasons for terminating the investigation; and

(iv) a response to any comments submitted under paragraph (1)(D).

(B) A written statement under subparagraph (A) may not be admissible as evidence in any judicial or administrative proceeding, without the consent of the person who received such statement under subparagraph (A).

(3) Except in a case in which an employee, former employee, or applicant for employment has the right to appeal directly to the Merit Systems Protection Board under any law, rule, or regulation, any such employee, former employee, or applicant shall seek corrective action from the Special Counsel before seeking corrective action from the Board. An employee, former employee, or applicant for employment may seek corrective action from the Board under section 1221, if such employee, former employee, or applicant seeks corrective action for a prohibited personnel practice described in section 2302(b)(8) or section 2302(b)(9)(A)(i), (B), (C), or (D) from the Special Counsel and—

(A)

(i) the Special Counsel notifies such employee, former employee, or applicant

that an investigation concerning such employee, former employee, or applicant has been terminated; and

(ii) no more than 60 days have elapsed since notification was provided to such employee, former employee, or applicant for employment that such investigation was terminated; or

(B) 120 days after seeking corrective action from the Special Counsel, such employee, former employee, or applicant has not been notified by the Special Counsel that the Special Counsel shall seek corrective action on behalf of such employee, former employee, or applicant.

(4) If an employee, former employee, or applicant seeks a corrective action from the Board under section 1221, pursuant to the provisions of paragraph (3)(B), the Special Counsel may continue to seek corrective action personal to such employee, former employee, or applicant only with the consent of such employee, former employee, or applicant.

(5) In addition to any authority granted under paragraph (1), the Special Counsel may, in the absence of an allegation, conduct an investigation for the purpose of determining whether there are reasonable grounds to believe that a prohibited personnel practice (or a pattern of prohibited personnel practices) has occurred, exists, or is to be taken.

(6)

(A) Notwithstanding any other provision of this section, not later than 30 days after the date on which the Special Counsel receives an allegation of a prohibited personnel practice under paragraph (1), the Special Counsel may terminate an investigation of the allegation without further inquiry if the Special Counsel determines that—

(i) the same allegation, based on the same set of facts and circumstances, had previously been—

(I)

(aa) made by the individual; and

(bb) investigated by the Special Counsel; or

(II) filed by the individual with the Merit Systems Protection Board;

(ii) the Special Counsel does not have jurisdiction to investigate the allegation; or

(iii) the individual knew or should have known of the alleged prohibited personnel practice on or before the date that is 3 years before the date on which the Special Counsel received the allegation.

(B) Not later than 30 days after the date on which the Special Counsel terminates an investigation under subparagraph (A), the Special Counsel shall provide a written notification to the individual who submitted

the allegation of a prohibited personnel practice that states the basis of the Special Counsel for terminating the investigation.

(b)

(1)

(A)

(i) The Special Counsel may request any member of the Merit Systems Protection Board to order a stay of any personnel action for 45 days if the Special Counsel determines that there are reasonable grounds to believe that the personnel action was taken, or is to be taken, as a result of a prohibited personnel practice.

(ii) Any member of the Board requested by the Special Counsel to order a stay under clause (i) shall order such stay unless the member determines that, under the facts and circumstances involved, such a stay would not be appropriate.

(iii) Unless denied under clause (ii), any stay under this subparagraph shall be granted within 3 calendar days (excluding Saturdays, Sundays, and legal holidays) after the date of the request for the stay by the Special Counsel.

(B)

(i) The Board may extend the period of any stay granted under subparagraph (A) for any period which the Board considers appropriate.

(ii) If the Board lacks the number of members appointed under section 1201 required to constitute a quorum, any remaining member of the Board may, upon request by the Special Counsel, extend the period of any stay granted under subparagraph (A).

(C) The Board shall allow any agency which is the subject of a stay to comment to the Board on any extension of stay proposed under subparagraph (B).

(D) A stay may be terminated by the Board at any time, except that a stay may not be terminated by the Board—

(i) on its own motion or on the motion of an agency, unless notice and opportunity for oral or written comments are first provided to the Special Counsel and the individual on whose behalf the stay was ordered; or

(ii) on motion of the Special Counsel, unless notice and opportunity for oral or written comments are first provided to the individual on whose behalf the stay was ordered.

