No. 25-1009

In the Supreme Court of the United States

NATIONAL ASSOCIATION OF IMMIGRATION JUDGES,
CROSS-PETITIONER

v.

DAREN K. MARGOLIN

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE CROSS-RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Civil Service Reform Act of 1978, Pub. L. No. 94-454, 92 Stat. 1111, precludes district-court jurisdiction over cross-petitioner's First Amendment challenge to an alleged change in the conditions of its members' federal employment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) is reported at 139 F.4th 293.[1] The opinion of the district court (Pet. App. 72a-124a) is reported at 693 F. Supp. 3d 549.

JURISDICTION

The judgment of the court of appeals was entered on June 3, 2025. A petition for rehearing was denied on November 20, 2025 (Pet. App. 33a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] This brief uses "Pet.," "Pet. App.," and "Cert. Reply Br." to refer to the filings in No. 25-767 and "Cross-Pet." to refer to the cross-petition for a writ of certiorari in No. 25-1009.

STATEMENT

1. Before 1978, federal employees could challenge agency personnel actions in district courts nationwide under various statutes and regulations. *Elgin* v. *Department of the Treasury*, 567 U.S. 1, 13-14 (2012). But that "'outdated patchwork'" produced "'wide variations'" in outcomes and a "'wasteful and irrational'" "double layer of judicial review." *Ibid.* (quoting *United States* v. *Fausto*, 484 U.S. 439, 444-445 (1988)). Congress therefore enacted the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111, to "establish[] a comprehensive system for reviewing personnel action taken against federal employees." *Elgin*, 567 U.S. at 5 (quoting *Fausto*, 484 U.S. at 455).

The CSRA sets out its review process in "painstaking detail." *Elgin*, 567 U.S. at 11. Chapter 23, 5 U.S.C. 2301 *et seq.*, identifies various "'prohibited personnel practice[s],'" including a "significant change in duties, responsibilities, or working conditions" in violation of a "law, rule, or regulation implementing, or directly concerning, the merit systems principles." 5 U.S.C. 2302(a)(1), (2)(A)(xii), and (b)(12). The merit-system principles include giving all employees "fair and equitable treatment * * * with proper regard for their privacy and constitutional rights." 5 U.S.C. 2301(b)(2).

A federal employee who alleges that he has experienced a prohibited personnel practice may file a complaint with the Office of Special Counsel. 5 U.S.C. 1214(a)(1)(A). The Special Counsel "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." *Ibid.* If the Special Counsel concludes that there are such grounds, he "shall report the deter-

mination together with any findings or recommendations" to, *inter alia*, the Merit Systems Protection Board (MSPB) and the employing agency. 5 U.S.C. 1214(b)(2)(B). If the agency fails to take corrective action, the Special Counsel may petition the MSPB to direct the agency to do so. 5 U.S.C. 1214(b)(2)(C).

Separately, Chapter 75 of the CSRA, 5 U.S.C. 7501 *et seq.*, covers more serious adverse actions like removal or a suspension of more than 14 days. 5 U.S.C. 7512. For those actions, the agency must provide an internal grievance process with written notice and an opportunity to respond. 5 U.S.C. 7513(b). Employees may then appeal directly to the MSPB without going through the Special Counsel. 5 U.S.C. 7513(d).

Under both Chapters 23 and 75, an employee may obtain judicial review of an adverse MSPB decision exclusively in the United States Court of Appeals for the Federal Circuit, with narrow exceptions not relevant here. 5 U.S.C. 1214(c), 7703(b)(1)(A); 28 U.S.C. 1295(a)(9).

Given that "'elaborate' framework," this Court has held that "the CSRA provides the exclusive avenue to judicial review when a qualifying employee challenges an adverse employment action." *Elgin*, 567 U.S. at 5, 11 (quoting *Fausto*, 484 U.S. at 443). Even when the employee brings "constitutional claims for equitable relief," he may not sue in district court. *Id.* at 8. The CSRA's coverage turns "only on the nature of the employee and the employment action at issue," not "the nature of an employee's constitutional claim." *Id.* at 15, 18.

