APPENDIX

APPENDIX TABLE OF CONTENTS

Court of appeals opinion (August 19, 2026)..... 1a

Court of appeals amended opinion (November 4, 2026)..... 4a

Supreme Court opinion (May 26, 2026) 7a

Court of appeals opinion (June 3, 2025)..... 16a

Court of appeals order denying rehearing en banc (Nov. 20, 2025) 51a

District court opinion (Sept. 21, 2023) 93a

District court order (Sept. 21, 2023)..... 151a

U.S. Const. amend. I 153a

5 U.S.C. § 1214 ..... 154a

5 U.S.C. § 2301 ..... 168a

5 U.S.C. § 2302 ..... 171a

5 U.S.C. § 7501 ..... 188a

5 U.S.C. § 7502 ..... 189a

5 U.S.C. § 7503 ..... 190a

5 U.S.C. § 7504 ..... 192a

5 U.S.C. § 7512 ..... 193a

5 U.S.C. § 7513 ..... 195a

5 U.S.C. § 7703 ..... 197a

28 U.S.C. § 1331 ..... 202a

Court of appeals opinion (August 19, 2026)

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-2235

NATIONAL ASSOCIATION OF IMMIGRATION JUDGES, affiliated with the International Federation of Professional and Technical Engineers,

Plaintiff - Appellant,

v.

SIRCE E. OWEN, in her official capacity as Acting Director of the Executive Office for Immigration Review,

Defendant - Appellee.

On Remand from the Supreme Court of the United States. (S. Ct. No. 25-767)

Submitted: June 29, 2026
Decided: August 19, 2026

Before HARRIS, HEYTENS and BERNER, Circuit Judges.

Affirmed as modified by unpublished per curiam opinion.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

The Supreme Court vacated our previous decision and directed us to reconsider in light of party presentation principles. *Margolin v. Nat'l Ass'n of Immigr. Judges*, 146 S. Ct. 1285 (2026). Upon remand, plaintiff-appellant the National Association of Immigration Judges filed a motion requesting that this court set a schedule for renewed briefing. Defendant-appellee Sirce E. Owen opposed. We deny the motion.

Having carefully reviewed the parties' newly filed papers, the prior briefing, and the record, we affirm the district court's ruling that it lacked jurisdiction to consider the plaintiff's claims.[*] *Nat'l Ass'n of Immigr. Judges v. McHenry*, 477 F. Supp. 3d 466 (E.D. Va. 2020). A dismissal for lack of subject-matter jurisdiction, however, "must be one without prejudice, because a court that lacks jurisdiction has no power to adjudicate and dispose of a claim on the merits." *S. Walk at Broadlands Homeowner's Ass'n,*

[*] In *Trump v. Slaughter*, 609 U.S. -- (2026), the Supreme Court held that the for-cause removal protections in the Federal Trade Commission Act violate the constitutional requirement of separation of powers. 2026 WL 1855612 (U.S. June 29, 2026). The for-cause removal protections applicable to members of the Merit Systems Protection Board and the Special Counsel under the Civil Service Reform Act of 1978 (CSRA) arguably suffer the same constitutional infirmity. The briefing in this case, however, did not address this issue nor did it address the question of whether the CSRA's for-cause removal protections are severable. *See id.* at *16 n.3.

Inc. v. OpenBand at Broadlands, LLC, 713 F.3d 175, 185 (4th Cir. 2013). Here, the district court entered judgment in favor of Owen rather than dismissing the case without prejudice.

Accordingly, we affirm the district court's order as modified to reflect a dismissal without prejudice.

AFFIRMED AS MODIFIED

Court of appeals amended opinion (November 4, 2026)

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-2235

NATIONAL ASSOCIATION OF IMMIGRATION JUDGES, affiliated with the International Federation of Professional and Technical Engineers,

Plaintiff - Appellant,

v.

SIRCE E. OWEN, in her official capacity as Acting Director of the Executive Office for Immigration Review,

Defendant - Appellee.

On Remand from the Supreme Court of the United States. (S. Ct. No. 25-767)

Submitted: June 29, 2026
Decided: August 19, 2026
Amended: November 4, 2026

Before HARRIS, HEYTENS and BERNER, Circuit Judges.

Affirmed as modified by unpublished per curiam opinion.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

The Supreme Court vacated our previous decision and directed us to reconsider in light of party presentation principles. *Margolin v. Nat'l Ass'n of Immigr. Judges*, 146 S. Ct. 1285 (2026). Upon remand, plaintiff-appellant the National Association of Immigration Judges filed a motion requesting that this court set a schedule for renewed briefing. Defendant-appellee Sirce E. Owen opposed. We deny the motion.

Having carefully reviewed the parties' newly filed papers, the prior briefing, and the record, we affirm the district court's ruling that it lacked jurisdiction to consider the plaintiff's claims.* *Nat'l Ass'n of Immigr. Judges v. Neal,* 693 F. Supp. 3d 549. (E.D. Va. 2023). A dismissal for lack of subject-matter jurisdiction, however, "must be one without

* In *Trump v. Slaughter*, 609 U.S. -- (2026), the Supreme Court held that the for-cause removal protections in the Federal Trade Commission Act violate the constitutional requirement of separation of powers. 2026 WL 1855612 (U.S. June 29, 2026). The for-cause removal protections applicable to members of the Merit Systems Protection Board and the Special Counsel under the Civil Service Reform Act of 1978 (CSRA) arguably suffer the same constitutional infirmity. The briefing in this case, however, did not address this issue nor did it address the question of whether the CSRA's for-cause removal protections are severable. *See id.* at *16 n.3.

prejudice, because a court that lacks jurisdiction has no power to adjudicate and dispose of a claim on the merits." *S. Walk at Broadlands Homeowner's Ass'n, Inc. v. OpenBand at Broadlands*, LLC, 713 F.3d 175, 185 (4th Cir. 2013). Here, the district court entered judgment in favor of Owen rather than dismissing the case without prejudice.

Accordingly, we affirm the district court's order as modified to reflect a dismissal without prejudice.

AFFIRMED AS MODIFIED

Supreme Court opinion (May 26, 2026)

SUPREME COURT OF THE UNITED STATES

DAREN K. MARGOLIN, DIRECTOR OF THE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW *v.* NATIONAL ASSOCIATION OF IMMIGRATION JUDGES,

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

NO. 25–767. Decided MAY 26, 2026

PER CURIAM.

After the Executive Office for Immigration Review adopted a policy regulating immigration judges' work-related speech, an association of such judges (respondent here) challenged the policy in federal district court. The District Court held that respondent's challenge must proceed through the administrative review scheme established by the Civil Service Reform Act. But the Fourth Circuit vacated and remanded based on an issue the parties had not raised. That decision violated the principle of party presentation, and we reverse.

I

The Executive Office for Immigration Review sets policies governing the immigration courts. See 8 CFR §1003.0 (2024). In October 2021, it implemented a rule requiring immigration judges to obtain supervisory approval for public speeches

relating to their official duties. Joint App. in No. 23–2235 (CA4), pp. 56–62. The policy was meant to ensure that employee speech which may be seen as bearing the "imprimatur" of the Office is consistent with its official positions. *Id.*, at 57.

Respondent challenged the policy in the Eastern District of Virginia, asserting violations of its members' First and Fifth Amendment rights. This Court has held that, under the Civil Service Reform Act of 1978 (CSRA), 92 Stat. 1122, 1125, 5 U. S. C. §§1205, 1206, Congress intended federal employees to bring most work-related grievances to the Merit Systems Protection Board (MSPB) and the Special Counsel—not to federal district court. See *United States* v. *Fausto*, 484 U. S. 439, 455 (1988); *Elgin* v. *Department of Treasury*, 567 U. S. 1, 11–12 (2012). Respondent thus accepted that "the CSRA channels judicial review of challenges to covered employment actions" to the MSPB. Opposition to Motion to Dismiss in No. 1:20–cv–731 (ED Va.), ECF Doc. 72, pp. 2–3. It argued only that its members' constitutional claims were not the *kind* of work-related claims that Congress intended to steer out of district court. See *id.*, at 21–30.

The District Court dismissed respondent's claims. The court, like respondent, acknowledged that "Congress intended to preclude district-court jurisdiction" over "covered actions" brought by federal employees. *National Assn. of Immigration Judges* v. *Neal*, 693 F. Supp. 3d 549, 569 (ED Va. 2023). And it held that respondent's claims were indeed "covered" by the CSRA. *Id.*, at 569–581.

Respondent appealed. It did "no[t] dispute that the CSRA provides the exclusive avenue for review of certain employment-related claims." Brief for Appellant in No. 23–2235 (CA4), ECF Doc. 11–1, p. 18; see also *id.*, at 21–22 ("Congress's intent to preclude district court jurisdiction is . . . manifest in the CSRA" (internal quotation marks omitted)). It again argued only that its specific claims were not covered under the CSRA's claim-channeling scheme. See *id.*, at 21–39.

The Fourth Circuit vacated and remanded. *National Assn. of Immigration Judges* v. *Owen*, 139 F. 4th 293 (2025). Like the District Court, it held that respondent's claims were covered by the CSRA. *Id.*, at 308–313. And the court recognized our precedent holding that "Congress designed the CSRA to divest district courts of jurisdiction to review legal challenges" like respondent's. *Id.*, at 313. Nonetheless, it held that factual circumstances had "called into question" whether the CSRA was "functioning as Congress intended." *Id.*, at 304. Specifically, the court believed that legal challenges to the tenure protection afforded MSPB members and the Special Counsel, and the MSPB's lack of a quorum, may require a "new examination of Congressional intent" to channel covered claims out of district court. *Id.*, at 308. The court thus remanded for factfinding into the current operation of the MSPB. *Id.*, at 305, 313.

The Court of Appeals denied rehearing en banc. *National Assn. of Immigration Judges* v. *Owen*, 160 F. 4th 100 (CA4 2025). Judge Quattlebaum, joined

by three judges, dissented.* He criticized the panel for "shirk[ing] party presentation principles" by deciding the case on a novel ground "without any party raising the issue and without requesting supplemental briefing." *Id.*, at 107–108, 118.

II

Federal courts adhere to the principle of party presentation. See *Clark* v. *Sweeney*, 607 U. S. 7, 9–10 (2025) (*per curiam*). That principle—the "rule that points not argued will not be considered"—distinguishes our adversarial system of justice from an inquisitorial one. *United States* v. *Burke*, 504 U. S. 229, 246 (1992) (Scalia, J., concurring in judgment). Because courts are "essentially passive instruments of government," we rely on the parties to "frame the issues for decision" and decide "only the questions presented." *United States* v. *Sineneng-Smith*, 590 U. S. 371, 375–376 (2020) (internal quotation marks omitted).

We recently reversed the Fourth Circuit for violating this party-presentation principle. In *Clark*, a state prisoner seeking federal habeas relief argued that his trial counsel was ineffective for failing to investigate whether the entire jury had been tainted by one juror's unauthorized crime-scene visit. 607 U. S., at 8–9. The District Court denied relief, but the Fourth Circuit reversed and granted a new trial. It did so based not on the prisoner's ineffective-

* Chief Judge Diaz and Judge Niemeyer voted to grant rehearing en banc but did not join Judge Quattlebaum's dissent.

assistance claim, but instead on "a combination of extraordinary failures from juror to judge to attorney" that deprived the prisoner of his confrontation and impartial-jury rights. *Id.*, at 9 (internal quotation marks omitted). We summarily reversed. By "granting relief " based on a claim that the prisoner "never asserted and that the State never had the chance to address," the Fourth Circuit "transgressed the party-presentation principle." *Ibid.*

So too here. The Fourth Circuit violated the party-presentation principle when it decided "a case different from the one [respondent] advanced." 160 F. 4th, at 118 (Quattlebaum, J., dissenting from denial of rehearing en banc). As respondent conceded below, our precedent establishes that Congress, through the CSRA, intended to channel covered claims to the MSPB. ECF Doc. 72, pp. 8–9; ECF Doc. 11–1, p. 18. The parties thus confined their arguments to the narrow question whether respondent's claims were, in fact, covered. Unsatisfied with rejecting respondent's arguments on that question, however, the Fourth Circuit *sua sponte* addressed a much broader one and remanded for further proceedings on that question. The court transformed respondent's argument that the CSRA did not channel *its* claims into one that the CSRA might not—in light of current conditions—channel *any* claims. And the court did so without giving either side a chance to address its theory. See *Clark*, 607 U. S., at 9. That "'drasti[c]'" departure from the principle of party presentation "'constitute[d] an abuse of discretion.'" *Id.*, at 10 (quoting *Sineneng-Smith*, 590 U. S., at 375).

Federal courts are not "roving commissions," *Broadrick* v. *Oklahoma*, 413 U. S. 601, 611 (1973), licensed to "'sally forth each day looking for wrongs to right,'" *Sineneng-Smith*, 590 U. S., at 376 (quoting *United States* v. *Samuels*, 808 F. 2d 1298, 1301 (CA8 1987) (Arnold, J., concurring in denial of rehearing en banc)). The Court of Appeals lost sight of those principles here.

The petition for a writ of certiorari is granted, the judgment of the Fourth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

DAREN K. MARGOLIN, DIRECTOR OF THE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW *v.* NATIONAL ASSOCIATION OF IMMIGRATION JUDGES

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

NO. 25–767. Decided MAY 26, 2026

JUSTICE THOMAS, with whom JUSTICE BARRETT joins, concurring.

I agree with the Court that the Fourth Circuit erred by disregarding traditional party-presentation principles. I write separately to explain why the Fourth Circuit's decision was also wrong on the merits.

As the Fourth Circuit seemed to acknowledge, this Court's precedent establishes that the District Court lacked jurisdiction over this challenge to a federal workplace policy. The Civil Service Reform Act of 1978, 5 U. S. C. §1101 *et seq*., provides a statutory review scheme through which certain federal employees must raise certain workplace complaints. The scheme authorizes judicial review only after the employees have had their claims heard by the Merit Systems Protection Board (and sometimes the Office of the Special Counsel). §§1214, 7512, 7703; 28 U. S. C. §1295(a)(9). In *Elgin* v. *Department of Treasury*, 567 U. S. 1 (2012), this Court held that "covered employees appealing

covered agency actions" must "proceed exclusively through the statutory review scheme." *Id.*, at 10. Respondent concedes that its members are covered employees. The Fourth Circuit agreed that the workplace policy at issue is a covered agency action. *National Assn. of Immigration Judges* v. *Owen*, 139 F. 4th 293, 308–313 (2025). Thus, the Fourth Circuit had to acknowledge that, under *Elgin*, "the National Association of Immigration Judges would be required to bring its case through [this] administrative scheme," which would require the dismissal of this case. 139 F. 4th, at 299; see also *id.*, at 305.

Nevertheless, the Fourth Circuit strained to avoid dismissal of the case based on its belief that new political considerations changed the governing law. The court explained that it would not allow its "black robes to insulate [it] from taking notice of items in the public record." *Id.*, at 313. Specifically, the Fourth Circuit worried that because "the President removed the Special Counsel" and "two members of the MSPB," there were now "serious questions as to whether the CSRA's adjudicatory scheme continues to function as intended." *Id.*, at 305. Congress designed the CSRA to rely on MSPB independence, the Fourth Circuit claimed, so now that "the Government has questioned the constitutionality of the removal protections enshrined in the CSRA," it was no longer clear that the statutory scheme was functioning as Congress intended. *Id.*, at 308. If it were not, the court reasoned, Congress might not have intended for such claims to be channeled to the MSPB any longer. The Fourth Circuit thus remanded to the District

Court for factfinding as to how the CSRA scheme is functioning and whether a "new examination of Congressional intent may be required in light of changing circumstances." *Ibid.*

The Fourth Circuit's analysis bears little resemblance to legal interpretation. Neither the President's view that he can remove federal executive officials, see *Myers* v. *United States*, 272 U. S. 52 (1926), nor his having done so, change the meaning of the statute or the binding nature of this Court's interpretation of it. "Conditions may have changed, but the statute has not." *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537, 547 (1943). Courts may not "rewrite the statutory scheme in order to approximate what we think Congress might have wanted had it known that" the President or courts may conclude that its removal restrictions were "beyond its authority." *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44, 76 (1996). Statutes change only when Congress changes them, not when judges decide that they no longer vindicate Congress's purposes. See U. S. Const., Art. I, §§1, 7.

As Judge Quattlebaum wrote in dissent, the Fourth Circuit's decision below "undermines important principles of our system of justice," including that law remains law despite the "political controversies of the day." *National Assn. of Immigration Judges* v. *Owen*, 160 F. 4th 100, 118 (2025) (en banc).

Court of appeals opinion (June 3, 2025)

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-2235

NATIONAL ASSOCIATION OF IMMIGRATION JUDGES, affiliated with the International Federation of Professional and Technical Engineers,

Plaintiff - Appellant,

v.

SIRCE E. OWEN, in her official capacity as Acting Director of the Executive Office for Immigration Review,

Defendant - Appellee.

Appeal from the United States District Court for the Eastern District of Virginia at Alexandria. Leonie M. Brinkema, District Judge. (1:20-cv-00731-LMB-JFA)

Argued: December 11, 2024
Decided: June 3, 2025

Before HARRIS, HEYTENS and BERNER, Circuit Judges.

Vacated and remanded by published opinion. Judge Berner wrote the opinion, in which Judge Harris and Judge Heytens joined.

BERNER, Circuit Judge:

The National Association of Immigration Judges brought this challenge to an employee policy that requires immigration judges to obtain permission before speaking publicly on issues relating to immigration. The National Association of Immigration Judges argues that the policy violates the First and Fifth Amendment rights of its members. The district court dismissed the case for lack of subject matter jurisdiction, concluding that the policy could only be challenged through the administrative procedures established by the Civil Service Reform Act.

Congress enacted the Civil Service Reform Act to create a uniform scheme for administrative and judicial review of covered federal employee personnel actions. That scheme sets forth the protections and remedies available to such employees as well as the procedural process they must follow. When a federal employee seeks relief from an action covered by the Civil Service Reform Act, she is required to comply with the prescribed scheme of administrative and judicial review and may not generally bring an initial claim in federal court. Constitutional challenges and pre-enforcement challenges are no exception.

When the Civil Service Reform Act functions as designed, we agree with the district court that the

National Association of Immigration Judges would be required to bring its case through its administrative scheme. It is not clear, however, that the Civil Service Reform Act is currently so functioning. The Civil Service Reform Act requires a strong and independent Merit Systems Protections Board and Special Counsel. That foundational principle, that functioning and independent bodies would receive, review, and decide in the first instance challenges to adverse personnel actions affecting covered federal employees, has recently been called into question. Because Congress intended for the Civil Service Reform Act to strip district courts of jurisdiction only if federal employees were otherwise able to receive adequate and independent review of their claims, we vacate and remand to the district court to consider whether the text, structure, and purpose of the Civil Service Reform Act has been so undermined that the jurisdiction stripping scheme no longer controls.

I. Background

The Executive Office for Immigration Review (EOIR) oversees the operation of the United States immigration courts. EOIR employs about 750 immigration judges (IJs). These IJs exercise the authority of the United States Attorney General to adjudicate immigration proceedings. Until 2022, when IJs were stripped of the right to union representation, the National Association of Immigration Judges (NAIJ) served as the certified bargaining representative for all non-supervisory IJs. Today, NAIJ is a non-profit voluntary association of IJs with hundreds of dues paying

members, including members who are required to comply with the challenged speech policy.

A. The EOIR Speech Policy

On October 12, 2021, EOIR issued a personnel policy that requires immigration judges to obtain prior approval before any official speech (the Speech Policy). The Speech Policy defines an official speech as one in which an IJ "is invited to participate in an event because of their official position, is expected to discuss agency policies, programs, or a subject matter that directly relates to their official duties or otherwise appear on behalf of the agency." J.A. 57.

To determine whether speech is "official," "[s]upervisors must consider the nature and purpose of the engagement, the host(s) and sponsor(s) of the event, and whether the event provides an appropriate forum for the dissemination of the information to be presented." J.A. 57. The Speech Policy includes an attachment, Attachment A, which lists examples of official capacity engagements. These include "[i]mmigration conferences or similar events where the subject is immigration (including litigation)," "[m]eetings with [s]takeholders," "[p]ro bono training related to immigration," and the "EOIR Model Hearing Program." J.A. 62. Attachment A also provides examples of personal capacity speech, such as "[m]oot court judge - not immigration related," "[c]ommencement speaker when topic is unrelated to immigration or official duties," "[i]nterview based on book written in appropriate personal capacity," and "[s]peaking at community, religious, youth, or small social groups

(e.g., book club) and meetings, not directly related to immigration law or advocacy." J.A. 62.

When an IJ seeks approval to speak or write in an official capacity, that request is subject to a multi-step review process. First, the IJ submits the speech request to her supervisor. If the supervisor determines that the request relates to an IJ's official duties, the request is forwarded to EOIR's Speaking Engagement Team (SET)—comprised of personnel from the Office of Policy, the Office of the General Counsel, and the Office of the Director. The EOIR's Ethics Program, also conducts a review to "offer[ ] guidance" on the request. J.A. 58. The Speech Policy ultimately permits supervisors, relying on the SET and Ethics Program's guidance, to make the final decision about whether a judge may speak or write in her official or personal capacity and whether to approve official capacity requests. Although the Speech Policy contains no specific timeframe for review, supervisors are encouraged to submit requests relating to an IJ's official duties at least ten days before the event at which the IJ wishes to speak or the date by which a written piece is due. While the Speech Policy does not require IJs to obtain supervisory approval to speak in a personal capacity on topics unrelated to their official duties, it does encourage them to consult with EOIR's Ethics Program regarding such speaking engagements.

B. NAIJ's First and Fifth Amendment Challenge[1]

NAIJ's members seek to contribute to public and scholarly discourse concerning developments in immigration law and policy. They contend, however, that the Speech Policy restricts their ability to speak about their professional experiences, prevents them from expressing their personal views at legal conferences, and deters them from publishing scholarship on immigration law. Some IJs have ceased seeking approval altogether because they understand the Speech Policy to forbid them from speaking about immigration issues in a private capacity, and speaking in their official capacity "would require [them] to recite the agency's talking points." J.A. 29.

EOIR has required IJs who attempt to publish written work on topics of immigration law to revise their writing to accord with EOIR's official positions. In one instance, an IJ attempted to publish an article about immigration court bond hearings. EOIR determined the article was an official capacity speech and a member of the EOIR Office of Policy "made several edits to the tone and substance of the piece." J.A. 31. The reviewing official conveyed that "certain observations made in the piece were not appropriate because they were not the official view of the agency." J.A. 31. In a section of the article

[1] Because this is an appeal from an order granting the Government's motion to dismiss, we accept as true the factual allegations in NAIJ's amended complaint. *De'lonta v. Johnson*, 708 F.3d 520, 522 (4th Cir. 2013). Accordingly, we state the facts as alleged by NAIJ.

described as the "author's opinion," the reviewing official asked whether the view conformed with EOIR's official position. If it did, the IJ was told that it "should not be expressed as [the] author's opinion." J.A. 31. If it did not, the reviewing official suggested that an "evaluation must be done as to whether [the opinion was] appropriate." J.A. 31.

Beyond outright restrictions on speech, IJs are sometimes constructively denied permission to speak because SET's decisions on speaking requests come too late. On one occasion, an NAIJ member requested approval to teach a law school course on immigration law. Although the Speech Policy provides that an immigration judge need only to receive supervisory approval to teach courses on immigration law, requests to teach are routinely routed to SET, "and judges who have sought approval often receive no decision." The judge submitted a request to teach a course during the Spring 2023 semester on November 3, 2022. She received no response before the end of the year, making it impossible for her to accept the teaching position or prepare a course. On other occasions, IJs submitted speaking requests or requests for approval to publish written work and heard no response for months.

NAIJ challenges the Speech Policy as a prior restraint on speech that is not tailored to a legitimate government interest, and as void for vagueness under both the First and Fifth Amendments.

C. The Civil Service Reform Act of 1978

At issue in this case is whether the district court had jurisdiction over NAIJ's claims or whether the Civil Service Reform Act of 1978 (CSRA) stripped the district court of jurisdiction. The CSRA "comprehensively overhauled the civil service system." *Lindahl v. Off. of Pers. Mgmt.*, 470 U.S. 768, 773 (1985). It created an entirely "new framework for evaluating adverse personnel actions against 'employees' and 'applicants for employment'" within the federal government. *Id.* at 774. A critical purpose of the CSRA was to fix the "haphazard arrangements for administrative and judicial review of personnel action," part of the "outdated patchwork of statutes and rules built up over almost a century" that had been the civil service system. *United States v. Fausto*, 484 U.S. 439, 444 (1988). The CSRA sets out "in great detail the protections and remedies applicable to such [adverse actions], including the availability of administrative and judicial review." *Id.* at 443.

The CSRA created two agencies: (1) the Office of Personnel Management (OPM), which has central responsibility for administering the civil service rules and regulations established under the CSRA; and (2) the Merit System Protection Board (MSPB), which serves as the adjudicatory arm with jurisdiction over the personnel system. *See* 5 U.S.C. §§ 1101, 1204. The MSPB was established as an independent agency consisting of three members, each appointed by the President with the advice and consent of the Senate to serve seven-year terms. 5 U.S.C. §§ 1201, 1202(a)–(c). The MSPB is a quasi-

judicial body, adjudicating conflicts between civil servants and their employing agencies. The MSPB resolves disputes including federal employees' allegations that their government employer discriminated against them, retaliated against them for whistleblowing, violated protections for veterans, or otherwise subjected them to an unlawful adverse employment action or prohibited personnel practice. 5 U.S.C. §§ 1204(a)(1), 1221, 2302(b)(1), (8)–(9), 3330a(d), 7512.