(E) If the Board grants a stay under subparagraph (A), the head of the agency employing the employee who is the subject of the action shall give priority to a request for a transfer submitted by the employee.

(2)

(A)

(i) Except as provided under clause (ii), no later than 240 days after the date of receiving an allegation of a prohibited personnel practice under paragraph (1), the Special Counsel shall make a determination whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken.

(ii) If the Special Counsel is unable to make the required determination within the 240-day period specified under clause (i) and the person submitting the allegation of a prohibited personnel practice agrees to an extension of time, the determination shall be made within such additional period of time as shall be agreed upon between the Special Counsel and the person submitting the allegation.

(B) If, in connection with any investigation, the Special Counsel determines that there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken which requires corrective action, the Special Counsel shall report the determination together with any findings or recommendations to the Board, the agency involved and to the Office of Personnel Management, and may report such determination, findings and recommendations to the President. The Special Counsel may include in the report recommendations for corrective action to be taken.

(C) If, after a reasonable period of time, the agency does not act to correct the prohibited personnel practice, the Special Counsel may petition the Board for corrective action.

(D) If the Special Counsel finds, in consultation with the individual subject to the prohibited personnel practice, that the agency has acted to correct the prohibited personnel practice, the Special Counsel shall file such finding with the Board, together with any written comments which the individual may provide.

(E) A determination by the Special Counsel under this paragraph shall not be cited or referred to in any proceeding under this paragraph or any other administrative or judicial proceeding for any purpose, without the consent of the person submitting the allegation of a prohibited personnel practice.

(3) Whenever the Special Counsel petitions the Board for corrective action, the Board shall provide an opportunity for—

(A) oral or written comments by the Special Counsel, the agency involved, and the Office of Personnel Management; and

(B) written comments by any individual who alleges to be the subject of the prohibited personnel practice.

(4)

(A) The Board shall order such corrective action as the Board considers appropriate, if the Board determines that the Special

Counsel has demonstrated that a prohibited personnel practice, other than one described in section 2302(b)(8) or section 2302(b)(9)(A)(i), (B), (C), or (D), has occurred, exists, or is to be taken.

(B)

(i) Subject to the provisions of clause (ii), in any case involving an alleged prohibited personnel practice as described under section 2302(b)(8) or section 2302(b)(9)(A)(i), (B), (C), or (D), the Board shall order such corrective action as the Board considers appropriate if the Special Counsel has demonstrated that a disclosure or protected activity described under section 2302(b)(8) or section 2302(b)(9)(A)(i), (B), (C), or (D) was a contributing factor in the personnel action which was taken or is to be taken against the individual.

(ii) Corrective action under clause (i) may not be ordered if, after a finding that a protected disclosure was a contributing factor, the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure.

(c)

(1) Judicial review of any final order or decision of the Board under this section may be obtained by any employee, former employee, or applicant

for employment adversely affected by such order or decision.

(2) A petition for review under this subsection shall be filed with such court, and within such time, as provided for under section 7703(b).

(d)

(1) If, in connection with any investigation under this subchapter, the Special Counsel determines that there is reasonable cause to believe that a criminal violation has occurred, the Special Counsel shall report the determination to the Attorney General and to the head of the agency involved, and shall submit a copy of the report to the Director of the Office of Personnel Management and the Director of the Office of Management and Budget.

(2) In any case in which the Special Counsel determines that there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken, the Special Counsel shall proceed with any investigation or proceeding unless—

(A) the alleged violation has been reported to the Attorney General; and

(B) the Attorney General is pursuing an investigation, in which case the Special Counsel, after consultation with the Attorney General, has discretion as to whether to proceed.

(e) If, in connection with any investigation under this subchapter, the Special Counsel determines that there is reasonable cause to believe that any

violation of any law, rule, or regulation has occurred other than one referred to in subsection (b) or (d), the Special Counsel shall report such violation to the head of the agency involved. The Special Counsel shall require, within 30 days after the receipt of the report by the agency, a certification by the head of the agency which states—

(1) that the head of the agency has personally reviewed the report; and

(2) what action has been or is to be taken, and when the action will be completed.

(f) During any investigation initiated under this subchapter, no disciplinary action shall be taken against any employee for any alleged prohibited activity under investigation or for any related activity without the approval of the Special Counsel.