2. The Executive Office for Immigration Review (EOIR) is the part of the Department of Justice to which the Attorney General has delegated the authority to adjudicate immigration proceedings. See 8 C.F.R. 1003.0(a) and (b). EOIR employs immigration judges nationwide

to determine whether aliens charged with violating immigration law should be ordered removed from the United States. See 8 U.S.C. 1101(b)(4). Immigration judges are subject to broad ethical restrictions to preserve the appearance of impartiality. See 5 U.S.C. 7321-7326; 5 C.F.R. Pts. 2635, 3801.

Under the policy challenged here—which EOIR formalized in September 2017 and updated in October 2021—immigration judges must obtain their supervisor's approval for public speeches and writings related to their official duties. C.A. App. 41-45, 56-62. The policy explains that "speaking engagements directly related to the employee's official duties provide the public with the impression that the speech has the imprimatur of the agency, and therefore, require close coordination with the employee's supervisor." *Id.* at 57. The policy requires immigration judges speaking about "subject matter that directly relates to their official duties" to speak in an official capacity with supervisor approval. *Ibid.* "Supervisors are encouraged to grant appropriate requests." *Ibid.* At the same time, the policy does not require supervisor approval when immigration judges "speak in a personal capacity about those parts of their lives that do not relate to their job." *Ibid.*

3. Cross-petitioner is the former labor union representing immigration judges and is now a "voluntary association of immigration judges." Pet. App. 72a. In 2020, cross-petitioner sued EOIR's Director in the United States District Court for the Eastern District of Virginia, alleging that earlier iterations of the speaking-engagement policy violated the First Amendment and were void for vagueness. Compl. ¶¶ 55-58. In January 2023, following a remand from an earlier appeal, respondent filed the operative second amended complaint,

which challenges the 2021 policy on the same grounds. Pet. App. 72a-73a, 86a.

In September 2023, the district court granted the government's motion to dismiss the complaint. Pet. App. 72a-124a. The court observed that "the United States Supreme Court has concluded that it is fairly discernable from the CSRA's scheme that Congress intended to preclude district-court jurisdiction over certain covered actions brought by covered federal employees." *Id.* at 100a (citing *Elgin*, 567 U.S. at 11-12). The court then addressed whether cross-petitioner's claims were of the type that Congress intended to channel to the MSPB. *Id.* at 100a-123a. The court concluded that they were by applying the three factors articulated in *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200 (1994): "(1) whether the statutory scheme forecloses all meaningful judicial review[,] (2) the extent to which the plaintiff's claims are wholly collateral to the statute's review provisions, and (3) whether agency expertise could be brought to bear on the questions presented." Pet. App. 99a (quoting *Bennett* v. *SEC*, 844 F.3d 174, 181 (4th Cir. 2016), which in turn quotes *Thunder Basin*, 510 U.S. at 212-213, 215) (brackets, ellipses, and internal quotation marks omitted).

First, the district court held that cross-petitioner challenged a CSRA-covered action for which meaningful judicial review was available. Pet. App. 102a-122a. The speaking-engagement policy, the court determined, "constitute[d] a significant change in working conditions" and was thus a personnel practice covered by Chapter 23 of the CSRA. *Id.* at 103a; see *id.* at 102a-107a. Cross-petitioner's members could therefore obtain Federal Circuit review via Chapter 23's process, which begins with a complaint to the Office of Special

Counsel. See *id.* at 110a-111a. The court rejected petitioner's concern that the Special Counsel could refuse to act on a meritorious claim as purely "hypothetical," since cross-petitioner's members had never pursued that route. *Id.* at 117a.

The district court held that the second and third *Thunder Basin* factors also counseled against jurisdiction. Pet. App. 122a-123a. Cross-petitioner's claims were not "wholly collateral" to the CSRA because they targeted a CSRA-covered personnel practice. *Id.* at 123a. And the Special Counsel and MSPB had relevant expertise, such as how speech restrictions for adjudicators work across the federal government. *Id.* at 123a & n.26. Because all relevant considerations disfavored jurisdiction, the court dismissed the complaint. *Id.* at 124a.

4. In June 2025, the court of appeals affirmed the district court's conclusion that cross-petitioner's claims were ones that Congress intended to channel via the CSRA. Pet. App. 20a-31a. Nonetheless, the court of appeals—invoking post-oral argument developments that no party had briefed—vacated and remanded on the theory that the CSRA may no longer work as Congress intended and that fact-finding on remand is necessary to determine whether the CSRA channels any claims. *Id.* at 12a-19a. In the court's view, it would "defeat congressional intent" to channel claims via the CSRA unless the MSPB and Office of Special Counsel are operating "adequately and efficiently" today. *Id.* at 14a. And the court determined that "a factual record" was needed "to assess the functionality of the CSRA's adjudicatory scheme" in the first instance. *Id.* at 15a. That holding is the subject of the government's petition in No. 25-767.