The CSRA also created the position of "Special Counsel." 5 U.S.C. § 1211. The Special Counsel receives and investigates allegations of prohibited personnel practices in violation of the merit system, reviews OPM rules and regulations, conducts investigations, and prevents reprisals against government "whistle blowers." *Id.* § 1212. The statute protects federal employees who disclose "mismanagement," "gross waste of funds," "abuse of authority," "danger[s] to public health or safety," and "violation[s] of law" to the Special Counsel. 5 U.S.C. § 1213. If the Special Counsel determines that there are "reasonable grounds" to believe a prohibited practice occurred, he or she is required to report that determination to the MSPB and the Special Counsel may "request" that the MSPB take corrective action. *Id.* § 1214(b)(1)(A)(i), (b)(2)(B).

Given the critical purpose of their roles, the MSPB and the Special Counsel were established to "be independent of any control or direction by the President." S. Rep. No. 95-969, at 24 (1978). The CSRA expressly provides that the MSPB's members and the Special Counsel can be removed only by the

President for "inefficiency, neglect of duty, or malfeasance in office." 5 U.S.C. §§ 1202(d), 1211(b). The Whistleblower Protection Act of 1989, 5 U.S.C. §§ 1211 *et seq.*, strengthened the Special Counsel's role in protecting and assisting government whistleblowers, by further separating the Special Counsel from the MSPB and creating the Office of Special Counsel (OSC) as an independent agency.

The CSRA has three primary sections regulating adverse personnel action, two of which are relevant here: Chapter 75 and Chapter 23. *See* 5 U.S.C. §§ 2301 *et seq.*, 7501 *et seq.*; *Fausto*, 484 U.S. at 445–47. Chapter 75 addresses major adverse actions against employees. The first subchapter governs suspensions of fourteen days or less, 5 U.S.C. §§ 7501–04, and the second subchapter governs more serious actions—involving removal, suspension over fourteen days, grade reduction, pay reduction, and furlough up to thirty days, *see id.* §§ 7511–15. The second subchapter provides that a covered employee "against whom an action is proposed is [generally] entitled to[:]" a minimum of "30 days' advance written notice[;]" the opportunity to respond orally and in writing; representation; and "a written decision and the specific reasons therefor at the earliest practicable date." *Id.* § 7513(b). Decisions under the second subchapter are appealable, first to the MSPB and then to the United States Court of Appeals for the Federal Circuit. *Id.* §§ 7513(d), 7703(b).

Chapter 23 outlines the "merit system principles" agencies must uphold. 5 U.S.C. § 2301(b). Violations of these principles constitute "prohibited personnel

practice[s]." *Id.* § 2302(a). An employee alleging a prohibited personnel practice must first file a charge with the OSC. *See id.* § 1214(b)(2)(A)(i). The OSC must then determine within 240 days whether "there are reasonable grounds to believe" that a prohibited personnel practice has occurred, exists, or will occur. *See id*. If the OSC determines that there are reasonable grounds, the Special Counsel reports that determination to the head of the employing agency, as well as the MSPB and OPM, to provide the agency with an opportunity to remedy the prohibited personnel practice. *Id.* § 1214(b)(2)(B). If the agency fails to take corrective action, the OSC "may petition the [MSPB] for corrective action." *Id.* § 1214(b)(2)(C). Just as in Chapter 75, the CSRA grants the Federal Circuit jurisdiction to review final orders of the MSPB. *See id.* §§ 1214(c), 7703(b)(1)(A).

II. Procedural History

NAIJ filed this case in the United States District Court for the Eastern District of Virginia. In September 2023, the district court dismissed for lack of jurisdiction,[2] concluding that the CSRA impliedly stripped the district court of jurisdiction to hear

[2] The district court first considered NAIJ's standing to bring the constitutional claims at issue. *NAIJ v. Neal*, 693 F. Supp. 3d 549, 563–67 (E.D. Va. 2023). While the Government does not raise standing on appeal, we are required to assure ourselves that standing exists. *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009). We agree with the district court that NAIJ possesses standing because of the chilling effect the Speech Policy allegedly has on NAIJ's members and the self-censorship it allegedly causes.

NAIJ's claims. *NAIJ v. Neal*, 693 F. Supp. 3d 549, 567–81 (E.D. Va. 2023). The district court concluded that the CSRA provides the sole remedial review scheme for adjudicating NAIJ's claims. *Id.* at 568–70. From this the district court concluded that the IJs must pursue their challenge to the Speech Policy before the MSPB, subject to judicial review in the Federal Circuit. *Id.* at 571–80.

III. Analysis

We must answer a single question: Does the CSRA strip the district court of jurisdiction over NAIJ's pre-enforcement challenge to the Speech Policy?[3] If so, NAIJ's members must pursue their claims through the scheme outlined in the CSRA. That broad question requires us to undertake "a two-step inquiry" established by the Supreme Court in *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207 (1994), to determine whether Congress intended to strip district-court jurisdiction over these claims. *See Bennett v. SEC*, 844 F.3d 174, 181 (4th Cir. 2016).

In the first step of the *Thunder Basin* inquiry, we ask whether Congress's intent to preclude district-court jurisdiction is "fairly discernible in the statutory scheme." 510 U.S. at 207. At this step, we look to the statute's language, structure, and purpose to assess whether Congress intended to

[3] We review *de novo* the district court's dismissal of a complaint for lack of subject-matter jurisdiction. *Berkley v. Mountain Valley Pipeline, LLC*, 896 F.3d 624, 629 (4th Cir. 2018).

funnel covered federal employees' claims through the CSRA's administrative scheme, stripping district courts of jurisdiction. *See id.* We conclude that this step requires further examination by the district court. The CSRA's adjudicatory scheme was predicated on the existence of a functioning and independent MSPB and Special Counsel. We take notice that the function of the MSPB and Special Counsel, contrary to the CSRA's text and purpose, has recently been called into question. The district court must address this issue in the first instance.

In the second step of the *Thunder Basin* test, we determine whether NAIJ's "claims are of the type Congress intended to be reviewed within this statutory structure." *Id.* at 212. At this second step, we consider three factors. We focus on (1) whether the statutory scheme "foreclose[s] all meaningful judicial review." *Id.* at 212–13. We also consider (2) the extent to which the NAIJ's claims are "wholly collateral" to the statute's review provisions, and (3) whether "agency expertise could be brought to bear on the . . . questions presented." *Id.* at 212, 215. On the basis of these three factors, we affirm the district court's conclusion that the claims NAIJ brings would fall within the ambit of the CSRA. We vacate and remand, however, for the district court to evaluate whether the CSRA continues to function as Congress intended.

A. Congressional Intent

At step one of the *Thunder Basin* test we consider "whether Congress's intent to preclude district court jurisdiction is 'fairly discernible in the statutory

scheme.'" *Bennett*, 844 F.3d at 181 (quoting *Thunder Basin*, 510 U.S. at 207). "[W]hether a statute is intended to preclude initial judicial review is determined from the statute's language, structure, and purpose, its legislative history, and whether the claims can be afforded meaningful review." *Thunder Basin*, 510 U.S. at 207 (internal citation omitted).

The Supreme Court has recognized that the CSRA, when functioning as Congress intended, was designed to strip district courts of jurisdiction. The Court first reached this conclusion in *United States v. Fausto*, which involved a federal employee's claims for back pay. 484 U.S. at 441–42. In *Fausto*, the Court recognized that the CSRA established a comprehensive system for reviewing personnel action taken against federal employees. *Id.* at 443. The CSRA "prescribes in great detail the protections and remedies applicable to such action, including the availability of administrative and judicial review." *Id.* Looking at the text, structure, and the legislative history of the CSRA, the Supreme Court determined that Congress's intent to foreclose review was "fairly discernible." *Id.* at 443– 450. Notably, the Supreme Court held that the structure of the CSRA evinces Congress's intent because of "*the primacy of the MSPB* for administrative resolution of disputes over adverse personnel action." *Id.* at 449 (emphasis added).

Likewise in *Elgin v. Department of Treasury*, the Supreme Court explained why the CSRA's "elaborate" framework and purpose demonstrate that Congress also intended covered employees appealing covered agency actions to proceed

exclusively through the statutory review scheme, "even in cases in which the employees raise constitutional challenges to federal statutes." 567 U.S. 1, 10–11 (2012). The Court ultimately concluded that, "[g]iven the painstaking detail with which the CSRA sets out the method for covered employees to obtain review of adverse employment actions, it is fairly discernible that Congress intended to deny such employees an additional avenue of review in district court." *Id.* at 11–12. In creating an administrative review process specifically for civil servants, Congress established administrative pathways to be adjudicated by the OSC and MSPB as the "exclusive forum" for review of agency personnel action. *Id.* at 14.

Those cases would have, until recently, made our analysis at step one of the *Thunder Basin* test simple. It has been well-established that Congress's intent for the CSRA to preclude district court jurisdiction is "fairly discernible in the statutory scheme." *Id.* at 17. That conclusion can only be true, however, when the statute functions as Congress intended. During the pendency of this case, whether the CSRA functions as Congress intended has been called into question.

To maintain Congress' intent, the MSPB and Special Counsel must function such that they fulfill their roles prescribed by the CSRA. If, for example, the Senate-confirmed roles in the MSPB and Special Counsel go unfilled, or if the agencies fail to perform their duties such that covered employees' claims are not adequately processed, then the framework of the CSRA would be thwarted. Either situation would

defeat congressional intent, as Congress enacted the CSRA for the express purpose that the merit system function and that claims be addressed adequately and efficiently. If claims are not so processed, of course, then turning to the MSPB or Special Counsel through the CSRA would be futile.

In reviewing a motion to dismiss, we may properly take judicial notice of matters of public record. *Philips v. Pitt Cnty. Mem'l Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009); *Papasan v. Allain,* 478 U.S. 265, 268 n. 1 (1986) ("Although this case comes to us on a motion to dismiss [. . .], we are not precluded in our review of the complaint from taking notice of items in the public record."). Here, we take notice that during the pendency of this case, the President removed the Special Counsel, *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), and two members of the MSPB such that it currently lacks a quorum, *Harris v. Bessent*, No. CV-25-412, 2025 WL 679303 (D.D.C. Mar. 4, 2025), *rehearing en banc granted*, No. 25-5037, 2025 WL 1021435 (D.C. Cir. Apr. 7, 2025). These removals and the lack of quorum in the MSPB raise serious questions as to whether the CSRA's adjudicatory scheme continues to function as intended. Such a question, which turns on a factual record, is best addressed by the district court in the first instance. We therefore remand to the district court to assess the functionality of the CSRA's adjudicatory scheme.

In addition to providing a functioning adjudicatory process, the CSRA was designed to

protect the independence of the agencies reviewing federal employees' claims. The CSRA devised an adjudication system that was to serve as "a vigorous protector of the merit system"—the crux of this was the "establishment of a *strong and independent* [MSPB] and Special Counsel." S. Rep. 95-969, at 6–7 (emphasis added). Congress was deeply concerned with preventing regression back to the "spoils" system of the 19th century, in which employees advanced on the basis of "political or personal favoritism." *Id.* at 2–3. "The lack of adequate protection [against political will] was painfully obvious during the civil service abuses" of the past. *Id.* at 6–7. Instead, Congress sought to ensure that employees were "hired and removed on the basis of merit" and "competence." *Id.* at 2–3.

The MSPB was hailed as "the Cornerstone of Civil Service Reform." *Id.* at 24. In order to carry out its role of preserving the merit system for all federal employees, Congress recognized that the MSPB must be "insulated from the kind of political pressures that [had] led to violations of merit principles in the past." *Id.* at 7. Congress explained that "*absent such a mandate for independence for the merit board*, it is unlikely that [it] would have granted the Office of Personnel Management the power it has or the latitude to delegate personnel authority to the agencies." *Id.* (emphasis added).

The CSRA established the same independence for the Special Counsel, who it tasked to "investigate and prosecute political abuses and merit system violations," and "safeguard the rights" of employees who "'blow the whistle' on violations of laws."

President Jimmy Carter, Federal Civil Service Message to Congress (Mar. 2, 1978).[4] In his letter calling for the creation of the Special Counsel, President Carter emphasized the need for "independent and impartial protection" for federal employees. *Id*. The CSRA incorporated President Carter's recommendation by "provid[ing] for an independent merit systems protection board and special counsel to adjudicate employee appeals and protect the merit system." S. Rep. No. 95-969, at 2.

Congress left little doubt about the importance of an independent MSPB and Special Counsel free from "*any control or direction by the President*." *Id.* at 24 (emphasis added). The MSPB and the Special Counsel "exercise statutory responsibilities independent of any Presidential directives." *Id.* at 7. For this reason, the CSRA mandates that the members of the MSPB and the Special Counsel can be removed by the President "only for inefficiency, neglect of duty, or malfeasance in office." 5 U.S.C. §§ 1202(d), 1211(b).

The text and structure of the CSRA likewise demonstrate Congress's intent to foster a strong and independent MSPB and Special Counsel. As noted above, Congress established a bipartite structure to the merit system when it enacted the CSRA. The first agency created was OPM, which serves as "the arm of the President in matters of personnel administration." S. Rep. 95-969, at 24. That agency

[4] Available at https://www.presidency.ucsb.edu/documents/federal-civil-service-reform-message-the-congress [https://perma.cc/L266-UJ2L].

contrasts starkly with the MSPB, which provides a quasi-judicial role intended to be fully independent from the president. *Id.*; 5 U.S.C §§ 1204(a), 1202(d). By statute, no more than two members of the MSPB are permitted to be from the same political party, to ensure that federal employees are "protected against arbitrary action, personal favoritism, or coercion for partisan political purposes." 5 U.S.C. §§ 2301, 1201. MSPB members serve seven-year terms—a term limit longer than that guaranteed to the appointing President. *Id.* § 1202(a). The Senate must consent to any MSPB member. *Id.* § 1201. Similar protections exist for the Special Counsel, though the Special Counsel's term is limited to five years. *Id.* § 1201(b).

The CSRA also gives the MSPB substantial independent authority to allow it to act outside of the influence of the President. Unlike the MSPB's predecessor agency, the Civil Service Commission, the CSRA gave the MSPB subpoena authority to require "the attendance and presentation of testimony of any such individual, and the production of documentary or other evidence," 5 U.S.C. § 1204(b)(2)(A), that the MSPB determines "essential in conducting investigations and adjudicating appeals by federal workers," S. Rep. 95-969, at 7. The MSPB can wield that authority to "hear, adjudicate, or provide for the hearing or adjudication, of all matters" that fall within its broad jurisdiction over covered federal employees' claims. 5 U.S.C. § 1204(a)(1). The MSPB can then "order any Federal agency or employee to comply" with its resulting decision and can act to "enforce compliance with any such order." *Id.* § 1204(a)(2).

The CSRA gives the Special Counsel similar independent authority. The Special Counsel has the authority to conduct investigations, *id.* § 1214(a)(5), and can "issue subpoenas" and "order the taking of depositions" and "responses to written interrogatories," *id.* § 1212(b)(2). The Special Counsel is also authorized access to all records or materials "available to the applicable agency that relate to an investigation." *Id.* § 1212(b)(5)(A)(i). If the Special Counsel finds reasonable grounds for a violation of the CSRA, and the employing agency does not take corrective action, the Special Counsel may petition the MSPB for corrective action. *Id.* § 1214(b)(2)(C). The Special Counsel may also initiate disciplinary action against those who violate the merit principles by engaging in prohibited personnel practices. *Id.* § 1212(a)(2).

Put simply, Congress enacted the CSRA on the bedrock principle that the members of the MSPB and the Special Counsel would be protected from removal on political grounds, providing them independence from the President. *See* 5 U.S.C. §§ 1202(d), 1211(b). Additionally, in lawsuits challenging the removals of the Special Counsel and members of the MSPB, the Government has argued that the removal protections enshrined in the CSRA are violations of separation of powers, Gov't Br. at 7–9, *Harris*, 2025 WL 679303; Gov't Br. at 5–8, *Dellinger*, 2025 WL 665041, thereby calling into question the constitutionality of a critical aspect of the CSRA, and the continued vitality of the statute's adjudicatory scheme. This issue has yet to be resolved, however. At present, reinstatement of the MSPB Board members has been stayed by the

Supreme Court. *Trump v. Wilcox*, No. 24A966, 605 U.S. ____, 2025 WL 1464804 (May 22, 2025).

The resolution of this issue could also call into question whether the CSRA continues to function as Congress intended for purposes of the *Thunder Basin* analysis. As described above, Congress may well have intended the CSRA to strip district courts of jurisdiction only because it understood that the President could not exercise unfettered control over the Special Counsel and MSPB. If that understanding proves to be incorrect, then a reevaluation of Congress's intent under *Thunder Basin* may be required. We leave that issue, should it arise, to the district court to address in the first instance.

At the time the district court considered its jurisdiction over this matter, the functionality and independence of the MSPB and Special Counsel had not been called into question. This is no longer necessarily true. The Special Counsel and several members of the MSPB have been terminated by the President and the Government has questioned the constitutionality of the removal protections enshrined in the CSRA. Accordingly, we remand to the district court to conduct a factual inquiry whether the CSRA continues to provide a functional adjudicatory scheme. If warranted, a new examination of Congressional intent may be required in light of changing circumstances around the MSPB and Special Counsel's removal protections.

B. Whether NAIJ's Claims Fall Within the CSRA

Having concluded that questions remain as to the first step of the *Thunder Basin* test, we now turn to the second step, namely "whether plaintiffs' 'claims are of the type Congress intended to be reviewed within this statutory structure.'" *Bennett*, 844 F.3d at 178 (quoting *Thunder Basin*, 510 U.S. at 212). The district court determined that they were, and we agree.

The Supreme Court has identified three factors to determine whether a claim falls within the statutory structure: First, could precluding district court jurisdiction "foreclose all meaningful judicial review" of the claim? *Thunder Basin*, 510 U.S. at 212. Second, is the claim "wholly collateral" to the statute's review provisions? *Id.* Third, does the claim fall "outside the agency's expertise"? *Id.* We take each of these questions in turn.

Whether meaningful judicial review of a claim is available is the "most important" factor in the second step of the *Thunder Basin* test. *Bennett*, 844 F.3d at 183 n.7. This factor stems from the Supreme Court's recognition "that Congress rarely allows claims about agency action to escape effective judicial review." *Axon Enter., Inc. v. Fed. Trade Comm'n*, 598 U.S. 175, 186 (2023). We begin our analysis by first determining which chapter of the CSRA, if any, applies to NAIJ's claims. For the reasons explained below, we agree with the district court that Chapter 23 applies. We begin with Chapter 75, however, because we find that Chapter 75 does not apply to NAIJ's claims.

1. Chapter 75

Chapter 75 of the CSRA governs the most severe adverse employment actions taken or proposed against covered federal employees. *See* 5 U.S.C. § 7501 *et seq.* NAIJ argues that Chapter 75 cannot provide an avenue to MSPB review for its members, because no adverse action has been taken or proposed against them. We agree.

The D.C. Circuit has considered when a Chapter 75 action is "proposed." *Payne v. Biden*, 62 F.4th 598 (D.C. Cir. 2023), *judgment vacated as moot*, 144 S. Ct. 480 (2023). That case involved pre-enforcement constitutional challenges to an Executive Order and its implementing policies, which set forth the adverse actions that would be taken against employees who failed to become current on COVID-19 vaccinations. *Id.* at 600–01; *see* Exec. Order No. 14043, 86 Fed. Reg. 50968 (Sept. 9, 2021).

In *Payne*, a federal employee refused to comply with the Executive Order and was told that he would be terminated because of his breach of the policy. 62 F.4th at 605; *id.* at 602 (explaining that enforcement of the COVID-19 policy "may include '[a] 5-day period of counseling and education;' a short suspension of up to 14 days without pay; and removal 'for failing to follow a direct order.'"). The D.C. Circuit determined that adverse action had been proposed in response to the employee's failure to comply with the vaccination requirement and Chapter 75 provided meaningful review of the employee's claim. *Id.* at 605; *see also Rydie v. Biden*, No. 21-2359, 2022 WL 1153249, at *6 (4th Cir. Apr.

19, 2022) (explaining that the term "proposed" in Chapter 75 signals congressional "intent to preclude pre-enforcement judicial challenges").

Unlike the employees in *Payne*, NAIJ's members have no route to judicial review through Chapter 75. NAIJ's amended complaint states explicitly that its members have neither violated nor intend to violate the Speech Policy. Employees challenging an employment policy on First Amendment grounds need not first violate the policy before seeking meaningful judicial review under Chapter 75. *See Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 490 (2010). Government employees are not required to "bet the farm by taking a violative action" in order to bring a constitutional challenge to an agency policy. *Id*. Moreover, NAIJ does not allege that its members have been threatened with any form of adverse action in connection with the Speech Policy. Indeed, the Speech Policy makes no mention of any disciplinary action covered by Chapter 75 that might result from non-compliance, plainly distinguishing this case from *Payne*. Where no action is "taken or proposed," Chapter 75 plainly does not apply.

2. Chapter 23

The other potential avenue for administrative review of NAIJ's claims is Chapter 23 of the CSRA. Chapter 23 contains a list of "prohibited personnel practices" that supervisors are forbidden from taking against covered federal employees. *See* 5 U.S.C. § 2302(b). The Government argues that NAIJ's challenges are encompassed within this list,

which includes a prohibition against employing agencies taking any "*personnel action* . . . [that] violates . . . the *merit system principles* contained in section 2301." *Id.* § 2302(b)(12) (emphasis added).

The CSRA lists twelve "personnel actions" actionable under Chapter 23. The Speech Policy, as described by NAIJ, fits within the final action listed, namely a "significant change in duties, responsibilities, or working conditions." *Id.* § 2302(a)(2)(A)(xii). Chapter 23 also establishes "merit system principles" the violation of which could constitute a prohibited personnel practice. Relevant here is the merit system principle that covered employees must receive "fair and equitable treatment [. . .] with proper regard for their privacy and constitutional rights." *Id.* § 2301(b)(2).

Incorporating these statutory definitions into the Section 2302(b)(12) "prohibited personnel practice," Chapter 23 prohibits covered federal employers from "tak[ing]" "any other personnel action," here, any "significant change in duties, responsibilities, or working conditions," "if the taking of or failure to take such action violates any law," including "proper regard for [the employee's] constitutional rights." *Id.* §§ 2301(b)(2); 2302(a)(2)(A)(xii), (b)(12). We hold that the Speech Policy fits that definition and would constitute a prohibited personnel practice under Chapter 23 based on NAIJ's allegations. The Speech Policy could constitute a significant change in working conditions that NAIJ alleges was adopted without "proper regard for [its members'] constitutional rights." *Id.* § 2301(b)(2).

NAIJ makes two arguments in rejecting this reading of Chapter 23. The first is a matter of statutory interpretation. NAIJ contends that the *ejusdem generis* canon limits the meaning of "any other significant change in duties, responsibilities, or working conditions." This canon counsels that where "general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Yates v. United States*, 574 U.S. 528, 545 (2015) (internal quotations omitted). NAIJ contends that the eleven personnel actions enumerated before the final action are discrete employment decisions that target individual employees, not policies that cover an entire group in a workforce. We disagree.

Rather than limiting the scope of what constitutes "working conditions," the enumerated personnel actions in Section 2302(a)(2)(A) confirm that "working conditions" encompasses policies like the Speech Policy. For example, Section 2302(a)(2)(A) lists as actionable personnel actions a "disciplinary or corrective action," and any "decision concerning pay, benefits, or awards, or concerning education or training." Neither of these actions requires that the action be taken against a single employee. Both could be levied against a group of employees, and over a prolonged or indefinite period. The list also includes "the implementation or enforcement of any nondisclosure policy." *Id.* § 2302(a)(2)(A)(xi). Nondisclosure policies can altogether prohibit speech on certain topics. Hence this action is similar to the challenged Speech Policy

that limits certain speech, and its inclusion demonstrates that policies like the challenged Speech Policy are covered by the CSRA.

We agree with the district court's apt observation that the Speech Policy broadly affects how immigration judges "interact with their supervisors and the EOIR" and "governs what types of speaking or writing they may do within their official capacities." *NAIJ v. Neal*, 693 F. Supp. 3d at 572. An exchange with a supervisor about what an employee may say or write in an official capacity speech represents a typical exchange between supervisor and employee as to how an employee should represent her employer. As such, the Speech Policy encompasses circumstances that relate directly to an IJ's working conditions.

