No. 25A662

IN THE
Supreme Court of the United States

DAREN K. MARGOLIN,

Applicant,

v.

NATIONAL ASSOCIATION OF IMMIGRATION JUDGES.

RESPONSE TO APPLICATION TO STAY THE MANDATE OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT AND REQUEST FOR AN ADMINISTRATIVE STAY

Victor M. Glasberg
Victor M. Glasberg & Associates
121 S. Columbus Street
Alexandria, VA 22314
(703) 684-1100
vmg@robinhoodesq.com

Ramya Krishnan
Counsel of Record
Alex Abdo
Xiangnong Wang
Jameel Jaffer
Knight First Amendment Institute at Columbia University
475 Riverside Drive
Suite 302
New York, NY 10115
(646) 745-8500
ramya.krishnan@knightcolumbia.org

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INTRODUCTION

The government seeks emergency relief from an interim panel judgment that imposes no obligation beyond minimal discovery. While the ultimate question in issue is significant—whether the Civil Service Reform Act ("CSRA") strips district courts of jurisdiction over a pre-enforcement challenge to a prior restraint on federal employee speech—the court of appeals did not resolve that question, but merely remanded for the district court to conduct fact-finding that may inform its resolution. The extraordinary remedy of a stay is unwarranted because the government faces no irreparable harm beyond the possibility of discovery; review at this stage would be premature; the Fourth Circuit's ruling was correct; and there is, in any event, an alternative basis for concluding that district-court review is available.

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 employees of the Executive Office for Immigration Review ("EOIR") 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 Coal Co. v. Reich*, 510 U.S. 200 (1994)—decided the year before *NTEU*—requires NAIJ to pursue its

First and Fifth Amendment claims through the CSRA. The district court reached that conclusion even though respondent's claims are not of the kind that can be raised under the CSRA, and even though the hypothetical claims that the district court thought could be raised would not be subject to judicial review unless the Office of Special Counsel ("OSC") decided in its discretion to submit them to the Merit Systems Protection Board ("MSPB"). The consequence of the court's ruling was to condemn NAIJ's constitutional claims to, at best, the unreviewable judgment of the OSC or, at worst, an administrative dead end.

On appeal, the Fourth Circuit properly held that developments that had taken place after briefing and oral argument—in particular, the President's termination of the Special Counsel and MSPB chair without cause, and the government's contention, in litigation over those terminations, that the CSRA's removal protections are unconstitutional—"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, if the administrative entities charged with reviewing executive action are not independent, but instead controlled by the executive whose actions were challenged, the CSRA's structure might no longer support preclusion of district-court review. Without protections for the independence and proper functioning of the CSRA's scheme, the OSC and MSPB could effectively deny administrative and thus judicial review of claims, leaving employees with no recourse, even for substantial constitutional claims. The Fourth

Circuit remanded for the district court to conduct the fact-finding necessary to assess "the continued vitality of the [CSRA's] adjudicatory scheme." App. 19a.

This decision does not warrant a stay. First, the Fourth Circuit's decision is correct and consistent with this Court's precedent. 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, *Fausto*, 484 U.S. at 443, and from the "painstaking detail with which the [statute]" provided for the review of adverse employment actions, *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. 17a (quoting S. Rep. No. 95-969, at 25), and to thereby "prevent[] regression back to the 'spoils' system of the 19th century, in which employees advanced on the basis of 'political or personal favoritism.'" App. 16a (quoting S. Rep. 95-969, at 2–3). Absent that independence, however, the inference that Congress intended to withdraw district-court jurisdiction over federal employment claims may no longer be appropriate. The government's counter—that changed circumstances are irrelevant to congressional intent under *Thunder Basin*—is breathtaking in its implications. On this theory, even evidence that agency adjudicators were ignoring meritorious constitutional claims would be insufficient to undermine the judicial inference that underlies implied preclusion.

Second, even if this Court's review might eventually be warranted in this case, it is premature now, because the court of appeals has not resolved the question of whether the CSRA continues to satisfy step one of the *Thunder Basin* framework, and because this Court has not yet decided whether the CSRA's removal protections are unconstitutional. The government argues that it will be deprived of the opportunity to challenge the panel's opinion if this Court does not grant review now, but this is incorrect. If the panel's opinion has any "significant future effect," the government will be able to obtain review even if it prevails in the next stage of the case. *See Camreta v. Greene*, 563 U.S. 692, 704, 713 (2011).

Third, this case is not a good vehicle for review of the government's challenges, because step two of the *Thunder Basin* framework provides a compelling, alternative basis for affirmance. Even if the CSRA were functioning normally, NAIJ's claims should still be heard in district court, because forcing NAIJ through administrative proceedings would "foreclose all meaningful judicial review." *Thunder Basin*, 510 U.S. at 212–13. As detailed below, NAIJ cannot bring its challenge through Chapter 23 of the CSRA. Even if it could, NAIJ would not be assured judicial review, because the availability of review would turn on the OSC's unreviewable decision to file a petition with the MSPB. *See* 5 U.S.C. § 1214(b)(2)(C). Even setting these concerns aside, channeling would be inappropriate because the prior restraint NAIJ challenges inflicts a "here-and-now" injury that cannot be remedied, and would only be exacerbated, by administrative proceedings. *See Axon Enter., Inc. v. FTC*, 598 U.S. 175, 191 (2023). In short, this case should have proceeded like *NTEU*, which the Court

considered only a year after *Thunder Basin* without expressing any doubt about the district court's jurisdiction to hear a pre-enforcement challenge to a prior restraint on federal employee speech.

Lastly, the government's reliance on the party-presentation principle is misplaced. That doctrine does not apply here because arguments over subject-matter jurisdiction are not bound by the limits of party presentation. In any event, the court of appeals' decision was based fundamentally on the same claim NAIJ has pursued throughout: that Congress did not intend to channel NAIJ's claims through the CSRA's administrative review scheme.

STATEMENT

A. Legal Background

1. The CSRA established the OSC and MSPB to uphold the principles of merit and efficiency in the federal workforce. In line with those goals, Congress carefully designed these agencies to be independent of the President.

