No. 25-767

IN THE
Supreme Court of the United States

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

v.

NATIONAL ASSOCIATION OF IMMIGRATION JUDGES,
Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Civil Service Reform Act ("CSRA"), Pub. L. No. 95-454, 92 Stat. 1111, established the Office of Special Counsel ("OSC") and the Merit Systems Protection Board ("MSPB") to provide for independent administrative adjudication of certain federal employment claims. Following oral argument in the court of appeals, the President claimed the authority to terminate the Special Counsel and members of the MSPB at will. Applying the test from *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), the court of appeals remanded for consideration of whether that intervening development, among others, had so compromised "the functionality and independence of the MSPB and Special Counsel" as to undermine the inference that Congress intended that those agencies serve as the exclusive avenue to judicial review of claims that fall within the CSRA's scope. App. 20a.

The question presented is:

Whether the court of appeals properly remanded to the district court to consider in the first instance whether post-argument developments undermine core features of the CSRA that justified the inference that Congress intended to withdraw district-court jurisdiction over claims that fall within the statute's ambit.

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

Supreme Court of the United States:

Margolin v. National Association of Immigration Judges, No. 25-1009 (Feb. 18, 2026)[1]

[1] Other related proceedings are set out on page II of the government's certiorari petition.

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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 1a–56a.

INTRODUCTION

The government's petition seeks review of a panel judgment that is interim, in that it requires no more than the consideration of changed circumstances on remand. While the ultimate question in issue—whether the CSRA continues to strip district courts of jurisdiction over certain federal employment claims—is significant, the court of appeals did not resolve that question, but merely

remanded for the district court to consider it anew in light of recent events. Review by this Court is unwarranted because the Fourth Circuit's decision did not resolve the legal question it identified, because remand for consideration of that question was correct and consistent with the principle of party presentation, and because, in any event, the cross-petition presents a compelling and far narrower ground for decision that would allow this Court to vacate and remand without addressing the consequential questions posed by the government's petition.

This case began as a straightforward pre-enforcement challenge by the National Association of Immigration Judges ("NAIJ") to an agency policy that imposes a sweeping prior restraint on the speech of the nation's immigration judges—a policy that categorically forbids them from speaking publicly in their personal capacities about immigration and about the agency that employs them. In other words, the suit began almost identically to the suit that led to this Court's seminal decision in *United States v. NTEU*, 513 U.S. 454 (1995). The similarities stop there, however, because in this case the district court refused to adjudicate the constitutionality of the challenged policy on the theory that this Court's decision in *Thunder Basin*—decided the year before *NTEU*—requires NAIJ to pursue its constitutional claims through the CSRA.

On appeal, the Fourth Circuit properly held that developments after briefing and oral argument—most notably, the President's claim and exercise of authority to terminate the Special Counsel and

members of the MSPB at will—"call into question" core features of the CSRA that justified the inference that Congress intended to channel employment claims through the statute's system of review. App. 19a. The court correctly understood that, unless they are operating adequately and independently, the OSC and MSPB could be coopted to thwart administrative and thus judicial review of federal employment claims, leaving employees with no recourse, even for constitutional claims. The Fourth Circuit remanded for the district court to assess and rule on these questions in the first instance. App. 19a.

This decision does not warrant the Court's review, much less the extraordinary measure of summary reversal.

First, review would be premature because the decision of the court of appeals is entirely interim. It did not resolve the question of whether the CSRA—following the loss of OSC and MSPB independence, among other developments—continues to satisfy step one of the *Thunder Basin* framework. Indeed, no court has resolved that question, and it would be exceedingly unusual for this Court to be the first. The government argues that review now is necessary to prevent "a gratuitous fishing expedition" on remand, Pet. 32, but in the district court NAIJ has already attested that the only fact-finding it seeks can be accomplished through a joint stipulation of facts and the submission of any declarations the parties believe to be relevant. *See* Dist. Ct. ECF 104.

Second, the Fourth Circuit's decision is correct and consistent with this Court's precedents. In *United States v. Fausto*, 484 U.S. 439 (1988) and *Elgin v. Department of the Treasury*, 567 U.S. 1 (2012), this Court held that Congress's intent to preclude district-court review of the plaintiffs' claims was evident from the CSRA's "elaborate" framework for the review of adverse employment actions. *Fausto*, 484 U.S. at 443; *see also Elgin*, 567 U.S. at 11–12. But that carefully calibrated system of review has been called into question. Congress's clear intent through the CSRA was to insulate the adjudication of federal employment claims "from 'any control or direction by the President.'" App. 16a–17a (quoting S. Rep. 95-969, at 25). Absent that independence, however, the inference that Congress intended to withdraw district-court jurisdiction over federal employment claims may no longer be appropriate.