NAIJ also contends that Congress did not intend for the CSRA to preclude district court jurisdiction over pre-enforcement challenges to vindicate free speech rights. The Supreme Court rejected a similar argument in *Elgin*. 567 U.S. at 5. There, the Supreme Court held that covered federal employees must bring their constitutional challenges through the CSRA's post-enforcement procedures. *Id.* at 15. As this court explained in *Bennett*, "Congress can require persons subject to administrative adjudication to pursue their claims exclusively there first before reaching an Article III court." 844 F.3d at 185 n.12 (citing *Thunder Basin*, 510 U.S. at 216). NAIJ cannot "bypass" this requirement "simply by alleging a constitutional challenge and framing it as 'structural,' 'prophylactic,' or 'preventative.'" *Id.* at 188.

i. Meaningful Judicial Review

Having determined that Chapter 23 provides a potential avenue to challenge the Speech Policy, we next consider whether Chapter 23 allows for meaningful judicial review. Judicial review need not be immediately available. A statutory scheme can provide for meaningful judicial review even if it requires litigants to first seek relief in an administrative forum, so long as an appeal to an Article III court is available "in due course." *Bennett*, 844 F.3d at 186. Meaningful judicial review similarly does not require the involvement of a district court. *Axon Enter., Inc.*, 598 U.S. at 190. Review of an agency's action in a court of appeals can meaningfully address a party's claim. *Id.* (quoting *Thunder Basin*, 510 U.S. at 215). The Supreme Court has held that the CSRA provides meaningful judicial review where its administrative processes authorize the Federal Circuit to consider and decide constitutional claims. *Elgin*, 567 U.S. at 21.

As a first step under Chapter 23, a covered federal employee alleging a "prohibited personnel practice" files a charge with the OSC. 5 U.S.C. § 1214(a). If the Special Counsel finds "reasonable grounds" suggesting a "prohibited personnel practice" occurred, the Special Counsel is required then to report the practice to the MSPB, the employing agency, and OPM. *Id.* § 1214(b)(2)(B). If the agency fails to resolve the problem, "the Special Counsel may petition the MSPB," and the MSPB can order corrective action. *Id.* § 1214(b)(2)(C), (b)(4)(A). Corrective action can include back pay, other compensatory damages, and attorneys' fees. *Id.*

§ 1214(g). Final orders of the MSPB may be appealed to the Federal Circuit. *Id.* §§ 1214(c), 7703(b)(1)(A).

Although the CRSA provides for meaningful judicial review of MSPB orders, NAIJ correctly points out that the Special Counsel is afforded leeway regarding which claims to bring to the MSPB. The Special Counsel may decline to bring to the MSPB claims it deems truly frivolous. *See id.* § 1214(b)(2)(B). NAIJ argues that this discretion effectively eliminates meaningful judicial review because the Special Counsel could prevent a claim from ever reaching the MSPB, thereby preventing the plaintiff from appealing an adverse determination to the Federal Circuit. That is not, however, the posture of the case before us.

NAIJ declined to bring its claim to the OSC altogether, thereby failing to follow the statutorily prescribed administrative and judicial procedures. That should generally be determinative. The CSRA precludes extra-statutory judicial review of constitutional claims asserted before an employee has utilized remedies that are available under the statute. As the Supreme Court emphasized in *Elgin*, "[t]he CSRA's objective of creating an integrated scheme of review would be seriously undermined if . . . a covered employee could challenge a covered employment action first in a district court, and then again in one of the courts of appeals." 567 U.S. at 13. The requirement that covered federal employees first bring their claims to the OSC is central to Chapter 23's statutory scheme.

NAIJ also argues that no meaningful judicial review is available because its members will suffer irreparable injury because their speech will be chilled in the interim period that it seeks administrative review. NAIJ claims that this is the type of "here-and-now injury" like the Supreme Court considered in *Axon Enterprise, Inc.*, 598 U.S. 175. NAIJ misconstrues the injury at issue in *Axon*. The challenge in *Axon* was not to any "specific substantive decision" made by an agency or to any "commonplace procedures agencies use to make" such decisions. *Id.* at 189. Rather, the challenge in *Axon*—as in *Free Enterprise Fund*—was to "the structure or very existence of an agency." *Id.*; *Free Enter. Fund*, 561 U.S. at 508. The plaintiffs asserted that the agency "wield[ed] authority unconstitutionally in all or a broad swath of its work." *Axon Enter., Inc.*, 598 U.S. at 189.

Thus, the core of the plaintiffs' claim in *Axon* was that they would face "an illegitimate proceeding, led by an illegitimate decisionmaker." *Id.* at 191. Such a harm qualified as a "here-and-now injury" that could not be remedied after the fact by a court of appeals, because "[a] proceeding that has already happened cannot be undone." *Id.* The Supreme Court concluded that such "structural constitutional" challenges need not be channeled through an enforcement proceeding the agency allegedly lacked constitutional authority to conduct, and that they could instead be brought directly in district court. *Id.* at 190–93; *see also Free Enter. Fund*, 561 U.S. at 489–90.

NAIJ's challenge is not a structural constitutional challenge to the authority of the EOIR or the OSC and MSPB. NAIJ likewise does not challenge the structure of or procedures outlined in the CSRA. Plaintiffs cannot avoid jurisdiction stripping statutes like the CSRA by merely alleging an irreparable injury. The Supreme Court explained that covered federal employees must go through the CSRA's administrative process even when doing so would "subject[ ] them to significant burdens" such as "the expense and disruption of protracted adjudicatory proceedings[.]" *Axon Enter., Inc.*, 598 U.S. at 192 (quotation marks omitted). Those routine burdens differ in kind from those suffered by the plaintiffs in *Axon*. NAIJ's claimed injuries fall outside the narrow class of structural constitutional claims that *Axon* carved out from the *Thunder Basin* framework. Thus, meaningful judicial review is available to NAIJ under Chapter 23.

ii. Wholly Collateral

The second *Thunder Basin* factor asks us to consider whether NAIJ's claims are "wholly collateral to a statute's review provisions." 510 U.S. at 212 (internal quotation marks and citation omitted). Jurisdiction stripping is less likely for a claim that is wholly collateral to a statute's review provisions. *Id.* "Under this standard, claims are not wholly collateral when they are the vehicle by which petitioners seek to reverse agency action." *Bennett*, 844 F.3d at 186 (cleaned up). Because this factor also focuses on whether a plaintiff challenges a covered action under the CSRA, our analysis follows closely

that for the meaningful judicial review factor. *See id.* at 187.

In *Elgin*, federal employees brought a constitutional challenge in federal court to their terminations after they failed to comply with the Military Selective Service Act. 567 U.S. at 6–7. The plaintiffs argued that their constitutional challenge had "nothing to do with the types of day-to-day personnel actions adjudicated by the MSPB," and that they were "not seeking the CSRA's protections and remedies." *Id.* at 22. The Supreme Court looked to the underlying conduct challenged by the plaintiffs and determined that the constitutional claims were merely a vehicle for challenging the terminations. *Id.* Such a dispute was, therefore, "precisely the type of personnel action" covered by the CSRA and regularly heard by the MSPB. *Id.* Because the CSRA was intended to foreclose covered federal employees from contesting covered employment actions outside the CSRA adjudicatory scheme, the Court held that the plaintiffs' constitutional challenge to their terminations must proceed through procedures prescribed by the CSRA. *Id.*

Like the plaintiffs in *Elgin*, NAIJ argues that its constitutional challenge is wholly collateral to the scope of the CSRA. As we have noted, however, that a case presents a constitutional challenge does not mean it necessarily falls beyond the CSRA's scope. The relevant question is whether the claim falls under the CSRA's scheme for personnel actions, and thus whether it is a vehicle to reverse agency personnel action. *See Bennett*, 844 F.3d at 186;

Elgin, 567 U.S. at 22 (finding a claim not wholly collateral when it was "precisely the type of personnel action regularly adjudicated by the MSPB and the Federal Circuit within the CSRA scheme"). Because NAIJ challenges a significant change to its members' working conditions, its claims are not wholly collateral to the CSRA scheme.

iii. Agency Expertise

The final *Thunder Basin* factor requires that we consider whether the agency possesses expertise that may help resolve the claim. NAIJ argues that its claims fall outside the agency's expertise because its constitutional challenge is unrelated to the CSRA's procedures. Agency expertise is interpreted broadly, however. *Bennett*, 844 U.S. at 187. Claims do not fall beyond the expertise of the MSPB simply because they raise a constitutional challenge. An agency "can apply its expertise" to "the many threshold questions that may accompany a constitutional claim." *Elgin*, 567 U.S. at 22–23.

We conclude that NAIJ's constitutional claims are sufficiently "intertwined with or embedded in matters on which the MSPB are expert." *Axon Enter., Inc.*, 598 U.S. at 195. The MSPB's expertise lies in "ensur[ing] that Federal employees are protected against abuses by agency management, that Executive branch agencies make employment decisions in accordance with the merit system principles, and that Federal merit systems are kept free of prohibited personnel practices." Merit Systems Protection Board, An Introduction to the Merit Systems Protection Board 5 (1999). One merit

system principle involves the failure to accord "proper regard for [the covered federal employee's] constitutional rights." 5 U.S.C. § 2301(b)(2). Should this case come before the Special Counsel and the MSPB, both would be sufficiently equipped to resolve the underlying challenge because they are familiar with agency speech policies, why they are implemented, and how such policies should best be designed in accordance with the Constitution.

Because all three factors of step two weigh in favor of the Government, we conclude 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.

IV. Conclusion

Congress designed the CSRA to divest district courts of jurisdiction to review legal challenges like those raised by NAIJ. The structure of the CSRA relies fundamentally, however, on a strong and independent MSPB and Special Counsel. Serious questions have recently arisen regarding the functioning of both the MSPB and the Special Counsel. We cannot allow our black robes to insulate us from taking notice of items in the public record, including, relevant here, circumstances that may have undermined the functioning of the CSRA's adjudicatory scheme. We therefore vacate and remand to the district court to engage in factfinding to determine whether—given current circumstances—it may properly exercise subject matter jurisdiction over NAIJ's claims.

VACATED AND REMANDED

Court of appeals order denying rehearing en banc (Nov. 20, 2025)

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-2235
(1:20-cv-00731-LMB-JFA)

NATIONAL ASSOCIATION OF IMMIGRATION JUDGES, affiliated with the International Federation of Professional and Technical Engineers,

Plaintiff - Appellant,

v.

SIRCE E. OWEN, in her official capacity as Acting Director of the Executive Office for Immigration Review,

Defendant - Appellee.

Filed: November 20, 2025

ORDER

The Court denies the petition for rehearing en banc.

A requested poll of the Court failed to produce a majority of judges in regular active service and not

disqualified who voted in favor of rehearing en banc. Judges Wilkinson, King, Gregory, Wynn, Thacker, Harris, Heytens, Benjamin, and Berner voted to deny rehearing en banc. Chief Judge Diaz and Judges Niemeyer, Agee, Richardson, Quattlebaum, and Rushing voted to grant rehearing en banc.

Judge Wilkinson wrote an opinion concurring in the denial of rehearing en banc. Judge King wrote an opinion concurring in the denial of rehearing en banc. Judge Thacker, with whom Judge King joined, wrote an opinion concurring in the denial of rehearing en banc. Judge Quattlebaum, with whom Judges Agee, Richardson, and Rushing joined, wrote an opinion dissenting from the denial of rehearing en banc.

Entered at the direction of Judge Berner.

For the Court
/s/ Nwamaka Anowi, Clerk

WILKINSON, Circuit Judge, concurring in the denial of rehearing en banc:

Notwithstanding my reservations with the panel opinion, I vote to deny rehearing this case en banc. Mere disagreement with the merits of a panel's decision is seldom sufficient grounds for deviating from our normal respect for panel adjudication.

I.

A rehearing en banc represents a departure from our standard procedures—a departure of an "extraordinary nature" that is heavily disfavored. Fed. R. App. P. 40 & advisory committee's notes to the 2024 amendment. "The decision to grant en banc consideration is unquestionably among the most serious non-merits determinations an appellate court can make, because it may have the effect of vacating a panel opinion that is the product of a substantial expenditure of time and effort by three judges and numerous counsel." *Bartlett ex rel. Neuman v. Bowen*, 824 F.2d 1240, 1242 (D.C. Cir. 1987) (Edwards, J., joined by Wald, C.J., Robinson, Mikva & R.B. Ginsburg, JJ., concurring in the denials of rehearing en banc); *see also Mitt v. Bagley*, 626 F.3d 366, 370 (6th Cir. 2010) (Sutton, J., joined by Kethledge, J., concurring in the denial of rehearing en banc).

A fifteen-member en banc court like ours is a bit of an ungainly beast. It rivals even FDR's audacious plans for court expansion. Its proceedings too often feature a cacophony of voices each vying for time, with counsels' arguments pushed to the periphery.

(I should apologize here and now for being part of the bedlam.) Too frequently en banc proceedings end with splintered opinions that have little or no educative effect. And these fractures raise considerable doubt that the en banc opinion will be any more correct than that of the original panel. Indeed, en banc arguments are regrettably bereft of the more personal interactions conducive to good listening and sound decision-making that are possible with three-, but not fifteen-, member courts.

Rules and regulations on speaking order or time are no answer to the problems plaguing swollen tribunals. In fact, they can make the whole situation worse. They lend to en banc hearings a stilted and artificial quality, quite at odds with the fluency and spontaneity that panel arguments at their best reflect. And even when en banc proceedings run smoothly, they constitute an "enormous distraction" from our "heavy schedule of brief-reading, oral arguments, motions work and opinion-writing in connection with cases on the regular calendar." *Bartlett*, 824 F.2d at 1243.

Judicial resources like those of many institutions are finite. Over-lavishing attention on one case can mean shortchanging another. Redirecting inordinate time and resources to hear a case for a second time does nothing but lengthen the line for all the other litigants waiting to have their first hearing. Litigation itself can come to seem unending. It is for many litigants, and even perhaps a lawyer or two, an exhausting ordeal. An en banc proceeding can seem to extend the lifespan of an already elderly case. I do not understand the view

that every assertedly "wrong" panel decision is perforce intolerably so. If only law was that clear-cut. In short, few should dispute Justice Frankfurter's observation that "[r]ehearings are not a healthy step in the judicial process," and should not be considered a "normal procedure." *W. Pac. R. Corp. v. W. Pac. R. Co.*, 345 U.S. 247, 270 (1953) (Frankfurter, J., concurring in the judgment).

My fine colleague Judge Thacker makes the legitimate point that there were often more en bancs in the past than there are today. Conc. Op. at 14–15. But the pertinent question is whether that state of affairs was desirable. The trend away from en bancs, for which I like to think I have worked, reflects a dissatisfaction with the practice's overuse. I write, in part, because I worry we are reverting to our former bad habits. In the past three months alone, we have conducted five en banc polls. The fact that these polls have not carried the day does not eliminate the danger that resort to en banc proceedings may become all too facile a practice.

This is not to say that rehearings en banc have no place in our judicial system. Indeed, the Rules provide for them. Such proceedings do possess occasional value in ironing out intra-circuit conflicts and addressing questions of exceptional importance. *See* Fed. R. App. P. 40(b)(2). It is, however, a matter of degree. Judging from the gist of my concurring colleague's view, en banc proceedings are to be welcomed, while the Rules provide precisely the opposite. Fed. R. App. P. 40 (indicating that "rehearing en banc is not favored"). Given the Rules, it would often seem more suitably the province of the

Supreme Court to decide which questions are sufficiently exceptional to require additional review; that is the purpose of certiorari, after all.

As Judge Oakes has noted, some cases are "too important to en banc." James Oakes, *Personal Reflections on Learned Hand and the Second Circuit*, 47 Stan. L. Rev. 387, 392 (1995). By subjecting litigation to the en banc detour, we shield it from Supreme Court review while the often year-long proceeding plays itself out. Shielding significant cases from the Supreme Court for prolonged periods can have deleterious consequences. We would often be wiser to "speed" such cases "on [their] way to the Supreme Court as an exercise of sound, prudent and resourceful judicial administration." *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005, 1021 (2d Cir. 1973) (Kaufman, J., joined by Friendly, C.J., Feinberg, Mansfield & Mulligan, JJ., concurring in the denial of rehearing en banc). While the argument can be fairly made that cases need to marinate or incubate in the courts of appeal, there is only so much benefit to be derived from chewing the bone of an issue indefinitely. The Supreme Court is well-equipped on its own to resolve the competing arguments on a question. The pathway to the Court reinforces the wise tradition of vertical, rather than horizontal, judicial review.

Considering a case's import also invites subjectivity: "one judge's case of exceptional importance is another judge's routine or run-of-the-mill case." *Bartlett*, 824 F.2d at 1242 (internal quotation marks omitted). Ordinarily en banc requests arise from divided panels. Concerns of

subjectivity become all the more exacerbated when, as here, we question the work of a unanimous panel. The agreement of three colleagues should be accorded substantial weight. Given the volume and variety of cases before our court, any one of us can find a case at any time to which we might register strong objections and ascribe to it "exceptional importance." If we were to request an en banc poll in such cases, I fear it would exact a terrible drain upon our judicial resources and our "sound, collegial attitude." *Air Line Pilots Ass'n Int'l v. E. Air Lines, Inc.*, 863 F.2d 891, 925 (D.C. Cir. 1988) (R.B. Ginsburg, J., concurring in the denial of rehearing en banc).

Requests for polls are always framed as exceptional, but there comes a point in which the exceptional becomes more and more the rule, and the practice more and more to our collective detriment. I cannot hurry to make myself party to such a trend or practice. I recognize it is best for judges "never to say never," lest some case from far-off lands appears to rebuke the principle just announced. But this scenario should be a rare occasion. We would benefit from allegiance to sound procedure even during those times when it seems less convenient to do so. At their best, standard procedures are neutral, thereby keeping substantive disputes year in and year out within mutually accepted bounds.

II.

Respectfully, I do not agree with the panel opinion in this case. I do not believe that our court

enjoys the prerogative to decide whether a particular statutory program is "functioning as Congress intended." *Nat'l Ass'n of Immigr. Judges v. Owen*, 139 F.4th 293, 304 (4th Cir. 2025). This "functionality" test plants the seeds of real mischief to which I think only the Supreme Court can bring an effective halt.

Put simply, it is not our job to amend Congress's handiwork. If a statutory scheme is not functioning as Congress intended, then it would seem logical that Congress be the one to fix the problem. Such matters require legislative attention, not judicial correction. And while the panel takes the seemingly modest step of remanding the case for judicial fact-finding, *id.* at 308, it is legislative oversight and fact-finding that is in order.

Furthermore, if a statute has a functionality problem, it will often be because of some alleged malfunction in executive enforcement. The malfunction here is assumed to be the President's removal of the Special Counsel and members of the Merit Systems Protection Board. *Id.* at 305–07. The lawfulness of those removals has yet to be resolved and is the subject of ongoing litigation. *See id.* at 307. That litigation would seem the most suitable way of addressing the problem. At the very least, it is premature to revisit the functionality of the statutory scheme when the statute's removal protections have not been held unconstitutional. *Cf. United States v. Arthrex, Inc.*, 594 U.S. 1, 23–25 (2021) (considering the issue of severability only after part of the statute had been held unconstitutional).

In sum, functionality is a vague and impenetrable standard. What is dysfunctional should often be the subject of political debate. Functionality assessments are too frequently untethered, as I see it, to any principle other than judicial preference. Left untamed, functionality will vest the judiciary with a general supervisory authority over both the legislative and executive branches. I hope this test will be consigned to strong disfavor—an emphasis only our highest court can suitably supply.

KING, Circuit Judge, joining in the concurrence of Judge THACKER in the denial of rehearing en banc, and separately concurring in the denial of rehearing en banc:

I join fully in the concurrence of my good colleague Judge Thacker in the denial of rehearing en banc in this appeal. I write separately to emphasize once more that it is the applicable Rules of Appellate Procedure that specify the requirements for en banc proceedings. *See* Fed. R. App. P. 40(c) (explaining when rehearing en banc may be ordered). If those conditions are satisfied — no matter how difficult the dispute might be — our Court should be willing to address and resolve that case en banc. As Judge Thacker properly recognizes, it is part of our job description to do so! *Accord Dubin v. United States*, 599 U.S. 110, 132 n.10 (2023) (Sotomayor, J.) (recognizing that "resolving hard cases is part of the judicial job description"); *Doe v. Va. Dep't of State Police*, 720 F.3d 212, 214 n.* (4th Cir. 2013) (King, J., dissenting from denial of rehearing en banc and highlighting that federal judges must "remain faithful to [their] constitutional charge to decide cases and controversies as they are presented").

Simply put, rehearing en banc is not at all warranted here. But Judge Thacker's view of our en banc procedures is "spot on" and absolutely correct.

THACKER, Circuit Judge, with whom Judge KING joins, concurring in the denial of rehearing en banc:

I vote to deny rehearing en banc in this case. In that regard, I agree with my good colleague Judge Wilkinson that denial is the appropriate vote here. We part ways, however, when it comes to the basis for that vote. Unlike Judge Wilkinson, I am in complete agreement with the panel opinion.

Additionally, I write separately to reject what I view as a fallacy offered by Judge Wilkinson's concurring opinion. What I take from the overriding tone and tenor of his opinion is that the mere act of holding an en banc proceeding is somehow untoward and that we run the risk of doing so too frequently. Neither is accurate. Therefore, in the interest of institutional integrity, I am compelled to push back.

Holding an en banc hearing is not some rogue act. It is provided for by the rules. En banc proceedings have been authorized since the Judicial Code of 1948 and have been a part of the Federal Rules of Appellate Procedure since 1968. Rule 40(b)(2) of the Federal Rules of Appellate Procedure provides the mechanism for an en banc proceeding. Such proceedings may be held if a majority of the members of the court who are in regular active service conclude that doing so is necessary to maintain uniformity across cases and/or that the question at issue is one of exceptional importance. Fed. R. App. P. 40(b)(2) and (c). But, in Judge Wilkinson's view, "it would often seem more suitably the province of the Supreme Court to decide which questions are sufficiently exceptional to require

additional review…." J. Wilkinson, Concurring Op. at 5. This approach puts the cart before the horse and is neither logical nor practical.

First of all, that is not the rule. To be sure, the Supreme Court has the last word on legal jurisprudence in our judicial system and resolves conflicts among the courts on significant issues. But that does not mean that the United States Circuit Courts play no role at all. The Supreme Court is not the arbiter of what is of sufficient exceptional importance in order for an appellate court to empanel an en banc court in the first instance. By rule, that is up to the appellate courts themselves; it is not the province of the Supreme Court. Additionally, it defies practical reality to suggest that we simply punt important cases to the Supreme Court. For the last fiscal year, our court disposed of 3,448 cases. *Monthly Statistical Report*, United States Court of Appeals for the Fourth Circuit, https://www.ca4.uscourts.gov/docs/pdfs/publicstats.pdf?sfvrsn=5524a238_324 [https://perma.cc/VX52-2JJE] (last accessed Nov. 13, 2025). And we are but a single court amongst all of the federal courts that funnel cases to the Supreme Court.

I expect the counter-argument would be that judicial efficiency favors the view that only the very most significant cases would be reserved for the Supreme Court to resolve rather than spend time on en banc review by the appellate courts. But that reads the "questions of exceptional significance" criteria out of Rule 40. And let's play that theory out. Suppose a majority of our court is of the view that a panel opinion is incorrect relative to an exceptional

issue. Judge Wilkinson would have the majority of the court take a pass on en banc review in favor of the Supreme Court deciding the issue—which may never actually come to pass. The viewpoint of the dissenting voices on the court would then prevail and an opinion that a *majority* of the court views as legally wrong would remain the law for the entire Circuit. That cannot be right.

Beyond that, in the case at hand, my colleagues' approach would leave plaintiff, the National Association of Immigration Judges, with no opportunity for meaningful review of its claim that the constitutional rights of its members are being violated. Claims for violation of rights arising under the United States Constitution are typically brought in federal court. 28 U.S.C. § 1331. This is true except when Congress makes clear its intent to strip such jurisdiction from the federal courts through legislation. *See Webster v. Doe*, 486 U.S. 592, 603 (1988). The Supreme Court in *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), set forth the test to determine whether Congress so intended. *Thunder Basin* directs us to look to "the statute's language, structure, and purpose, its legislative history, and whether the claims can be afforded meaningful review." *Id.* at 207. The panel opinion does just that, and it remands to the district court to assess whether the CSRA's adjudicatory scheme is functioning as Congress intended. 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 Merit Systems Protection Board or the Office of Special Counsel and choose to act.

Judge Wilkinson may not like the Rule. And I acknowledge that en banc proceedings are "not favored." Fed. R. App. P. 40(c). But it is not an act of anarchy when we as a court work within the rules to correct what a majority of us believe to be an error. Nor is doing so an "enormous distraction" from our workload. J. Wilkinson, Concurring Op. at 2 (quoting *Bartlett ex rel. Neumann v. Bowen*, 824 F.2d 1240, 1243 (D.C. Circ. 1987)). To the contrary, in my view, it *is* our job.

The undergirding of Judge Wilkinson's point of view appears to be his professed concern that the exceptional may become the rule. And he opines that he "cannot hurry to make [himself] party to such a trend or practice." J. Wilkinson, Concurring Op. at 6. But he need not worry. There is no such "trend or practice." Indeed, the reverse is true.