On the question presented by the cross-petition, the court of appeals agreed with the district court that cross-petitioner's claims fall within the CSRA's channeling scheme, and tracked the district court's analysis of that issue. Pet. App. 20a-32a. As the court of appeals explained, cross-petitioner alleged "a significant change in working conditions," which is a personnel practice in the heartland of the MSPB's jurisdiction. *Id.* at 23a; see *id.* at 22a-25a. Cross-petitioner's members could raise their claims in a complaint to the Office of Special Counsel, permitting "meaningful judicial review" on appeal from the MSPB to the Federal Circuit. *Id.* at 25a-28a.

The court of appeals also held that cross-petitioner's challenge was not "wholly collateral to the CSRA scheme" because it challenged a CSRA-covered personnel practice. Pet. App. 30a. And the court held that the Special Counsel and MSPB had relevant expertise "with agency speech policies, why they are implemented, and how such policies should best be designed in accordance with the Constitution." *Id.* at 31a. Accordingly, the court concluded that "Congress designed the CSRA to divest district courts of jurisdiction to review legal challenges like those raised by [cross-petitioner]." *Ibid.*

5. The government sought rehearing en banc of the court of appeals' holding that the CSRA does not channel any claims if a factual record suggests that the CSRA is not functioning as Congress intended. Pet. for Reh'g 9-19. Cross-petitioner did not seek rehearing en banc of the panel's holding that its specific claims fall within the CSRA. Instead, cross-petitioner told the en banc court that that portion of the panel's opinion "d[id] not warrant rehearing" because "it was made in dicta" and "not binding on any future panel that considers

whether [cross-petitioner's] claims fall within the CSRA's ambit." Resp. to Pet. for Reh'g 16.

The court of appeals denied rehearing en banc by a 9-6 vote, with three judges authoring concurring opinions. Pet. App. 33a-34a. Judge Thacker, joined by Judge King, stated that she was "in complete agreement with the panel opinion." *Id.* at 42a.

Judge Quattlebaum, joined by Judges Agee, Richardson, and Rushing, dissented from the denial of rehearing en banc. Pet. App. 49a-71a. While he vigorously disagreed with the panel's questioning of the CSRA's general channeling effect, he "t[ook] no issue with the panel opinion's description" of how to determine whether a particular claim falls within that scheme. *Id.* at 60a n.4.

ARGUMENT

Cross-petitioner seeks review of whether its First Amendment challenge to EOIR's speaking-engagement policy falls within the CSRA's channeling scheme. That question is manifestly not certworthy. The court of appeals correctly rejected cross-petitioner's view of whether its particular claims challenge an adverse employment action under the CSRA, and that aspect of its decision conflicts with no decision of this Court or any other court of appeals. Further review is unwarranted and would needlessly delay resolution of the government's petition in No. 25-767, which cross-petitioner recognizes (Cross-Pet. 37) raises "consequential questions" about the CSRA's continuing vitality.

1. The court of appeals and district court correctly held that cross-petitioner's claims fall within the CSRA's channeling scheme.

In *Elgin* v. *Department of the Treasury*, 567 U.S. 1 (2012), this Court held that the CSRA provides the "ex-

clusive avenue to judicial review when a qualifying employee challenges an adverse employment action by arguing that a federal statute is unconstitutional." *Id.* at 5. "Given the painstaking detail with which the CSRA sets out the method for covered employees to obtain review of adverse employment actions," Congress would not have wanted those same employees to have "an additional avenue of review in district court." *Id.* at 11-12.

That is true regardless of "the nature of an employee's claim." *Elgin*, 567 U.S. at 13. In *Elgin*, federal employees who had been fired for failing to register for the selective service argued that the male-only draft was unconstitutional sex discrimination and a bill of attainder. *Id.* at 7. Despite their assertion that such claims "have nothing to do with the types of day-to-day personnel actions adjudicated by the MSPB," this Court declined to allow the employees to bypass the CSRA. *Id.* at 22 (citation omitted). "Nothing in the CSRA's text" supported an exception for their constitutional claims. *Id.* at 13. And permitting the suit would "seriously undermine[]" the "integrated scheme of review" that Congress enacted the CSRA to ensure. *Id.* at 14.