Third, the government's reliance on the party-presentation principle is misplaced. The Fourth Circuit did not "radical[ly] transform[]" NAIJ's case. *United States v. Sineneng-Smith*, 590 U.S. 371, 375 (2020). It merely remanded for further consideration of an issue that is logically antecedent to, and bound up in, the primary legal question that has been in dispute throughout. The cases the government cites do not address this circumstance; they involved situations in which the courts refashioned the claims raised or provided relief never sought, neither of which the Fourth Circuit did here. It would be especially inappropriate to reverse based on the party-presentation principle, because the *Thunder Basin* framework goes to jurisdiction, and therefore

implicates the "virtually unflagging" obligation of federal courts to exercise the jurisdiction conferred upon them. *See Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976).

Finally, review of the petition is unnecessary because the cross-petition presents a compelling and far narrower ground for decision. As explained in the cross-petition, the Fourth Circuit erred in holding that—if not for its ruling at step one of *Thunder Basin*—NAIJ's members would have to challenge the broad prior restraint on their speech through the CSRA's scheme of administrative review. App. 20a–31a. NAIJ's members cannot raise their claims through that scheme, but even if they could, the scheme would not guarantee *any*—let alone meaningful—judicial review of their "here-and-now" injuries. *See generally* Cross-Pet. The Fourth Circuit's disregard of that fact cries out for this Court's review, because it creates a conflict with the D.C. Circuit, which has held that district courts have jurisdiction over "a simple pre-enforcement attack on a regulation restricting employee speech," *Weaver v. U.S. Info. Agency*, 87 F.3d 1429, 1435 (D.C. Cir. 1996); because it conflicts with this Court's decisions in *Free Enterprise Fund v. Public Company Accountability Oversight Board*, 561 U.S. 477 (2010), *Axon Enterprise, Inc. v. Federal Trade Commission*, 598 U.S. 175 (2023), and *NTEU*; and because it threatens to create a First Amendment black hole by allowing each new administration to impose brazenly unconstitutional prior restraints on the speech of federal employees, without any guarantee of judicial review of those restraints and the "here-and-now" injuries they cause.

STATEMENT OF THE CASE

I. Legal Background

1. Congress enacted the CSRA to "provide the people of the United States with a competent, honest, and productive Federal work force." Pub. L. No. 95-454 § 3(1), 92 Stat. 1111, 1112 (1978). The overriding concern of the statute was to prevent a return to the "spoils system" of the 19th Century, in which federal employees advanced on the basis of "political or personal favoritism" rather than merit. S. Rep. 95-969, at 2–3. Critical to that goal was Congress's creation of "an independent Merit Systems Protection Board and Special Counsel to adjudicate employee appeals," *id.* at 2, free from "any control or direction by the President," *id.* at 25.

Prior to the CSRA, both the management of federal employees and the adjudication of employee claims were handled by a single agency, the Civil Service Commission. *See id.* at 24. Congress believed, however, that the consolidation of these roles in one agency led to serious conflicts of interest. *See id.* at 5. To fix this problem, the CSRA divided these functions between two separate agencies: the Office of Personnel Management, which would serve as "the arm of the President in matters of personnel administration," *id.* at 24; and the MSPB, which would adjudicate disputes between federal employees and their employing agencies "independent of any presidential directives," *id.* at 7.

Because Congress believed it was essential that the Special Counsel, who was charged with

investigating and prosecuting employees' claims, also be independent, Congress housed the position within the MSPB. *Id.* at 29. Through amendments to the CSRA, Congress later moved the position to its own independent agency in order to further strengthen the Special Counsel's role in protecting government employees, especially whistleblowers. *See* Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16 (1989). In its current form, the CSRA maintains a tripartite scheme, separating employee management—which is subject to the President's control—from both the investigation and prosecution of employee claims (by the OSC) and their adjudication (by the MSPB).

The CSRA also protects the independence of the OSC and MSPB in other ways. It provides that MSPB members and the Special Counsel shall serve terms exceeding that of the President. *See* 5 U.S.C. §§ 1202(a), 1211(b). It provides that the Special Counsel and MSPB members may be removed by the President only for "inefficiency, neglect of duty, or malfeasance in office." *Id.* §§ 1211(b), 1202(d). And it establishes that no more than two members of the MSPB may be from the same political party, to ensure that the merit system is "protected against arbitrary action, personal favoritism, or coercion for partisan political purposes." *Id.* §§ 1201, 2301(8)(a). It also ensures that the MSPB chair's appointment of the administrative judges who conduct hearings and issue preliminary decisions for the Board "shall not be subject to the approval or supervision of the Office of Personnel Management or the Executive Office of the President." *Id.* § 1204(j).

2. The Special Counsel and the MSPB play an integral role in the CSRA's "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." *Kloeckner 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 OSC. *Id.*

§ 1214(a)(1)(A). If the Special Counsel concludes that the complaint has merit, and the agency fails to 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 declines 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 History

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 with the work of EOIR. C.A. App. 19. While approval was required for these activities, immigration judges routinely received it so long as they included a

[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.

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. The Policy has had the unsurprising effect of silencing judges on topics that are of substantial public interest. *See, e.g.*, *id.* at 28–29, 35–36.