As a court, we dispose of an average of 3,500 cases per year. *Monthly Statistical Report*, United States Court of Appeals for the Fourth Circuit, https://www.ca4.uscourts.gov/docs/pdfs/publicstats.pdf?sfvrsn=5524a238_324 [https://perma.cc/VX52-2JJE] (last accessed Nov. 13, 2025) (indicating the court disposed of 3,660 cases in the 2023–2024 fiscal year and 3,448 cases in the 2024–2025 fiscal year). In comparison, for the 2024 calendar year[1] we held

[1] The Fourth Circuit Court of Appeals website maintains these statistics by calendar year versus by court term. *En Banc Cases*, United States Court of Appeals for the Fourth Circuit, https://www.ca4.uscourts.gov/opinions/en-banc-cases [https://perma.cc/CEB7-NLTR] (last visited Nov. 13, 2025).

three en banc hearings[2] and for the 2025 calendar year thus far we have held two en banc hearings. Further, if these hearings are viewed through the lens of a court term[3] as opposed to a calendar year, the numbers are even more lean. Viewed that way, we held one en banc hearing for the 2024–2025 court term[4] and one en banc hearing thus far for the 2025–2026 court term.[5] Indeed, over the course of the most recent five years, we have averaged only 3.4 en banc proceedings per calendar year.[6] But in diametric opposition to the trend Judge Wilkinson portends—this relatively low average of en banc proceedings was not always the norm on this court.

---

[2] Of note, these three cases all shared the common theme of the issue of constitutionality of firearms regulation. *See United States v. Price*, 111 F.4th 392 (2024) (argued March 20, 2024) (authored by J. Wynn); *Bianchi v. Brown,* 111 F.4th 438 (2024) (argued March 20, 2024) (authored by J. Wilkinson); *Maryland Shall Issue, Inc. v. Moore*, 116 F.4th 211 (2024) (argued March 21, 2024) (authored by J. Keenan).

[3] As a court, we generally hear oral arguments from September to May (although we decide cases and write opinions throughout the year). Here, I am considering the 2024–2025 court term to encompass the period of September 1, 2024 to August 31, 2025 and the 2025–2026 court term to include September 1, 2025 to August 31, 2026.

[4] *See United States v. Chatrie*, 136 F.4th 100 (2025) (argued January 30, 2025) (per curiam).

[5] *See American Federation of State, County and Municipal v. Soc. Sec. Admin.*, 25-1411 (argued September 1, 2025).

[6] The number of en banc proceedings we have held for each of the past five years is as follows: 2025 – two; 2024 – three; 2023 – three; 2022 – three; 2021 – six. *See En Banc Cases*, United States Court of Appeals for the Fourth Circuit, https://www.ca4.uscourts.gov/opinions/en-banc-cases [https://perma.cc/CEB7-NLTR] (last visited Nov. 13, 2025).

My esteemed colleague was on the court when, during the 1995 calendar year,[7] our court held **thirteen** en banc proceedings. **Thirteen**.[8] What is

---

[7] 1995 is the first year for which the Fourth Circuit website maintains statistics for en banc proceedings.

[8] These are those thirteen en banc Fourth Circuit cases: *Smith v. Virginia Commonwealth University*, 84 F.3d 672 (1996) (authored by J. Chapman) (reversal of grant of summary judgment in a Title VII pay disparity case); *United States v. Barber*, 80 F.3d 964 (1996) (authored by J. Niemeyer) (affirming the constitutionality of Section 571 of the National Defense Authorization Act (commonly known as "Don't Ask. Don't Tell")); *Thomasson v. Perry*, 80 F.3d 915 (1996) (authored by J. Wilkinson) (affirming jury verdict convicting Appellants of money laundering cash proceeds from the sale of marijuana); *Stiltner v. Beretta USA Corp.*, 74 F.3d 1473 (1996) (authored by J. Hamilton) (affirming the grant of summary judgment to employer on ERISA and state law claims); *Gilliam v. Foster*, 75 F.3d 881 (1996) (authored by J. Wilkins) (affirming the grant of habeas relief); *Cochren v. Morris*, 73 F.3d 1310 (1996) (authored by J. Wilkinson) (affirming the dismissal of in forma pauperis complaint); *Spicer v. Commonwealth of Virginia*, 66 F.3d 705 (1995) (authored by J. Niemeyer) (Title VII case in which the jury verdict against the plaintiff as to her retaliation claim was affirmed but the district court's ruling in her favor following a bench trial as to her sexual harassment claim was reversed); *United States v. Hines*, 65 F.3d 392 (1995) (per curiam) (conviction confirmed on all counts); *Nasim v. Warden, Maryland House of Corrections*, 64 F.3d 951 (1995) (authored by J. Niemeyer) (affirming the dismissal of in forma pauperis complaint as frivolous); *Berkeley v. Common* (*Council City of Charleston*, 63 F.3d 295 (1995) (authored by J. Luttig) (holding that a municipality is not immune from liability under Section 1983 for the enactments and actions of the local legislative body); *United States v. Langley*, 62 F.3d 602 (1995) (authored by J. Hamilton) (affirming convictions for making a false statement to a federally licensed firearms dealer and possession of a firearm after having been convicted of a felony); *Pinder v. Johnson*, 54 F. 3d 1169 (1995) (authored by J.

more, such proceedings appear to have been held as a matter of course on some relatively run of the mill issues. But it is *now* that my colleague is concerned that en banc proceedings may be overused?

For the sake of completeness, having set out above the number of en banc proceedings for the most recent five year period (a total of 17) as well as the average for that period (3.4 per year), I do the same for the five year period from 1995 to 1999. Over the course of that period, we held a total of 55 en banc proceedings, for an average of eleven per calendar year.[9]

Thus, with all due respect to my good colleague Judge Wilkinson, I am compelled to complete the record on the state of en banc proceedings in our court, lest his viewpoint have an unintended chilling effect. Judge Wilkinson is, of course, entitled to his view. But I am entitled to mine as well.

Wilkinson) (granting qualified immunity to law enforcement officer holding that failure to safeguard was not a clearly established due process right); *Hardester v. Lincoln Nat. Life Ins. Co.*, 52 F.3d 70 (1995) (per curiam) (affirming grant of summary judgment to insureds in dispute over health insurance coverage provided under an ERISA welfare benefit plan).

[9] The number of en banc proceedings we held each year from 1995 to 1999 was: 1995 – thirteen; 1996 – fourteen; 1997 – thirteen; 1998 – seven; 1999 – eight. *See En Banc Cases*, United States Court of Appeals for the Fourth Circuit, https://www.ca4.uscourts.gov/opinions/en-banc-cases [https://perma.cc/CEB7-NLTR] (last visited Nov. 13, 2025).

QUATTLEBAUM, Circuit Judge, with whom Judges AGEE, RICHARDSON, and RUSHING join, dissenting from the denial of rehearing en banc:

As framed by the panel opinion, this appeal turns on a single question—is it "fairly discernible" from the Civil Service Reform Act of 1978 (CSRA) that Congress intended to preclude district courts from hearing claims like those brought in this case? *See Nat'l Ass'n of Immigr. Judges v. Owen*, 139 F.4th 293, 304 (4th Cir. 2025) (*NAIJ II*). For an inferior court, the answer to that question is unquestionably yes. Finding this answer doesn't take any heavy lifting. The Supreme Court has already given us the answer. Not subtly. Not by implication. No, the Supreme Court has told us twice—emphatically and directly—that district courts lack jurisdiction over claims like the ones the National Association of Immigration Judges (NAIJ) asserts here. *See Elgin v. Dep't of Treasury*, 567 U.S. 1, 11–12 (2012) ("Given the painstaking detail with which the CSRA sets out the method for covered employees to obtain review of adverse employment actions, it is fairly discernible that Congress intended to deny such employees an additional avenue of review in district court."); *United States v. Fausto*, 484 U.S. 439, 447 (1988) ("[T]he absence of provision for these employees to obtain judicial review is . . . manifestation of a considered congressional judgment that they should not have statutory entitlement to review for adverse action of the type governed by Chapter 75."). In fact, the answer is so clear that the NAIJ does not even contest the issue. It concedes that *Elgin* resolves the question. *See* Op. Br. at 17.

Even so, the panel decided on its own—without any party raising the issue and without requesting supplemental briefing—that actions of the current administration after oral argument and a recent Supreme Court stay decision have made Congress' intent less clear. To arrive at that conclusion was no small feat—the panel not only had to disregard party presentation principles; it also had to create a new test. Instead of applying the test that the Supreme Court told inferior courts to apply in *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207 (1994), the panel added a new consideration—whether recent political and judicial events have caused the CSRA to cease to function as intended. Having raised that question on its own, the panel attempts to claim that *Fausto* and *Elgin* do not control since those decisions did not answer that specific question. It then vacates the district court's decision and remands with instructions to that court to conduct factfinding on "whether the text, structure, and purpose of the [CSRA] has been so undermined that the jurisdiction stripping scheme no longer controls." *NAIJ II*, 139 F.4th at 300.

By my count, no fewer than three errors underpin the panel's holding. First, it fails to adhere to Supreme Court precedent that is directly on point. Second, it usurps Congress' role by allowing unelected judges to update the intent of unchanged congressional statutes if the court believes recent political events—like those of the current administration it cites—alter the operation of a statute from the way Congress intended. And third, it disregards the principle of party presentation. The result? Now, at least in our circuit, we are free to set

aside Supreme Court precedent, reimagine congressional intent and abandon our role as a neutral arbiter of the positions presented by the parties if we divine that events decades after a statute's passage suggest it is not functioning as originally intended. This cannot be right.

Regrettably, our court denied rehearing this appeal en banc. Because in my view the panel decision conflicts with Supreme Court precedent and involves questions of exceptional importance, I respectfully dissent.

I.

A. The Civil Service Reform Act

I begin with an overview of the relevant statutory scheme. The CSRA "comprehensively overhauled the civil service system." *Lindahl v. Off. of Pers. Mgmt.*, 470 U.S. 768, 773 (1985). One aspect of the CSRA was the creation of a "new framework for evaluating adverse personnel actions against [federal] 'employees' and 'applicants for employment.'" *Id.* at 774. This was intended to centralize and streamline "administrative and judicial review of personnel action." *Fausto*, 484 U.S. at 444.

From this, two agencies emerged—the Office of Personnel Management (OPM) and the Merit Systems Protection Board (MSPB). 5 U.S.C. §§ 1101, 1204. The OPM is the implementing arm, responsible for enacting rules and regulations under the CSRA to protect federal workers. *See* 5 U.S.C.

§§ 1101–05. The MSPB, on the other hand, is the quasi-judicial body charged with protecting and enforcing what the OPM implements. *See* 5 U.S.C. § 1204. It is vested with authority to adjudicate disputes arising under the CSRA. *See id*. As the panel opinion notes, this includes hearing disputes regarding "federal employees' allegations that their government employer discriminated against them, retaliated against them for whistleblowing, violated protections for veterans, or otherwise subjected them to an unlawful adverse employment action or prohibited personnel practice." *NAIJ II*, 139 F.4th at 302 (citation omitted). The MSPB is composed of three members appointed by the President with the advice and consent of the Senate. 5 U.S.C. § 1201. And only two may be from the same political party. *Id*. A member serves a term of seven years and can only be removed for inefficiency, neglect of duty or malfeasance in office. *Id*. § 1202.[1]

---

[1] As noted below, the constitutionality of these for-cause removal provisions and other similar provisions has recently been called into question. *See Trump v.* Cook, No. 25A312, 2025 WL 2784699 (October 1, 2025) (deferring ruling on the government's stay application pending oral argument in January 2026 in a case considering executive for-cause removal authority under the Federal Reserve Act); *Trump v. Slaughter*, No. 25A264, 2025 WL 2692050 (Sept. 22, 2025) (granting stay permitting discharge of members of the Federal Trade Commission and directing parties to brief and argue whether "statutory removal protections . . . violate the separation of powers and, if so, whether *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), should be overruled"); *Trump v. Boyle*, 145 S. Ct. 2653, 2654 (2025) (granting stay permitting discharge of members of the Consumer Product Safety Commission relying on *Trump v. Wilcox*, 145 S. Ct. 1415 (2025)

The CSRA also established the role of Special Counsel. *Id.* § 1211(a). One of the Special Counsel's jobs is to receive and investigate allegations of prohibited personnel practices against the federal government. *See id.* § 1212. If the Special Counsel finds "reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken," it must report such determination together with any findings or recommendations to the MSPB, the agency involved in the employment dispute and the OPM. *Id.* § 1214(b)(2)(B). This report can include recommendations for the MSPB to take corrective action. *Id.* If the agency fails to address the practice, the Special Counsel can petition the MSPB for corrective action. *Id.* § 1214(b)(2)(C).

The Special Counsel is appointed by the President with the advice and consent of the Senate for a five-year term. *Id.* § 1211(b). Similar to MSPB members, the President may remove the Special Counsel "only for inefficiency, neglect of duty, or malfeasance in office." *Id.*

"Three main sections of the CSRA govern personnel action taken against members of the civil service." *Fausto*, 484 U.S. at 445. But only two are

---

because the CPSC exercises executive power in a manner similar to the National Labor Relations Board); *Wilcox*, 145 S. Ct. at 1415 (granting stay permitting removal of members of the National Labor Relations Board and the MSPB because the President "may remove without cause executive officers who exercise that power on his behalf, subject to narrow exceptions . . .").

relevant in this case—Chapter 23 and Chapter 75. *See* 5 U.S.C. §§ 2301 *et seq*., 7501 *et seq*.

Chapter 23 describes the merit system of employment, forbidding an agency from engaging in "'prohibited personnel practices,' including unlawful discrimination, coercion of political activity, nepotism, and reprisal against so-called whistleblowers." *Fausto*, 484 U.S. at 446 (quoting 5 U.S.C. § 2302). Employees alleging violations under this Chapter "are given the right to file charges of 'prohibited personnel practices' with the Office of Special Counsel of the MSPB . . . ." *Id*. (citation omitted). As outlined above, the Special Counsel then investigates, notifies the agency, the MSPB and the OPM, and takes such action as authorized under the statute. *See* 5 U.S.C. § 1214(b)(2). "Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the [MSPB] may obtain judicial review of the order or decision" in the United States Court of Appeals of the Federal Circuit. *Id*. §§ 7703(a)–(b).

Chapter 75 covers adverse actions against employees for "efficiency of the service." *Fausto*, 484 U.S. at 446. It has two subchapters that delineate between minor and major adverse actions. *Id*. at 446–47. Under the second subchapter, an employee against whom a major adverse action is proposed must be afforded: (1) 30 days' written notice of the action with the agency's reasoning (absent limited circumstances), (2) a reasonable time to respond, (3) the right to have an attorney represent him and (4) a written agency decision with reasoning at the earliest practicable date. 5 U.S.C. § 7513(b). From

there, an employee is "entitled to appeal to the [MSPB] . . . " and then the United States Court of Appeals for the Federal Circuit. *Id*. §§ 7513(d), 7703(a)–(b).

So, the takeaway here is that under the CSRA, an aggrieved employee must proceed through the administrative procedures in Chapter 23 or Chapter 75—chiefly through the MSPB and the United States Court of Appeals for the Federal Circuit. The only listed exception is § 7703(b)(2), which applies to district court review of adverse MSPB decisions concerning discrimination under the Civil Rights Act, the Age Discrimination in Employment Act and the Fair Labor Standards Act.

B. The Challenged Speech Policy, the NAIJ and this Lawsuit

With that background in mind, I turn to the facts and history of this case. The Executive Office of Immigration Review (EOIR) is a separate agency within the Department of Justice tasked with adjudicating immigration cases under authority delegated from the Attorney General. To carry out its purposes, the EOIR employs hundreds of immigration judges. In October of 2021, the EOIR established a personnel policy requiring those immigration judges to obtain prior approval before any official speech.[2] Where the judge is "invited to

[2] There are previous iterations of the policy. *See Nat'l Ass'n of Immigr. Judges v. Neal,* 693 F. Supp. 3d 549, 557–58 (E.D. Va. 2003) (*NAIJ I*). For the sake of brevity, I do not discuss them here.

participate in an event because of their official position, is expected to discuss agency policies, programs, or a subject matter that directly relates to their official duties, or otherwise appear on behalf of the agency, . . . [it] will be considered in an official capacity." J.A. 57. In determining whether a speech is "official," supervisors are to consider a host of relevant factors such as the nature and purpose of the engagement, the host and sponsors and the appropriateness of the forum for the speech. *See* J.A. 57. To the extent a speech is official, the supervisor, with input from the speaking engagement team, ultimately "make[s] the final decision concerning approval or denial of the request and inform[s] the employee of the supervisor's decision," J.A. 59.

The NAIJ is a non-profit voluntary association of immigration judges, which includes members who are required to comply with EOIR's speech policy. Although it did not allege a discrimination action, which would have been excepted from the CSRA's administrative procedures, the NAIJ still sued the Director of the EOIR in the United States District Court for the Eastern District of Virginia on behalf of its members contending that the speech policy violates the First Amendment by "impos[ing] an unconstitutional prior restraint on the speech of federal immigration judges." J.A. 13. The NAIJ asserted "[t]he policy bans judges from sharing their private views on immigration law or policy issues, or about the agency that employs them. Judges who violate the policy face a range of disciplinary sanctions, including reprimand, suspension, and even removal from the federal service." J.A. 13. And the NAIJ alleged the speech policy is "void for

vagueness under the First and Fifth Amendments because it invites arbitrary and discriminatory enforcement, and . . . fails to give immigration judges fair notice of what standards will be applied in reviewing their requests for preapproval." J.A. 36.

After determining that the NAIJ had standing, the district court analyzed the CSRA under the two-part test established in *Thunder Basin* to determine whether "Congress intended to divest district courts of jurisdiction." *Nat'l Ass'n of Immigr. Judges v. Neal*, 693 F. Supp. 3d 549, 569 (E.D. Va. 2003) (*NAIJ I*). At step one, it considered whether it was "fairly [discernible] from the CSRA's scheme that Congress intended to preclude district-court jurisdiction over certain covered actions brought by covered federal employees." *Id.* (citing *Elgin*, 567 U.S. at 11–12). The clear answer—yes. *See id.*

Next, the district court turned to step two to evaluate whether NAIJ's claim is "of the type Congress intended to be reviewed within this statutory structure." *Id.* (quoting *Bennett v. U.S. Sec. & Exch. Comm'n*, 844 F.3d 174, 181 (4th Cir. 2016) (internal quotation mark omitted)). After examining the possibility of meaningful judicial review, whether NAIJ's claims were "wholly collateral" to the statute's review provisions and whether agency expertise would bear on the case, the district court determined that "Congress intended the CSRA scheme to preclude district court jurisdiction over plaintiff's challenge to the 2021 policy." *Id.* at 581. NAIJ timely appealed, and we have jurisdiction under 28 U.S.C. § 1291 and 28 U.S.C. § 1331.

On appeal, the NAIJ took no issue with the district court's analysis of step one of *Thunder Basin*. In fact, it conceded that Supreme Court precedent foreclosed this issue. Op. Br. at 16–17 ("Under the first step, courts must ask whether Congress's intent to preclude district court jurisdiction is fairly discernible in the statutory scheme. The Supreme Court has already held that such intent is manifest in the CSRA . . . ." (cleaned up)). Rather, it only argued that the district court erred at step two. *Id*. at 17 ("[O]nly the second step of the *Thunder Basin* inquiry is at issue here.").

Despite that concession, the panel decided on its own that the district court should look again at step one to consider the "[s]erious questions [that] have recently arisen regarding the functioning of both the MSPB and the Special Counsel." *NAIJ II*, 139 F.4th at 313. In other words, the panel decided that, if the district court determines that actions by the current administration and a recent stay order from the Supreme Court prevent the CSRA from functioning as Congress originally intended, the district court can reconsider Congress' intent and disregard *Fausto* and *Elgin*.

We cannot do that. We must follow Supreme Court precedent. *See State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (noting that even where a Supreme Court precedent contains many "infirmities" and rests on "wobbly, moth-eaten foundations," it remains the Supreme Court's "prerogative alone to overrule one of its precedents" (quoting *Khan v. State Oil Co.*, 93 F.3d 1358, 1363 (7th Cir. 1996))). Nor should courts reconsider the intent of a statute

that has not changed because they perceive that statute is not functioning as intended. Finally, a dramatic ruling like the panel opinion would be dubious under any circumstances, but to issue such an opinion without any party raising those issues and without ordering any supplemental briefing magnifies the mistake.

II.

A. Supreme Court Precedent

Supreme Court precedent should have made easy work of this case. District courts have jurisdiction "of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. Congress, however, may "impliedly preclude jurisdiction by creating a statutory scheme of administrative adjudication and delayed judicial review in a particular court." *Bennett*, 844 F.3d at 178 (citing *Thunder Basin*, 510 U.S. at 207). So, the question is then how to determine when a district court is divested of jurisdiction by a statutory scheme.

Thunder Basin tells us. It established a two-part test for determining when a district court is divested of jurisdiction. At step one, a court must ask whether Congress' intent to preclude district court jurisdiction over claims within the statute's scope was "fairly discernible in the statutory scheme." *Thunder Basin*, 510 U.S. at 207 (quoting *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 351 (1994)). This requires looking at the "statute's language, structure, and purpose, [and] its legislative

history . . . ." *Id.* (citing *Block*, 467 U.S. at 345).[3] At step two, the court looks to whether the claim "can

[3] As a matter of first principles, I have some concerns about *Thunder Basin*. Examining a statute's text seems like a better way to determine whether Congress has precluded federal courts from hearing certain claims than using judge-made multi-factor tests. *See Axon Enter., Inc., v. Fed. Trade Comm'n*, 598 U.S. 175, 209 (2023) (Gorsuch, J., concurring) (noting that there is a "better way" than *Thunder Basin* to determine whether a district court is deprived of jurisdiction, and it "begins with the language of the relevant statutes, and when the statutory language provides a clear answer, it ends there as well" (quoting *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) (cleaned up))). But as an inferior court, *Thunder Basin* binds us. That includes its reference to legislative history as a consideration. *But see* ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 376 (2012) (stating that using "legislative history to find 'purpose' in a statute is a legal fiction that provides great potential for manipulation and distortion"). In *Fausto*, the Court did not expressly incorporate legislative history as a separate factor in its step one preclusion analysis. 484 U.S. at 444 ("The answer is to be found by examining the purpose of the CSRA, the entirety of its text, and the structure of review that it establishes." (citations omitted)). It did, however, cite briefly to legislative history as part of its purpose analysis. *Id.* ("A leading purpose of the CSRA was to replace the haphazard arrangements for administrative and judicial review of personnel action, part of the 'outdated patchwork of statutes and rules built up over almost a century' that was the civil service system." (quoting S. Rep. No. 95-969, p. 3 (1978), U.S. Code Cong. & Admin. News 1978, p. 2723)). Likewise, in *Elgin*, the Court makes no mention of legislative history as a separate factor to assess. 567 U.S. at 10 ("To determine whether it is 'fairly discernible' that Congress precluded district court jurisdiction over petitioners' claims, we examine the CSRA's text, structure, and purpose." (citations omitted)). Regardless of the weight afforded legislative history, the Supreme Court has already decided that

be afforded meaningful review" and is the "type Congress intended to be reviewed within this statutory structure." *Id*. at 207, 212. This examines whether the claim at issue is "wholly collateral to a statute's review provisions and outside the agency's expertise, particularly where a finding of preclusion could foreclose all meaningful judicial review." *Id*. at 212–13 (cleaned up).[4] But remember, no party here took issue with the district court's analysis as to step one of the CSRA. *See* Section II.B.3. And that was for good reason—because the Supreme Court has already decided the issue.

First, in *Fausto*, the Supreme Court determined the CSRA was designed to foreclose the United States Claims Court from exercising jurisdiction over employment disputes involving certain federal employees—nonpreference employees of the excepted service. 484 U.S. at 455.[5] Fausto was an

---

it supports the broad preclusive sweep of the CSRA to deprive federal district courts of jurisdiction.

[4] Because I take no issue with the panel opinion's description of *Thunder Basin* at step two, I do not discuss it here.

[5] And while *Fausto* predates the Court's establishment of the *Thunder Basi*n test, the Court's analysis as to the CSRA in *Fausto* relied on *Thunder Basin*'s same principles. *See Lindahl*, 470 U.S. at 779 ("[T]he question whether a statute precludes judicial review 'is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." (quoting *Block*, 467 U.S. at 345)); *Block*, 467 U.S. at 345 ("Whether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of

employee of the Department of the Interior Fish and Wildlife Service who was suspended from his job due to unauthorized use of a government vehicle. *Id*. at 440–41. He later sought backpay in the United States Claims Court. *Id*. at 440–41. The Court noted the conduct underlying Fausto's claim was covered by Chapter 75 of the CSRA because it constituted an adverse action for "efficiency of the service." *Id*. at 446–47. The real question was whether or not Fausto's classification as a nonpreference member of the excepted service rendered him eligible for judicial review, rather than review under the CSRA, because Chapter 75 only addressed "preference eligibles in the excepted service." *See id*. at 446–47. Fausto argued that silence as to nonpreference members meant the statute's scheme foreclosing judicial review did not apply to him—and he was free to proceed in whatever judicial forum he chose. *Id*. at 449–50. The Supreme Court rejected this attempt to narrowly construe the CSRA. *See id*. at 449–51. It emphasized that the "CSRA established a comprehensive system for reviewing personnel action taken against federal employees." *Id*. at 445. And it found the CSRA intentionally excluded employees in Fausto's "service category from the provisions establishing administrative and judicial review," thereby preventing Fausto from seeking review in the Claims Court. *Id*.