Elgin forecloses district-court jurisdiction here. Cross-petitioner does not dispute that its members are covered by the CSRA. And because cross-petitioner's claims derive solely from its members, cross-petitioner does not suggest that its status as a voluntary membership organization that could not itself bring a claim under the CSRA changes the analysis. The central question is thus whether cross-petitioner challenges a CSRA-covered employment action. The answer is yes for two independent reasons.

First, cross-petitioner's suit is a preemptive attack on adverse employment actions in the CSRA's heartland.

Although the speaking-engagement policy does not specify an enforcement mechanism, EOIR can direct cross-petitioner's members only as their employer, so any discipline could be imposed only as part of the employment relationship. As authority for the policy, EOIR's Director cited his power to "manage EOIR and its employees," including by "[p]rovid[ing] for performance appraisals for immigration judges." 8 C.F.R. 1003.0(b)(1) and (v); see C.A. App. 56.

This lawsuit therefore seeks to prevent workplace discipline that cross-petitioner's members could challenge via the CSRA process. For example, if EOIR gave an immigration judge a poor performance evaluation or declined to promote him for violating the policy, the immigration judge could challenge those actions under Chapter 23 of the CSRA by filing a complaint with the Special Counsel. 5 U.S.C. 2302(a)(2)(A)(ii) and (viii); see pp. 2-3, *supra*. And if EOIR imposed more severe sanctions like a reduction in pay or a suspension lasting over 14 days, the immigration judge could challenge those actions before the MSPB under Chapter 75 of the CSRA. 5 U.S.C. 7512(2) and (4); see p. 3, *supra*. Cross-petitioner cannot evade the CSRA's strictures by running to court before the CSRA-covered action occurs and calling the suit "prophylactic" or "preventive." Pet. App. 25a (citation omitted).

Second, the court of appeals correctly held that the speaking-engagement policy is itself a personnel action covered by Chapter 23 of the CSRA. The CSRA defines a covered "'personnel action'" to include any "significant change in duties, responsibilities, or working conditions." 5 U.S.C. 2302(a)(2)(A)(xii). The district court and the court of appeals both concluded that the challenged policy "broadly affects how immigration judges

'interact with their supervisors and the EOIR,'" and "'governs what types of speaking or writing they may do within their official capacities.'" Pet. App. 24a (quoting Pet. App. 106a). The policy thus "encompasses circumstances that relate directly to an [immigration judge's] working conditions" and constitutes a "personnel action[]" within the meaning of the CSRA. *Ibid.*

Cross-petitioner contends (Cross-Pet. 27) that Chapter 23 applies only to "individual personnel decisions, not to blanket policies." That crabbed view of the CSRA's reach defies the broad statutory text. Chapter 23 covers "*any* * * * significant change in duties, responsibilities, or working conditions." 5 U.S.C. 2302(a)(2)(A)(xii) (emphasis added). "[T]he word 'any' has an expansive meaning," *FDA* v. *R.J. Reynolds Vapor Co.*, 606 U.S. 226, 237 (2025) (citation omitted), and connotes that the CSRA covers *all* major changes in working conditions, not just those affecting one employee.

Cross-petitioner notes (Cross-Pet. 27) that the CSRA defines covered personnel actions to occur "with respect to *an employee*." 5 U.S.C. 2302(a)(2)(A) (emphasis added). But the singular presumptively includes the plural, 1 U.S.C. 1, and a policy affecting multiple employees is still one "with respect to an employee" (the complainant) even if it might also be respect to other employees. Cross-petitioner similarly asserts (Cross-Pet. 27-28) that the CSRA's other covered personnel actions are "individual employment actions," so the working conditions clause should be read the same way. But the other covered actions, like a decision "concerning education or training" or "the implementation * * * of any nondisclosure policy" could easily occur on a group basis. 5 U.S.C. 2302(a)(2)(A)(ix) and (xi). Cross-petitioner challenges a condition of federal employment

on behalf of CSRA-covered employees. That suit belongs before the MSPB, not in district court.