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, a judge must share only the agency's official positions—they may not share their personal views. *See, e.g.*, *id.* at 29–33.[3]

[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.

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 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 fact-finding. App. 1a, 31a–32a. Its analysis followed the two-step framework established by *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.

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). Addressing whether the CSRA applied to NAIJ's claims, the court concluded that Chapter 75 of the Act did not apply because "no adverse action ha[d] been taken or proposed against [NAIJ's members]," *id.* at 21a–22a, but that NAIJ's members could challenge the Policy under Chapter 23 as "a significant change in working conditions," *id.* at 23a (quoting 5 U.S.C. § 2301(b)(2)).

The Fourth Circuit next considered the *Thunder Basin* factors. 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* to require NAIJ's members to bring their claims to the OSC anyway. *Id.* The court also rejected NAIJ's argument that its prior-restraint 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.

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)).

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. 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. 12/19/2025 Order.

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. On February 18, 2026, NAIJ filed a cross-petition seeking review of the Fourth Circuit's decision at step two of *Thunder Basin*.

REASONS FOR DENYING THE PETITION

I. Review of the Fourth Circuit's interim decision at step one of *Thunder Basin* is premature and unnecessary.

A. Review is premature.

The question of whether the CSRA continues to satisfy step one of *Thunder Basin* is undoubtedly an important one, but it would be premature to resolve that question now.

1. To begin with, the court of appeals did not actually answer that question. The court held only that there are "serious questions as to whether the CSRA's adjudicatory scheme continues to function as intended." App. 15a–16a. To resolve these questions, it instructed the district court to conduct further fact-finding. On remand, NAIJ has taken the position that the fact-finding ordered by the court of appeals can be accomplished *without discovery*, through a joint stipulation of facts and any declarations that the parties wish to submit. Dist. Ct. ECF 104. Once the district court assesses those submissions, its ruling on the step-one inquiry will be subject to circuit review and, in due course, review by this Court.

Moreover, proceedings on remand in the district court will aid in the ultimate resolution of the step-one question. Again, the question at step one is whether the CSRA's "text, structure, and purpose" evince Congress's intent to channel claims through the statute's scheme of administrative review. *Elgin*, 567 U.S. at 10. As part of the fact-finding ordered by the Fourth Circuit, NAIJ intends to submit public-record evidence demonstrating that the CSRA's textual and structural protections for independence—and the statutory purpose they reveal—have been so undermined that Congress could not have intended to consign federal claims to this path.

For instance, it has now become clear that the President claims not only the authority to fire members of the MSPB at will (a claim that the D.C. Circuit has blessed, *Harris v. Bessent*, 160 F.4th 1235 (D.C. Cir. 2025)), but also the authority: to fire administrative judges of the MSPB at will,[4] to dictate how the MSPB must interpret the law,[5] and to dictate how the MSPB must apply the law *in specific cases*.[6] He has installed as Acting Director of

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[4] *See* Letter from Acting Solicitor General Sarah M. Harris to Hon. Charles Grassley, *Multilayer Restrictions on the Removal of Administrative Law Judges* (Feb. 20, 2025), https://perma.cc/5EC3-5G6U.

[5] *See* Exec. Order No. 14,215, §§ 1, 2(b), 5, 7 (Feb. 18, 2025) (providing that the President's and Attorney General's opinions on questions of law are "controlling" on all employees including members of "independent regulatory bodies" like the MSPB).

[6] *See The Merit Systems Protection Board's Authority to Adjudicate Constitutional Questions within an Administrative*

the OSC the U.S. Trade Representative, who serves within the Executive Office of the President and the President's Cabinet.[7] He has also replaced the former MSPB chair, with the result that, although the MSPB has regained quorum, it currently has no Democratic members.[8] These developments, NAIJ will contend in the district court, have compromised Congress's goal in enacting the CSRA of moving beyond "the 'spoils' system of the 19th century," App. 15a (quoting S. Rep. 95-969, at 2–3), in which political loyalty and favoritism determined advancement. These developments go directly to the question of whether the statute's "text, structure, and purpose" support the implied withdrawal of district-court jurisdiction.

2. Even setting these more specific developments to the side, review by this Court would be premature at least until it decides the fate of *Humphrey's*

Proceeding, 49 Op. O.L.C. __ (Sept. 26, 2025), https://perma.cc/CMS7-HDD3 ("[W]e conclude that the MSPB administrative judges must adjudicate the constitutional issues raised by the Agencies."); Agency's Mot. for Leave to File Additional Pleading and Alternative Mot. to Remand, *Jackler v. DOJ*, No. DA-0752-25-0330-I-1 (MSPB Sept. 27, 2025) (describing that opinion as "binding" on the MSPB); Agency's Mot. for Leave to File Additional Pleading and Alternative Mot. to Remand, *Jaroch v. DOJ*, No. DA-0752-25 0328-I-1 (MSPB Sept. 27, 2025) (same).