Next, in *Elgin*, the Supreme Court considered whether the CSRA's scheme precluding judicial review applied to constitutional claims in district

---

the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved.").

court. 567 U.S. at 8. There, petitioners were former federal competitive service employees who were required under the CSRA to comply with the Military Selective Service Act but failed to do so. *Id.* at 6–7. As a result, they were "discharged (or allegedly constructively discharged)" from their positions. *Id.* at 7. All petitioners, except one, sued in federal district court raising constitutional challenges to the CSRA. *See id.* The Supreme Court considered whether the district court was the proper forum for their claims. *See id.* at 8. The answer: A resounding no. *See id.*

Following *Thunder Basin*, the Court began with the CSRA's text and structure. "Nothing in the CSRA's text suggests that its exclusive review scheme is inapplicable simply because a covered employee challenges a covered action on the ground that the statute authorizing that action is unconstitutional." *Elgin*, 567 U.S. at 13. The Court highlighted that the CSRA contained only one exception where claims were permissible in district court—when a covered employee "alleges that a basis for the action was discrimination in contravention of federal employment laws." *Id.* (quoting 5 U.S.C. § 7702(a)(1)(B)). But even that is limited to after the employee obtains an unfavorable MSPB decision. *See id.* The Court explained that such an exception reveals that "Congress knew how to provide alternative forums for judicial review based on the nature of an employee's claim." *Id.* "That Congress declined to include an exemption from Federal Circuit review for challenges to a statute's constitutionality indicates that Congress intended no such exception." *Id.* Thus, the Court

rejected the petitioner's request to create an exception to "CSRA exclusivity for facial or as-applied constitutional challenges to federal statutes." *Id*. at 12–13.

Next, the Court considered the purpose of the CSRA.

> [T]he CSRA's integrated scheme of administrative and judicial review for aggrieved federal employees was designed to replace an outdated patchwork of statutes and rules that afforded employees the right to challenge employing agency actions in district courts across the country. Such widespread judicial review, which included appeals in all of the Federal Courts of Appeals produced wide variations in the kinds of decisions issued on the same or similar matters and a double layer of judicial review that was wasteful and irrational.

Id. at 13–14 (cleaned up). According to the Supreme Court, the very purpose of the CSRA was to create a streamlined and more consistent system of review precisely by depriving district courts of jurisdiction. *See id*. at 14.

Fausto and *Elgin* work in tandem to clarify the CSRA's sweeping preclusive effect. "Just as the CSRA's elaborate framework demonstrates Congress' intent to entirely foreclose judicial review to employees to whom the CSRA *denies* statutory

review, it similarly indicates that extrastatutory review is not available to those employees to whom the CSRA *grants* administrative and judicial review." *Id.* at 11 (cleaned up). As the Seventh Circuit has properly explained, district courts are "not, in the first instance, the appropriate forum to expound on the meaning of the CSRA's various provisions. That task was delegated to the MSPB, with later review by the Federal Circuit." *Ayrault v. Pena*, 60 F.3d 346, 350 (7th Cir. 1995) (citation omitted).

As a result, step one of *Thunder Basin* is settled as to the CSRA—the Supreme Court has determined Congress' intent for the CSRA to preclude district court review is "fairly discernible." *Elgin*, 567 U.S. at 12. Thus, we need not, and indeed we cannot, go any further. *See Payne v. Taslimi*, 998 F.3d 648, 655 n.4 (4th Cir. 2021) ("[O]ur mandate as an inferior court [is] to follow the Supreme Court's commands (vertical stare decisis).").

B. The Panel's Reasoning

Despite this on-point Supreme Court precedent, the panel doesn't stop; it marches on. The panel refers to the current administration's removal of the Special Counsel and two members of the MSPB—which resulted in the MSPB lacking a quorum—and the administration's position in lawsuits challenging those removals because "removal protections enshrined in the CSRA are violations of separation of powers." *NAIJ II*, 139 F.4th at 305, 307 (citations omitted). The panel also points to the recent Supreme Court order in *Trump v. Wilcox*, 145 S. Ct.

1415 (2025), which stayed reinstatement of MSPB board members who were removed by the President. *NAIJ II*, 139 F.4th at 307. According to the panel, these events create tension with the CSRA's limitations on the President's removal power of members of the MSPB and the Special Counsel "only for inefficiency, neglect of duty, or malfeasance in office," 5 U.S.C. §§ 1202(d), 1211(b); the term limits on both MSPB members and the Special Counsel; the requirement that the Senate approve MSPB members; and the MSPB's structural requirements that members be from separate political parties. *NAIJ II*, 139 F.4th at 305–08.

These tensions, the panel finds, cast doubt—doubt that apparently did not exist from 1978, when Congress passed the CSRA, until early 2025, when the current administration took the actions the majority describes and the Supreme Court issued its stay order in *Wilcox*—on whether Congress' intent to preclude district court jurisdiction over claims within the CSRA's scope was "fairly discernible in the statutory scheme." *Thunder Basin*, 510 U.S. at 207 (quoting *Block*, 467 U.S. at 351). To address that concern, the panel opinion changes the *Thunder Basin* test by adding an inquiry into whether recent political events prevent the CSRA from functioning as intended when Congress passed it. *NAIJ II*, 139 F.4th at 305. If the district court finds the answer is no, the panel concludes the district court must then decide whether Congress would have nevertheless intended for the CSRA to still preclude judicial review in district court. *See id*. at 308. Finally, if the district court concludes the answer to that question

is no, NAIJ's case can proceed in district court contrary to *Fausto* and *Elgin*.

To repeat, I see three problems with this decision. First, the Supreme Court has already spoken as to the CSRA's scheme—judicial review in district court is not appropriate. Second, the panel's decision requires the district court to invade the responsibilities the Constitution vests to Congress. Third, the panel takes these extraordinary steps on its own without the issues being raised by any party and without the benefit of any briefing or oral argument.

1. *Fausto* and *Elgin* Bind Us

First, the Supreme Court has already told us in *Fausto* and *Elgin* that, under *Thunder Basin*'s test, the CSRA's statutory scheme deprives district courts of jurisdiction to review federal workers' employment claims. *See* Section II.A. And nowhere in *Thunder Basin* did the Supreme Court inquire into whether a statute was functioning as originally intended. *See* 510 U.S. at 207. The Supreme Court can of course change the test or the answer. But we can't. As an inferior court, we are not free to conjure up new questions to avoid Supreme Court precedent. *See Payne*, 998 F.3d at 654 ("It is beyond our power to disregard a Supreme Court decision, even if we are sure the Supreme Court is soon to overrule it.").

Despite this command, the panel opinion suggests that *Fausto* and *Elgin* may not control because they did not address whether recent political events have caused the statutory scheme to

cease to operate as originally intended. Technically, that is true—those cases are from decades ago. But the only basis the panel gives for revisiting those cases here is to consider the functioning-as-intended component of the *Thunder Basin* test that the panel creates in its opinion. That's not a good reason. In the absence of the Supreme Court speaking, whether *Thunder Basin* should include a function component is not our decision to make.

2. Reimagining and Updating the Intent of Unchanged Statutes Invades Congress' Role

Second, the panel's inquiry into whether a statute is functioning as intended creates enormous separation of powers concerns. Congress passed the CSRA. If the statute is not functioning as Congress thinks it should be in light of the administration's actions or judicial decisions, Congress can amend it. *See Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 313 (1994) ("Congress, of course, has the power to amend a statute that it believes we have misconstrued."). That has happened repeatedly through the years. *See, e.g.*, *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 126 (2000) (holding that "Congress has clearly precluded the FDA from asserting jurisdiction to regulate tobacco products," after which Congress enacted the Family Smoking Prevention and Tobacco Control Act, 15 U.S.C. § 1331 *et seq*., to give the FDA authority to regulate the sale, distribution, advertising, promotion and use of tobacco products). But unelected judges in 2025 cannot cast aside the CSRA's preclusive review scheme because they believe that the 95th Congress in 1978 would not

have intended the CSRA to be exclusive if it had known a later administration might claim a constitutional right to terminate members of the MSPB and the Special Counsel and act on that claim. *See Bostock v. Clayton Cnty.*, 590 U.S. 644, 654–55 (2020) ("This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment. After all, only the words on the page constitute the law adopted by Congress and approved by the President. If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending statutes outside the legislative process reserved for the people's representatives.").

Besides, how are judges supposed to do this? There are countless reasons members of Congress may have voted to adopt the CSRA. I don't see how judges today can discern a new congressional intent for a statute enacted 47 years ago based on recent political events. Congress expresses its intent in the words of the statutes it passes and in the amendments to those statutes. As courts, we should stick to applying and interpreting those words, not trying to divine what Congress would or would not have done differently had it known about the political environment today.

What's more, consider the instability we are sowing. If the current administration's actions allow us to reinterpret Congress' intent about the CSRA's statutory scheme, future political events will too. The nature of the CSRA's exclusive review scheme will be in a constant state of flux on whether district

courts have jurisdiction, rendering the scheme captive to judges' views on political whims of the most recent administration.

Similarly, the panel's reliance on *Wilcox* is also misplaced. First, it's a stay order—not a final ruling on the constitutionality of the CSRA's removal provisions. Second, even if the Supreme Court were to decide that those removal provisions are unconstitutional, I don't see how that could reveal a new congressional intent about the exclusivity of the CSRA's review procedures. Such a ruling might present severability issues. But without a final ruling striking the removal provisions, this is neither the time nor place for such an analysis. Nor is it appropriate to jump the gun on those settled principles by creating and applying a new functioning-as-intended test.

In sum, had the Congress that passed the CSRA known of the recent events the panel identifies, who knows whether that Congress would or would not have still deprived district courts of jurisdiction to hear employment disputes of federal employees? I certainly don't. But even if inferior courts didn't have the answer to that question from *Fausto* and *Elgin*—and we do—I don't see how our court or the district court is equipped to answer that question based on present events and circumstances. Whatever one thinks of *Thunder Basin*, it doesn't permit the panel's approach.

3. Party Presentation

Last but not least, party presentation. "In our adversarial system of adjudication, we follow the principle of party presentation." *United States v. Sineneng-Smith*, 590 U.S. 371, 375 (2020). Courts rely on the parties to "frame the issues for decision," thereby assigning to courts the "role of neutral arbiter of matters the parties present." *Id*. (quoting *Greenlaw v. United States*, 554 U.S. 237, 243 (2008)) (internal quotation mark omitted). While the principle is "supple, not ironclad," the Supreme Court has instructed us that deviation from the general principle is limited to "circumstances in which a modest initiating role for a court is appropriate." *Id*. at 376.

So just what did the parties say on step one of *Thunder Basin*? The NAIJ conceded in its brief that:

> Under the first step [of *Thunder Basin*], courts must ask "whether Congress's intent to preclude district court jurisdiction is 'fairly discernible in the statutory scheme.'" *Bennett v. SEC*, 844 F.3d 174, 181 (4th Cir. 2016) (quoting *Thunder Basin*, 510 U.S. at 207). The Supreme Court has already held that such intent is manifest in the CSRA, *see Elgin*, 657 U.S. at 12, and so only the second step of the *Thunder Basin* inquiry is at issue here.

Op. Br. at 16–17. And the Director of the EOIR agreed, saying:

> [T]his Court and the Supreme Court have repeatedly observed that the CSRA provides the exclusive means by which covered federal employees may bring claims arising out of their employment. *Elgin*, 569 U.S. at 13; *see also Bennett v. U.S. Sec. & Exch. Comm'n*, 844 F.3d 174, 180–81 (4th Cir. 2016) (discussing *Elgin*); *Hall v. Clinton*, 235 F.3d 202, 203 (4th Cir. 2000).

Resp. Br. at 17–18. The result was that the parties confined their argument to step two of *Thunder Basin*. Without question, the panel raises an issue that the parties not only failed to raise, they conceded it was foreclosed by Supreme Court precedent.

Beyond that, the panel opinion's discussion of step one of *Thunder Basin* interjects factual events that all occurred after oral argument. So, the panel doesn't just make arguments that the parties did not make; it makes arguments the parties could never have made. And it did so without asking for supplemental briefing or oral argument on these far-reaching issues.

True, the panel opinion claims sending this back to the district court for findings in the first instance justifies its departure from party presentation principles. But the only thing it sends back is the factual findings informing the new functioning-as-intended test it adopts. The opinion decides that if the inquiry under this new test comes out a certain

way, Supreme Court precedent doesn't apply. We should not be confused about the scope of what the panel opinion did and did not do.

III.

To conclude, the panel claims that it "cannot allow [its] black robes to insulate [it] from taking notice of items in the public record." *NAIJ II*, 139 F.4th at 313. That may sound well-intentioned. But I fear that in "tak[ing] judicial notice of matters of public record," the opinion unnecessarily and improperly inserts our court into the political controversies of the day. *Id.* at 305. And worse than that, in doing so, it undermines important principles of our system of justice. First, the panel opinion trods upon the black robes of our Nation's highest court, whose precedent demands concluding that Congress' intent to deprive district courts of jurisdiction under the CSRA is "fairly discernible" in the statute. *See Elgin*, 567 U.S. at 11–12; *Fausto*, 484 U.S. at 447. Second, the panel opinion uses its robes to invade the role of the legislative branch, permitting judges to reimagine the congressional intent behind an unchanged statutory scheme because we believe the statute is not functioning as the 95th Congress intended. And third, the panel opinion shirks party presentation principles—taking off its black robes to argue a case different from the one the NAIJ advanced. But our job, and only our job, is to follow the law wherever it leads. Here, it leads to affirming the district court. Because the panel fails to do so, and because of the far-reaching implications of its reasoning, I respectfully dissent from the denial of rehearing en banc.

District court opinion (Sept. 21, 2023)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

No. 1:20-cv-731 (LMB/JFA)

NATIONAL ASSOCIATION OF IMMIGRATION JUDGES, affiliated with the International Federation of Professional and Technical Engineers,

Plaintiff,

v.

DAVID L. NEAL, in his official capacity as Director of the Executive Office for Immigration Review,

Defendant.

Filed: September 21, 2023

MEMORANDUM OPINION

Plaintiff, the National Association of Immigration Judges ("plaintiff" or "NAIJ"), a voluntary association of immigration judges, [Dkt. No. 65] at ¶ 7,[1] challenges the 2021 "Speaking Engagements" policy ("2021 policy") of the Executive Office for Immigration Review ("EOIR") on the

[1] Until April 15, 2022, NAIJ was a labor union representing immigration judges.

grounds that it constitutes a prior restraint on the speech of immigration judges in violation of the First Amendment and that it is void for vagueness under the First and Fifth Amendments because it effectively prohibits immigration judges from speaking in their personal capacities about immigration law or policy and EOIR. [Dkt. No. 65] at ¶¶ 1, 63–64; [Dkt. No. 65-3]. Defendant, David L. Neal ("defendant" or "EOIR") has filed a Motion to Dismiss plaintiff's Second Amended Complaint for Declaratory and Injunctive Relief ("SAC"), arguing that plaintiff lacks Article III standing, that its claims are jurisdictionally barred by the Civil Service Reform Act of 1978 ("CSRA"),[2] and that it has failed to state a claim upon which relief can be granted. For the reasons that follow, the Court finds that, although plaintiff has sufficiently alleged Article III standing, the CSRA strips the Court of jurisdiction over plaintiff's claims. As such, the Court will not reach the merits of the parties' other arguments, and will grant defendant's Motion to Dismiss.

I. BACKGROUND

A. Factual Background

1. History of EOIR's Speaking Engagement Policies

Before 2017, immigration judges' speaking engagements and publications were subject to

[2] Pub. L. No. 95–454, 92 Stat. 1111 (codified as amended throughout 5 U.S.C.).

supervisory approval, but approval was "routinely" granted, and judges were frequently able to speak in their personal capacities about immigration and EOIR at conferences, schools, and in law review articles. [Dkt. No. 65] at ¶ 17–18. Judges were permitted to use their official titles to identify themselves to their audience, as long as they also included a disclaimer that the views represented were their own. Id. at ¶ 18. To receive approval to speak or write publicly, a judge would submit a request to a supervising Assistant Chief Immigration Judge ("supervisor"). If a request were approved by the supervisor, it would be forwarded to a department official to provide ethical guidance. Id. The Ethics and Professionalism Guide for Immigration Judges ("Ethics Guide"), enacted in 2011 and signed by both the EOIR and NAIJ, when it served as a union for immigration judges, approved this process and memorialized the Ethics Guide. [Dkt. No. 65] at ¶ 18; Ethics Guide, 8–9, 17.[3]

Beginning in 2017, EOIR's approach to how immigration judges could speak about immigration

[3] Ethics and Professionalism Guide for Immigration Judges, Executive Office for Immigration Review, (Jan. 26, 2011), https://www.justice.gov/sites/default/files/eoir/legacy/2013/05/23/EthicsandProfessionalismGuideforIJs.pdf [https://perma.cc/M6LA-JUFZ]. The Ethics Guide is incorporated in the SAC, defendant has linked to it in the Motion to Dismiss, and plaintiff does not contest its authenticity. As such, the Court can properly consider it. In re KBR, Inc., Burn Pit Litig., 744 F.3d 326, 333 (4th Cir. 2014) (stating standard for 12(b)(1) motion); Lokhova v. Halper, 441 F. Supp. 3d 238, 252 (E.D. Va. 2020) (quoting Sec'y of State for Defence v. Trimble Navigation Ltd., 484 F.3d 700, 705 (4th Cir. 2007)) (stating standard for 12(b)(6) motion).

or EOIR in their private capacities began to change. On September 1, 2017, EOIR promulgated a memorandum titled "Speaking Engagement Policy for EOIR Employees" ("2017 policy"), which required judges who were invited to speak at an event[4] "about immigration-related topics" to receive not only supervisory approval for the engagement, but also to seek review of the request by the Office of General Counsel ("OGC") and the Office of Communications and Legislative Affairs ("OCLA") through the "headquarters speaking engagement team." ("SET"). [Dkt. No. 65-1] at 3, 6. The 2017 policy did not outline criteria for approval of these speaking engagement requests and lacked a timeline for decisions, although it encouraged requests to be submitted to the SET within seven days of the event at which the judge wanted to speak. Id. at 3. The 2017 policy stated that the goal of the SET review was to "allow[] OCLA to ensure that EOIR's messaging is consistent across official engagements." Id. In 2018, NAIJ engaged in collective bargaining over the 2017 policy, resulting in the 2018 Memorandum of Understanding between EOIR and the NAIJ. [Dkt. No. 65] at ¶ 24. This Memorandum imposed deadlines on the approval process that supervisors and the SET aimed to meet, and committed EOIR to providing NAIJ with a list of factors that EOIR would consider when approving speaking engagement requests. [Dkt. No. 3].

[4] The 2017 policy only applied to speaking engagements, rather than written publications. [Dkt. No. 65-1].

In January 2020, EOIR issued a new memorandum titled "Submission and Processing of Requests for Speaking Engagements" ("2020 policy"). [Dkt. No. 65] at ¶ 25; [Dkt. No. 65-2]. Although the 2020 policy only purported to reissue the 2017 policy and "clarify some points that have occasionally caused confusion," [Dkt. No. 65-2] at 2, plaintiff alleges that the 2020 policy was "significantly more restrictive than its predecessor," [Dkt. No. 65] at ¶ 25. The 2020 policy prohibited immigration judges from speaking or writing[5] about immigration or EOIR in their personal capacities by labeling any speech or writing about "immigration law or policy issues, the employee's official EOIR duties or position, or any agency programs and policies" as "official" speech. [Dkt. No. 65-2] at 3; [Dkt. No. 65] at ¶ 29. The 2020 policy also required SET review of requests to speak in a personal capacity about any topic so that EOIR could "determine whether [the requests] involve genuinely personal capacity events, whether there are any ethics concerns with the engagement, and whether the engagement will disrupt EOIR operations by requiring the employees to miss work." [Dkt. No. 65-2] at 3.

The 2020 policy specifically outlined the multiple layers of review for all requests by immigration judges and other EOIR employees to participate in a speaking engagement or to publish a piece of

[5] The 2020 policy applied to all "written pieces intended for publication," rather than just speaking engagements. [Dkt. No. 65-2] at 3 n.2; [Dkt. No. 65] at 26.

writing.[6] Id. It required judges to submit a request including any "presentation slides and hand out materials if applicable and complete talking points at a minimum" through EOIR's portal. Id. at 3. In the first step, the judge's supervisor would determine if the request should move forward in the approval process. Id. at 4. If the supervisor did not reject the request, the SET would review the request and make a recommendation to the supervisor. Id. The Office of General Counsel's Ethics Program ("Ethics Program") would also review the request for any ethical concerns, but would not make a recommendation as to whether the supervisor should approve or deny the request. Id. Finally, the supervisor would consider the recommendation provided by the SET and the guidance provided by Ethics, and make a final determination. Id. Plaintiff alleges that, if the engagement involved prepared materials, the supervisor could condition approval on the judge making changes. [Dkt. No. 65] at ¶ 26.

Like the 2017 policy, the 2020 policy did not contain specific criteria for supervisors or the SET to consider when reviewing and approving or denying requests, other than indicating that "[a]ll requests, regardless of capacity, must comply with applicable law and agency policies," and that "all employees,

[6] Plaintiff alleges that this multi-step review process was "instituted" by the 2021 policy; however, the policy itself, attached to the SAC, states that it "does not change the approval process" but, rather, only changes "the mechanism by which approval is sought," i.e., through a new online portal. [Dkt. No. 65-2] at 3.

especially all non-supervisory adjudicators," such as plaintiff's members, "seeking approval of a speaking engagement request in either capacity are reminded of the importance of maintaining impartiality and avoiding the appearance of impropriety, favoritism, or preferential treatment." Id. at 3–4; [Dkt. No. 65] at 27. The 2020 policy also did not include a timeline by which the approval process would be completed, other than specifying that requests should be submitted no later than two weeks before an engagement. [Dkt. No. 65-2] at 3.

2. 2021 Speaking Engagement Policy

The EOIR policy at issue in this litigation became operational in October 2021 ("2021 policy"). [Dkt. No. 65-3] at 2. It effectively continues to prohibit immigration judges from speaking or writing in their personal capacities about immigration or EOIR, although it does not do so as explicitly as the 2020 policy. Under the 2021 policy, EOIR employees speak in their official capacity "[w]hen an employee is invited to participate in an event because of their official position, is expected to discuss agency policies, programs, or a subject matter that directly relates to their official duties, or otherwise appear on behalf of the agency."[7] Id. at 3. "Attachment A" to

[7] Largely consistent with the 2017 and 2020 policies, the 2021 policy also defines official capacity speech as "[w]hen an EOIR employee is assigned to participate as a speaker or panel participant or otherwise present information on behalf of the agency at a conference or other event, or requests to do so," and states that "any EOIR employee speaking at an event hosted by a Federal Department, Office, or Agency, or at an event featuring representatives from other Departments, Offices,

the 2021 policy gives examples of official capacity engagements, including "[i]mmigration conferences or similar events where the subject is immigration (including litigation)," "[m]eetings with [s]takeholders," "[p]ro bono training related to immigration," and the "EOIR Model Hearing Program." Id. at 8. Attachment A's examples of personal capacity engagements confirm that the 2021 policy continues the 2020 policy's prohibition on personal capacity speech about immigration, as it explicitly excludes speaking about immigration from many of the following examples of personal capacity speech: "[m]oot court judge - not immigration related," "[c]ommencement speaker when topic is unrelated to immigration or official duties," "[c]areer day/[a]lumni career panel - to discuss full career path and experience," "[i]nterview based on book written in appropriate personal capacity," "[s]peaking at community, religious, youth, or small social groups (e.g., book club) and meetings, not directly related to immigration law or advocacy." Id. at 8.

Under the 2021 policy, requests to speak or write in an official capacity, which includes any speech about immigration or EOIR, must undergo a multi-step review process, which is largely similar to the approval process outlined in the 2020 policy. Id. at 4–5. It requires supervisors to submit requests for review by the SET and by the Ethics Program, and permits supervisors to make the final decision as to whether a judge must speak or write in his or her

---

Agencies or members of Congress" will be presumed to be speaking in an official capacity." [Dkt. No. 65-3] at 3.

official or personal capacity and whether to approve official capacity requests.[8] Id. The 2021 policy does not list extensive criteria for supervisors to use in determining whether a judge's speech is in the judge's official or personal capacity. Other than the broad definition of official capacity speech and the examples given in Attachment A, the 2021 policy only specifies that a supervisor "must consider the nature and purpose of the engagement, the host(s) and sponsor(s) of the event, and whether the event provides an appropriate forum for the dissemination of the information to be presented" when determining the proper capacity of a judge's speech for an engagement. [Dkt. No. 65-3] at 3. Supervisors may also seek guidance from the SET as to how to classify an engagement. Plaintiff alleges that "supervisors treat [the SET's] input as determinative." [Dkt. No. 65] at 13 n.4.

Like the 2017 and 2020 policies, the 2021 policy does not provide supervisors with criteria to consider when approving or denying a request by a judge to speak or write in his or her official capacity. It merely states that "[s]upervisors are encouraged to grant appropriate requests." [Dkt. No. 65-3] at 3. The 2021 policy continues to lack a timeline for the approval process, but supervisors are encouraged to submit requests relating to a judge's official duties at least ten days before the event at which the judge

[8] The 2021 policy does not require the SET to review requests by judges to teach classes on immigration, although it does recommend that supervisors submit these requests to the SET for guidance. [Dkt. No. 65-3] at 6.

wants to speak or the date by which a writing is due. [Dkt. No. 65-3] at 5.