(g) If the Board orders corrective action under this section, such corrective action may include—

(1) that the individual be placed, as nearly as possible, in the position the individual would have been in had the prohibited personnel practice not occurred; and

(2) reimbursement for attorney's fees, back pay and related benefits, medical costs incurred, travel expenses, any other reasonable and foreseeable consequential damages, and compensatory damages (including interest, reasonable expert witness fees, and costs).

(h) Any corrective action ordered under this section to correct a prohibited personnel practice may include fees, costs, or damages reasonably incurred due to an agency investigation of the employee, if

such investigation was commenced, expanded, or extended in retaliation for the disclosure or protected activity that formed the basis of the corrective action.

(i) The Special Counsel may petition the Board to order corrective action, including fees, costs, or damages reasonably incurred by an employee due to an investigation of the employee by an agency, if the investigation by an agency was commenced, expanded, or extended in retaliation for a disclosure or protected activity described in section 2302(b)(8) or subparagraph (A)(i), (B), (C), or (D) of section 2302(b)(9), without regard to whether a personnel action, as defined in section 2302(a)(2)(A), is taken.

5 U.S.C. § 2301

Merit system principles

- (a)** This section shall apply to—
- (1)** an Executive agency; and
 - (2)** the Government Publishing Office.
- (b)** Federal personnel management should be implemented consistent with the following merit system principles:
- (1)** Recruitment should be from qualified individuals from appropriate sources in an endeavor to achieve a work force from all segments of society, and selection and advancement should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition which assures that all receive equal opportunity.
 - (2)** All employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management without regard to political affiliation, race, color, religion, national origin, sex, marital status, age, or handicapping condition, and with proper regard for their privacy and constitutional rights.
 - (3)** Equal pay should be provided for work of equal value, with appropriate consideration of both national and local rates paid by employers in the private sector, and appropriate incentives and recognition should be provided for excellence in performance.

(4) All employees should maintain high standards of integrity, conduct, and concern for the public interest.

(5) The Federal work force should be used efficiently and effectively.

(6) Employees should be retained on the basis of the adequacy of their performance, inadequate performance should be corrected, and employees should be separated who cannot or will not improve their performance to meet required standards.

(7) Employees should be provided effective education and training in cases in which such education and training would result in better organizational and individual performance.

(8) Employees should be—

(A) protected against arbitrary action, personal favoritism, or coercion for partisan political purposes, and

(B) prohibited from using their official authority or influence for the purpose of interfering with or affecting the result of an election or a nomination for election.

(9) Employees should be protected against reprisal for the lawful disclosure of information which the employees reasonably believe evidences—

(A) a violation of any law, rule, or regulation,
or

(B) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

(c) In administering the provisions of this chapter—

(1) with respect to any agency (as defined in section 2302(a)(2)(C) of this title), the President shall, pursuant to the authority otherwise available under this title, take any action, including the issuance of rules, regulations, or directives; and

(2) with respect to any entity in the executive branch which is not such an agency or part of such an agency, the head of such entity shall, pursuant to authority otherwise available, take any action, including the issuance of rules, regulations, or directives; which is consistent with the provisions of this title and which the President or the head, as the case may be, determines is necessary to ensure that personnel management is based on and embodies the merit system principles.

5 U.S.C. § 2302

Prohibited personnel practices

(a)

(1) For the purpose of this title, “prohibited personnel practice” means any action described in subsection (b).

(2) For the purpose of this section—

(A) “personnel action” means—

(i) an appointment;

(ii) a promotion;

(iii) an action under chapter 75 of this title or other disciplinary or corrective action;

(iv) a detail, transfer, or reassignment;

(v) a reinstatement;

(vi) a restoration;

(vii) a reemployment;

(viii) a performance evaluation under chapter 43 of this title or under title 38;

(ix) a decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in this subparagraph;

(x) a decision to order psychiatric testing or examination;

(xi) the implementation or enforcement of any nondisclosure policy, form, or agreement; and

(xii) any other significant change in duties, responsibilities, or working conditions;

with respect to an employee in, or applicant for, a covered position in an agency, and in the case of an alleged prohibited personnel practice described in subsection (b)(8), an employee or applicant for employment in a Government corporation as defined in section 9101 of title 31;