[7] *See* 2024 Off. of Special Couns. Ann. Rep. 6, https://perma.cc/99XK-D5ZA; The White House, *The Cabinet*, https://perma.cc/HL4J-YDG9 (Mar. 1, 2026).

[8] *See* MSPB, *U.S. Merit Systems Protection Board Officially Welcomes Member James J. Woodruff II* (Dec. 17, 2025), https://perma.cc/27VQ-P63A.

Executor, and until lower courts have an opportunity to address the implications of that decision—and the D.C. Circuit's recent invalidation of MSPB removal protections—for administrative channeling under the statute.

If the President and his appointees may exert total control over the OSC and MSPB, they may effectively thwart the ability of federal employees to obtain any judicial review through the CSRA, and it would be inappropriate under *Thunder Basin*—and likely unconstitutional, *see Webster*, 486 U.S. at 603—to subject the constitutional rights of federal employees to such a scheme. This Court is now considering whether to overturn *Humphrey's Executor* and may soon consider whether the CSRA's protections against at-will removal of MSPB members is constitutional. *See Trump v. Wilcox*, 145 S. Ct. 1415 (2025); *Harris v. Bessent*, 160 F.4th 1235 (D.C. Cir. 2025). The Court should resolve those questions before turning to the question of whether the CSRA continues to satisfy step one of *Thunder Basin*.

The government argues that the constitutionality of the CSRA's removal protections is irrelevant to the *Thunder Basin* analysis because removal protections are severable. *See* Pet. 24–25. But that is a non-sequitur. Under severability analysis, the question is whether Congress would have enacted what remains of its statute. *See Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987). In the context of removal protections, this question becomes whether Congress "would have preferred a dependent [agency] to *no agency at all*." *Seila Law*

LLC v. CFPB, 591 U.S. 197, 236 (2020) (emphasis in original). The default rule, moreover, "is in favor of severability." *Regan v. Time, Inc.*, 468 U.S. 641, 653 (1984). Implied preclusion, however, asks a different question—namely, whether courts should infer congressional intent to silently strip district-court jurisdiction over certain claims, *Thunder Basin*, 510 U.S. at 207—and it has a different default answer: an express grant of jurisdiction "must control, in the absence of subsequent legislation equally express." *Rosencrans v. United States*, 165 U.S. 257, 262 (1897). For these reasons, even if Congress would have enacted the CSRA absent its removal protections (which NAIJ does not concede), it is a different question altogether whether it would be fair to infer from what remains of the CSRA an intent to silently limit the grant of jurisdiction in 28 U.S.C. § 1331.

The government relies on *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 73 (1996), but it overstates the relevance of that case. *See* Pet. 23–24. The question there was whether to extend the judicially created exception to sovereign immunity from *Ex parte Young*, 209 U.S. 123 (1903), to allow suit to enforce a statutory right that Congress had carefully cabined. The Court understandably declined, stating that "the fact that Congress chose to impose upon the State a liability that is significantly more limited than would be the liability imposed upon the state officer under *Ex parte Young* strongly indicates that Congress had no wish to create the latter under [the statutory regime]." *Seminole Tribe*, 517 U.S. at 75–76. In other words, the Court refused to provide a broad judicial remedy

for a statutory violation in the face of clear statutory text providing only a narrow one.

That the Court reached this conclusion even after invalidating the narrow statutory remedy does not prove the government's case. *Seminole Tribe* concerned only a statutory cause of action, not a constitutional one as here, and so it did not have to address the possibility that the Court's decision might deny all judicial review of a colorable constitutional claim. *See Webster*, 486 U.S. at 603. The case also concerned a judicially created doctrine, which generally must yield to "a contrary expression from Congress." *Carlson v. Green*, 446 U.S. 14, 20 (1980). Here, by contrast, it is CSRA preclusion that is the judicial creation, while the basis for subject-matter jurisdiction—28 U.S.C. § 1331—is one of express statutory enactment. *See generally Axon Enter.*, 598 U.S. at 204–17 (Gorsuch, J., concurring).

Of course, the Court need not now resolve the implications for CSRA preclusion of invalidating the statute's removal protections. The prudent course would be to allow the courts of appeals to consider this issue first. Not a single appellate court has yet addressed whether the CSRA, absent its removal protections, would satisfy the first step of *Thunder Basin*. There is thus no circuit split—nor even a single tine of what could become a split—on this momentous question.

3. The government's plea for this Court's intervention now might be more compelling if the Fourth Circuit's ruling were inflicting serious and

immediate harms—but the government's claims on this score are weak.

The government suggests that remand in this case will entail a "gratuitous fishing expedition," Pet. 32, but it overlooks NAIJ's filing in the district court stating that the fact-finding ordered by the court of appeals can be completed *without discovery*.

Nor is there any risk of havoc in the Fourth Circuit, more broadly. Neither the district court in this case, nor any district court in the Fourth Circuit, has held that the CSRA no longer satisfies step one of *Thunder Basin*. If a court reaches that conclusion, or if a court authorizes sweeping discovery to answer that question, the government can seek review at that juncture.