Efforts to modernize the civil service began in the 1970s amid public concern that the federal government had become wasteful, inefficient, and corrupt. *See Developments in the Law—Public Employment,* 97 Harv. L. Rev. 1619, 1631–32 (1984); *see also Violations and Abuses of Merit Principles in Federal Employment: Hearings Before the Subcommittee on Manpower and Civil Service of the House Committee on Post Office and Civil Service*, 94th Cong., 1st Sess. (1975). President Carter spearheaded the reforms, recommending that Congress create a new structure for adjudicating civil-service claims to give "*independent and impartial* protection to

employees." Federal Civil Service Reform Message to the Congress (Mar. 2, 1978) (emphasis added). These efforts culminated in the enactment of the CSRA. *See Developments in the Law—Public Employment,* 97 Harv. L. Rev. 1619, 1632 (1984).

During the CSRA's legislative development, lawmakers repeatedly expressed their intent to avoid returning to a "spoils system" like that of the 19th Century, in which "political or personal favoritism" overrode merit in the federal workforce. S. Rep. 95-969, at 2–3. As the bill's co-sponsor Senator Charles Percy stated during deliberations, the Governmental Affairs Committee devoted "much effort" to guaranteeing that the CSRA "absolutely insure[d] against any form of destructive political manipulation" of the civil service. 124 Cong. Rec. 27566 (1978). Thus, a central aim of the law was to create an adjudicatory scheme for federal employees' claims that was independent from "any control or direction by the President." S. Rep. No. 95-969, at 25. This would ensure that employees "were hired and removed on the basis of merit" rather than political patronage. *Id*. To that end, the CSRA established the OSC to investigate abuses of civil service protections and the MSPB to adjudicate disputes between federal employers and their employees. *See* 5 U.S.C. § 1211 (OSC); 5 U.S.C. § 1204(a) (MSPB).

The CSRA's text and structure reflect Congress's intent to insulate the adjudication of federal employee claims from the President's influence. For example, the CSRA provides that the Special Counsel shall serve a five-year term, and that MSPB members shall serve a non-renewable seven-year term, with both terms in office exceeding that of the President's. *See* 5 U.S.C. §§ 1211(b), 1202(a). The statute

also 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)—a choice that distinguishes the MSPB from its predecessor, the Civil Service Commission, whose members could "be removed by the President at any time for any reason," 124 Cong. Rec. 27536 (1978). The statute also provides that no more than two members of the MSPB may be from the same political party, 5 U.S.C. § 1201.

When he signed the CSRA into law, President Carter specifically praised the CSRA's "safeguards against political intrusion." President Jimmy Carter, Civil Service Reform Act of 1978 Statement on Signing S. 2640 Into Law (Oct. 13, 1978).

2. In general, the CSRA's administrative scheme provides for the review of two categories of employment actions.

First, Chapter 23 provides for the review of "prohibited personnel practices," which are "the least severe employment actions the Government can take." *Feds for Med. Freedom v. Biden*, 63 F.4th 366, 370, 370–71 (5th Cir.) (citing 5 U.S.C. § 2302(b)), *cert. granted, judgment vacated*, 144 S. Ct. 480, 217 L. Ed. 2d 248 (2023). Prohibited personnel practices are an enumerated set of acts that federal employees may not "take, direct others to take, recommend, or approve" because they violate the principles of the merit system. 5 U.S.C. § 2302(b). Employees challenging a prohibited personnel practice must first file a complaint with the OSC. *Id.* § 1214(a)(1)(A). The OSC, however, has sole and unreviewable discretion over whether to petition the MSPB for "corrective action." *Id.* § 1214(b)(2)(C). If the OSC petitions the MSPB for

review, then judicial review in the Federal Circuit may be had of the MSPB's "final order or decision." *Id.* §§ 1214(c), 7703. But if the OSC does not do so, then, except in circumstances not relevant here, the employee may not obtain judicial review.

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. §§ 7501–04, 7512(1)–(5). An employee who suffers a suspension of 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 to the MSPB, *id.* § 7513(d). Judicial review is available for the MSPB's resulting "final order[s] or final decision[s]." *Id.* § 7703(b)(1)(A).

B. 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. Second Am. Compl. ¶ 11 (C.A. App. 16–17). From 1979 to 2022, NAIJ was the certified bargaining representative for all non-supervisory immigration judges. *Id.* 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.*

In addition to serving as judicial officers, many immigration judges are 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. *Id.* ¶ 17 (C.A. App. 19). While approval was required for these activities, immigration judges routinely received it. *Id.* ¶ 18 (C.A. App. 19).

2. Beginning in 2017, however, EOIR issued a series of policies sharply limiting the ability of judges to engage in private speech. The currently operative speech policy categorically prohibits immigration judges from speaking about immigration or EOIR in their personal capacities. C.A. App. 56–62 (the "Policy"). 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." Policy at 2 (C.A. App. 57). This has had the unsurprising effect of silencing immigration judges on topics that are of substantial public interest. *See, e.g.*, C.A. App. 28–32 (describing judges who have been chilled from publishing scholarship, participating in panel discussions, and teaching courses related to immigration law and policy).

3. NAIJ filed this lawsuit and a motion for a preliminary injunction in 2020, arguing that EOIR's policy violates the First and Fifth Amendments. *See* D. Ct. Dkt. Nos. 1, 9 (C.A. App. 3–4). The district court denied NAIJ's request for a

preliminary injunction after concluding that, as a certified bargaining representative, NAIJ should have first proceeded through the administrative review process established by the Federal Service Labor–Management Relations Statute. *NAIJ v. McHenry*, 477 F. Supp. 3d 466, 476 (E.D. Va. 2020). The Fourth Circuit initially affirmed, *see NAIJ v. Neal*, No. 20-1868, 2022 WL 997223 (4th Cir. Apr. 4, 2022), but then vacated its ruling after the government decertified NAIJ, *see NAIJ v. Neal*, No. 20-1868, 2022 WL 2045339 (4th Cir. June 7, 2022).

Following NAIJ's decertification, it filed the operative complaint (the second amended complaint), which the government moved to dismiss shortly thereafter. D. Ct. Dkt. Nos. 65, 68 (C.A. App. 9–10). In September 2023, the district court dismissed NAIJ's claims, concluding that the CSRA impliedly divested the court of jurisdiction to hear NAIJ's challenge. *See NAIJ v. Neal*, 693 F. Supp. 3d 549, 567–81 (E.D. Va. 2023). NAIJ timely filed a notice of appeal. C.A. App. 111–112.

4. On June 3, 2025, the Fourth Circuit vacated the district court's ruling and remanded for further factfinding. Its analysis followed the two-step framework, established by this Court in *Thunder Basin* for evaluating whether Congress impliedly divested district courts of jurisdiction to hear a plaintiff's claims by enacting a comprehensive system of administrative review. In the first step, courts ask whether Congress's intent to preclude district-court jurisdiction is "fairly discernible in the statutory scheme." *Id.* at 207. In the second step, courts ask whether the claims at issue "are of the type Congress intended to be reviewed within [the scheme]." *Id.* at 212.