2. Cross-petitioner's objections lack merit.

a. Cross-petitioner asserts (Cross-Pet. 37) that this Court "implicit[ly]" excluded pre-enforcement First Amendment suits from the CSRA in *United States* v. *National Treasury Employees Union*, 513 U.S. 454 (1995) (*NTEU*). *NTEU* held that a ban on federal employees accepting compensation for speeches or articles violated the First Amendment. *Id.* at 457. But the government did not argue that the CSRA precluded the claim, and the Court did not address the issue. Any such "drive-by jurisdictional ruling[]" has "no precedential effect." *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500, 511 (2006) (quoting *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 91 (1998)); see *Lewis* v. *Casey*, 518 U.S. 343, 352 n.2 (1996) ("[W]e have repeatedly held that the existence of unaddressed jurisdictional defects has no precedential effect."). In any event, the policy in *NTEU* could be enforced only in a civil action by the Attorney General—not as part of the employment relationship—making it less obviously subject to the CSRA than the policy here. See 513 U.S. at 460.

Cross-petitioner also errs (Cross-Pet. 22-25) in its reliance on *Axon Enterprise, Inc.* v. *FTC*, 598 U.S. 175 (2023), and *Free Enterprise Fund* v. *Public Company Accounting Oversight Board*, 561 U.S. 477 (2010). In *Axon*, parties subject to agency enforcement proceedings challenged the legitimacy of those proceedings in district court, arguing that the proceedings' structure violated the Constitution's separation of powers. 598 U.S. at 182-183. This Court permitted the suits to proceed because the parties did not challenge "any specific substantive decision" but "the structure or very exist-

ence of an agency." *Id.* at 189. The parties did not have to sit through the very proceedings they argued were illegitimate to have their day in court.

Similarly, in *Free Enterprise Fund*, an accounting firm regulated by the Public Company Accounting Oversight Board sought to challenge the Board's structure as unconstitutional. 561 U.S. at 488. That claim could proceed in district court, this Court held, because the firm had no other way to "meaningfully pursue" it; the relevant statute did not provide for judicial review of the Board's decisions. *Id.* at 490. While the government noted various ways in which the firm could have contrived a path to court, the Court deemed those paths insufficient, particularly given that the firm "object[ed] to the Board's existence." *Ibid.*

Axon and *Free Enterprise Fund* thus stand for the narrow but important proposition that certain constitutional claims targeting an agency's "structure or very existence" do not have to be channeled through the agency the challenger attacks. *Axon*, 598 U.S. at 189. Those cases do not support cross-petitioner's assertion (Cross-Pet. 22) that channeling does not apply whenever the plaintiff suffers irreparable harm, *i.e.*, "harms not remediable by any after-the-fact judicial review." That test would risk making CSRA channeling the exception, not the rule.

Nor does *Free Enterprise Fund* establish a categorical rule that Congress may not channel "constitutional claims through a statutory scheme that provides no guarantee of judicial review," as cross-petitioner claims (Cross-Pet. 24). This Court merely held that a regulated party did not need to contrive an administrative suit to challenge its regulator's very existence. *Free Enter. Fund*, 561 U.S. at 490. But here, cross-petitioner

brings a heartland CSRA claim that has a clear path to the Federal Circuit. While cross-petitioner notes the "hypothetical scenario" in which its claim could be stymied by the Special Counsel, Pet. App. 117a, such speculation is unfounded, see pp. 14-15, *infra*, and looks nothing like the facts of *Free Enterprise Fund*.

b. Cross-petitioner's invocation (Cross-Pet. 26-33) of the *Thunder Basin* factors is equally unavailing. In determining whether a claim falls within an exclusive-review scheme like the CSRA, this Court often considers: (1) whether "precluding district court jurisdiction [could] 'foreclose all meaningful judicial review'"; (2) whether the claim is "'wholly collateral to [the] statute's review provisions'"; and (3) whether the claim is "'outside the agency's expertise.'" *Axon*, 598 U.S. at 186 (quoting *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 212-213 (1994)) (second set of brackets in original).

Cross-petitioner claims (Cross-Pet. 28-29) that its members lack meaningful judicial review because, under Chapter 23 of the CSRA, the Special Counsel could hypothetically decline to bring their claim to the MSPB. Cross-petitioner's members could, of course, violate the policy and, if EOIR imposes a more serious sanction like a reduction in pay, appeal to the MSPB under Chapter 75 with guaranteed judicial review. See 5 U.S.C. 7512(4). But even considering only Chapter 23, cross-petitioner's speculation is unsound because its members never brought a claim to the Special Counsel. Pet. App. 27a. The Special Counsel's bar to bring a claim is low, requiring only "reasonable grounds to believe that a prohibited personnel practice has occurred." 5 U.S.C. 1214(b)(2)(B). And if he refuses to investigate, the D.C. Circuit permits a complainant to seek mandamus. See *Weber* v. *United States*, 209 F.3d 756, 759 (2000).