Finally, the government's citation to other cases from other circuits does not help its cause. To state the obvious, if the proceedings in those cases are causing "destabilizing uncertainty," Pet. 30, the government should seek review in *those cases*. Notably, however, even though the district court entered a preliminary injunction in the first case cited by the government, *Elev8 Baltimore, Inc. v. Corporation for National & Community Service*, 804 F. Supp. 3d 524 (D. Md. 2025), the government did not even appeal. Further, in all of the cases cited by the government, the district court allowed the plaintiffs' claims to proceed because the government's bid for preclusion failed at step two of *Thunder Basin*—not step one. *See Elev8 Balt.*, 804 F. Supp. 3d at 553–555; *AFGE v. OPM*, 799 F. Supp. 3d 967, 984 (N.D. Cal. 2025). If the real source of

harm to the government is the step-two analysis in other cases, reviewing the Fourth Circuit's step-one decision will provide no relief.

B. Review is unnecessary.

Even if the court of appeals erred by directing the district court to revisit the first step of *Thunder Basin*, review of that decision is unnecessary, because the Court can more narrowly resolve this case by granting NAIJ's cross-petition, reversing the Fourth Circuit's decision at step two, and vacating and remanding for further proceedings. If the Court took that approach, it would not need to address the step-one question at all, and neither would the court of appeals or district court on remand.

After its decision at step one, the court of appeals held that NAIJ's members would normally have to challenge the broad prior restraint on their speech through the CSRA's scheme of administrative review—without any guarantee of judicial review, and notwithstanding the fact that the prior restraint is inflicting here-and-now injuries. App. 20a–31a. As explained in NAIJ's cross-petition, that holding cries out for this Court's review, because it creates a circuit split with the D.C. Circuit; conflicts with this Court's decisions in *Free Enterprise Fund*, *Axon*, and *NTEU*; and threatens to create a First Amendment black hole by allowing the executive to impose brazenly unconstitutional prior restraints that are insulated from meaningful judicial review.

Moreover, resolving this case through the cross-petition is the far more prudent path. The

government's petition raises consequential questions about the implications for administrative channeling of the loss of OSC and MSPB independence. No court has 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 district courts have jurisdiction over "a simple pre-enforcement attack on a regulation restricting employee speech." *Weaver*, 87 F.3d at 1434.

II. The Fourth Circuit's decision at step one of *Thunder Basin* is consistent with the party-presentation principle.

Reversal on party-presentation grounds is typically appropriate only when the court of appeals has "departed so drastically from the principle of party presentation as to constitute an abuse of discretion." *Sineneng-Smith*, 590 U.S. at 375. That is not what happened here. The Fourth Circuit simply remanded to the district court to consider in the first instance whether post-argument developments were relevant to the question the parties have been litigating all along: whether Congress intended to strip district courts of jurisdiction over NAIJ's prior-restraint claims. This remand is not only modest, it is sound judicial practice, and it bears no resemblance to the circumstances in which this Court has found an abuse of discretion.

1. Contrary to the government's assertion, Pet. 15, the Fourth Circuit did not "radical[ly]

transform[]" NAIJ's case, *Sineneng-Smith*, 590 U.S. at 380. NAIJ has maintained all along that the CSRA does not evince Congress's intent to impliedly divest district-court jurisdiction over its constitutional claims. Pl. C.A. Br. 16; Dist. Ct. ECF 72 at 21–22. The district court rejected that argument. The Fourth Circuit's decision asks whether intervening developments require a "reevaluation" of congressional intent, but left that issue to the district court to determine "in the first instance." App. 19a.

That the Fourth Circuit addressed this question at step one of *Thunder Basin* rather than step two is no radical transformation of NAIJ's case. As this Court has explained, "[w]hen an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991). Here, the Fourth Circuit was plainly within its discretion to consider the application of the full test that has been at issue in NAIJ's case since the beginning. Indeed, *Thunder Basin* itself did not sharply divide its analysis into two distinct inquiries. *See* 510 U.S. at 207 (reciting a single list of factors relevant to "[w]hether a statute is intended to preclude initial judicial review").

The government asserts that NAIJ somehow "waived" this argument in briefs filed before the developments that gave rise to the argument. Pet. 15. This is nonsense. Waiver requires "the

'*intentional* relinquishment or abandonment of a *known* right.'" *Hamer v. Neighborhood Hous. Servs. of Chicago*, 583 U.S. 17, 20 n.1 (2017) (quoting *United States v. Olano*, 507 U.S. 725, 733 (1993) (emphasis added)). NAIJ can hardly be said to have intentionally relinquished an argument that became available only after briefing and oral argument.