The court of appeals 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 ultimately concluded that intervening factual developments had called into question "the functionality and independence of the MSPB and Special Counsel." App. 20a. In reaching this conclusion, the Fourth Circuit reasoned that Congress's purpose in enacting the CSRA was to prevent a regression to the "spoils" system of the past, in which political patronage rather than merit dominated the civil service. App. 16a. And it pointed to factual developments—post-dating oral argument in the case—that "raise[d] serious questions" as to whether the CSRA was functioning as Congress intended. App. 31a. In particular, the court of appeals pointed to the fact that the President had fired the Special Counsel and the MSPB chair without cause, App. 15a, 20a; that the MSPB was deprived of a quorum as a result, App. 15a; 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, App. 19a–20a; *see also Dellinger v. Bessent*, No. CV-25-0385, 2025 WL 665041 (D.D.C. Mar. 1, 2025), *vacated and remanded*, No. 25-5052, 2025 WL 935211 (D.C. Cir. Mar. 27, 2025); *Trump v. Wilcox*, 145 S. Ct. 1415 (2025).

The court of appeals stopped short of concluding that the MSPB and OSC no longer have the functionality and independence necessary to support the inference that Congress intended to channel federal employees' claims through the CSRA.

Instead, it remanded to the district court with instructions "to conduct a factual inquiry [into] whether the CSRA continues to provide a functional adjudicatory scheme." App. 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 CSRA's scheme. App. 20a (cleaned up). The court first considered the possibility that NAIJ could pursue an administrative challenge under Chapter 75 of the CSRA, but rejected that possibility, correctly holding that "Chapter 75 cannot provide an avenue to MSPB review for [NAIJ's] members, because no adverse action has been taken or proposed against them." App 21a. The court then considered whether NAIJ's members could recast their challenge to EOIR's speech policy as a challenge to a "prohibited personnel practice" under Chapter 23 of the CSRA. App. 23a. The court concluded that NAIJ's members could do so, App. 23a–25a, and it further concluded that NAIJ's members could obtain judicial review of a Chapter 23 challenge, App. 27a–29a, even while acknowledging "that the Special Counsel is afforded leeway regarding which claims to bring to the MSPB," and could exercise that "leeway" to "prevent a claim from ever reaching the MSPB," App. 27a.

5. The government petitioned the Fourth Circuit for rehearing, which the court of appeals denied by a 9–6 vote. App. 33a–34a. Following that denial, 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 also denied that request. App. 114a. On December 5, 2025, the government filed an

application with this Court to stay the Fourth Circuit's mandate pending the disposition of a timely petition for a writ of certiorari, and to issue an administrative stay. Appl. to Stay Mandate, No. 23-2235 (Dec. 5, 2025). That same day, the Court issued an administrative stay and ordered NAIJ to respond to the government's application by December 10, 2025.

ARGUMENT

"To obtain a stay pending the filing and disposition of a petition for a writ of certiorari, an applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam). These conditions "are *necessary* for issuance of a stay," but they are "not necessarily *sufficient*." *Barnes v. E-Sys., Inc. Grp. Hosp. Med. & Surgical Ins. Plan*, 501 U.S. 1301, 1304 (1991) (Scalia, J., in chambers). Even when they are all present, the Court must "balance the equities—[by] explor[ing] the relative harms to the applicant and respondent, as well as the interests of the public at large." *Id.* at 1305 (quotation marks omitted). "Where there is doubt, it should inure to the benefit of those who oppose the grant of the extraordinary relief which a stay represents." *Williams v. Zbaraz*, 442 U.S. 1309, 1316 (1979) (Stevens, J., in chambers).

The government cannot satisfy this standard. The Court is not likely to grant certiorari and reverse. The court of appeals' decision at step one of the *Thunder Basin*

framework is consistent with the party-presentation principle and with the decisions of this Court. It is also correct: recent changes to the operation and structure of the CSRA have seriously called into question whether it is appropriate to continue to infer Congress's intent to silently strip district-court jurisdiction over claims covered by the scheme. Review now would, in any event, be premature because the court of appeals did not resolve the question of whether the CSRA fails step one of the *Thunder Basin* framework—it merely remanded to the district court for fact-finding—and there is no circuit split on the issue the court did decide. The case is also a poor vehicle for review because NAIJ's arguments at step two of the framework provide an alternative ground for affirmance. Finally, the government has failed to demonstrate irreparable harm from the court of appeals' decision, and any harm it has demonstrated is far exceeded by the harm to NAIJ's members and the public from further delay in the adjudication of NAIJ's challenge to a sweeping prior restraint on the speech of the nation's immigration judges.

I. The Court is not likely to grant certiorari and reverse.

A. The court of appeals' decision is consistent with the party-presentation principle.

The government's argument that the court of appeals' decision violated the party-presentation principle, Stay Appl. 13–18, is incorrect.

1. As an initial matter, the party-presentation principle does not apply in this case, because it does not apply to questions that go to a federal court's subject-matter jurisdiction—which was the sole basis for the court of appeals' opinion. Subject-matter jurisdiction concerns a court's "statutory or constitutional *power* to

adjudicate the case." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998). Federal courts "have an independent obligation to determine whether subject-matter jurisdiction exists," *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 501 (2006), and "[w]hen a requirement goes to subject-matter jurisdiction, [they] are obligated to consider *sua sponte* issues that the parties have disclaimed or have not presented," *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012). Such arguments "can never be waived or forfeited." *Id.*

This rule against forfeiture applies as much to arguments for jurisdiction as it does to arguments against it. 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. (6 Wheat.) 264, 404 (1821); *accord New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 358 (1989). Declining to find subject-matter jurisdiction in a case where it exists would contravene "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976); *accord Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013).