(B) “covered position” means, with respect to any personnel action, any position in the competitive service, a career appointee position in the Senior Executive Service, or a position in the excepted service, but does not include any position which is, prior to the personnel action—

(i) excepted from the competitive service because of its confidential, policy-determining, policy-making, or policy-advocating character; or

(ii) excluded from the coverage of this section by the President based on a determination by the President that it is necessary and warranted by conditions of good administration;

(C) “agency” means an Executive agency and the Government Publishing Office, but does not include—

(i) a Government corporation, except in the case of an alleged prohibited personnel practice described under subsection (b)(8) or section 2302(b)(9)(A)(i), (B), (C), or (D);

(ii)

(I) the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, the National Security Agency, the Office of the Director of National Intelligence, and the National Reconnaissance Office; and

(II) as determined by the President, any executive agency or unit thereof the principal function of which is the conduct of foreign intelligence or counterintelligence activities, provided that the determination be made prior to a personnel action; or

(iii) the Government Accountability Office; and

(D) “disclosure” means a formal or informal communication or transmission, but does not include a communication concerning policy decisions that lawfully exercise discretionary authority unless the employee or applicant

providing the disclosure reasonably believes that the disclosure evidences—

(i) any violation of any law, rule, or regulation; or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—

(1) discriminate for or against any employee or applicant for employment—

(A) on the basis of race, color, religion, sex, or national origin, as prohibited under section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–16);

(B) on the basis of age, as prohibited under sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a);

(C) on the basis of sex, as prohibited under section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d));

(D) on the basis of handicapping condition, as prohibited under section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791); or

(E) on the basis of marital status or political affiliation, as prohibited under any law, rule, or regulation;

(2) solicit or consider any recommendation or statement, oral or written, with respect to any individual who requests or is under consideration for any personnel action unless such recommendation or statement is based on the personal knowledge or records of the person furnishing it and consists of—

(A) an evaluation of the work performance, ability, aptitude, or general qualifications of such individual; or

(B) an evaluation of the character, loyalty, or suitability of such individual;

(3) coerce the political activity of any person (including the providing of any political contribution or service), or take any action against any employee or applicant for employment as a reprisal for the refusal of any person to engage in such political activity;

(4) deceive or willfully obstruct any person with respect to such person's right to compete for employment;

(5) influence any person to withdraw from competition for any position for the purpose of improving or injuring the prospects of any other person for employment;

(6) grant any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment (including defining the scope or manner of competition or the requirements for any position) for the purpose of improving or injuring the prospects of any particular person for employment;

(7) appoint, employ, promote, advance, or advocate for appointment, employment, promotion, or advancement, in or to a civilian position any individual who is a relative (as defined in section 3110(a)(3) of this title) of such employee if such position is in the agency in which such employee is serving as a public official (as defined in section 3110(a)(2) of this title) or over which such employee exercises jurisdiction or control as such an official;

(8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of—

(A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences—

(i) any violation of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs;

(B) any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of

information which the employee or applicant reasonably believes evidences—

(i) any violation (other than a violation of this section) of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety; or

(C) any disclosure to Congress (including any committee of Congress) by any employee of an agency or applicant for employment at an agency of information described in subparagraph (B) that is—

(i) not classified; or

(ii) if classified—

(I) has been classified by the head of an agency that is not an element of the intelligence community (as defined by section 3 of the National Security Act of 1947 (50 U.S.C. 3003)); and

(II) does not reveal intelligence sources and methods.

(9) take or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for employment because of—

(A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation—

(i) with regard to remedying a violation of paragraph (8); or

(ii) other than with regard to remedying a violation of paragraph (8);

(B) testifying for or otherwise lawfully assisting any individual in the exercise of any right referred to in subparagraph (A)(i) or (ii);

(C) cooperating with or disclosing information to the Inspector General (or any other component responsible for internal investigation or review) of an agency, or the Special Counsel, in accordance with applicable provisions of law; or

(D) refusing to obey an order that would require the individual to violate a law, rule, or regulation;

(10) discriminate for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others; except that nothing in this paragraph shall prohibit an agency from taking into account in determining suitability or fitness any conviction of the employee or applicant for any crime under the laws of any State, of the District of Columbia, or of the United States;

(11)

(A) knowingly take, recommend, or approve any personnel action if the taking of such action would violate a veterans' preference requirement; or