In any case, this Court has made clear that, even when a party has expressly disclaimed an argument, courts may consider it where, as here, it is logically antecedent to, and bound up in, an argument the party did raise. For example, in *United States National Bank of Oregon v. Independent Insurance Agents of America, Inc.*, this Court observed that although "the parties did not lock horns over the status of section 92"—the antecedent issue—"they did clash over whether the Comptroller properly relied on section 92 as authority for his ruling"—the dependent issue. 508 U.S. 439, 446 (1993). In these circumstances, the Court explained, the court of appeals was not obliged "to treat the unasserted argument that section 92 had been repealed as having been waived, since a court may consider an issue antecedent to and ultimately dispositive of the dispute before it, even if the parties fail to identify and brief the issue." *Id.* at 440. Similarly, in *Lebron v. National Railroad Passenger Co.*, the Court found it proper to address a threshold issue that the petitioner had, in fact, "expressly disavowed" in the courts below—namely, whether Amtrak was a government entity. 513 U.S. 374, 378 (1995). The Court explained that the petitioner's argument was "not a new claim, . . . but a new argument to support what has been his consistent claim: that Amtrak did

not accord him the rights it was obliged to provide by the First Amendment." *Id.* at 379.

The same is true here. The step-one question under *Thunder Basin* is clearly antecedent to the step-two question, and so it was entirely proper for the court of appeals to instruct the district court to consider it on a remand.

2. The fact that the argument at issue goes to subject matter jurisdiction reinforces this conclusion. As Chief Justice Marshall explained in *Cohens v. Virginia*, federal courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." 19 U.S. 264, 404 (1821). That is why this Court has described the obligation of federal courts "to exercise the jurisdiction given them" as "virtually unflagging." *Colo. River Water Conservation Dist*, 424 U.S. at 817.

The Fourth Circuit did not abuse its discretion by considering whether post-argument developments supplied a basis for jurisdiction. Indeed, courts of appeals have routinely gone further, actually exercising jurisdiction based on theories not raised by the parties, rather than remanding for further consideration of the question as the court did here. *See, e.g., Schoenthal v. Raoul*, 150 F.4th 889, 905–06 & n.12 (7th Cir. 2025) (finding standing based on theory raised only in supplemental briefing); *In re Fin. Oversight & Mgmt. Bd. for Puerto Rico*, 110 F.4th 295, 314–15 (1st Cir. 2024) (finding standing based on a theory the plaintiff never advanced); *Wideman v. Innovative Fibers LLC*, 100 F.4th 490,

494 n.3 (4th Cir. 2024) (finding jurisdiction based on argument that the plaintiffs had conceded).

The government's attempts to brush away these cases are unavailing. The government characterizes *Schoenthal* and *In re Financial Oversight & Management Board for Puerto Rico* as cases where the courts of appeals were simply assuring themselves of jurisdiction in light of "new standing concerns." Pet. 19. But in each, the court found jurisdiction based on an argument that was not raised—and in the First Circuit's case, over a dissent focused on party presentation. Moreover, in *Wideman*, the government itself concedes that the court "look[ed] past" forfeiture to consider an argument for jurisdiction. *Id.* (quoting *Wideman*, 100 F.4th at 494 n.3).

The government's reliance on this Court's decisions in *Adarand*, *TransUnion*, and *California v. Texas*, Pet. 18, fares no better. In each of those cases, the relevant argument did not depend on intervening developments and was raised for the first time before this Court in merits briefing. *See Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 109–10 (2001); *TransUnion LLC v. Ramirez*, 594 U.S. 413, 434 n.6 (2021); *California v. Texas*, 593 U.S. 659, 674 (2021). More importantly, however, none of those cases suggests that the Court could not address the argument, only that it need not.

3. It bears emphasis that the Fourth Circuit did not *decide* the step-one question it raised. It merely vacated and remanded for further consideration of that question in light of intervening developments.

Its decision to do so was entirely in keeping with the ordinary and prudent practice of this Court and other appellate courts of vacating and remanding where new developments may affect the resolution of a dispositive legal issue. *See, e.g.*, *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (explaining that a GVR order is appropriate "[w]here intervening developments . . . reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration"); *Medtronic Med. CR SRL v. Felciano-Soto*, 59 F.4th 51, 53–55 & n.2 (1st Cir. 2023) (remanding to the district court for consideration of intervening factual developments); *Fair Hous. Ctr. of Metro. Detroit v. Singh Senior Living, LLC*, 124 F.4th 990, 993 (6th Cir. 2025) (same for consideration of intervening Supreme Court authority); *Dobbs v. Anthem Blue Cross & Blue Shield*, 475 F.3d 1176, 1178 (10th Cir. 2007) (same for consideration of intervening statutory amendments).

Thus, the government's suggestion that the Fourth Circuit's decision not to invite supplemental briefing "wrested the case even more wholly out of the parties' hands," Pet. 16, gets it backwards. The court of appeals gave the parties ample opportunity to address the relevance of post-argument developments to the step-one inquiry—on remand in the district court. But the parties also had (and, indeed, took) the opportunity to address the step-one issue in full before the Fourth Circuit on the

government's petition for rehearing. *See* C.A. ECF 45.[9]

4. For all these reasons, this case is a far cry from *Sineneng-Smith* and *Clark v. Sweeney*, 607 U.S. 7 (2025), the two main cases on which the government relies.