Lower courts therefore routinely exercise subject-matter jurisdiction based on theories not raised by the parties. *See, e.g.*, *Schoenthal v. Raoul*, 150 F.4th 889, 905 & n.12 (7th Cir. 2025) (finding standing based on arguments the plaintiffs failed to present in briefing, "particularly where [they] mounted other vigorous arguments for standing); *In re Fin. Oversight & Mgmt. Bd. for Puerto Rico*, 110 F.4th 295, 314–15

(1st Cir. 2024) (similar); *Wideman v. Innovative Fibers LLC*, 100 F.4th 490, 494 n.3 (4th Cir. 2024), *cert. dismissed,* 145 S. Ct. 838 (2025) (finding subject-matter jurisdiction on a basis not advanced by the plaintiffs); *Hartig Drug Co. Inc. v. Senju Pharm. Co. Ltd.*, 836 F.3d 261, 267 (3d Cir. 2016) (finding jurisdiction based on argument raised only by an amicus); *K.P. v. LeBlanc*, 627 F.3d 115, 122–24 (5th Cir. 2010) (addressing standing *sua sponte* and finding that the plaintiffs had standing); *see also United States v. Campbell*, 26 F.4th 860, 872 n.6 (11th Cir. 2022) (en banc) (describing questions that go to subject-matter jurisdiction as a "limited exception[]" to the party-presentation principle).

The authorities the government cites for support cannot bear the weight placed on them. The first is a dissent from a case in which a majority of this Court found jurisdiction based on an argument that "track[ed]" the petitioner's, albeit at a higher level of abstraction. Stay Appl. 17 (citing *Monsalvo Velázquez* v. *Bondi*, 604 U.S. 712, 743 (2025) (Thomas, J., dissenting)); *see Monsalvo Velázquez*, 604 U.S. at 724 n.1. That is precisely what the court of appeals did here, as explained below. The government's reliance on *TransUnion LLC* v. *Ramirez*, 594 U.S. 413 (2021) fares no better. Although the Court explained in a footnote that the plaintiffs had "forfeited" a "new argument" for standing, the Court was quick to reject this argument as "unavailing" in any event. *Id.* at 434 n.6 ("the plaintiffs' internal publication theory . . . does not bear a sufficiently 'close relationship' to the traditional defamation tort to qualify for Article III standing"). And it certainly did not state that the party-presentation principle applies to arguments for jurisdiction. *Id.* at 434 n.6. It is

unlikely that the Court intended to wordlessly undo decades of precedent in a footnote. As the Court has explained, it "does not normally overturn, or so dramatically limit, earlier authority *sub silentio*." *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000).

2. Even assuming the party-presentation principle applies here, the court of appeals' decision was consistent with it. NAIJ has maintained from the outset that the CSRA does not impliedly withdraw district-court jurisdiction over its claims under the *Thunder Basin* framework. That the panel arrived at this conclusion at step one, as opposed to step two, of the framework does not amount to a "radical transformation" of NAIJ's case. *United States v. Sineneng-Smith*, 590 U.S. 371, 380 (2020). In fact, while recent precedent has divided *Thunder Basin*'s list of considerations into two steps, *Thunder Basin* itself did not do so. It treated the relevant factors as all ultimately addressing the question of whether Congress intended to channel the plaintiff's claims through administrative review. *See Thunder Basin*, 510 U.S. at 207 (reciting a single list of factors relevant to "[w]hether a statute is intended to preclude initial judicial review"). There is thus no significant gap—let alone a "radical" one—between NAIJ's arguments and the Fourth Circuit's reasoning. *See Sineneng-Smith*, 590 U.S. at 376 ("The party presentation principle is supple, not ironclad."); *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991) ("When 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.").

The cases that the government cites to the contrary do not support its claim. *See* Stay Appl. 15–16 (citing *Sineneng-Smith* and *Clark v. Sweeney*, No. 25–52, 2025 WL 3260170, at *2 (U.S. Nov. 24, 2025)).

In *Sineneng-Smith*, the Court found that the Ninth Circuit had improperly altered a criminal defendant's First Amendment challenge to her conviction by invalidating the relevant statute on its face rather than as-applied. *See id.* at 374–75. This was a dramatic change to the defendant's claims: facial and as-applied First Amendment challenges turn on entirely different analyses and trigger vastly different forms of relief. *See Moody v. NetChoice, LLC*, 603 U.S. 707, 723–24 (2024). Here, by contrast, the central focus of steps one *and* two of the *Thunder Basin* framework is the same—whether Congress intended to strip district-court jurisdiction over the plaintiff's claims. *See Axon Enter.*, 598 U.S. at 185.

In *Sweeney*, a state prisoner seeking federal habeas relief argued that he had received ineffective assistance from counsel who failed to investigate whether the jury in his trial had been prejudiced by a dismissed juror's crime-scene visit. *Id.* at *1. The Fourth Circuit granted the petitioner a new trial, but only after expanding his 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). That is why this Court held that the Fourth Circuit had "departed so drastically from the principle of party presentation as to constitute an abuse of discretion": the court had "grant[ed] relief

on a claim [the petitioner] never asserted." *Sweeney*, 2025 WL 3260170, at *2 (quoting *Sineneng-Smith*, 590 U.S. at 375). That is not what happened here. The court of appeals' ruling below does not bear merely high-level resemblance to NAIJ's arguments. It concerns fundamentally the same claim, on the same grounds, in pursuit of the same relief.

B. The court of appeals' decision at step one of the *Thunder Basin* framework is consistent with this Court's precedent.

1. In vacating and remanding to the district court, the court of appeals faithfully applied step one of the *Thunder Basin* framework, which asks "whether Congress's intent to preclude district-court jurisdiction is 'fairly discernible in the statutory scheme.'" App. 12a (quoting *Thunder Basin*, 510 U.S. at 207). Courts assess congressional intent at step one by examining "the statute's language, structure, and purpose, [and] its legislative history." *Thunder Basin*, 510 U.S. at 207 (internal citation omitted); *see also Elgin*, 567 U.S. at 10. That is precisely what the court of appeals did when it determined that Congress intended to withdraw district-court jurisdiction only "when the [CSRA] functions as Congress intended," App. 14a–15a, and that recent developments had seriously called that functioning into question, *id.* 4a.

First, the court of appeals correctly concluded that the CSRA's text, structure, and purpose establish that Congress intended the statute "to strip district courts of jurisdiction only if federal employees were otherwise able to receive adequate and independent review of their claims." App. 4a.