(B) knowingly fail to take, recommend, or approve any personnel action if the failure to take such action would violate a veterans' preference requirement;

(12) take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of this title;

(13) implement or enforce any nondisclosure policy, form, or agreement, if such policy, form, or agreement—

(A) does not contain the following statement: “These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive order relating to (1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General or the Office of Special Counsel of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or (4) any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling Executive orders and statutory provisions are incorporated into this agreement and are controlling.”; or

(B) prohibits or restricts an employee or applicant for employment from disclosing to Congress, the Special Counsel, the Inspector General of an agency, or any other agency component responsible for internal investigation or review any information that relates to any violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or any other whistleblower protection; or

(14) access the medical record of another employee or an applicant for employment as a part of, or otherwise in furtherance of, any conduct described in paragraphs (1) through (13).

This subsection shall not be construed to authorize the withholding of information from Congress or the taking of any personnel action against an employee who discloses information to Congress. For purposes of paragraph (8), (i) any presumption relating to the performance of a duty by an employee whose conduct is the subject of a disclosure as defined under subsection (a)(2)(D) may be rebutted by substantial evidence, and (ii) a determination as to whether an employee or applicant reasonably believes that such employee or applicant has disclosed information that evidences any violation of law, rule, regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety shall be made by determining whether a disinterested observer with knowledge of the

essential facts known to and readily ascertainable by the employee or applicant could reasonably conclude that the actions of the Government evidence such violations, mismanagement, waste, abuse, or danger.

(c)

(1) In this subsection—

(A) the term “new employee” means an individual—

(i) appointed to a position as an employee on or after the date of enactment of this subsection; and

(ii) who has not previously served as an employee; and

(B) the term “whistleblower protections” means the protections against and remedies for a prohibited personnel practice described in paragraph (8) or subparagraph (A)(i), (B), (C), or (D) of paragraph (9) of subsection (b).

(2) The head of each agency shall be responsible for—

(A) preventing prohibited personnel practices;

(B) complying with and enforcing applicable civil service laws, rules, and regulations and other aspects of personnel management; and

(C) ensuring, in consultation with the Special Counsel and the Inspector General of the agency, that employees of the agency are informed of the rights and remedies available

to the employees under this chapter and chapter 12, including—

(i) information with respect to whistleblower protections available to new employees during a probationary period;

(ii) the role of the Office of Special Counsel and the Merit Systems Protection Board with respect to whistleblower protections; and

(iii) the means by which, with respect to information that is otherwise required by law or Executive order to be kept classified in the interest of national defense or the conduct of foreign affairs, an employee may make a lawful disclosure of the information to—

(I) the Special Counsel;

(II) the Inspector General of an agency;

(III) Congress (including any committee of Congress with respect to information that is not classified or, if classified, has been classified by the head of an agency that is not an element of the intelligence community and does not reveal intelligence sources and methods); or

(IV) another employee of the agency who is designated to receive such a disclosure.

(3) The head of each agency shall ensure that the information described in paragraph (2) is

provided to each new employee of the agency not later than 180 days after the date on which the new employee is appointed.

(4) The head of each agency shall make available information regarding whistleblower protections applicable to employees of the agency on the public website of the agency and on any online portal that is made available only to employees of the agency, if such portal exists.

(5) Any employee to whom the head of an agency delegates authority for any aspect of personnel management shall, within the limits of the scope of the delegation, be responsible for the activities described in paragraph (2).

(d) This section shall not be construed to extinguish or lessen any effort to achieve equal employment opportunity through affirmative action or any right or remedy available to any employee or applicant for employment in the civil service under—

(1) section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–16), prohibiting discrimination on the basis of race, color, religion, sex, or national origin;

(2) sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a), prohibiting discrimination on the basis of age;

(3) under section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d)), prohibiting discrimination on the basis of sex;

(4) section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791), prohibiting discrimination on the basis of handicapping condition; or

(5) the provisions of any law, rule, or regulation prohibiting discrimination on the basis of marital status or political affiliation.

(e)

(1) For the purpose of this section, the term “veterans’ preference requirement” means any of the following provisions of law:

(A) Sections 2108, 3305(b), 3309, 3310, 3311, 3312, 3313, 3314, 3315, 3316, 3317(b), 3318, 3320, 3351, 3352, 3363, 3501, 3502(b), 3504, and 4303(e) and (with respect to a preference eligible referred to in section 7511(a)(1)(B)) subchapter II of chapter 75 and section 7701.