The central problem in those cases was that the court of appeals "radical[ly] transform[ed]" the party's case in a manner that went "well beyond the pale." *Sineneng Smith*, 590 U.S. at 380; *Sweeney*, 607 U.S. at 10. In *Sineneng-Smith*, the Ninth Circuit converted a criminal defendant's as-applied First Amendment challenge to her conviction under a federal statute into a far-reaching ruling invalidating the statute as unconstitutionally overbroad. 590 U.S. at 374, 377–78. In *Sweeney*, the Fourth Circuit concluded that a habeas petitioner was entitled to a new trial, but only after significantly expanding the petitioner's narrow ineffective-assistance-of-counsel claim into a much broader claim of "structural error . . . that extend[ed] far beyond just [counsel's] ineffectiveness" and "infected the entire judicial process and [the petitioner's] right to a fair trial." *Sweeney v. Graham*, No. 22-6513, 2025 WL 800452, at *20 (4th Cir. Mar. 13, 2025).

[9] It is notable that the government failed to raise any party-presentation argument in its petition for rehearing. Instead, it mentioned party presentation for the first time in a notice of supplemental authority connected with its motion to stay the Fourth Circuit's mandate. C.A. ECF 55.

The Fourth Circuit's conduct here looks nothing like that. In neither case was the issue considered—facial overbreadth in *Sineneng-Smith* and structural error in *Sweeney*—logically antecedent to, or bound up in, the argument the party raised. In neither case did the issue considered concern an argument for subject matter jurisdiction, which, as explained above, implicates the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." *Colorado River*, 424 U.S. at 817. Moreover, in neither case did the court vacate and remand for further consideration—an act of judicial restraint that allows the parties ample opportunity to make their arguments to the district court. Instead, they took the dramatic step of reversing and ordering relief based "on a claim that [was] never asserted," *Sweeney*, 607 U.S. at 8, and in the case of *Sineneng-Smith*, ordering relief far broader than anything the party asked for. Accordingly, neither case supports the conclusion that the Fourth Circuit abused its discretion by considering the step-one inquiry in this case.

III. The Fourth Circuit's decision at step one of *Thunder Basin* is correct and consistent with this Court's precedent.

1. In vacating and remanding to the district court, the Fourth Circuit faithfully applied step one of *Thunder Basin*, which asks "whether Congress's intent to preclude district-court jurisdiction is 'fairly discernible in the statutory scheme.'" App. 11a (quoting *Thunder Basin*, 510 U.S. at 207). This Court has instructed courts to assess congressional intent at step one by examining the statute's "text,

structure, and purpose." *Elgin*, 567 U.S. at 10. That is precisely what the Fourth Circuit did when it determined that the CSRA may impliedly strip district-court jurisdiction only "when functioning as Congress intended," App. 12a, and that recent developments had seriously called that functioning into question, *id*. at 4a.

First, the court of appeals correctly concluded that the CSRA's text, structure, and purpose establish that Congress may have intended the statute to strip district courts of jurisdiction only if federal employees who proceed through the scheme are able to receive "adequate and independent review of their claims." *Id.* at 3a.

As discussed at length above, *see supra* Statement Part I, Congress passed the CSRA to prevent a return to the spoils system of the 19th Century, and central to this effort was its establishment of a system for review of federal employment claims that operated free from "any control or direction by the President." S. Rep. 95-969, at 24. This was a rejection of the prior structure, in which a single agency handled both the management of employees *and* the adjudication of employee claims. *See supra* Statement Part I. Congress also reinforced this structural independence with other protections that, at bottom, deny the President the ability to exert total control over the apparatus for reviewing claims against his own administration. S. Rep. 95-969, at 24.

These features of the CSRA, together with the statute's purpose, make clear that Congress

intended to withdraw district-court jurisdiction only to the extent the OSC and MSPB continue to provide employees adequate and independent review of their claims.

Second, the Fourth Circuit was correct to determine that recent developments may have substantially undermined the agencies' ability to do so. After oral argument, President Trump removed the former Special Counsel and MSPB Chair without cause, depriving the Board of quorum. App. 15a. And in litigation challenging those terminations, the government argued that the CSRA's removal protections violate the separation of powers. *Id.* at 19a. The court of appeals was right to conclude that, without a quorum and removal protections to ensure the independence of the MSPB and OSC, the CSRA may not be capable of providing adequate and independent administrative review.

Although the President has since appointed an Acting Director of the OSC—the U.S. Trade Representative who serves within the Executive Office of the President and President's Cabinet—and the MSPB has regained quorum, *see supra* Statement Part I.A., serious questions about the agencies' independence remain. In May 2025, the Court held that the government was likely to succeed on the merits of its challenge to the constitutionality of removal protections for MSPB members, *Trump v. Wilcox*, 145 S. Ct. 1415 (2025), and in December 2025, the D.C. Circuit held that those protections are unconstitutional. *Harris v. Bessent*, 160 F.4th 1235 (D.C. Cir. 2025). Moreover, "[a]s a *de facto* matter, the Special Counsel now

answers to the President." *Id.* at 18 (Pan, J., dissenting).

