

No. 25-1009

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

REPLY BRIEF FOR CROSS-PETITIONER

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ARGUMENT

NAIJ’s cross-petition presents a recurring and important question on which the circuits are split: may federal employees file a pre-enforcement challenge to a prior restraint directly in federal court, or must they instead raise their claims through the CSRA, an administrative scheme that fails to guarantee *any*—let alone meaningful—judicial review of their “here-and-now” injuries? *See Axon Enter., Inc. v. FTC*, 598 U.S. 175, 191 (2023). If the Fourth Circuit is correct that employees must proceed through the CSRA, then even partisan and viewpoint-based restrictions on speech will be shielded from effective judicial review. The CSRA does not require this result, and the First Amendment does not countenance it. For good reason, this Court has long recognized the “special importance of swift action to guard against the threat to First Amendment values posed by prior restraints.” *Cap. Cities Media, Inc. v. Toole*, 463 U.S. 1303, 1304 (1983) (Brennan, J.). The Fourth Circuit’s decision at step two of *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994) is at odds with this recognition, and with controlling precedent from this Court concerning the appropriate bounds of implied jurisdictional channeling.

The government raises four main points in opposition to the cross-petition. All miss their target.

1. The government argues that *Elgin v. Department of Treasury*, 567 U.S. 1 (2012), compels the Fourth Circuit’s conclusion at step two of *Thunder Basin* that Congress would have intended

to strip jurisdiction over NAIJ’s prior-restraint claims. Cross-Pet. Opp. 9. But the employees in *Elgin* challenged their *terminations*—employment actions at the core of the CSRA that are guaranteed judicial review. 567 U.S. at 12. The plaintiffs here are not challenging a covered action. They have filed a simple pre-enforcement challenge to a prior restraint on time-sensitive political speech.

The government advances two theories why NAIJ must nonetheless proceed under the CSRA. First, it argues that NAIJ’s claims are a “preemptive attack” on employment actions that are covered—namely, discipline for non-compliance with the Policy—and therefore that NAIJ members should not be permitted to challenge the Policy without first violating it and subjecting themselves to possible termination. Cross-Pet. Opp. 9–10. This argument misunderstands NAIJ’s complaint, which is that the Policy chills the speech of immigration judges by its very existence. *Cf. City of Lakewood v. Plain Dealer Publi’g Co.*, 486 U.S. 750, 757 (1988); *Freedman v. Maryland*, 380 U.S. 51, 56 (1965). It also runs headlong into this Court’s decision in *Free Enterprise Fund v. Public Co. Accounting Board*, which held that plaintiffs should not be required to “bet the farm by taking a violative action” in order to obtain judicial review of their constitutional claims. 561 U.S. 477, 490 (2010); *see also* Pet. App. 22a. Both the district court and Fourth Circuit correctly rejected the argument the government advances here. Pet. App. 103a, 22a.

Next, the government argues that the Policy is itself a “personnel action” covered by Chapter 23 of

the CSRA, Cross-Pet. Opp. 10–11, but this argument runs aground on the statute’s text. The CSRA defines “personnel action” as one of twelve employment actions—such as an “appointment,” “promotion,” “disciplinary or corrective action,” or “any other significant change in . . . working conditions”—taken “with respect to an employee.” 5 U.S.C § 2302(a)(2)(A). The government says the reference to “any other significant change in . . . working conditions” sweeps in any action that significantly “affects how [employees] interact with their supervisors and the[ir] [agency employer],” Cross-Pet. Opp. 10–11 (quoting Pet. App. 24a), but this “all encompassing” interpretation of § 2302(a)(2)(A)’s residual clause would render the preceding eleven items in the list redundant, *cf. Begay v. United States*, 553 U.S. 137, 139–140, 142 (2008) (applying *ejusdem generis* and rejecting interpretation of residual clause that would achieve similar result); *see also Yates v. United States*, 574 U.S. 528, 546 (2015) (same). It would also lead to the “absurd result[]” that far-reaching policies that seriously curtail the rights of thousands or millions of employees would receive less process and judicial scrutiny than run-of-the mill disciplinary actions that affect only a single person. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982). That is obviously *not* what Congress intended. *Cf. Feds for Med. Freedom v. Biden*, 63 F.4th 366, 381 (5th Cir. 2023), *cert. granted, judgment vacated*, 144 S. Ct. 480 (2023). The better reading—and the one most consonant with Congress’s purpose in creating a “graduated” scheme of review, *Kloeckner v. Solis*, 568 U.S. 41, 44 (2012)—is that § 2303(a)(2)(A)

reaches only routine employment actions against individual employees, not far-reaching speech policies like the one at issue here.