Under the 2021 policy, judges generally are not required to seek approval for any personal capacity speaking engagements or writing, a change from the 2020 policy which required approval for any personal capacity event. [Dkt. No. 65-3] at 3; [Dkt. No. 65-2] at 3. But plaintiff alleges that the 2021 policy keeps supervisors, the SET, and Ethics involved in reviewing and approving personal capacity requests in one "significant carveout." [Dkt. No. 65] at ¶ 30. If an event takes place during working hours, a leave request must be submitted to the judge's supervisor, and the supervisor may "inquire how the employee intends to use the time before approving the leave request." [Dkt. No. 65-3] at 3. If the supervisor "approves an engagement," the supervisor would then solicit ethics guidance and pass this along to the employee. Id. The SAC alleges that the 2021 policy permits EOIR to exert control over personal capacity speech even when formal approval is not required. For example, even if a judge did not initially seek approval to speak at an event because the judge was appearing in a personal capacity outside of working hours, the 2021 policy specifies that, "if the circumstances surrounding the speaking event change, the requesting employee should convey such changes to the supervisor to consider the advisability of the employee's continued participation." Id. at 4. Additionally, the 2021 policy encourages judges to consult with their supervisors if they believe "that there is a potential that a speaking engagement may result in the perception by the public that the

engagement relates to the employee's official duties or employment with EOIR." Id. at 3. To enforce compliance with all of the described procedures, the 2021 policy states that a judge "who participates in an event that requires official capacity, or improperly presents the appearance of official capacity, without first obtaining supervisory approval may be subject to discipline." Id. at 4.

3. Individual Judges' Experiences with the 2021 Policy

The SAC contains a number of allegations as to how the 2021 policy has stymied the ability of judges to speak about immigration in their personal capacities, claiming that "many judges who wish to share their private views on substantive questions of immigration law or policy no longer do so." [Dkt. No. 65] at ¶ 47. For example, before 2017, NAIJ President Judge Mimi Tsankov frequently participated in her personal capacity on conference panels, speaking about immigration-related issues such as mental competency and juvenile hearings, court practice and procedure, and "crimmigration" issues. Id. She also published articles in her personal capacity on topics related to immigration law. Id. The SAC alleges that, although Judge Tsankov would like to continue to speak in her personal capacity on panels or publish writing about immigration law, she has not sought approval to do so "because she understands the [2021] [p]olicy to prohibit her from speaking about these issues in her private capacity," and because speaking in her official capacity "would require her to recite the agency's talking points." Id. at ¶ 48. Despite her

reluctance to seek approval to speak at events or publish writing about immigration, Judge Tsankov has requested approval to teach a course on immigration law at Fordham Law School in her personal capacity. Id. at ¶ 53. Plaintiff alleges that, although the 2021 policy provides that a judge only needs to receive supervisory approval to teach an immigration law course, "in practice, requests to teach are routed to the SET, and judges who have sought approval often receive no decision." Id. In Judge Tsankov's case, although she submitted her request on November 3, 2022 to teach a course in the Spring 2023 semester, the request remained pending at the time the SAC was filed on January 9, 2023. Id.

NAIJ Vice President Judge Samuel Cole has similarly experienced delays in the approval process, and the SAC alleges that he has been encouraged by EOIR to make changes to his written work about immigration. On September 2, 2022, Judge Cole emailed his supervisor requesting to publish an article about immigration court bond hearings. Id. at 49. Although he wanted to publish the article in his personal capacity, he requested authorization in either his personal or official capacity because he did not believe a personal capacity request would be approved for an article on this topic. Id. Judge Cole's article was determined to be official capacity speech, and, because of this, a member of EOIR's Office of Policy "made several edits to the tone and substance of the piece," which the SAC alleges "demonstrate the control that the agency exercises over immigration-related speech that the agency deems 'official capacity.'" Id. at ¶¶ 50–51. The article "seeks

to give practitioners practical advice on how to approach immigration court bond hearings," and the SAC alleges that certain comments made by a reviewing official indicated her view that "certain observations made in the piece were not appropriate because they were not the official view of the agency." Id. at 51. For example, in response to one observation made by Judge Cole in the article, the reviewing official asked whether it constituted a "'sanctioned' EOIR practice tip," because Judge Cole was writing in his official capacity. Id. In response to another observation, which was described as the "author's opinion," the reviewing official asked again if it was an "EOIR tip," and, if it was, it "should not be expressed as [the] author's opinion." Id. If it was not, an "evaluation must be done as to whether [it was] appropriate in [his] official capacity." Id. Even after making revisions to his article in response to these comments by the SET, Judge Cole's request had not been approved by January 9, 2023. Id.

A judge who wished to remain unnamed similarly experienced a delay in receiving approval to publish an article under the 2021 policy. She intended to publish an article titled "Five Perspectives on Immigration Law and Policy," and, although she would have preferred to publish the article in her personal capacity, she submitted the article for approval without specifying the capacity for which she sought approval "to maximize the chance approval would be granted." Id. at ¶ 52. She submitted this request to her supervisor on September 6, 2022, and the supervisor forwarded this request to the SET the next day. Id. Even though the supervisor followed up with the SET six

separate times, as of January 9, 2023, the request had not been granted. Id.

Delays caused by the approval process have presented issues for two other judges as well. Judge Frank Loprest requested to teach an immigration law course for Spring 2023 at St. John's University School of Law. Id. at ¶ 53. Despite making this request on October 20, 2022, the request had neither been approved nor denied as of January 9, 2023. Id. On October 3, 2022, Judge Michael Straus sought approval to speak about immigration court practice at a November 17, 2022 meeting of the Connecticut chapter of the American Immigration Lawyers Association ("AILA"). Id. at ¶ 54. He requested to speak in his official capacity because "he believed that this is what the [2021 policy] required him to do," even though he would have preferred to speak in his personal capacity. Id. On November 1, 2022, his supervisor asked him to send talking points that the SET could consider when making its decision, advising him that the SET would not approve any speech about "EOIR and court 'initiatives, updates, and policies, because those are topics that only the [Assistant Chief Immigration Judge] and [Court Administrator] can generally speak about to outside groups.'" Id. (alteration in original). He agreed to confine his remarks to just his own docket in the court. Id. Eventually, his request was approved; however, he received the approval on November 17, 2022, the day of the meeting, despite having submitted his request almost two months before. Id. Because the event organizers had not received a timely confirmation that he could participate, they

had already made plans to proceed without his participation. Id.

B. Procedural History

On July 1, 2020, the NAIJ filed its initial complaint [Dkt. No. 1] and a Motion for a Preliminary Injunction, [Dkt. No. 9], seeking to enjoin the enforcement of the 2017 and 2020 policies, both of which were still in effect. On August 6, 2020, Judge Liam O'Grady[9] denied the Motion for a Preliminary Injunction finding that the Court did not have jurisdiction over plaintiff's claims because NAIJ was, at the time, the "exclusive collective bargaining representative for non-managerial immigration judges" and the Federal Service Labor-Management Relations Statute ("FSL-MRS") precluded jurisdiction by the district court over NAIJ's claims.[10] [Dkt. No. 31] at 1, 6, 14–15.

The NAIJ appealed the dismissal to the United States Court of Appeals for the Fourth Circuit, which initially affirmed the dismissal on April 4, 2022; however, on April 15, 2022, the Federal Labor Relations Authority decertified plaintiff as a labor union. Based on that changed circumstance, the

[9] The undersigned judge was randomly reassigned this civil action after Judge O'Grady's retirement.

[10] The FSL-MRS provides administrative review of actions involving "negotiability" and "unfair labor practice" disputes and requires parties to bring their claims in front of the Federal Labor Relations Authority ("FLRA"). [Dkt. No. 31] at 6–7 (citing Am. Fed'n of Gov't Emps., AFL-CIO v. Trump, 929 F.3d 748, 752 (D.C. Cir. 2019)).

Fourth Circuit vacated Judge O'Grady's August 6 order, and remanded this action.[11] [Dkt. No. 43].

On remand, the plaintiff, now appearing as a voluntary organization, filed an Amended Complaint for Declaratory and Injunctive Relief ("Amended Complaint") on August 18, 2022, [Dkt. No. 47]. On October 7, 2022, defendant filed a Motion to Dismiss plaintiff's Amended Complaint, [Dkt. No. 49], which the Court granted on December 2, 2022, because the Amended Complaint had failed to allege that any of NAIJ's members had standing to challenge the 2021 policy, [Dkt. No. 62]. The Court granted plaintiff leave to file a second amended complaint, and, on January 9, 2023, the plaintiff filed the Second Amended Complaint ("SAC"), [Dkt. No. 65], which is at issue in the defendant's Motion to Dismiss, [Dkt. No. 68].

II. DISCUSSION

EOIR moves to dismiss the SAC under Fed. R. Civ. P. 12(b)(1) and 12(b)(6), arguing that (1) the SAC has failed to allege that plaintiff has Article III standing to bring its First and Fifth Amendment claims; (2) the Civil Service Reform Act ("CSRA") strips the Court of jurisdiction to hear plaintiff's claims; and (3) if the Court has jurisdiction, the SAC should be dismissed for failure to state a claim. For

[11] Defendant's memorandum supporting its Motion to Dismiss indicated that NAIJ was seeking recertification as a union. If recertified, this Court's jurisdiction over this action would again be stripped by the FSL-MRS; however, plaintiff stated in its opposition that it withdrew its petition for recertification on February 3, 2023. [Dkt. No. 72] at 3 n.1.

the reasons discussed below, the Court finds that, although the SAC sufficiently alleges that plaintiff has standing, the CSRA divests this Court of jurisdiction to hear plaintiff's claims. As such, the SAC will be dismissed under Rule 12(b)(1).

A. Standard of Review

Under Rule 12(b)(1), "a civil action must be dismissed whenever the court lacks subject matter jurisdiction." Al Shimari v. CACI Premier Tech., Inc., 320 F. Supp. 3d 781, 782 (E.D. Va. 2018). "[B]ecause 'Article III gives federal courts jurisdiction only over cases and controversies,' and standing is 'an integral component of the case or controversy requirement[,]'" motions to dismiss for lack of Article III standing are brought under Rule 12(b)(1). CGM, LLC v. BellSouth Telecommunications, Inc., 664 F.3d 46, 52 (4th Cir. 2011) (quoting Miller v. Brown, 462 F.3d 312, 316 (4th Cir. 2006)). "When a Rule 12(b)(1) challenge is raised, the burden of proving subject matter jurisdiction is on the plaintiff." Ortiz v. Mayorkas, No. 20-7028, 2022 WL 595147, at *2 (4th Cir. Feb. 28, 2022) (citing Adams v. Bain, 697 F.2d 1213, 1219 (4th Cir. 1982)). In evaluating a motion to dismiss based on Rule 12(b)(1), the Court "may consider evidence outside the pleadings without converting the proceeding to one for summary judgment." In re KBR, Inc., Burn Pit Litig., 744 F.3d 326, 333 (4th Cir. 2014) (internal quotation marks omitted); see also White Tail Park, Inc. v. Stroube, 413 F.3d 451, 459 (4th Cir. 2005) (quoting Richmond, Fredericksburg & Potomac R.R. Co. v. United States, 945 F.2d 765, 768 (4th Cir. 1991)). Without

jurisdiction, a court cannot reach any decision on the merits of a plaintiff's claim. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94 (1998) ("Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." (quoting Ex parte McCardle, 74 U.S. (7 Wall.) 506, 514 (1868))). Because the Court does not have jurisdiction over the claims in the SAC, it will not consider defendant's arguments as to why the SAC should be dismissed pursuant to Rule 12(b)(6).

B. Analysis

1. Standing

NAIJ brings this civil action "on behalf of its members," [Dkt. No. 65] at ¶ 7, which means it must establish that it has "associational standing." To do so, it must show that "(1) its members would otherwise have standing to sue as individuals; (2) the interests at stake are germane to the group's purpose; and (3) neither the claim made nor the relief requested requires the participation of individual members in the suit." White Tail Park, 413 F.3d at 458 (quoting Friends for Ferrell Parkway, LLC v. Stasko, 282 F.3d 315, 320 (4th Cir. 2002)). To establish standing, an individual "must show (i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief." TransUnion LLC v. Ramirez, 141 S.

Ct. 2190, 2203 (2021) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–561 (1992)).

Standing requirements are "'somewhat relaxed in First Amendment cases,' given that even the risk of punishment could 'chill[]' speech." Edgar v. Haines, 2 F.4th 298, 310 (4th Cir. 2021), cert. denied, 142 S. Ct. 2737 (2022) (quoting Cooksey v. Futrell, 721 F.3d 226, 235 (4th Cir. 2013)) (emphasis and alteration in original). A plaintiff "need not show she ceased" speaking "'altogether' to demonstrate an injury in fact." Benham v. City of Charlotte, N.C., 635 F.3d 129, 135 (4th Cir. 2011) (quoting Smith v. Frye, 488 F.3d 263, 272 (4th Cir. 2007)). Instead, "a plaintiff must allege that he or she has 'experienced a non-speculative and objectively reasonable chilling effect,' on speech." Menders v. Loudoun Cnty. Sch. Bd., 65 F.4th 157, 165 (4th Cir. 2023) (quoting Cooksey, 721 F.3d at 236). This chilling effect can be established in one of two ways. First, a plaintiff "may show that [he or she] intend[s] to engage in conduct at least arguably protected by the First Amendment but also proscribed by the policy [he or she] wish[es] to challenge, and that there is a 'credible threat' that the policy will be enforced against [him or her] when [he or she] do[es] so." Id. (quoting Abbott v. Pastides, 900 F.3d 160, 176 (4th Cir. 2018)). Second, a plaintiff may allege that he or she intends to comply with the policy, but in doing so, will suffer "self-censorship." Id. Even under this second path, to establish standing, the Fourth Circuit has emphasized that "a credible threat of enforcement is critical" because, without one, a plaintiff cannot show "an objectively good reason for refraining from speaking and 'self-

censoring.'" Abbott, 900 F.3d at 176 (citations omitted).

Here, the SAC alleges that its members have complied with the 2021 policy's prohibition on personal capacity speech about immigration and EOIR, and, as a result, have been injured. For example, the SAC asserts that multiple judges, including Judge Cole, would prefer to speak or write in their personal capacity about immigration, but instead have requested to speak or write in their official capacity because they feel compelled to do so. [Dkt. No. 65] at ¶ 49. Moreover, it alleges that Judge Tsankov has stopped requesting to speak at events or publish written work about immigration altogether because she believes she will not be permitted to speak in her personal capacity and does not want to be required to recite EOIR's talking points. Id. at ¶ 48. Additionally, Judge Straus' choice to comply with the 2021 policy and wait for EOIR to approve his speech at the Connecticut chapter of the AILA program actually prevented him from speaking because of delays in the approval process. Id. at 54. These examples show that the SAC has alleged that certain judges have self-censored their speech in an effort to comply with the 2021 policy, and, in some cases, have been denied the ability to speak. See Edgar, 2 F.4th at 310 ("[S]ome plaintiffs alleged that they have decided not to write about certain topics because of the prepublication review policies. Such self-censorship is enough 'for an injury-in-fact to lie.'").

The SAC has also sufficiently alleged that this self-censorship stemmed from an objectively

reasonable chilling effect. In assessing whether a chilling effect is objectively reasonable, the Fourth Circuit considers whether a policy "would be 'likely to deter a person of ordinary firmness from the exercise of First Amendment rights,'" and has found that a prepublication review policy similar in important respects to the 2021 policy has met this standard. Edgar, 2 F.4th at 310 (quoting Benham v. City of Charlotte, 635 F.3d 129, 135 (4th Cir. 2011)). Plaintiffs in Edgar v. Haines claimed that a prepublication review policy "allowed agency officials to 'redact material unwarrantedly' . . . and caused them to write some pieces 'differently than [they] would have otherwise written them,'" and that "these infirmities, together with the delays created by the defendants' prepublication review regimes," had "'dissuaded [them] from writing some pieces' they 'would have otherwise written,'" and had "made it more difficult to engage in 'quickly evolving public debates.'" Id. at 310 (alterations in original). The Fourth Circuit found that all of these allegations taken together established an objectively reasonable chilling effect. Id.; see also Menders, 65 F.4th at 165 (finding an objectively reasonable chilling effect was imposed on students who desired to speak about certain issues but refrained from doing so out of fear that they would be investigated under a bias reporting policy). The SAC has similarly alleged that immigration judges' speech has been chilled because they feel compelled to seek approval to speak or write about immigration or the EOIR in their official capacity when they would prefer to do so in their personal capacity, which, at least in Judge Tsankov's situation, has prevented

her from speaking or writing about immigration or the EOIR at all. Furthermore, the SAC alleges, similar to the prepublication review scheme at issue in Edgar, that the delays caused by the 2021 policy's lack of definite deadlines have entirely prevented judges from speaking or publishing written works.

Despite defendant's arguments to the contrary, an objectively reasonable chilling effect can be established without a showing of actual discipline. In a recent Fourth Circuit opinion, the court considered whether parents representing their children's interests had standing to challenge a school's policy that permitted "students to anonymously report incidents of perceived bias." Menders, 65 F.4th at 160, 164–66. The parents had alleged that their children wanted to speak in a manner that could be perceived as biased under the school's policy, which could trigger an anonymous report and investigation, and that "any such report, investigation or public disclosure could harm their [children's] standing in the school community and ruin their college or career prospects." Id. at 165. Although the parents' complaint did not allege that any child had actually been disciplined as a result of the policy, the Fourth Circuit concluded that the potential negative impact of a report under the school's policy created an objectively reasonable chilling effect. Id. In so holding, the court explicitly reversed the district court's finding that the parents lacked standing because they "failed to allege that there have been any disciplinary incidents launched as a result of the reporting form or even bias incidents recommended for investigation." Id. at 164–66. Similarly, the SAC alleges that "EOIR has

warned judges that failure to comply with its speaking engagement policy may result in disciplinary action, including reprimand, suspension, and even removal from the federal service." [Dkt. No. 65] at 20. This warning establishes that there is potential liability for any judge who fails to follow the 2021 policy. The threatened discipline, which could include termination, present in this case is far more severe than the investigation or public disclosure of certain speech that the Fourth Circuit found sufficient to establish an objectively reasonable chilling effect in Menders. As such, the SAC has adequately alleged that the 2021 policy has an objectively reasonable chilling effect on plaintiff's members.

The SAC has also satisfied the causation requirement for standing by alleging that the 2021 policy caused this self-censorship. For example, it alleges that Judge Tsankov has been deterred "from seeking approval to discuss substantive questions of immigration law in her private capacity" by the 2021 policy. [Dkt. No. 65] at ¶ 48. The SET's determination that Judge Cole could only publish his forthcoming article in his official capacity, and the subsequent edits it required him to make to his article, resulted from the 2021 policy. Id. at ¶ 49. These allegations that the 2021 policy caused the alleged chilling effects are sufficient to establish causation for purposes of the standing inquiry. See Edgar, 2 F.4th at 311 ("The chilling of the plaintiffs' speech was plainly alleged to have been caused by the particular prepublication review regimes at issue here. As the plaintiffs alleged, they would

publish more but for those regimes." (emphasis in original) (citing Cooksey, 721 F.3d at 238)).

Furthermore, the relief requested by plaintiff—a declaratory judgment that the 2021 policy violates the First and Fifth Amendments and an order enjoining defendant from continuing to enforce the 2021 policy—would redress plaintiff's alleged injury—the chilling of certain judges' speech. See id. (finding "more than 'a non-speculative likelihood that [plaintiffs'] injury would be redressed by a favorable judicial decision" when "[a] favorable decision on the plaintiffs' behalf would deem the defendants' regimes unconstitutional and enjoin the defendants from enforcing them." (citing Cooksey, 721 F.3d at 238)).

Accordingly, the SAC's allegations support the conclusion that plaintiff's members have standing to bring this First Amendment challenge. Defendant does not contest the two other required showings for associational standing—namely that "the interests at stake are germane to the group's purpose" and that the action does not "require[] the participation of individual members in the suit," White Tail Park, 413 F.3d at 458 (quoting Friends for Ferrell Parkway, 282 F.3d at 320), and the Court finds that plaintiff's challenge to the EOIR's speaking policy is sufficiently germane to the purpose of NAIJ as a voluntary association of non-supervisory immigration judges and that plaintiff's facial challenge will not require the participation of individual members in this action. For these reasons, the SAC has alleged plaintiff's associational

standing as to its First Amendment claim that the SAC constitutes a prior restraint on speech.

Defendant also argues that the SAC fails to allege standing as to the plaintiff's First and Fifth Amendment claim that the 2021 policy is void for vagueness because it does not allege that any individual judge was treated arbitrarily by the 2021 policy. Responding to a similar challenge to a plaintiff's First and Fifth Amendment void for vagueness claim, the district court in Edgar recognized that "a provision may be impermissibly vague 'if it authorizes or even encourages arbitrary and discriminatory enforcement,'" and found that the plaintiffs had plausibly alleged an injury in the form of a chilling effect by alleging that "their works have been arbitrarily redacted and excised, in part because of discrimination against the viewpoints they contain." Edgar v. Coats, 454 F. Supp. 3d 502, 528 (D. Md. 2020), aff'd sub nom. Edgar, 2 F.4th 298 (quoting Hill v. Colorado, 530 U.S. 703, 732 (2000)). The Fourth Circuit affirmed, finding that the plaintiffs had sufficiently alleged that the "vagueness and breath of the defendants' prepublication review regimes" created a chilling effect. Edgar, 2 F.4th at 310. Although the SAC does not specifically allege that any judge's work has been redacted because the EOIR wanted to discriminate against certain viewpoints, it has alleged that redactions and delays imposed by the 2021 policy have created a chilling effect on the speech of judges and have deprived some judges of speaking at all because of the delay in approving speaking requests. Additionally, it has alleged that the 2021 policy could permit arbitrary enforcement as supervisors

and the SET have sole discretion over whether to label speech as official or personal capacity, and limited guidance exists within the 2021 policy to cabin this discretion. At this stage, these allegations are sufficient to state an injury in fact as to plaintiff's Fifth Amendment void for vagueness claim. Because the SAC has adequately alleged that the 2021 policy directly causes the alleged injuries and that a change of this policy would redress the injuries, and given that defendant did not contest the other requirements for associational standing, the Court finds that plaintiff has standing to raise a void for vagueness claim.

2. Civil Service Reform Act

Defendant next contends that the CSRA strips this Court's jurisdiction over plaintiff's claims. Congress passed the CSRA to "replace the haphazard arrangements for administrative and judicial review of personnel action," and, in doing so, created "an elaborate 'new framework for evaluating adverse personnel actions against [federal employees].'" United States v. Fausto, 484 U.S. 439, 443–44 (1988) (alteration in original) (quoting Lindahl v. OPM, 470 U.S. 768, 773 (1985)). This framework regulates virtually every aspect of federal employment and "prescribes in great detail the protections and remedies applicable to such action[s], including the availability of administrative and judicial review." Id. at 443. When considering actions taken against federal employees covered by this elaborate framework, courts almost always find that Congress intended to preclude district court jurisdiction over their claims.

The CSRA provides carefully crafted remedial administrative review schemes for three types of personnel actions taken against federal employees, two of which are relevant here.[12] First, Chapter 23 lays out "merit systems principles" by which agencies must abide. See 5 U.S.C. § 2301(b). That chapter also classifies certain violations of those principles as "prohibited personnel practices," defined by the CSRA as "any one of fourteen acts that supervisory employees may not take" against covered federal employees. Rydie v. Biden, No. 21-2359, 2022 WL 1153249, at *5 (4th Cir. Apr. 19, 2022). For example, it prohibits a supervisor from taking any "personnel action"—including "disciplinary or corrective action" or "any other significant change in duties, responsibilities, or working conditions"—against an employee if taking the action "violates any law." § 2302(a)(2)(A), (b)(12).[13] A federal employee who has experienced a "prohibited personnel practice" must file the allegation with the Office of Special Counsel ("OSC" or the "Special Counsel"). § 1214(a)(1)(A). The Special Counsel is then required to "investigate the allegation to the extent necessary to determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken." Id. If the Special Counsel determines that there are reasonable grounds to

[12] The third, found in Chapter 43 of the CSRA, "provides that before an employee can be removed or reduced in grade for unacceptable job performance certain procedural protections must be afforded." Fausto, 484 U.S. at 446; see 5 U.S.C. § 4303.

[13] Unless otherwise indicated, all sections cited refer to title 5 of the United States Code.

believe that a personnel action was taken or is to be taken as a result of a prohibited personnel practice, the Special Counsel must investigate the allegation and report its determination together with any findings or recommendations to the MSPB, the employing agency, and the Office of Personnel Management. § 1214(b)(2)(B).[14] If the employing agency does not take corrective action within a reasonable period of time, "the Special Counsel may petition the [MSPB]," and the MSPB can order corrective action. § 1214(b)(2)(C). Whenever the Special Counsel petitions the MSPB for corrective action, both the agency involved and the federal employee who is subject to the prohibited personnel practice have an opportunity to provide written comments to the MSPB. § 1214(b)(3). Judicial review of the MSPB's final order is available in the United States Court of Appeals for the Federal Circuit. § 1214(c); § 7703(b)(1)(A).

If the Special Counsel determines that there are not reasonable grounds to believe that a personnel action was taken or is to be taken as a result of a prohibited personnel practice, it may terminate the investigation. When the Special Counsel terminates an investigation, it must notify the employee of: 1) the "relevant facts ascertained by the Special Counsel, including the facts that support, and the facts that do not support, the allegations;" and 2) the

[14] The Special Counsel also has the statutory authority to "report any such determination, findings, and recommendations to the President," including recommendations for corrective action. § 1214(b)(2)(B).

reasons for the termination of the investigation. § 1214(a)(2)(A).