(B) Sections 943(c)(2) and 1784(c) of title 10.

(C) Section 1308(b) of the Alaska National Interest Lands Conservation Act.

(D) Section 301(c) of the Foreign Service Act of 1980.

(E) Sections 106(f), [2] 7281(e), and 7802(5) [2] of title 38.

(F) Section 1005(a) of title 39.

(G) Any other provision of law that the Director of the Office of Personnel Management designates in regulations as being a veterans’ preference requirement for the purposes of this subsection.

(H) Any regulation prescribed under subsection (b) or (c) of section 1302 and any other regulation that implements a provision

of law referred to in any of the preceding subparagraphs.

(2) Notwithstanding any other provision of this title, no authority to order corrective action shall be available in connection with a prohibited personnel practice described in subsection (b)(11). Nothing in this paragraph shall be considered to affect any authority under section 1215 (relating to disciplinary action).

(f)

(1) A disclosure shall not be excluded from subsection (b)(8) because—

(A) the disclosure was made to a supervisor or to a person who participated in an activity that the employee or applicant reasonably believed to be covered by subsection (b)(8)(A)(i) and (ii);

(B) the disclosure revealed information that had been previously disclosed;

(C) of the employee's or applicant's motive for making the disclosure;

(D) the disclosure was not made in writing;

(E) the disclosure was made while the employee was off duty;

(F) the disclosure was made before the date on which the individual was appointed or applied for appointment to a position; or

(G) of the amount of time which has passed since the occurrence of the events described in the disclosure.

(2) If a disclosure is made during the normal course of duties of an employee, the principal job function of whom is to regularly investigate and disclose wrongdoing (referred to in this paragraph as the “disclosing employee”), the disclosure shall not be excluded from subsection (b)(8) if the disclosing employee demonstrates that an employee who has the authority to take, direct other individuals to take, recommend, or approve any personnel action with respect to the disclosing employee took, failed to take, or threatened to take or fail to take a personnel action with respect to the disclosing employee in reprisal for the disclosure made by the disclosing employee.

5 U.S.C. § 7501

Definitions

For the purpose of this subchapter—

(1) “employee” means an individual in the competitive service who is not serving a probationary or trial period under an initial appointment or who has completed 1 year of current continuous employment in the same or similar positions under other than a temporary appointment limited to 1 year or less; and

(2) “suspension” means the placing of an employee, for disciplinary reasons, in a temporary status without duties and pay.

5 U.S.C. § 7502

Actions covered

This subchapter applies to a suspension for 14 days or less, but does not apply to a suspension under section 7521 or 7532 of this title or any action initiated under section 1215 of this title.

5 U.S.C. § 7503

Cause and procedure

(a) Under regulations prescribed by the Office of Personnel Management, an employee may be suspended for 14 days or less for such cause as will promote the efficiency of the service (including discourteous conduct to the public confirmed by an immediate supervisor's report of four such instances within any one-year period or any other pattern of discourteous conduct).

(b) An employee against whom a suspension for 14 days or less is proposed is entitled to—

(1) an advance written notice stating the specific reasons for the proposed action;

(2) a reasonable time to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

(3) be represented by an attorney or other representative; and

(4) a written decision and the specific reasons therefor at the earliest practicable date.

(c) Copies of the notice of proposed action, the answer of the employee if written, a summary thereof if made orally, the notice of decision and reasons therefor, and any order effecting [1] the suspension, together with any supporting material, shall be maintained by the agency and shall be furnished to the Merit Systems Protection Board upon its request and to the employee affected upon the employee's request.

5 U.S.C. § 7504

Regulations

The Office of Personnel Management may prescribe regulations to carry out the purpose of this subchapter.