Cross-petitioner notes (Cross-Pet. 8, 29) that the Special Counsel did not file a complaint with the MSPB between 2020 and 2024. But cross-petitioner omits that, in that same period, the Special Counsel negotiated *over 2000* favorable outcomes directly with agencies. Office of Special Counsel, *Annual Report to Congress for Fiscal Year 2024*, at 16 (Jan. 6, 2025), https://perma.cc/99XK-D5ZA. That the Special Counsel can obtain redress *without* litigation belies claims of systematic failure.

Regardless, Congress in the CSRA deliberately chose to leave certain claims—here, those too minor and meritless to make it past the Special Counsel—without a path to court. See *United States* v. *Fausto*, 484 U.S. 439, 447-452 (1988). Where Congress has done so, claimants may not bypass the CSRA. Holding otherwise would turn "upside down" Congress's choice to prioritize some claims over others and "seriously undermine" the MSPB's exclusive jurisdiction over federal personnel actions. *Id.* at 449; see *Krafsur* v. *Davenport*, 736 F.3d 1032, 1037 (6th Cir. 2013) ("For the most part, the claims the Special Counsel keeps out do not belong in court anyway.").[2]

As for the second *Thunder Basin* factor—whether the claim is "wholly collateral" to the CSRA—cross-petitioner repeats (Cross-Pet. 32) its erroneous assertion that it is not challenging a CSRA-covered employ-

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[2] Some lower courts have suggested that plaintiffs who try and fail to obtain judicial review under the CSRA might then sue in district court. See, *e.g.*, *Irizarry* v. *United States*, 427 F.3d 76, 78-80 (1st Cir. 2005); *Ferry* v. *Hayden*, 954 F.2d 658, 661 (11th Cir. 1992); *Fleming* v. *Spencer*, 718 Fed. Appx. 185, 188 n.2 (4th Cir. 2018) (per curiam). Cross-petitioner claims (Cross-Pet. 29) that that exhaustion requirement misunderstands the test for preclusion. But it simply honors Congress's decision to channel claims through the CSRA while accommodating perceived constitutional concerns.

ment action. See pp. 11-12, *supra*. "Because [cross-petitioner] challenges a significant change to its members' working conditions, its claims are not wholly collateral to the CSRA scheme." Pet. App. 30a. Cross-petitioner notes (Cross-Pet. 32-33) that it seeks declaratory and injunctive relief that it says are not available under the CSRA. But in *Elgin*, the plaintiffs also sought declaratory and injunctive relief, yet this Court channeled those claims to the MSPB. 567 U.S. at 7.

Finally, cross-petitioner argues (Cross-Pet. 33) that the Special Counsel and MSPB lack expertise in "purely constitutional claims involving the right of federal employees to speak in their personal capacities." But as the court of appeals observed, the Special Counsel and MSPB "are familiar with agency speech policies, why they are implemented, and how such policies should best be designed in accordance with the Constitution." Pet. App. 31a. And the MSPB can "apply its expertise" to the "many threshold questions that may accompany a constitutional claim." *Elgin*, 567 U.S. at 22. The *Thunder Basin* factors therefore uniformly favor preclusion.

3. The court of appeals' decision does not conflict with the precedent of any other circuit.

Cross-petitioner asserts (Cross-Pet. 17-18) a conflict with the D.C. Circuit's 30-year-old decision in *Weaver* v. *United States Information Agency*, 87 F.3d 1429 (1996), cert. denied, 520 U.S. 1251 (1997). There, the D.C. Circuit rejected on the merits a First Amendment challenge to an agency policy restricting employees' public speeches and writings on matters of official concern. *Id.* at 1432. The court declined to channel that claim to the MSPB because it was "a simple pre-enforcement attack on a regulation restricting employee speech." *Id.* at 1434.