This comprehensive statutory scheme gives the Special Counsel the mandate to bring all reasonable, nonfrivolous claims of prohibited personnel practices to the employing agency and the MSPB; and if the MSPB makes a finding as to the agency's need to take corrective action, that finding is subject to Article III review.[15] Should the Special Counsel violate this non-discretionary statutory duty to investigate an employee's allegations, a federal district court has subject matter jurisdiction to issue a writ of mandamus directing the Special Counsel to investigate the claim.[16]

---

[15] This mandate is subject to two exceptions, not relevant here. First, if the substantive law provides employees the right to appeal directly to the MSPB, employees need not first bring their claim of a prohibited personnel practice to the OSC. § 1214(a)(3). Second, the statute provides that an employee who seeks corrective action for retaliation, as described in § 2302(b)(8) or § 2302(b)(9)(A)(i), (B), (C), or (D) may themselves appeal to the MSPB after first going to the OSC.

[16] See, e.g., Weber v. United States, 209 F.3d 756 (D.C. Cir. 2000); Carson v. U.S. Off. of Special Couns., No. 04-0315-PLF, 2006 WL 785292, at *3 (D.D.C. March 27, 2006) (finding that district courts have jurisdiction to review whether OSC conducted an investigation); Hunt v. U.S. Dep't of Agric., 740 F. Supp. 2d 41, 51 (D.D.C. 2010) ("This Court only has jurisdiction to review whether OSC conducted an investigation, it cannot pass on the merits of OSC's decision to terminate an investigation." (citation omitted)); Krafsur v. Davenport, 736 F.3d 1032 (6th Cir. 2013) ("A court may not review the Special Counsel's decisions unless the Counsel has declined to investigate a complaint at all." (internal quotation marks omitted)).

Federal employees can challenge more serious personnel actions, that is "adverse actions," through the second statutory scheme outlined in Chapter 75 of the CSRA. See Rydie, 2022 WL 1153249, at *3. Among the types of adverse actions subject to this scheme are "a suspension for 14 days or less," § 7502, "removal," "a suspension for more than 14 days," or "a reduction in pay," § 7512(1)–(5). When challenging an adverse action, a federal employee is afforded a number of procedural rights, including notice of the action, a right to respond, representation by counsel, and a written decision as to the action. § 7513(b). Employees against whom an adverse action is taken do not need to go through the Special Counsel, but can directly appeal the agency's written decision to the MSPB, § 7503(c), 7513(d), and can then appeal an unsatisfactory MSPB decision to the Federal Circuit, § 7703(b)(1)(A). Federal employees who challenge these more serious adverse actions therefore have a more expeditious journey to an Article III court after the administrative process.

Although federal district courts typically have jurisdiction "of all civil actions arising under the Constitution, laws, or treaties of the United States," 28 U.S.C. § 1331, Congress may "impliedly preclude jurisdiction by creating a statutory scheme of administrative adjudication and delayed judicial review in a particular court." Bennett v. U.S. Sec. & Exch. Comm'n, 844 F.3d 174, 178 (4th Cir. 2016) (citing Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 207 (1994)). To determine whether Congress intended to divest district courts of jurisdiction, courts generally apply the two-part test enumerated

in Thunder Basin Coal Co., 510 U.S. 200. Bennett, 844 F.3d at 178, 181. "First, [courts] ask whether Congress's intent to preclude district-court jurisdiction is 'fairly discernible in the statutory scheme.'" Id. at 181 (quoting Thunder Basin, 510 U.S. at 207). "Second, [courts] ask whether [a] plaintiff['s] 'claims are of the type Congress intended to be reviewed within this statutory structure.'" Id. at 181 (quoting Thunder Basin, 510 U.S. at 212). At this second step, courts evaluate three factors: "(1) whether the statutory scheme 'foreclose[s] all meaningful judicial review.' . . . (2) the extent to which the plaintiff's claims are 'wholly collateral' to the statute's review provisions, and (3) whether 'agency expertise could be brought to bear on the . . . questions presented.'" Id. (alteration in original) (quoting Thunder Basin, 510 U.S. at 212–13, 215).

At step one, the United States Supreme Court has concluded that it is fairly discernable from the CSRA's scheme that Congress intended to preclude district-court jurisdiction over certain covered actions brought by covered federal employees. Elgin v. Dep't of Treasury, 567 U.S. 1, 11–12 (2012); Rydie, 2022 WL 1153249, at *4. Acknowledging "the painstaking detail with which the CSRA sets out the method for covered employees to obtain review of adverse employment actions," the Supreme Court held that "it is fairly discernible that Congress intended to deny such employees an additional avenue of review in district court." Elgin, 567 U.S. at 11–12; Rydie, 2022 WL 1153249, at *4.

At step two, to present claims of the type intended to be reviewed through the statutory

scheme, a plaintiff must both be a covered employee and bring a covered action. Neither party disputes that immigration judges are "covered employees" under the CSRA.[17] Plaintiff primarily argues that the SAC does not challenge a covered employment action under the CSRA, and, as such, the CSRA process would not provide meaningful judicial review of plaintiff's claims, which are wholly collateral to the CSRA process. Plaintiff also argues that, even if an immigration judge could bring a challenge to a prohibited personnel practice through the CSRA's administrative scheme, there is no meaningful judicial review because he or she would not be guaranteed review by an Article III court under the CSRA's scheme. Additionally, plaintiff contends that, because its claims are "purely constitutional" and do not challenge a covered action, the MSPB's expertise in adjudicating workplace issues in the executive branch would not come to bear on plaintiff's claims. By contrast, defendant argues that plaintiff's challenge does fall under the CSRA because its First and Fifth Amendment claims "arise directly out of [judges'] employment with EOIR and their alleged dissatisfaction with a condition of that employment." [Dkt. No. 69] at 17. Moreover, defendant contends that the Fourth Circuit has rejected the idea that the CSRA's process does not provide meaningful judicial

[17] The CSRA defines a "covered position" as including "any position in the competitive service," § 2302(a)(2)(B), § 7511(a)(1)(A), which includes "all civil service positions in the executive branch," § 2102(a)(1), and excludes limited categories of positions, which are not relevant here. See Rydie, 2022 WL 1153249, at *5–*6 & n.8.

review when an employee challenges a lesser prohibited personnel practice.

a. Meaningful Judicial Review

"A statutory scheme provides meaningful judicial review, even if it requires litigants to begin in an administrative forum, so long as an appeal to an Article III court is available 'in due course.'" Rydie, 2022 WL 1153249, at *5 (quoting Bennett, 844 F.3d at 186). If it "pose[s] a risk of some additional and irreparable harm beyond the burdens associated with the dispute resolution process," or requires the plaintiff "to 'bet the farm . . . by taking [a] violative action' before 'testing the validity of [a] law" to obtain relief, the statutory scheme fails to provide meaningful judicial review. Id. (alterations in original) (quoting Tilton v. Sec. & Exch. Comm'n, 824 F.3d 276, 286 (2d Cir. 2016), then quoting Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 490 (2010)). Whether an administrative scheme provides meaningful judicial review is the most important factor at step two of the Thunder Basin analysis. Bennett, 844 F.3d at 183 n.7.

For the CSRA's scheme to provide meaningful judicial review, the plaintiff must challenge an action covered under the statute. The parties first dispute whether plaintiff's facial challenge to the 2021 policy, which has been made before any disciplinary actions have been taken or proposed against any of plaintiff's members, can constitute a CSRA covered action. Second, even if the plaintiff's members could bring these claims through the

CSRA, the parties dispute whether the CSRA process provides for meaningful judicial review in an Article III court.

i. Covered Action Under the CSRA

Plaintiff argues that it would not receive meaningful judicial review under the CSRA because the CSRA's scheme does not govern an employee speech policy such as the 2021 policy. Plaintiff emphasizes that, rather than "challenging [an] individual personnel decision[,] . . . it is challenging a policy that imposes a prior restraint on the speech of all immigration judges."[18] [Dkt. No. 72] at 30 (emphasis in original). By contrast, defendant contends that plaintiffs First Amendment claims "arise directly out of [judges'] employment with EOIR and their alleged dissatisfaction with a condition of that employment." [Dkt. No. 69] at 17. As such, defendant argues that plaintiff's members could bring this challenge under the CSRA's administrative scheme as either a challenge to a

[18] Plaintiff appears to argue that its status as an organization, rather than as an individual, means it could not bring a challenge under the CSRA. There is no support for this argument. Cf. Feds for Med. Freedom v. Biden, 63 F.4th 366, 369 (5th Cir. 2023) (en banc) (considering a CSRA challenge including organizational plaintiffs without concluding that the status of the organizational plaintiffs affected the CSRA analysis). To accept plaintiff's argument would permit any group of federal employees aggrieved in the same way to form a voluntary association to bring an action in the district court in the first instance, an unacceptable loophole in the CSRA's structure when the same individual members in the voluntary association would otherwise have to bring their challenges through the CSRA.

significant change in the judges' working conditions, or as a hypothetical challenge to the discipline that could result if an individual judge did not comply with the 2021 policy. The Court agrees that the 2021 policy constitutes a significant change in working conditions in that it effectively eliminates all personal capacity speech involving immigration- or EOIR-related topics, and that plaintiff's members can challenge it as a prohibited personnel practice under the CSRA. The Court rejects defendant's argument that plaintiff's members could challenge either a prohibited personnel practice or an adverse action under the CSRA based on the hypothetical discipline judges may face.[19]

The CSRA prohibits a "supervisory employee," defined as "[a]ny employee who has authority to take, direct others to take, recommend, or approve

---

[19] Although the Fourth Circuit has held that the CSRA provides the exclusive remedy to challenge prospective, more serious adverse actions if the actions have been "proposed," Rydie, 2022 WL 1153249, at *6, because the SAC has only alleged that judges have been "warned" that failing to comply with the policy could lead to disciplinary actions and that discipline "may" result from violating the policy, it has not alleged a "proposed" adverse action that the plaintiff can properly challenge under the CSRA. [Dkt. No. 65] at 20. Furthermore, in contrast with the plaintiffs in Rydie, whose complaint had alleged that they intended to not comply with the policy at issue, Rydie, 572 F. Supp. 3d 153 (D. Md. 2021), vacated and remanded, 2022 WL 1153249, [Dkt. No. 1] at ¶¶ 18, 22, plaintiff here has alleged that its members intend to comply with the 2021 policy, meaning that no discipline could be proposed. Moreover, plaintiff is correct, and defendant cites no contrary authority, that the provisions governing less severe personnel actions do not permit employees to challenge purely prospective or hypothetical disciplinary action.

any personnel action," § 2302(b), from "tak[ing] or fail[ing] to take any . . . personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles" as stated in the CSRA, which includes constitutional violations. § 2302(b)(12); Rydie, 2022 WL 1153249, at *5 ("Violations of an employee's constitutional rights fall within this subsection." (citing Weaver v. U.S. Info. Agency, 87 F.3d 1429, 1432 (D.C. Cir. 1996)). Included in the list of personnel actions is a "significant change in duties, responsibilities, or working conditions." § 2302(a)(2)(A)(xii). As defendant correctly argues, the actions the 2021 policy requires supervisors to take in reviewing immigration judges' requests to speak or write about immigration matters represents a "significant change in duties, responsibilities, or working conditions," and, because the SAC has alleged that the policy compels supervisors to act in a way that violates the First and Fifth Amendments, it has alleged a CSRA-covered action. § 2302(b)(12).

The parties primarily dispute whether the 2021 policy's restrictions on speech change the "working conditions" of immigration judges, or whether these restrictions solely affect the "private, off-the-job speech of employees." [Dkt. No. 72] at 32 (emphasis in original). Although the CSRA does not define "working conditions," courts have interpreted the term to encompass broadly the circumstances that affect an employee's job. For example, the Supreme Court has interpreted the term "working conditions" in "the labor-management provisions of the CSRA," Turner v. U.S. Agency for Glob. Media, 502 F. Supp.

3d 333, 367 (D.D.C. 2020), to mean "the 'circumstances' or 'state of affairs' attendant to one's performance of a job." Fort Stewart Sch. v. Fed. Labor Relations Auth., 495 U.S. 641, 645 (1990) (citation omitted); see also Dep't of Def. Dependents Sch. v. Fed. Labor Relations Auth., 863 F.2d 988, 990 (D.C. Cir. 1988), judgment vacated on reh'g on other grounds, 911 F.2d 743 (D.C. Cir. 1990) (interpreting the same provision to mean the "the day-to-day circumstances under which an employee performs his or her job."). In interpreting the specific CSRA provision at issue here, the Federal Circuit has found that "'working conditions' most naturally connote[] the physical conditions under which an employee labors," but has also acknowledged that the ambiguity in the meaning of "conditions" could make it "possible to give it a broader interpretation to mean the conditions that the employee must satisfy to qualify for the job." Hesse v. Dep't of State, 217 F.3d 1372, 1378 (Fed. Cir. 2000); see also Mahoney v. Donovan, 721 F.3d 633, 636 (D.C. Cir. 2013) (interpreting this provision to include actions that "affect the ability of administrative law judges to do their jobs efficiently and effectively," and that "interfere with . . . [the] decisional independence" of administrative law judges when adjudicating matters); Turner, 502 F. Supp. 3d at 367 ("[C]ourts have determined that the term "working conditions" generally refers to the daily, concrete parameters of a job, for example, hours, discrete assignments, and the provision of necessary equipment and resources.").

Although the SAC alleges that the 2021 policy primarily burdens the private speech of judges, the

policy broadly affects how judges interact with their supervisors and the EOIR, governs what types of speaking or writing they may do within their official capacities, and enforces these restrictions through traditional workplace disciplinary measures. For example, Judge Straus' exchange with his supervisor discussing the types of statements he may make in an official capacity speech about immigration court practice represents a traditional exchange between supervisor and employee as to how an employee should represent an agency at an external event. Moreover, the SAC's challenge to the requirement that immigration judges receive approval to attend speaking engagements during working hours certainly constitutes a challenge to a working condition, as the regulation of how employees may take time off during working hours meets even the narrowest understanding of a working condition. Although the restrictions in the 2021 policy may not directly bear on immigration judges' key responsibilities of adjudicating matters that come before them, the CSRA's "working conditions" provision has no primary purpose test. Instead, consistent with other courts' interpretation, it encompasses the circumstances that relate to one's performance of a job. The 2021 policy governs just that.

The enumerated personnel actions found in § 2302(a)(2)(A) before "change in . . . working conditions" confirm that "working conditions" encompasses a significant policy governing employee's speech such as the 2021 policy. For example, § 2302(a)(2)(A) includes the following categories of personnel action: "disciplinary or

corrective action," "a performance evaluation," and "a decision concerning pay, benefits, or awards, or concerning education or training. . . ." Most relevant here, it also includes "the implementation or enforcement of any nondisclosure policy, form, or agreement." § 2302(a)(2)(A)(x)–(xi). Listing enforcement of a nondisclosure policy as a personnel practice suggests that Congress intended to include a policy regulating the speech of employees in the types of "working conditions" that federal employees can challenge through the CSRA process. See Yates v. United States, 574 U.S. 528, 545 (2015) ("[W]here general words follow specific words in a statutory enumeration, the general words are [usually] construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." (alteration in original) (quoting Washington State Dept. of Social and Health Servs. v. Guardianship Estate of Keffeler, 537 U.S. 371, 384 (2003))).

Plaintiff urges the Court to follow three out-of-circuit decisions that held certain First Amendment challenges fell outside of the CSRA's scheme. Weaver, 87 F.3d at 1429; Turner v. U.S. Agency for Glob. Media, 502 F. Supp. 3d 333 (D.D.C. 2020); Firenze v. N.L.R.B., No. 12-10880-PBS, 2013 WL 639151 (D. Mass. Jan. 10, 2013), report and recommendation adopted, Firenze v. N.L.R.B., No. 12-cv-10880-PBS, 2013 WL 639148 (D. Mass. Feb. 19, 2013). In Weaver, the United States Court of Appeals for the D.C. Circuit considered whether an employee at Voice of America ("VOA") could bring a challenge in district court to a prepublication review policy that required all employees "to submit all

speaking, writing, and teaching material on matters of 'official concern' to their employers for review prior to publication," as well as a challenge to an admonishment that she received under this policy. Weaver, 87 F.3d at 1431–32. Although the D.C. Circuit found that the admonishment was a CSRA-covered prohibited personnel practice, it found that the plaintiff did not need to bring her constitutional challenge through the CSRA as "the district court would have" otherwise had "jurisdiction over such a suit, framed as a simple pre-enforcement attack on a regulation restricting employee speech." Id. at 1432–34 (citing United States v. Nat'l Treasury Employees Union, 513 U.S. 454 (1995); Sanjour v. EPA, 56 F.3d 85 (D.C. Cir. 1995) (en banc)). Neither decision cited by the D.C. Circuit considered whether the CSRA barred consideration of the laws and regulations at issue, and, accordingly, do not support the plaintiff's proposition that a preenforcement constitutional challenge to an employee speech policy falls outside of the CSRA absent any enforcement (or proposed enforcement) against employees. See [Dkt. No. 31] at 13–14.

Moreover, Weaver did not consider the Thunder Basin factors to determine whether the CSRA precluded jurisdiction, as the Supreme Court in Elgin has since clarified that courts must, even when plaintiffs bring a constitutional challenge. See id.; Elgin, 567 U.S. at 15. As Judge O'Grady has already held, and as the Fourth Circuit has affirmed,[20] the

[20] The Fourth Circuit initially affirmed Judge O'Grady's decision in full. It was only vacated after the NAIJ was decertified as a union and, accordingly, no longer met the

Supreme Court in Elgin "expressly declined to draw 'a jurisdictional rule' based on 'amorphous distinctions' such as whether a plaintiff is bringing a facial or as-applied challenge. . . . The law is clear that, where a complex statutory scheme is exclusive, that 'exclusivity does not turn on the constitutional nature' of a plaintiff's claim." [Dkt. No. 31] at 9 (quoting Elgin, 567 U.S. at 15).

Plaintiff has cited to only two opinions that, it contends, support Weaver's conclusion that "challenges to employee speech policies do not qualify" as CSRA-covered actions, [Dkt. No. 72] at 30; however, neither decision addresses the same type of broad employee speech policy as plaintiff challenges here. In Turner, the plaintiffs brought First Amendment challenges to changes in policy at a government-run media agency, which they alleged permitted Executive Branch appointees to interfere with journalistic content. Turner, 502 F. Supp. 3d at 348–51, 369. In concluding that one plaintiff had experienced no covered action, and that the district court had jurisdiction to consider plaintiff's claim, the court emphasized that the media agency was a "sui generis environment," and that, in this environment which is "unique among government agencies, . . . dramatic shifts in policy and practice that implicate the very constitutional rights on which U.S.-funded international broadcasting is predicated are outside the bounds of a 'working condition.'" Id. at 367. In Firenze, after the plaintiff sought to publicize that his employer had sought to

---

requirements to bring a claim through the FSL-MRS's administrative scheme.

use arbitration to adjudicate six grievances that plaintiff had filed in the course of his employment, his employer sent him an email prohibiting him from doing so, which plaintiff contended was enforcing a rule from his employer preventing employees from publicizing their grievances at work. Firenze, 2013 WL 639151, at *2. Plaintiff challenged this email and rule as a prior restraint in violation of the First Amendment, and, because the court found that this communication and rule did not constitute a prohibited personnel practice under the CSRA, it concluded that it had jurisdiction to hear plaintiff's claim. Id. at *6, *8. Neither of the situations challenged by the plaintiffs in both Turner and Firenze—a broad First Amendment challenge to a media agency, which the court acknowledged as a "sui generis" environment, and an individual communication enforcing a rule by an employer prohibiting employees from speaking internally about workplace grievances—are sufficiently similar to a speech policy affecting how all immigration judges can speak about immigration or EOIR to suggest that the 2021 policy does not constitute a CSRA-covered action. And, as stated, Weaver's determination that a prepublication review policy did not constitute a CSRA-covered action is of waning significance after the Supreme Court's decision in Elgin.[21] For all the reasons

[21] In Elgin, the Supreme Court observed that the "MSPB routinely adjudicates some constitutional claims, such as claims that an agency took adverse employment action in violation of an employee's First or Fourth Amendment rights, and that these claims must be brought within the CSRA." 567 U.S. at 12 (emphasis added). It went on to reject petitioner's argument seeking to carve out an exception to the CSRA

explained above, notwithstanding plaintiffs reference to these three non-binding decisions, its challenge to the 2021 policy constitutes a challenge to a significant change in working conditions.

ii. Whether There is Meaningful Review by an Article III Court

Plaintiff contends that CSRA review is inappropriate because it may not have a guaranteed avenue to an Article III court. This is because a federal employee challenging a prohibited personnel practice under the CSRA must first bring the claim to the Office of Special Counsel, which, after mandatory investigation, may decline to petition the MSPB for corrective action, making the decision potentially unreviewable by the Federal Circuit. Yet few courts have encountered the circumstance in which a plaintiff brings a nonfrivolous constitutional claim that is not acted on by the Special Counsel, and thus potentially barring Article III review after the administrative process. See, e.g., Fleming v. Spencer, 718 Fed. App'x. 185, 188 n.2 (4th Cir. 2018) (citing Webster v. Doe, 486 U.S. 592, 603 (1988)) (per curiam); Bridges v. Colvin, 136 F. Supp. 3d 620, 637–48 (E.D. Pa. 2015), aff'd sub nom. Bridges v. Comm'r Soc. Sec., 672 F. App'x 162 (3d Cir. 2016). Contra Krafsur, 736 F.3d at 1038 (requiring a constitutional challenge to a prohibited personnel practice be exhausted under the CSRA despite the risk of the Special Counsel refusing to petition the MSPB).

---

exclusively for facial or as-applied constitutional challenges. Id.

The Thunder Basin analysis specifies that "where Congress simply channels judicial review of a constitutional claim to a particular court," such as the Federal Circuit, courts should merely ask whether Congress's intent to divest district courts of jurisdiction is "fairly discernable in the statutory scheme," Elgin, 567 U.S. at 9 (quoting Thunder Basin, 510 U.S. at 207); however, the lack of guaranteed access to an Article III court when a plaintiff brings a constitutional claim implicates "the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." Webster v. Doe, 486 U.S. 592, 603 (1988) (quoting Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 681 n. 12 (1986)). To avoid this serious constitutional question, the Supreme Court has held that "where Congress intends to preclude" any Article III "judicial review of constitutional claims[,] its intent to do so must be clear." Webster v. Doe, 486 U.S. at 603 (citing Johnson v. Robison, 415 U.S. 361, 373–74 (1974)). Whether Webster's heightened standard should apply to a colorable constitutional claim that is not guaranteed Article III review under the CSRA's scheme for prohibited personnel practices is a question that has divided federal courts. See Bridges, 136 F. Supp. 3d at 637–48 (collecting cases).

The Supreme Court's decision in Elgin provides guidance but not an answer to this question because the plaintiffs in Elgin had suffered an adverse

action,[22] meaning they were guaranteed the ability to bring their constitutional challenges to an Article III court.[23] Petitioners in Elgin had urged the court to apply Webster's heightened, clear-statement standard to the CSRA to determine whether

---

[22] Plaintiffs were federal employees who were terminated for their failure to comply with the Military Selective Service Act, which requires male citizens and permanent residents between the ages of 18 and 26 to register for the selective service. Elgin, 567 U.S. at 6–8. Plaintiffs challenged the federal statute that authorized their terminations as an unconstitutional bill of attainder, and as unconstitutional discrimination on the basis of sex. Id. The court found the CSRA precluded district court jurisdiction over plaintiffs' claims because when "constitutional claims are the vehicle by which [a plaintiff] seek[s] to reverse" an adverse action, a plaintiff's claims must proceed exclusively through the CSRA's scheme. Id. at 22.

[23] As described, the CSRA provides two different avenues of review that depend on the type of action taken against a federal employee. More serious adverse actions, such as proposed termination, can be brought to the MSPB, and the employee can then appeal the MSPB's decision to the Federal Circuit. § 7703(b)(1)(A). Accordingly, federal employees who challenge an adverse action will be guaranteed Article III judicial review should they seek it. By contrast, less serious prohibited personnel practices must first be brought to the OSC, who then "may petition" the MSPB for review. § 1214(b)(2)(C). The OSC's discretionary authority means that federal employees who challenge a less serious prohibited personnel practice may not receive Article III judicial review. But the availability of judicial review under the CSRA can still be meaningful despite the inability of a plaintiff to assert a pre-enforcement challenge initially in federal court. See Am. Fed'n of Gov't Emps., AFL-CIO v. Trump, 929 F.3d 748, 757 (D.C. Cir. 2019) ("[I]t is the comprehensiveness of the statutory scheme involved, not the adequacy of specific remedies thereunder, that counsels judicial abstention." (quoting Am. Fed'n of Gov't Emps. v. Sec. of Air Force, 716 F.3d 633, 638 (D.C. Cir. 2013)).