5 U.S.C. § 7512

Actions covered

This subchapter applies to—

- (1) a removal;
- (2) a suspension for more than 14 days;
- (3) a reduction in grade;
- (4) a reduction in pay; and
- (5) a furlough of 30 days or less;

but does not apply to—

- (A) a suspension or removal under section 7532 of this title,
- (B) a reduction-in-force action under section 3502 of this title,
- (C) the reduction in grade of a supervisor or manager who has not completed the probationary period under section 3321(a)(2) of this title if such reduction is to the grade held immediately before becoming such a supervisor or manager,
- (D) a reduction in grade or removal under section 4303 of this title,
- (E) an action initiated under section 1215 or 7521 of this title, or
- (F) a suitability action taken by the Office under regulations prescribed by the Office, subject to the rules prescribed by the President under this title for the administration of the competitive service.

5 U.S.C. § 7513

Cause and procedure

(a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service.

(b) An employee against whom an action is proposed is entitled to—

(1) at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action;

(2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

(3) be represented by an attorney or other representative; and

(4) a written decision and the specific reasons therefor at the earliest practicable date.

(c) An agency may provide, by regulation, for a hearing which may be in lieu of or in addition to the opportunity to answer provided under subsection (b)(2) of this section.

(d) An employee against whom an action is taken under this section is entitled to appeal to the Merit

Systems Protection Board under section 7701 of this title.

(e) Copies of the notice of proposed action, the answer of the employee when written, a summary thereof when made orally, the notice of decision and reasons therefor, and any order effecting an action covered by this subchapter, together with any supporting material, shall be maintained by the agency and shall be furnished to the Board upon its request and to the employee affected upon the employee's request.

5 U.S.C. § 7703

**Judicial review of decisions of the Merit
Systems Protection Board**

(a)

(1) Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision.

(2) The Board shall be named respondent in any proceeding brought pursuant to this subsection, unless the employee or applicant for employment seeks review of a final order or decision on the merits on the underlying personnel action or on a request for attorney fees, in which case the agency responsible for taking the personnel action shall be the respondent.

(b)

(1)

(A) Except as provided in subparagraph (B) and paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review shall be filed within 60 days after the Board issues notice of the final order or decision of the Board.

(B) A petition to review a final order or final decision of the Board that raises no challenge to the Board's disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8), or 2302(b)(9)(A)(i), (B), (C), or (D) shall be filed in the United States Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction. Notwithstanding any other provision of law, any petition for review shall be filed within 60 days after the Board issues notice of the final order or decision of the Board.

(2) Cases of discrimination subject to the provisions of section 7702 of this title shall be filed under section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)), and section 16(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216(b)), as applicable. Notwithstanding any other provision of law, any such case filed under any such section must be filed within 30 days after the date the individual filing the case received notice of the judicially reviewable action under such section 7702.

(c) In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be—

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule, or regulation having been followed; or

(3) unsupported by substantial evidence;

except that in the case of discrimination brought under any section referred to in subsection (b)(2) of this section, the employee or applicant shall have the right to have the facts subject to trial de novo by the reviewing court.

(d)

(1) Except as provided under paragraph (2), this paragraph shall apply to any review obtained by the Director of the Office of Personnel Management. The Director may obtain review of any final order or decision of the Board by filing, within 60 days after the Board issues notice of the final order or decision of the Board, a petition for judicial review in the United States Court of Appeals for the Federal Circuit if the Director determines, in the discretion of the Director, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive. If the Director did not intervene in a matter before the Board, the Director may not petition for review of a Board decision under this section unless the Director first petitions the Board for a reconsideration of its decision, and such petition is denied. In addition to the named respondent, the Board and all other parties to the proceedings before the Board shall have the right to appear in the proceeding before the Court of Appeals. The

granting of the petition for judicial review shall be at the discretion of the Court of Appeals.

(2) This paragraph shall apply to any review obtained by the Director of the Office of Personnel Management that raises no challenge to the Board's disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8), or 2302(b)(9)(A)(i), (B), (C), or (D). The Director may obtain review of any final order or decision of the Board by filing, within 60 days after the Board issues notice of the final order or decision of the Board, a petition for judicial review in the United States Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction if the Director determines, in the discretion of the Director, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive. If the Director did not intervene in a matter before the Board, the Director may not petition for review of a Board decision under this section unless the Director first petitions the Board for a reconsideration of its decision, and such petition is denied. In addition to the named respondent, the Board and all other parties to the proceedings before the Board shall have the right to appear in the proceeding before the court of appeals. The granting of the petition for judicial review shall be at the discretion of the court of appeals.

28 U.S.C. § 1331

Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.