As the statute's legislative history demonstrates, Congress passed the CSRA to preserve the merit system of federal employment, and to "prevent[] regression back to the 'spoils' system of the 19th century, in which employees advanced on the basis of 'political or personal favoritism.'" App. at 16a (quoting S. Rep. 95-969, at 2–3). The CSRA's establishment of a "strong and independent" Special Counsel and MSPB was critical to achieving this purpose. *Id.* (quoting S. Rep. 95-969, at 6–7). Both entities were intended to protect employees from "improper political influences or personal favoritism," and "to protect individuals who speak out about government wrongdoing." S. Rep. No. 95-969, at 18. Under Congress's scheme, the Special Counsel would "receive and investigate allegations of prohibited personnel practices in violation of the merit system," with a "mandate . . . to prevent reprisals against government 'whistle blowers.'" *Id.* at 25. And the MSPB would function "as a quasi-judicial body, empowered to determine when abuses or violations have occurred" and to "order corrective action" to "discipline employees who commit abuses." *Id.* To ensure that the Special Counsel and MSPB carried out their roles impartially, and that the public retained confidence in them, Congress intended the agencies to "be independent of any control or direction by the President." App. 9a (quoting S. Rep. No. 95-969, at 24).

The text and structure of the CSRA give effect to Congress's design. To begin, the statute's adjudicatory scheme assures the "primacy" of the Special Counsel and MSPB in administratively resolving disputes over covered personnel actions. *Fausto*, 484 U.S. at 449. For example, under Chapter 23, employees may complain of

"prohibited personnel practices" by filing charges with the OSC. 5 U.S.C. § 1214(a)(1)(A). If, following an investigation, the Special Counsel determines that there are "reasonable grounds" to believe the practice has occurred, he must report that determination to the agency. *Id.* § 1214(b)(2)(B). The Special Counsel may petition the MSPB for corrective action if the agency does not correct the practice itself within a "reasonable period." *Id.* § 1214(b)(2)(C). Under Chapter 75—which governs "adverse actions," such as terminations, suspensions, and reductions in pay or grade—employees may appeal directly to the MSPB. *Id.* §§ 7503, 7513. Final decisions of the Board are appealable to the Federal Circuit. *Id.* § 7703(b).

The CSRA also makes clear that the independence of the Special Counsel and MSPB is essential to their roles in the statutory scheme. Most critically, the statute prohibits the President from removing the Special Counsel and MSPB members except for "inefficiency, neglect of duty, or malfeasance in office." App. 17a (quoting 5 U.S.C. §§ 1202(d), 1211(b)). But the statute also requires the Special Counsel and MSPB members to be Senate-confirmed, provides those positions a term in office longer than the President's, and imposes partisan-balance requirements. App. 18a. It also gives the agencies "substantial independent authority to . . . act outside the influence of the President." App. 18a. For example, the Special Counsel may conduct investigations, access agency records or materials relevant to an investigation, petition the MSPB for corrective action, and initiate disciplinary action against those who engage in prohibited personnel practices. App. 18a–19a. And the MSPB may

issue subpoenas, call witnesses to testify at hearings, and enforce compliance with its final decisions. App. 18a.

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 court of appeals was correct to determine that recent factual developments may have substantially undermined the functionality and independence of those agencies. In the months before the court of appeals rendered its decision, President Trump had removed Special Counsel Hampton Dellinger and MSPB Chair Cathy Harris without cause, depriving the Board of quorum. App. 15a. And in litigation challenging those terminations, the government had defended the President's actions on the ground that the CSRA's removal protections violate the separation of powers. *Id.* 19a. The court of appeals was right to conclude that, without a quorum and without 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, and the MSPB has regained quorum, serious questions about the agencies' independence remain. On May 22, 2025, the Court stayed a district court order that would have effectively restored Harris to her position, holding that the government was likely to succeed on the merits of its challenge to the constitutionality of the MSPB's removal

protections. *Trump v. Wilcox*, No. 24A966, 2025 WL 1464804 (May 22, 2025). And on December 5, 2025, the D.C. Circuit held that the CSRA's removal protections for members of the MSPB are unconstitutional. *Harris v. Bessent*, No. 25-5037 (D.C. Cir. Dec. 5, 2025). However that litigation is finally resolved, "[a]s a *de facto* matter, the Special Counsel now answers to the President." *Id.* at 18 (Pan, J., dissenting).[1]

2. The government argues that the court of appeals' decision conflicts with the Court's decisions in *Fausto* and *Elgin*. Stay Appl. 18–19. Not so. The court of appeals acknowledged that "until recently" *Fausto* and *Elgin* would have made its analysis at step one of the *Thunder Basin* framework "simple." App. 14a. Those cases held that Congress' intent to preclude district-court review through the CSRA was fairly discernible from the statute's creation of an "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 (describing the "painstaking detail with which the CSRA sets out the method for covered employees to obtain review"). But that same framework evinces Congress' 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 about whether 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.

[1] Although former Special Counsel Dellinger initially challenged his firing, resulting in a district court order requiring the government to reinstate him, a special panel of the D.C. Circuit stayed the district court's order pending appeal, *Dellinger v. Bessent*, No. 25-5052, 2025 WL 887518 (D.C. Cir. Mar. 10, 2025), and Dellinger subsequently dropped his suit.

3. The government suggests that the court of appeals' 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.'" Stay Appl. 19 (quoting *Wisconsin Cent. Ltd v. United States*, 585 U.S. 274, 284 (2018)). This line of attack misunderstands the court of appeals' 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 concluded that Congress had *always* intended the statute to withdraw district-court jurisdiction only if the agencies provided employees with adequate and independent review of their claims. And it determined there is now serious doubt over whether the agencies still do so.

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 the petitioner, a prison inmate who had a brought a § 1983 action against two prison guards, met the Prison Litigation Reform Act's requirement to exhaust "such remedies as are available" before bringing suit. *Id.* at 635 (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 further proceedings consistent with its opinion, *id.* at 648–49.

A similar attention to facts is warranted here. Implied preclusion as in *Fausto* and *Elgin* is not a conclusion that courts reach lightly, because it involves inferring congressional intent to silently override district-court jurisdiction that is explicitly provided by statute. *See* 28 U.S.C. § 1331; *Cohens*, 19 U.S. (6 Wheat) at 404 (Marshall, C.J., for the Court); *see also Axon Enter.,* 598 U.S. at 207–09 (Gorsuch, J., concurring). 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. A contrary approach would not only defeat Congress' 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 colorable constitutional claims. *See* App. 44a (Thacker, J., concurring) ("We cannot abdicate our duty to hear constitutional challenges in the pyrrhic hope that Congress will recognize the dysfunction or lack of independence of the [ORSC or MSPB] and choose to act."). And it would raise serious separation-of-powers concerns.

C. The Court's review would be premature at this juncture.

Even if review would otherwise be warranted, it would be premature at this stage of the case.