Congress had intended to divest the district court of jurisdiction over their constitutional claims. Elgin, 567 U.S. at 9. In deciding to apply the Thunder Basin factors instead, the court emphasized that Webster's heightened standard only applies to "a statute that purports to 'deny any judicial forum for a colorable constitutional claim,'" but did not apply "where Congress simply channels judicial review of a constitutional claim to a particular court." Id. (quoting Webster, 486 U.S. at 603). Because the petitioners in Elgin had a structural guarantee that they would be able to bring their constitutional claims to the Federal Circuit, the Court applied Thunder Basin to determine the preclusive effect of the CSRA. Essential to the court's determination was that the petitioners could bring their claims to the Federal Circuit, and that the Federal Circuit would eventually be able to adjudicate the constitutional issues underlying plaintiffs' lawsuit. Id. at 10 ("[T]he CSRA does not foreclose all judicial review of petitioners' constitutional claims, but merely directs that judicial review shall occur in the Federal Circuit."). Accordingly, although Elgin did not confront the issue presented here, which involves a prohibited personnel practice rather than an adverse action, it emphasized the importance of the eventual review of plaintiffs constitutional claims by the Federal Circuit.

The Fourth Circuit has directly considered whether Webster's heightened standard applies to constitutional challenges to prohibited personnel practices. In the 1984 decision Pinar v. Dole, 747 F.2d 899 (4th Cir. 1984), the Fourth Circuit held that a plaintiff challenging a letter of reprimand and

a two day suspension as violative of his First Amendment rights must go through the CSRA's administrative scheme to challenge a prohibited personnel practice, even if he would not have a guaranteed recourse to an Article III court. Id. at 910–11. The court emphasized that, to hold otherwise would "fly in the face of" Congressional intent to guarantee more serious, adverse actions, recourse to an Article III court, and guarantee less serious, personnel actions, only administrative review. Id. at 911.

Defendant argues that Pinar conclusively establishes that, even with a lack of guaranteed Article III review, the CSRA provides meaningful judicial review for prohibited personnel practices; however, more recent Fourth Circuit opinions have cast doubt on the continued relevance of Pinar's holding. In 1991, the Fourth Circuit considered again whether a federal employee must bring his First Amendment claim through the CSRA process, but "decline[d] to address the continuing vitality of Pinar" to the case, instead, finding that the plaintiff lacked Article III standing to bring his claims. Bryant v. Cheney, 924 F.2d 525, 528 (4th Cir. 1991). The Fourth Circuit had the occasion in Bryant to address whether Pinar remained good law because of a remand from the Supreme Court. In a prior opinion in Bryant, the Fourth Circuit had found that the district court lacked jurisdiction over the claim, stating "Pinar holds that recourse to CSRA procedures is [plaintiffs] exclusive remedy in challenging punitive personnel actions on the basis that they were undertaken in retaliation for his exercise of his [F]irst [A]mendment rights." Bryant

v. Weinberger, 838 F.2d 465 (4th Cir. 1988) (unpublished table decision), cert. granted, judgment vacated sub nom. Bryant v. Carlucci, 488 U.S. 806 (1988). The Supreme Court vacated and remanded the initial opinion "for further consideration in light of Webster v. Doe, 486 U.S. 592 . . . (1988)," Bryant, 488 U.S. 806 (1988), the opinion which stated definitively that "where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear," Webster, 486 U.S. at 603.

More recently, albeit in an unpublished opinion, the Fourth Circuit held that Webster's clear statement test should apply to determine whether the CSRA provides meaningful judicial review of a prohibited personnel practice. In Fleming v. Spencer, 718 Fed. App'x. 185 (4th Cir. 2018), the court upheld a district court's decision to dismiss an action for lack of jurisdiction when the plaintiff challenged prohibited personnel practices as violative of his First Amendment rights. Id. at 187–89. This time, the Fourth Circuit cast the jurisdictional deficiencies as a failure to exhaust administrative remedies, rather than assuming that the CSRA completely stripped district court jurisdiction to hear any constitutional claims that federal employees had brought through the CSRA process. See id. at 188 ("The CSRA plainly precludes extrastatutory judicial review of constitutional claims that are asserted before an employee has exhausted his remedies available under the statute."). When contemplating the CSRA's exhaustion requirement, the court observed that "[a] different question would be presented here if

[plaintiff] had brought his constitutional claim to the OSC and been denied an opportunity to pursue that claim in the Federal Circuit. In such a case, this court would need to address whether 'Congress intend[ed] [for the CSRA] to preclude judicial review of constitutional claims.'" Fleming, 718 Fed. App'x. at 188 n.2 (later alterations in original) (citing Webster, 486 U.S. at 603). This approach is consistent with that of other courts that have similarly found that the CSRA does not preclude all access to Article III courts when a plaintiff raises a colorable constitutional claim, but require a plaintiff to exhaust administrative remedies by first bringing her claim to the OSC. See, e.g., Weaver, 87 F.3d at 1433; Irizarry v. United States, 427 F.3d 76, 77 (1st Cir. 2005).

Here—without question—plaintiff raises a reasonable, nonfrivolous First Amendment challenge to the 2021 policy, the type of constitutional claim that the Special Counsel would be required to investigate and report its determination and recommendation to the MSPB, the employing agency, and the Office of Personnel Management. § 1214(b)(2)(B). Should the agency fail to take corrective action within a reasonable period of time, the Special Counsel could then petition the MSPB seeking corrective action of the nonfrivolous claim. § 1214(b)(2)(C). But plaintiff has taken no such action before the Special Counsel as required by the CSRA. Nor has plaintiff actually been denied an opportunity to bring its constitutional claims to the Federal Circuit after proceeding through the statute's adjudicative structure. Accordingly, plaintiff has not exhausted its administrative

remedies, and, under more recent Fourth Circuit precedent that suggests a plaintiff must exhaust administrative remedies through the CSRA process before bringing constitutional challenges to prohibited personnel practices in district court, the CSRA process does not on this record deny plaintiff meaningful judicial review. Moreover, Fleming suggests that, should plaintiff proceed through the CSRA process and not receive Article III review of its constitutional claims, it would be able to return to district court. For example, plaintiff would be well within its right to return to this Court seeking a petition for a writ of mandamus if the Special Counsel failed to investigate its nonfrivolous constitutional claims, at which time this Court could order the Special Counsel to abide by its statutory mandate and conduct such an investigation, starting the congressionally-designed CSRA process once more. See supra at 568 n.16.

Plaintiff's common rejoinder centers on the hypothetical scenario in which the Special Counsel fails to pursue its constitutional claims with the agency and the MSPB. But this postulated argument—which does not reflect the facts of this case—cannot overshadow the balance that Congress has struck in "establish[ing] a comprehensive system for reviewing personnel action taken against federal employees." Fausto, 484 U.S. at 455; Elgin, 567 U.S. at 5. By design, the Special Counsel weeds out only frivolous complaints, see § 1214(b)(2)(B); and frivolous arguments—even those constitutional in nature—have no special entitlement to reach a federal court. Moreover, the Special Counsel also weeds out grievances that agencies stand ready to

redress without litigation. See § 1214(b)(2)(C). Beyond that, various safeguards attending the Special Counsel procedure diminish the risk of blocking meritorious constitutional challenges. The Special Counsel has every incentive to help wronged federal employees. In creating the Office of Special Counsel, Congress empowered the independent officeholder to expose agency misbehavior and to "protect employees . . . from prohibited personnel practices." § 1212(a). The Special Counsel receives his appointment from the President, may be removed only for cause, chooses his staff without interference from other executive agencies, and has independent authority to launch investigations, to participate in MSPB proceedings, and to file amicus briefs. §§ 1211(b), 1212(b)–(d), (h).

Allowing plaintiff to pivot straight to federal district court would undermine a central element of the CSRA's architecture: the harsher the action, the greater the employee's entitlement to judicial review. See Kloeckner v. Solis, 568 U.S. 41, 44 (2012) ("[The CSRA] provides graduated procedural protections depending on an action's severity."). Under Elgin, employees facing more severe adverse actions must go through the MSPB before bringing their constitutional challenges in federal court. Under plaintiff's theory, however, employees facing less severe decisions (prohibited personnel practices) would enjoy immediate judicial review without resort to the administrative process. Put another way, an immigration judge would have more extensive and immediate remedies for a reprimand than for a dismissal, more for a temporary reassignment than for a permanent demotion, and

more for a denial of leave to attend a speaking engagement than for a two-week suspension.[24]

The CSRA serves another purpose which goes unaddressed by plaintiff: ensuring that federal workplaces across the country follow a uniform body of law developed by the Federal Circuit. Elgin, 567 U.S. at 6, 14 ("The CSRA's objective of creating an integrated scheme of review would be seriously undermined if . . . a covered employee could challenge a covered employee action first in a district court, and then again in one of the courts of appeals, simply by alleging that the statutory authorization for such action is unconstitutional."). Here, plaintiff attempts to challenge a prohibited personnel practice in a regional circuit, which might have a divergent interpretation of the underlying constitutional claims than the court of Congress's choosing—the Federal Circuit.[25]

Plaintiff's interpretation of the CSRA and this Court's jurisdiction attempts to bypass the comprehensive system established by Congress for addressing the personnel complaints of federal

---

[24] Moreover, if a federal district court adjudicated a constitutional claim before the Special Counsel had an opportunity to investigate the claim, it would deny the agency the opportunity to correct its own mistakes. Direct review in federal court would also eliminate the opportunities to have issues first focused, or potentially resolved, by the Special Counsel.

[25] See Krafsur, 736 F.3d at 1040 (Sutton, C.J.) (discussing the risk of forum shopping if prohibited personnel actions could be routed to the regional circuits instead of through the Special Counsel and ultimately the Federal Circuit).

employees. Because meaningful judicial review of nonfrivolous constitutional claims is ultimately available through the statutory scheme, plaintiffs constitutional claims cannot escape the exhaustion requirement of the CSRA.

iii. Whether There is Otherwise No Meaningful Review

Plaintiff otherwise argues that it would not receive meaningful judicial review under the CSRA because an immigration judge may be forced to provoke a disciplinary action to receive any judicial review and review through this process could delay relief for so long as to cause "additional and irremediable harm beyond the burdens associated with the dispute resolution process." Bennett, 844 F.3d at 186 n.13 (4th Cir. 2016) (quoting Tilton v. Sec. & Exch. Comm'n, 824 F.3d 276, 286 (2d Cir. 2016)).

A statutory scheme including administrative and judicial review does not provide meaningful judicial review when it requires a plaintiff "to 'bet the farm . . . by taking the violative action' before 'testing the validity of the law," Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 490 (2010) (quoting MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 129 (2007)); see also Rydie, 2022 WL 1153249, at *5; however, merely bringing a pre-enforcement challenge to a policy does not force employees to "bet the farm." For example, the Fourth Circuit in Rydie found that the plaintiffs did not need to be disciplined before challenging the policy because they could challenge the policy as a

proposed covered action. Rydie, 2022 WL 1153249, at *5. Similarly here, immigration judges can bring a CSRA challenge to the 2021 policy as a change in working conditions, and therefore do not need to experience any disciplinary actions before bringing a CSRA challenge. See Payne v. Biden, 602 F. Supp. 3d 147, 160 (D.D.C. 2022), aff'd, No. 22-5154, 2023 WL 2576742 (D.C. Cir. March 21, 2023) ("[Plaintiff's] ability to challenge a change in his working conditions via the OSC allows him to raise his constitutional claims before termination is even proposed.").

Plaintiff also argues that requiring it to pursue its claims through the CSRA would unduly delay resolution of the prior restraint on speech allegedly created by the 2021 policy. "A scheme that 'pose[s] a risk of some additional and irreparable harm beyond the burdens associated with the dispute resolution process' is not meaningful" review. Rydie, 2022 WL 1153249, at *5 (alterations in original) (quoting Tilton, 824 F.3d at 286). The Fourth Circuit has held that when employees challenge covered actions under the CSRA, the administrative process generally does not impose any additional burdens beyond those associated with traditional litigation. Id.

Plaintiff argues that a challenge to a prior restraint on speech requires a faster resolution than the CSRA can provide as it represents "the most serious and the least tolerable infringement on First Amendment rights," Neb. Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976), and, in other situations, courts have held that plaintiffs bringing First Amendment

challenges need not exhaust administrative remedies because this delay may result in irreparable injury. See Able v. United States, 88 F.3d 1280, 1289 (2d Cir. 1996); Ramirez v. U.S. Customs & Border Prot., 709 F. Supp. 2d 74, 84 (D.D.C. 2010); see also Nat'l Taxpayers Union v. U.S. Soc. Sec. Admin., 376 F.3d 239, 244 (4th Cir. 2004) (Wilkinson, J., concurring); however, the time plaintiff has spent litigating this civil action rather than pursuing remedies through the administrative scheme belies its contention that pursuing its claims through the CSRA would create irreparable harm. That no individual immigration judge has chosen to proceed through the administrative scheme after almost three years of litigation suggests that the irreparable harm faced by judges is not so great that the CSRA's process would fail to provide meaningful judicial review. Moreover, in Rydie, the Fourth Circuit found that the CSRA's procedure created no burdens outside those of traditional litigation even when the Rydie plaintiffs filed suit only three weeks before they needed to receive the first dose of a COVID-19 vaccine or risk being fired. See Rydie, 2022 WL 1153249, at *5; Rydie v. Biden, 572 F. Supp. 3d 153 (D. Md. 2021), vacated and remanded, 2022 WL 1153249 (4th Cir. Apr. 19, 2022), [Dkt. No. 1] at ¶ 2. If the three-week deadline present in Rydie did not mandate review by a district court in the first instance, plaintiff's challenge to a speech policy enacted in 2021 does not here.

b. Wholly Collateral

Thunder Basin's second factor at step two asks whether claims are "wholly collateral" to the CSRA's

review process. "[C]laims are not wholly collateral when they are 'the vehicle by which [petitioners] seek to'" challenge a CSRA-covered action. Bennett, 844 F.3d at 186 (quoting Elgin, 567 U.S. at 22). "In other words, a claim isn't wholly collateral to the CSRA if the Board 'regularly adjudicate[s]' similar challenges." Rydie, 2022 WL 1153249, at *7 (alteration in original) (quoting Elgin, 567 U.S. at 22). As the Fourth Circuit has acknowledged, because this factor also focuses on whether a plaintiff challenges a covered action, it does not have much "independent significance." Bennett, 844 F.3d at 187. Here again, plaintiff argues that it does not challenge a CSRA-covered action, but instead, brings a "'general challenge' to an employee speech policy," [Dkt. No. 72] at 35; however, as discussed, plaintiff challenges a significant change in the working conditions of immigration judges, and, as such, its claims are not wholly collateral to the CSRA scheme. See Elgin, 567 U.S. at 22 (finding a claim not wholly collateral when it was "precisely the type of personnel action regularly adjudicated by the Board and the Federal Circuit within the CSRA scheme.").

c. Agency Expertise

The third step-two Thunder Basin factor requires courts to determine "whether 'agency expertise could be brought to bear on the . . . questions presented." Bennett, 844 F.3d at 181 (quoting Thunder Basin, 510 U.S. at 212, 215). Plaintiff contends that its constitutional claims are beyond both the OSC and the MSPB's agency expertise because they have "never had occasion to evaluate the constitutionality

of a broad prior restraint like the [2021] Policy." [Dkt. No. 72] at 36 (emphasis in original). In Elgin, the Supreme Court held that, even if an Article III court may be necessary to ultimately adjudicate the constitutional issues in an employee's claim, the MSPB is competent to adjudicate the "threshold questions that may accompany a constitutional claim" such as "preliminary questions unique to the employment context." Elgin, 567 U.S. at 22. As agency expertise can be brought to bear on a challenge to a prohibited personnel practice, the OSC and the MSPB have agency expertise relevant to adjudicate plaintiff's claims.[26]

III. CONCLUSION

In sum, evaluating the Thunder Basin factors, it is fairly discernable that Congress intended the CSRA scheme to preclude district court jurisdiction over plaintiff's challenge to the 2021 policy. Were plaintiff's members to pursue their reasonable, nonfrivolous constitutional claims through the CSRA's administrative process and fail to secure review in the Federal Circuit, it is possible that plaintiff would then be entitled to district court

[26] For example, the OSC and the MSPB, having broad jurisdiction over federal employees, may actually have more experience with the restriction, if any, imposed on administrative law judges throughout the federal sector, which could be relevant when assessing the merits of plaintiff's First and Fifth Amendment challenges. Although counsel provided examples of only two other agencies—the Social Security Administration and the Patent and Trademark Office—that had speech policies for its administrative judges, the OSC or the MSPB may know of more.

review; however, at this stage, this Court is satisfied that it lacks jurisdiction over plaintiff's claims.

For the reasons stated above, defendant's Motion to Dismiss [Dkt. No. 68] will be GRANTED by an Order to be issued with this Memorandum Opinion.

Entered this [21st] day of September, 2023.

Alexandria, Virginia

/s/ LBM
Leonie M. Brinkema
United States District Judge

District court order (Sept. 21, 2023)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

No. 1:20-cv-731 (LMB/JFA)

NATIONAL ASSOCIATION OF IMMIGRATION JUDGES, affiliated with the International Federation of Professional and Technical Engineers,

Plaintiff,

v.

DAVID L. NEAL, in his official capacity as Director of the Executive Office for Immigration Review,

Defendant.

Filed: September 21, 2023

ORDER

For the reasons stated in the accompanying Memorandum Opinion, defendant's Motion to Dismiss [Dkt. No. 68] is GRANTED, and it is hereby

ORDERED that judgment be and is entered in favor of defendant.

The Clerk is directed to enter judgment in defendant's favor pursuant to Federal Rule of Civil

Procedure 58, forward copies of this Order and Memorandum Opinion to counsel of record, and close this civil action.

Entered this [21st] day of September, 2023.

Alexandria, Virginia

/s/ LBM
Leonie M. Brinkema
United States District Judge

U.S. Const. amend. I

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

5 U.S.C. § 1214

Investigation of prohibited personnel practices; corrective action

(a)

(1)

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

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

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

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

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

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

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

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

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

(2)

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

(i) the termination of the investigation;

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

(iii) the reasons for terminating the investigation; and

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

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

(3) Except in a case in which an employee, former employee, or applicant for employment has the right to appeal directly to the Merit Systems Protection Board under any law, rule, or regulation, any such employee, former employee, or applicant shall seek corrective action from the Special Counsel before seeking corrective action

from the Board. An employee, former employee, or applicant for employment may seek corrective action from the Board under section 1221, if such employee, former employee, or applicant seeks corrective action for a prohibited personnel practice described in section 2302(b)(8) or section 2302(b)(9)(A)(i), (B), (C), or (D) from the Special Counsel and—

(A)

(i) the Special Counsel notifies such employee, former employee, or applicant that an investigation concerning such employee, former employee, or applicant has been terminated; and

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

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

(4) If an employee, former employee, or applicant seeks a corrective action from the Board under section 1221, pursuant to the provisions of paragraph (3)(B), the Special Counsel may

continue to seek corrective action personal to such employee, former employee, or applicant only with the consent of such employee, former employee, or applicant.

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

(6)

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

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

(I)

(aa) made by the individual; and

(bb) investigated by the Special Counsel; or

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

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

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

(B) Not later than 30 days after the date on which the Special Counsel terminates an investigation under subparagraph (A), the Special Counsel shall provide a written notification to the individual who submitted the allegation of a prohibited personnel practice that states the basis of the Special Counsel for terminating the investigation.

(b)

(1)

(A)

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

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

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

(B)

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

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

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

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

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

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

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

(2)

(A)

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

prohibited personnel practice has occurred, exists, or is to be taken.

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

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

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

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

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

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

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

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

(4)

(A) The Board shall order such corrective action as the Board considers appropriate, if the Board determines that the Special Counsel has demonstrated that a prohibited

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

(B)

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

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

(c)

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

for employment adversely affected by such order or decision.

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

(d)

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

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

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

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

(e) If, in connection with any investigation under this subchapter, the Special Counsel determines that there is reasonable cause to believe that any violation of any law, rule, or regulation has occurred other than one referred to in subsection (b) or (d), the Special Counsel shall report such violation to the head of the agency involved. The Special Counsel shall require, within 30 days after the receipt of the report by the agency, a certification by the head of the agency which states—

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

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

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

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

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

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

compensatory damages (including interest, reasonable expert witness fees, and costs).

(h) Any corrective action ordered under this section to correct a prohibited personnel practice may include fees, costs, or damages reasonably incurred due to an agency investigation of the employee, if such investigation was commenced, expanded, or extended in retaliation for the disclosure or protected activity that formed the basis of the corrective action.

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

5 U.S.C. § 2301

Merit system principles

(a) This section shall apply to—

(1) an Executive agency; and

(2) the Government Publishing Office.

(b) Federal personnel management should be implemented consistent with the following merit system principles:

(1) Recruitment should be from qualified individuals from appropriate sources in an endeavor to achieve a work force from all segments of society, and selection and advancement should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition which assures that all receive equal opportunity.

(2) All employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management without regard to political affiliation, race, color, religion, national origin, sex, marital status, age, or handicapping condition, and with proper regard for their privacy and constitutional rights.

(3) Equal pay should be provided for work of equal value, with appropriate consideration of both national and local rates paid by employers in the private sector, and appropriate incentives

and recognition should be provided for excellence in performance.

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

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

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

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

(8) Employees should be—

> **(A)** protected against arbitrary action, personal favoritism, or coercion for partisan political purposes, and
>
> **(B)** prohibited from using their official authority or influence for the purpose of interfering with or affecting the result of an election or a nomination for election.

(9) Employees should be protected against reprisal for the lawful disclosure of information

which the employees reasonably believe evidences—

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

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

(c) In administering the provisions of this chapter—

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

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

5 U.S.C. § 2302

Prohibited personnel practices

(a)

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

(2) For the purpose of this section—

(A) "personnel action" means—

(i) an appointment;

(ii) a promotion;

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

(iv) a detail, transfer, or reassignment;

(v) a reinstatement;

(vi) a restoration;

(vii) a reemployment;

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

(ix) a decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance

evaluation, or other action described in this subparagraph;

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

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

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

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

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

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

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

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

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

(ii)

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

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

(iii) the Government Accountability Office; and

(D) "disclosure" means a formal or informal communication or transmission, but does not include a communication concerning policy decisions that lawfully exercise discretionary authority unless the employee or applicant providing the disclosure reasonably believes that the disclosure evidences—

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(B) any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences—

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

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

(C) any disclosure to Congress (including any committee of Congress) by any employee of an

agency or applicant for employment at an agency of information described in subparagraph (B) that is—

(i) not classified; or

(ii) if classified—

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

(II) does not reveal intelligence sources and methods.

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

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

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

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

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

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

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

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

(11)

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

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

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

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

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

(B) prohibits or restricts an employee or applicant for employment from disclosing to Congress, the Special Counsel, the Inspector General of an agency, or any other agency

component responsible for internal investigation or review any information that relates to any violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or any other whistleblower protection; or

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

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

Government evidence such violations, mismanagement, waste, abuse, or danger.

(c)

(1) In this subsection—

(A) the term "new employee" means an individual—

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

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

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

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

(A) preventing prohibited personnel practices;

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

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

informed of the rights and remedies available to the employees under this chapter and chapter 12, including—

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

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

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

(I) the Special Counsel;

(II) the Inspector General of an agency;

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

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

(3) The head of each agency shall ensure that the information described in paragraph (2) is provided to each new employee of the agency not later than 180 days after the date on which the new employee is appointed.

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

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

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

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

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

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

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

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

(e)

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

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

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

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

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

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

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

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

(H) Any regulation prescribed under subsection (b) or (c) of section 1302 and any other regulation that implements a provision of law referred to in any of the preceding subparagraphs.

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

(f)

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

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

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

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

(D) the disclosure was not made in writing;

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

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

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

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

5 U.S.C. § 7501

Definitions

For the purpose of this subchapter—

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

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

5 U.S.C. § 7502

Actions covered

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

5 U.S.C. § 7503

Cause and procedure

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

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

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

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

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

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

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

upon its request and to the employee affected upon the employee's request.

5 U.S.C. § 7504

Regulations

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

5 U.S.C. § 7512

Actions covered

This subchapter applies to—

(1) a removal;

(2) a suspension for more than 14 days;

(**3)** a reduction in grade;

(4) a reduction in pay; and

(5) a furlough of 30 days or less;

but does not apply to—

(A) a suspension or removal under section 7532 of this title,

(B) a reduction-in-force action under section 3502 of this title,

(C) the reduction in grade of a supervisor or manager who has not completed the probationary period under section 3321(a)(2) of this title if such reduction is to the grade held immediately before becoming such a supervisor or manager,

(D) a reduction in grade or removal under section 4303 of this title,

(E) an action initiated under section 1215 or 7521 of this title, or

(F) a suitability action taken by the Office under regulations prescribed by the Office, subject to the rules prescribed by the President under this title for the administration of the competitive service.

5 U.S.C. § 7513

Cause and procedure

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

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

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

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

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

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

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

(d) An employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board under section 7701 of this title.

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

5 U.S.C. § 7703

Judicial review of decisions of the Merit Systems Protection Board

(a)

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

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

(b)

(1)

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

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

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

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

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

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

(3) unsupported by substantial evidence;

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

(d)

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

reconsideration of its decision, and such petition is denied. In addition to the named respondent, the Board and all other parties to the proceedings before the Board shall have the right to appear in the proceeding before the Court of Appeals. The granting of the petition for judicial review shall be at the discretion of the Court of Appeals.

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

before the Board shall have the right to appear in the proceeding before the court of appeals. The granting of the petition for judicial review shall be at the discretion of the court of appeals.

28 U.S.C. § 1331

Federal question

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