Other recent developments, summarized above, also cast serious doubt on the agencies' independence. *See supra* Part I.A. For example, the President has asserted the authority to remove MSPB administrative judges without cause; he has claimed the authority to instruct the MSPB on how it must interpret federal law; and through the Justice Department, he has directed the MSPB on how to construe the law in specific cases. All of these developments are a matter of public record, and all are relevant to the district court's task on remand of determining whether the CSRA still satisfies step one of *Thunder Basin*.

2. The government's argument that the Fourth Circuit's decision conflicts with *Fausto* and *Elgin* fails to convince. Pet. 21–22. The court of appeals acknowledged that "until recently" *Fausto* and *Elgin* would have made its analysis at step one of *Thunder Basin* "simple." App. 13a. Those cases held that Congress's intent to preclude district-court review was fairly discernible from the CSRA's "elaborate" framework for reviewing adverse personnel actions against federal employees. *Fausto*, 484 U.S. at 443; *see also Elgin* 567 U.S. at 11–12. But that same framework evinces Congress's intent to channel claims through *its* carefully designed scheme—not a simulacrum of the scheme that, in operation, bears little resemblance to the one it enacted. When *Fausto* and *Elgin* were decided, there was no serious doubt that the OSC and MSPB were functioning as Congress intended. *See, e.g.*, *Elgin*, 567 U.S. at 21

(concluding that "Petitioners' constitutional claims can receive meaningful review within the CSRA scheme"). Now there is.

The government observes that neither *Fausto* nor *Elgin* mentions the CSRA's removal restrictions. Pet. 22. That is hardly surprising at a time when their future was not in doubt. Moreover, *Fausto* expressly recognized that the CSRA's detailed framework was "designed to balance the legitimate interests of . . . federal employees with the needs of sound and efficient administration."484 U.S. at 446. It is not a leap to conclude, as the Fourth Circuit did, that ending the OSC's and MSPB's independence threatens to upset that balance and to such a degree that the statutory scheme no longer supports an inference of congressional intent to impliedly strip jurisdiction over covered claims.

3. The government suggests that the Fourth Circuit's consideration of changed facts is inconsistent with *Thunder Basin*'s focus on congressional intent because "the meaning of a statute 'is fixed at the time of enactment.'" Pet. 22 (quoting *Wisconsin Cent. Ltd v. United States*, 585 U.S. 274, 284 (2018)). This line of attack misunderstands the Fourth Circuit's decision. The court of appeals did not find that the CSRA's meaning had changed. Rather, based on a careful analysis of the CSRA's text, structure, and purpose, the court suggested that Congress's intent to withdraw district-court jurisdiction may *always* have been premised on the ability of the OSC and MSPB to provide employees with adequate and independent review of their claims.

The court's approach is consistent with that taken by this Court in *Ross v. Blake*, 578 U.S. 632 (2016). There, the question was whether a prison inmate had satisfied the Prison Litigation Reform Act's requirement to exhaust "such remedies as are available," before bringing his § 1983 suit against two prison guards. *Id.* at 632 (quoting 42 U.S.C. § 1997e(a)). The petitioner had failed to seek relief through the state's administrative process. But recognizing the need to apply the PLRA's standard "to the real-world workings of prison grievance systems," the Court observed that an administrative procedure, "although officially on the books," may be unavailable within the meaning of the statute. *Id.* at 643. For example, the procedure may "operate[] as a simple dead end—with officers unable or consistently unwilling to provide any relief"; it might be "so opaque that it becomes, practically speaking, incapable of use"; or "prison administrators [may] thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation." *Id.* at 643–44. Since the facts of the case "raise[d] questions" about whether the state's administrative procedure suffered from these defects, *id.* at 645, the Court remanded for consideration of those questions, *id.* at 648–49.

A similar attention to facts is warranted here. Implied preclusion as in *Fausto* and *Elgin* is not a conclusion the Court reaches lightly, because it involves inferring congressional intent to silently override district-court jurisdiction that is explicitly provided by statute. As the court of appeals recognized, where the government undermines key

aspects of the statutory scheme that once justified the inference that Congress intended to withdraw jurisdiction, such an inference might no longer be justified. Ignoring these changed circumstances, as the government urges, would not only defeat Congress's intent to channel CSRA-covered claims through a functioning review process. *See* App. 9a–10a, 15a. It would deprive employees of meaningful judicial review of federal claims, and it would raise serious separation-of-powers concerns.

IV. The extraordinary relief of summary reversal is not warranted.

Summary reversal is an extraordinary remedy that is appropriate only when "the lower court result is so clearly erroneous . . . that full briefing and argument would be a waste of time." Stephen M. Shapiro et al., *Supreme Court Practice* § 5.12(a), at 5-36 (11th ed. 2019). For the reasons already discussed, this case falls well short of meeting that high bar.

CONCLUSION

The Court should deny the petition.

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