In any event, *Elgin* would not control even if the the Policy were a Chapter 23-covered action. The employees in *Elgin* challenged their terminations—actions covered by Chapter 75 of the statute, 5 U.S.C. § 7512—and accordingly they had a direct and guaranteed pathway to the Federal Circuit through the MSPB, *id.* §§ 7513(d), 7703(a)(1). In addition, those employees could not point to any “here-and-now” injury that was “impossible to remedy” once “appellate review kick[ed] in,” *Axon*, 598 U.S. at 191. The MSPB and Federal Circuit were empowered to reinstate the employees and to award backpay and attorney’s fees. *Elgin*, 567 U.S. at 22. Here, by contrast, there would be no guarantee of judicial review: even if the Policy were covered by Chapter 23, access to judicial review would turn on the unfettered and unreviewable discretion of the Special Counsel. Moreover, even if NAIJ’s members could get to the Federal Circuit, they could not get effective relief for the speech opportunities they have already lost—or for the harms to public debate caused by their silence. *See Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 609 (1976) (Brennan, J., concurring) (“Prior restraints fall on speech with a brutality and a finality all their own. Even if they are ultimately lifted they cause irremediable loss—a loss in the immediacy, the impact, of speech.” (quoting A. Bickel, *The Morality of Consent*, 61 (1975)); *Lane v. Franks*, 573 U.S. 228, 240 (2014) (observing that public employees’ speech has

“special value” because of public employees’ distinctive knowledge and experience).

2. The government says the Fourth Circuit’s decision does not conflict with this Court’s decisions in *Axon* and *Free Enterprise Fund*. Cross-Pet. Opp. 12–14. But those cases held that a scheme fails to provide meaningful judicial review of a plaintiff’s constitutional claims where the plaintiff suffers a “here-and-now” injury that cannot be “undone” by any after-the-fact judicial review the scheme affords, *Axon*, 598 U.S. at 191, or where the scheme affords no guarantee of judicial review at all, *Free Enter. Fund.*, 561 U.S. at 489–90. Here, the CSRA fails at each hurdle, but the Fourth Circuit still found that it provided a meaningful avenue of relief. *See* Cross-Pet. 22–25.

The government attempts to get around this clear conflict by cabining *Axon* and *Free Enterprise Fund* to the specific kinds of claims at issue in those cases: “constitutional claims targeting an agency’s ‘structure or very existence.’” Cross-Pet. Opp. 13 (quoting *Axon*, 598 U.S. at 189). But the logic of those cases cannot be so easily cabined.

In *Axon*, the plaintiffs challenged the constitutionality of administrative enforcement proceedings that had been initiated against them. But “the rub,” as this Court explained, was that the plaintiffs’ harm—the burden of having to go through an illegitimate proceeding—“is impossible to remedy once the proceeding is over, which is when appellate review kicks in.” *Axon*, 598 U.S. at 191. The same is true of the harms caused by prior restraints like the

one NAIJ challenges here. *See Neb. Press Ass’n*, 427 U.S. at 559 (“A prior restraint, . . . by definition, has an immediate and *irreversible* sanction.” (emphasis added)); *accord CBS, Inc. v. Davis*, 510 U.S. 1315, 1317 (1994). It is for precisely this reason that the Court has allowed those subject to a speech licensing scheme to bring an immediate challenge, whether or not they have applied for a license. *See, e.g., City of Lakewood*, 486 U.S. at 757–58; *Freedman*, 380 U.S. at 56; *cf. Dombrowski v. Pfister*, 380 U.S. 479, 485–87 (1965) (immediate federal-court intervention in state proceedings permitted where risk of prosecution would chill First Amendment rights).

The government reads *Free Enterprise Fund* too narrowly, too. Yes, that case, unlike this one, involved a challenge to the existence of an agency—an accounting oversight board. But what was crucial to the Court’s analysis was that the statutory scheme failed to guarantee that the plaintiff’s constitutional claims would receive meaningful judicial review. As the Court explained, the plaintiff was the subject of a board investigation, but not every board action resulted in action by the Securities Exchange Commission—and under the scheme, only action by the SEC was reviewable in a court of appeals. *Free Enter. Fund*, 561 U.S. at 489–90; *see also Axon*, 598 U.S. at 190 (explaining that the plaintiff in *Free Enterprise Fund*, “absent district court jurisdiction, might never have had judicial recourse”). The situation here is analogous, because even assuming that the Policy is a Chapter 23–covered action, the ability of immigration judges to access judicial review will turn entirely on the

unfettered and unreviewable discretion of the Special Counsel.