1. To begin with, the Fourth Circuit did not actually resolve the question that might be worthy of this Court's review—namely, whether the CSRA continues to satisfy step one of the *Thunder Basin* framework. The court of appeals 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 those questions, it instructed the district court to conduct further fact-finding. That fact-finding will entail targeted discovery and, presumably, the filing of declarations by government officials, to shed light on whether the OSC and MSPB are adequately processing claims and functioning independently of political interference, as the statutory scheme contemplates. Once the district court conducts that fact-finding and issues its opinion, that opinion will be subject to circuit review and, in due course, review by this Court on the basis of an evidentiary record. Until then, review would be premature.

2. Review should also wait until this Court decides whether the CSRA's removal protections are constitutional. The independence of the OSC and MSPB is highly relevant to whether it is appropriate to infer congressional intent to channel the claims of federal employees exclusively through those administrative bodies. 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 v. Doe*, 486 U.S. 592, 603 (1988)—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 protection against the removal of MSPB members is constitutional. *See Trump v. Slaughter*, No. 25-332; *Trump v. Wilcox*, 145 S. Ct. 1415 (2025); *Harris v. Bessent*, No. 25-5037 (D.C. Cir. Dec. 5, 2025). The Court should resolve those questions before turning to the question of whether the CSRA continues to satisfy step one of the *Thunder Basin* analysis.

The government argues that the constitutionality of the CSRA's removal protections is irrelevant to the *Thunder Basin* analysis because removal protections are always severable. *See* Stay Appl. 20. But that is a non-sequitur. The doctrines of severability and implied preclusion ask fundamentally different questions. With severability, 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). With implied preclusion, the question is whether courts should infer congressional intent to silently strip district-court jurisdiction over certain claims. The doctrines ask different questions, and they might yield different answers. For that reason, 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 make the statute's adjudicatory scheme the exclusive avenue to judicial review. Even if the answer to the first question could

conceivably be "yes" (perhaps because of the CSRA's many functions beyond its adjudicatory scheme), the answer to the latter question would certainly be "no."

The government cites *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 73 (1996), for the contrary proposition, but it overstates the relevance of that case. *See* Stay Appl. 20. In *Seminole Tribe*, the question 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 (as a violation of state sovereignty, *see id.*) 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; *Elgin*, 567 U.S. at 10. 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. If the Court decides that the removal protections are unconstitutional, the prudent course would be to allow the courts of appeals to first grapple with the implications of that decision for implied preclusion. Not a single court of appeals has yet addressed whether the CSRA, absent its removal protections, would meet the first step of the *Thunder Basin* framework. There is thus no circuit split—nor even a single tine of what could become a split—on this momentous question. This Court is "'a court of review, not of first view,'" *NetChoice, LLC*, 603 U.S. at 707 (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005)), and so it would be imprudent to rush to judgment now.

3. The government argues that review is necessary now because the court of appeals' opinion might evade this Court's review if the government prevails on remand. Stay Appl. 24–25. Even if that were correct, it's not clear why that should matter in this case. If the government prevails on remand, then whatever door the panel's opinion opened will have been closed, if not entirely, then at least as far as any bar to litigating changed circumstances can go. At that point, the question of the impact on CSRA preclusion of recent events will have been fully resolved in the government's favor in the Fourth Circuit. And if not—if the government could still show continuing harm from the court of appeals' opinion—then this Court would have an opportunity to address it. Although this Court is typically reluctant to review cases

at the request of prevailing parties, it has recognized an exception for "legally consequential decision[s]" that continue to "have a significant future effect." *Camreta*, 563 U.S. at 704, 713. In those circumstances, the Court has observed that there may still be a case or controversy under Article III, *id.* at 703, and there may be good cause to look past the prudential reasons for forbearance, *id.* at 706. If the government's speculative concerns about the court of appeals' opinion bear out—if the opinion truly does cause continuing harm—then the government can justify review, even as a prevailing party.

But even if the government fails to obtain review in this case, it will have other opportunities to challenge the panel's holding. The government cites cases from three districts across the country in which litigants have questioned whether the CSRA continues to strip district courts of jurisdiction over the claims of federal employees. Stay Appl. 23. Litigation over the CSRA did not start with this suit, and it will not end with it. Courts around the country are dealing with the fallout of the OSC's and MSPB's loss of independence, and this Court will have many opportunities to find an appropriate vehicle for review. This case, however, is a particularly bad vehicle, as explained below. *See* Part I.D.

4. The government also claims that review is necessary now because the Fourth Circuit's opinion will create "instability" and "uncertainty," Stay Appl. 21–23, but its concerns are misplaced. To start, it is the government—not the Fourth Circuit—that bears the blame for any uncertainty concerning CSRA preclusion, because it is the government that has undermined the independence that is central

to the CSRA's scheme of administrative adjudication. It is no surprise, then, that there are cases across the country now contesting CSRA preclusion. *See* Stay Appl. 23. Moreover, the district court's task on remand will not be "unworkable" or "amorphous[]," *id.* at 21, but instead to determine whether the OSC and MSPB are adequately processing claims, and whether outside officials are exerting political influence on the agencies. To do so, NAIJ will ask for targeted discovery into whether outside officials are directing the work of the OSC and MSPB; whether the OSC and MSPB are delaying or denying review of administrative complaints; whether the OSC and MSPB are otherwise thwarting judicial review of employee complaints; etc. The answers to these and similar questions are necessary to conduct the *Thunder Basin* analysis—that is, to determine whether Congress would have intended to channel federal employees' claims through the CSRA's adjudicatory scheme as it is currently operating. *See Thunder Basin*, 510 U.S. at 207.

D. NAIJ's arguments at step two of the *Thunder Basin* framework provide an alternative ground for affirmance.

This Court's review and reversal is also unlikely because, even if the court of appeals erred at step one of the *Thunder Basin* framework, NAIJ's arguments at step two of that framework offer a compelling, alternative ground for affirmance. Step two of the *Thunder Basin* framework asks whether the plaintiff's "claims are of the type Congress intended to be reviewed within the statutory scheme." *Thunder Basin*, 510 U.S. at 212. In answering this question, courts consider, among other markers of congressional intent, whether precluding district-court review could "foreclose all meaningful judicial review." *Id.* at 212–13. As the Court recently recognized, this first

Thunder Basin factor "recognizes that Congress rarely allows claims about agency action to escape effective judicial review." *Axon Enter.*, 598 U.S. at 186; *see also Thunder Basin*, 510 U.S. at 215 n.20 (noting that a "'serious constitutional question' . . . would arise if an agency statute were construed to preclude all judicial review of a constitutional claim" (quoting *Bowen v. Mich. Acad. of Fam. Physicians*, 476 U.S. 667, 681 n.12 (1986))).