Cross-petitioner is correct that *Weaver* conflicts with the decision below insofar as it endorses a categorical exception to CSRA channeling for preenforcement First Amendment claims. But this Court's 2012 decision in *Elgin* superseded that aspect of *Weaver* by holding that "the nature of an employee's constitutional claim" is not relevant to whether the claim falls within the CSRA. 567 U.S. at 15. Since *Elgin*, the D.C. Circuit has never relied on that portion of *Weaver* and has repeatedly held that the CSRA and its sister statute, the Federal Service Labor-Management Relations Statute, Pub. L. No. 95-454, Tit. VII, § 701, 92 Stat. 1191, preclude preenforcement suits challenging agency personnel and labor policies, even on First Amendment grounds. See, *e.g.*, *American Fed'n of Gov't Emps.* v. *Trump*, 929 F.3d 748, 756-757 (D.C. Cir. 2019); *American Fed'n of Gov't Emps.* v. *Secretary of the Air Force*, 716 F.3d 633, 638 (D.C. Cir. 2013); *Payne* v. *Biden*, 62 F.4th 598, 603-604 (D.C. Cir.), vacated as moot, 144 S. Ct. 480 (2023). The D.C. Circuit's current precedent is fully consistent with the decision below.

Tellingly, cross-petitioner identifies (Cross-Pet. 18-19) only one post-*Elgin* case from a district court in the D.C. Circuit applying *Weaver* to permit a preenforcement First Amendment suit. See *Turner* v. *United States Agency for Global Media*, 502 F. Supp. 3d 333, 369 (D.D.C. 2020). Even that case recognized that *Elgin* "may have weakened the rule of *Weaver*." *Ibid.* And that case did not endorse a categorical First Amendment exception to CSRA preclusion but simply held that the claim there did not target "working conditions" under the CSRA. *Id.* at 367.

Cross-petitioner also cites (Cross-Pet. 19) *Wolfe* v. *Barnhart*, 446 F.3d 1096 (2006), in which the Tenth Cir-

cuit adjudicated a First Amendment challenge to an agency speech restriction without mentioning the CSRA. That case also predates *Elgin* and, again, "drive-by jurisdictional rulings" have "no precedential effect." *Arbaugh*, 546 U.S. at 511 (citation omitted).

Finally, cross-petitioner cites the Fifth Circuit's decision in *Feds for Medical Freedom* v. *Biden*, 63 F.4th 366 (en banc), vacated as moot, 144 S. Ct. 480 (2023), which declined to channel a challenge to a federal-employee vaccine mandate via the CSRA. Because that decision has been vacated, it cannot create a circuit conflict. Moreover, cross-petitioner omits that the Fifth Circuit split from the D.C. Circuit, which had channeled similar vaccine-mandate litigation to the MSPB. *Id.* at 388 (discussing *Payne*, *supra*). If the Fifth Circuit's decision proves anything, it is that the D.C. Circuit has course corrected since *Weaver*. The D.C. Circuit, like the Fourth Circuit, has no exception to CSRA channeling for preenforcement constitutional claims.

4. Further review is particularly unwarranted given petitioner's prior representations about the lack of consequences of the decision below. Cross-petitioner opposed rehearing en banc by representing to the court of appeals that the panel decision "d[id] not warrant rehearing" because its analysis of the question presented by the cross-petition was "dicta" and "not binding" on future panels. Resp. to Pet. for Reh'g 16. That is a far cry from cross-petitioner's current position (Cross-Pet. 35) that the same analysis "impose[s] intolerable costs on First Amendment freedoms."

Moreover, further review would risk delaying the correction of the court of appeals' sua sponte holding that the CSRA's preclusive effect turns on whether the MSPB and Special Counsel are operating "adequately

and efficiently" today. Pet. App. 14a. As the government has explained, that holding has spawned a flood of copycat litigation that threatens not just the CSRA, but countless agency-review schemes. Pet. 30-31; Cert. Reply Br. 10-11. Because that aspect of the decision below is obviously incorrect and flouts the party-presentation principle, the appropriate disposition is a summary reversal this Term. Pet. 15-16, 25-26; Cert. Reply Br. 2-3. By waiting nearly two months after the government's petition to file its cross-petition, cross-petitioner has already delayed the Court's consideration of the government's petition, which was fully briefed on March 11. This Court should reject the cross-petition's bid for yet further delay on a splitless question that does not warrant certiorari.

CONCLUSION

The cross-petition for a writ of certiorari should be denied.

Respectfully submitted.

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