The government effectively concedes this point when it acknowledges that NAIJ's claims may be "stymied by the Special Counsel," Cross-Pet. Opp. 14, and its efforts to overcome this basic reality cannot save it. It suggests, first, that if the OSC fails to *investigate* a Chapter 23 complaint, a complainant may seek mandamus. *Id.* But while the CSRA requires the OSC to investigate Chapter 23 complaints, 5 U.S.C. § 1214(a)(1)(A), it gives the Special Counsel unlimited and unreviewable discretion to decide whether to petition the MSPB for corrective action, *see Feds for Med. Freedom*, 63 F.4th at 380 (citing *Krafsur v. Davenport*, 736 F.3d 1032, 1034 (6th Cir. 2013)); Pet. App. 26a–27a. The upshot is that if the Special Counsel refuses to petition the MSPB, employees have no judicial recourse.

Next, the government holds out the possibility, in a non-committal footnote, that, if NAIJ filed a Chapter 23 complaint and the Special Counsel refused to petition the MSPB, then NAIJ could proceed to district court on the theory that *Thunder Basin* requires only administrative exhaustion. Cross-Pet. Opp. 15 n.2. But the government's own brief is predicated on the assumption that *Thunder Basin* is a rule of jurisdiction, not of administrative exhaustion. *See id.* at 15 ("Where Congress has [left certain claims without a path to court], claimants may not bypass the CSRA."). Indeed, it has maintained throughout this litigation that NAIJ can

obtain judicial review through the CSRA or not at all. Gov't C.A. Br. 21–23; Gov't Dist. Ct. Reply 11.

The First Amendment rule against prior restraints is too important to leave to such feeble and uncertain protection.

On this, the Court's decision in *United States v. National Treasury Employees Union (NTEU)*, 513 U.S. 454 (1995) is instructive. The government casts *NTEU* as a “drive-by jurisdictional ruling[],” Cross-Pet. Opp. 12 (quoting *Arbaugh v. Y & H Corp*, 546 U.S. 500, 511 (2006)), but the fact that the Court exercised jurisdiction over a prior-restraint challenge almost identical to this one just one year after *Thunder Basin*, and with no suggestion at all that the CSRA could be viewed as an obstacle, underscores the radical and indeed out-of-left-field character of the arguments the government makes here. Notably, until the Fourth Circuit's decision below, lower courts repeatedly and uncontroversially found that district courts have jurisdiction over similar pre-enforcement challenges to prior restraints on the speech of federal employees. *See* Cross-Pet. 18–20 (collecting cases).¹

¹ The government's claim that *NTEU* involved a policy that was enforceable only in a civil action by the Attorney General, *see* Cross-Pet. Opp. 12, is wrong. It was also enforceable by employing agencies through the imposition of disciplinary sanctions. *See* 56 Fed. Reg. 1721, 1724 (Jan. 17, 1991) (codified at 5 C.F.R. § 2636.104(b)); Brief for Respondents, *United States v. NTEU*, 513 U.S. 454 (1995) (No. 93–1170), 1994 WL 396914 at *3 n.2. Yet there was no suggestion that the plaintiff

3. The government’s claim that there is no circuit split is belied by its own acknowledgement that the decision below “conflicts” with the D.C. Circuit’s decision in *Weaver v. United States Information Agency*, 87 F.3d 1429, 1434 (D.C. Cir. 1996). Cross-Pet. Opp. 17. The government suggests that *Weaver* has been superseded by this Court’s decision in *Elgin*. Cross-Pet. Opp. 17. But, as NAIJ has explained, *Elgin* and *Weaver* are entirely consistent with one another. Cross-Pet. 20–21. In *Weaver*, the D.C. Circuit rejected the argument that the CSRA stripped jurisdiction over “a simple pre-enforcement attack on a regulation restricting employee speech” that “st[ood] independently” of any covered sanction for non-compliance. 87 F.3d at 1434. In *Elgin*, the plaintiffs challenged the constitutionality of a federal statute in the course of challenging a covered sanction. In no sense were those two challenges independent. As the Court recognized, the challenge to the statute was the very “vehicle” by which the plaintiffs sought to “reverse” their sanctions. 567 U.S. at 12, 14.²

employees should have to violate the policy and be disciplined before challenging it.