As described above, the court of appeals concluded that NAIJ could obtain meaningful judicial review through the CSRA by bringing its prior-restraint claims to the OSC. This is wrong twice over.

1. NAIJ cannot bring its claims to the OSC because, as NAIJ explained at length in the court of appeals, Br. 19–26; Reply Br. 8–16, the policy it challenges is not a CSRA-covered action. The court of appeals suggested that the policy may be challenged as a "significant change in . . . working conditions," App. 23a—one of the twelve "personnel actions" challengeable under Chapter 23 of the statute as a prohibited personnel practice, 5 U.S.C. § 2302(a)(2)(A)(xii)—but this reading is at odds with the CSRA's text and structure, as well as precedent. The phrase "any other significant change in . . . working conditions" appears in a residual clause following a list of routine employment actions taken against individual employees—actions like the decision to "promote or reassign a single employee." *Feds for Med. Freedom*, 63 F.4th at 375; *see also* 5 U.S.C. § 2303(a)(2) (defining each of these actions as being taken "with respect to *an employee*" (emphasis added)). The most natural reading of the residual clause is that it is similarly limited to "discrete employment decisions,"

Feds for Med. Freedom, 63 F.4th at 375, and does not reach broad policies that impose prior restraints on private speech of the kind at issue here. This reading is consistent with the CSRA's structure, which provides no guarantee of judicial review to employees who suffer "personnel actions" because these are considered to be relatively "trivial." *Weaver v. U.S. Info. Agency*, 87 F.3d 1429, 1434 (D.C. Cir. 1996); *see also Feds for Med. Freedom*, 63 F.4th at 370–71; *Pinar v. Dole*, 747 F.2d 899, 911–12 (4th Cir. 1984). It is also in harmony with a long line of cases starting with this Court's seminal public-employee speech decision in *NTEU*, which allow employees to challenge speech policies directly in district court, so long as they do not contest any specific sanction for non-compliance. *See, e.g.*, *Weaver*, 87 F.3d at 1433–35; *Sanjour v. EPA*, 56 F.3d 85 (D.C. Cir. 1995); *Wolfe v. Barnhart*, 446 F.3d 1096 (10th Cir. 2006).

Indeed, in *NTEU*, which this Court decided just one year after *Thunder Basin*, the Court exercised jurisdiction over a First Amendment suit virtually identical to NAIJ's—brought by federal employees challenging a broad prior restraint on speech—without even mentioning the possibility of CSRA preclusion. Instead, the Court resolved the employees' claims on the merits, holding that a ban on honoraria for federal employees was an unconstitutional prior restraint. As this Court observed in *Brown Shoe Co. v. United States*, 370 U.S. 294, 307 (1962), it is not bound by silent assumptions of jurisdiction, but nor should it "disregard the implications of an exercise of judicial authority assumed to be proper" for many years.

2. Even if NAIJ could challenge the policy as a significant change in working conditions under Chapter 23, however, it could not obtain *meaningful* judicial review. This is so for two reasons.

First, Chapter 23 does not guarantee judicial review. Judicial review under the CSRA is available only for final actions of the MSPB, 5 U.S.C. § 1214(c), but a challenge under Chapter 23 can reach the MSPB only if the Special Counsel decides, in his sole and unreviewable discretion, to petition the MSPB for corrective action, *id.* § 1214(b)(2)(C). Accordingly, even if the OSC retained its independence, NAIJ may never obtain judicial review because the Special Counsel could reject its complaint. (In fact, he likely would because, for reasons already explained, the challenged policy is not a CSRA-covered action.) The "narrowness" of this pathway to review—"and the fact any review at all turns on the unreviewable discretion of Government officials"—makes clear that Chapter 23 fails to afford NAIJ a meaningful avenue for judicial review. *Feds for Med. Freedom*, 63 F.4th at 380; *see also Axon Enter.*, 598 U.S. at 190 (explaining that the problem in *Free Enterprise Fund v. Public Company Accountability Oversight Board*, 561 U.S. 477 (2010) was that "absent district court jurisdiction, [Petitioner] might never have had judicial recourse").

Second, even if NAIJ could hypothetically obtain judicial review, it would "come too late" to be meaningful. *Axon Enter.*, 598 U.S. at 191. As in *Axon Enterprise*, the policy NAIJ challenges inflicts a "here-and-now" injury, *id.*, because it imposes a prior restraint on the speech of immigration judges. In *Axon Enterprise*, the Court observed that the harm that the petitioners challenged—being subjected to "an

illegitimate proceeding, led by an illegitimate decisionmaker"—was "impossible to remedy once the proceeding [wa]s over, which is when appellate review kicks in." *Id*. The Court described this harm as a "here-and-now" injury and held that the petitioners should not be required to raise their claims administratively because judicial review through the relevant scheme would "come too late to be meaningful." *Id*. If anything, the conclusion is even more clean cut here. It is hornbook law that an unconstitutional prior restraint on speech is "the most serious and the least tolerable infringement on First Amendment rights." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). The imposition of such a restraint, even for a short period of time, causes irremediable harms that plainly cannot be "undone" by the reversal of an agency order—or any post-proceeding relief a court of appeals could provide. *Axon Enter.*, 598 U.S. at 191; *see also Elrod v. Burns*, 427 U.S. 347, 374 n.29 (1976) (noting that "[t]he timeliness of political speech is particularly important"). For that reason, federal employees should be able to bring pre-enforcement challenges to agency policies imposing prior restraints on their speech without being made to navigate needless, protracted, and ultimately futile administrative hurdles.

3. Applying the first *Thunder Basin* factor is enough in this case to conclude that Congress did not intend to strip district-court jurisdiction over NAIJ's claims, because a contrary holding would effectively preclude judicial review of a colorable constitutional claim. But the two remaining factors—which ask whether the claims at issue are wholly collateral to the administrative scheme and within the expertise of the agency, *see Axon Enter.*, 598 U.S. at 186—also strongly favor district-

court jurisdiction, as NAIJ explained in its briefing in the court of appeals. *See* Br. 31–34; Reply Br. 24–25.

II. Any harm to the government from the denial of the stay is far outweighed by the irreparable harm NAIJ and the public would suffer from the issuance of one.