² The D.C. Circuit’s holding in *Weaver* is also consistent with this Court’s longstanding recognition that “the nature of the claim being asserted and the consequences of deferment of judicial review” are important factors in determining whether district-court jurisdiction is precluded. *Mathews v. Eldridge*, 424 U.S. 319, 331 & n.11 (1976) (permitting plaintiff to bring a due-process challenge in district court because “an erroneous termination would damage him in a way not recompensable through retroactive payments”); *see also McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496–97 (1991) (holding that a

That is why district courts in the D.C. Circuit and other circuits have continued to apply *Weaver* post-*Elgin*. See Cross-Pet. 18–20 (collecting cases). The government attempts to downplay the significance of one of these cases based on the district court’s observation that *Elgin* “may have weakened” the holding in *Weaver*, Cross-Pet. Opp. 17 (quoting *Turner v. U.S. Agency for Global Media*, 502 F. Supp. 3d 333, 369 (D.D.C. 2020)), but the court there was speaking of cases in which employees have already incurred a covered sanction, which is why it expressly stated that “*Weaver*’s guidance remains particularly applicable” where, as here, employees have not. 502 F. Supp. 3d at 369; see *id.* at 369 n.20 (“[T]he D.C. Circuit has not rejected *Weaver* in *Elgin*’s wake.”).

The handful of post-*Elgin* D.C. Circuit decisions the government cites do not advance its ball. Cross-Pet. Opp. 17. None of those cases involved pre-enforcement challenges to prior restraints on the speech of federal employees, and none involved the kind of here-and-now injuries present in *Weaver*, *NTEU*, or in this case.

4. Finally, the government suggests that granting NAIJ’s cross-petition would delay resolution of the government’s certiorari petition, which seeks summary reversal of the Fourth Circuit’s analysis at step one of *Thunder Basin*. Cross-Pet. Opp. 18–19. This argument assumes that

statute did not strip district courts of jurisdiction over claims because plaintiffs could ensure appellate review “only if they voluntarily surrender[ed] themselves for deportation”).

summary reversal is the appropriate response to that petition. But as NAIJ explained in its brief in opposition, review of the step one question now would be premature. It is also unnecessary because, even if the Fourth Circuit erred by directing the district court to revisit step one of *Thunder Basin*—and, to be clear, it did not—the Court can more narrowly resolve this case by granting NAIJ’s cross-petition, vacating the Fourth Circuit’s ruling at step one, and reversing its ruling at step two.

The government argues that review of the step two question is unwarranted because counsel for NAIJ described the Fourth Circuit’s step two ruling as “dicta” in response to the government’s petition for rehearing. *Id.* at 18. On further consideration, that description was mistaken. First, although strictly unnecessary for the court’s mandate to issue, the court’s step two ruling was necessary to cover the issues within the scope of the remand—that is, to account for the possibility that the district court would rule that the CSRA continued to satisfy step one of *Thunder Basin*. *Cf. United States v. Adamson*, 665 F.2d 649, 656 n.19 (5th Cir. 1982) (citing *Cross v. Harris*, 418 F.2d 1095, 1105 n.64 (D.C. Cir. 1969)). Second, the step two question was “properly presented, fully argued, and elaborately considered.” *Fla. Cent. R.R. Co. v. Schutte*, 103 U.S. 118, 143 (1880). Third, the court itself described its decision as “affirm[ing]” the district court’s step two conclusion. Pet. App. 12a. It follows that if the Court were to reverse the Fourth Circuit’s step one analysis, a future panel would be bound by the court’s ruling at step two. *See Schutte*, 103 U.S. at 143 (“It cannot be said that a case is not authority

on one point because, although that point was properly presented and decided in the regular course of the consideration of the cause, something else was found in the end which disposed of the whole matter.”); *see also, e.g., Mississippi, ex rel. Hood v. AU Optronics Corp.*, 559 F. App’x 375, 376–77 (5th Cir. 2014) (holding that prior ruling that the case did *not* qualify as a “class action” under federal statute controlled following this Court’s reversal of ruling that that it *did* qualify as a “mass action”). The government does not suggest otherwise.

CONCLUSION

The Court should grant the cross-petition.

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