A stay is unnecessary because there is no risk of irreparable harm to the government. The panel's decision does not hold that CSRA preclusion no longer operates in the Fourth Circuit. It holds only that further factfinding is necessary to resolve that question. The government might view that factfinding as inconvenient, but it would not inflict the irreparable harm necessary to justify the extraordinary remedy of a stay of the court of appeals' mandate. The government's arguments to the contrary fail to persuade.

1. The government's primary claim of irreparable harm derives not from this case, but from other cases concerning CSRA preclusion. Stay Appl. 23. To state the obvious, if the proceedings in those cases are causing irreparable harm, then 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 and Community Service*, 2025 WL 1865971 (D. Md. July 7, 2025), the government did not appeal, which undermines its claim of irreparable harm here. The government is also simply incorrect to attribute the results in those cases to the Fourth Circuit's decision. In the primary case 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 the

Thunder Basin analysis—not because of anything to do with step one. *See Elev8 Balt.*, 2025 WL 1865971, at *15–18 (accepting that step one is satisfied, but holding that step two is not satisfied because "the administrative channels may be presently unavailable"). The same is true of the second case cited by the government, in which the original jurisdictional ruling by the court predated the Fourth Circuit's opinion in this case. *See Am. Fed'n of Gov't Emps., AFL-CIO v. U.S. Off. of Pers. Mgmt.*, 771 F. Supp. 3d 1127, 1137 (N.D. Cal. 2025) (holding, in March 2025, that "[a]ll three *Thunder Basin* factors counsel that the public-sector unions' claims are not of the kind Congress intended to be reviewed through the CSRA"); *Am. Fed'n of Gov't Emps., AFL-CIO v. U.S. Off. of Pers. Mgmt.*, 2025 WL 2633791, at *12 (N.D. Cal. Sep. 12, 2025) (noting that earlier jurisdictional analysis "remains dispositive," but addressing whether the MSPB and OSC are currently capable of providing relief). If the real source of harm to the government is the step two analysis in other cases, staying the Fourth Circuit's mandate will provide no relief from its purported injury.

More fundamentally, what the government casts as irreparable harm is the normal operation of common-law decision-making. The government's attack on the independence of agency adjudicatory bodies has thrown a wrench into Congress's scheme of administrative and then judicial review of federal employment claims. When facts change, so might legal analysis, and so it is entirely unsurprising—banal, really—that courts are doing their best to determine whether the legal analysis does in fact change. The government's goal appears to be to stop lower courts from even considering what to do about the loss of agency independence, to preempt any

percolation in the courts of appeals, and to have this Court be the first and last to judge its actions. That is not the ordinary course, and it would upend our system of judicial review to treat any consideration of changed circumstances as the cause of "irreparable harm" justifying this Court's immediate intervention.

2. The government also asserts that it will suffer irreparable harm from the panel's remand because courts might "indefinitely thwart the MSPB—an executive-branch agency—from resolving matters within its purview." Stay Appl. 25. There is no substance behind this speculation. The MSPB is free to continue operating as it is, and any matters initiated by the government or by employees who seek the Board's review will continue as they would have otherwise. It is true that some employees might elect not to pursue their complaints through the OSC or MSPB, but that is hardly an injury—let alone an irreparable one—to the government. If the government is correct in those cases that implied preclusion continues to hold, then the employees who file their claims in district court will be forced back into administrative proceedings. The diversion will have caused some delay, but to the detriment only of the employees seeking review. And if the government is incorrect, and the courts ultimately allow certain employees to pursue their claims in district court, then the government can hardly claim any injury.

To the extent the government's real concern is with uncertainty about whether the CSRA will, in the future, preclude district-court jurisdiction over claims by federal employees, *see* Stay Appl. 23–24, staying the mandate will only perpetuate that uncertainty. As the panel correctly concluded, further factfinding is necessary to

determine whether the CSRA continues to satisfy step one of the *Thunder Basin* test. Permitting the district court to do that work is the fastest way to resolve any uncertainty.

3. Finally, the government complains of the prospect of "extensive discovery" on remand, Stay Appl. 24, but NAIJ has never claimed the need for extensive discovery. It will seek discovery targeted at the narrow set of questions relevant to step one of the *Thunder Basin* analysis, and it will be for the district court to determine in the first instance whether to grant any discovery. If the district court permits discovery, and if NAIJ serves discovery requests that the government believes to be overbroad, the government may object at that point. *See Jud. Watch, Inc. v. Nat'l Energy Pol'y Dev. Grp.*, 2003 WL 22319584, at *1 (D.C. Cir. Sep. 30, 2003) (denying a motion to stay the mandate based on Petitioners' concerns about the possible scope of discovery).

4. Any harm the government would suffer as a result of the district court's fact-finding is, in any event, far outweighed by the additional irreparable harm that a lengthy stay would cause to NAIJ's members and the public. This suit challenges a sweeping prior restraint that forbids the nation's immigration judges from talking publicly in their personal capacities about anything related to immigration or to the agency that employs them. That prior restraint is patently unconstitutional, and yet it continues to silence hundreds of immigration judges on topics of urgent public interest. Issuing a stay of the mandate pending the filing of a certiorari petition would

substantially delay any prospect that NAIJ's members and the public will obtain relief from that ongoing harm.

The government suggests that NAIJ's harms are not irreparable because it did not seek preliminary relief on its amended complaint after the Fourth Circuit's first order of remand in the case. *See* Stay Appl. 25. NAIJ did, of course, seek a preliminary injunction the day it filed suit in 2020. App. 79a. On the remand in 2022, it did not seek a preliminary injunction because it had become clear that the initial stage of the case would focus solely on implied preclusion, and because the district court—the Eastern District of Virginia—had moved expeditiously, living up to its reputation as the "rocket docket." In any event, the loss of First Amendment freedoms is always an irreparable harm, *see Elrod*, 427 U.S. at 373 ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."), whether or not the plaintiff seeks preliminary relief.

CONCLUSION

The Court should deny the government's application to stay the court of appeals' mandate.

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Respectfully submitted,

/s/ Ramya Krishnan

Ramya Krishnan
Counsel of Record
Alex Abdo
Xiangnong Wang
Jameel Jaffer
Knight First Amendment Institute at Columbia University

Victor M. Glasberg
Victor M. Glasberg & Associates
121 S. Columbus Street
Alexandria, VA 22314
(703) 684-1100
vmg@robinhoodesq.com

475 Riverside Drive, Suite 302
New York, NY 10115
(646) 745-8500
ramya.krishnan@knightcolumbia.org

Counsel for National Association of Immigration Judges