ORAL ARGUMENT NOT YET SCHEDULED

No. 20-1868

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NATIONAL ASSOCIATION OF IMMIGRATION JUDGES,

Appellant,

v.

JAMES R. McHENRY III,
Director of the Executive Office for Immigration Review,

Appellee.

ON APPEAL FROM A DECISION OF THE U.S. DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA,
ALEXANDRIA DIVISION

BRIEF FOR THE NATIONAL TREASURY EMPLOYEES UNION AS AMICUS CURIAE IN SUPPORT OF APPELLANT URGING REVERSAL

GREGORY O'DUDEN
General Counsel

LARRY J. ADKINS
Deputy General Counsel

JULIE M. WILSON
Deputy General Counsel

PARAS N. SHAH
Assistant Counsel

ALLISON C. GILES
Assistant Counsel

NATIONAL TREASURY
EMPLOYEES UNION
1750 H Street, N.W.
Washington, D.C. 20006
(202) 572-5500

October 5, 2020

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 20-1868 Caption: National Association of Immigration Judges v. James R. McHenry, III

Pursuant to FRAP 26.1 and Local Rule 26.1,

National Treasury Employees Union
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐YES ☑NO

2. Does party/amicus have any parent corporations? ☐YES ☑NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐YES ☑NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☐NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Paras N. Shah Date: 10/5/2020

Counsel for: National Treasury Employees Union

Print to PDF for Filing

TABLE OF CONTENTS

IDENTITY AND INTEREST OF THE AMICUS CURIAE.....1

STATEMENT OF THE ISSUE.....2

INTRODUCTION.....2

ARGUMENT.....3

The Statute Does Not Preclude the Union's First Amendment Claim.....3

A. Proceeding Through the Statute's Scheme Could Foreclose Meaningful Judicial Review.....4

1. If Channeled, the First Amendment Issue Might Not Receive Judicial Review, Which Weighs Heavily Against a Finding of Preclusion.....4

2. Delayed Court of Appeals Review, In Any Event, Would Not Be Meaningful Review for a First Amendment Prior Restraint Claim.....11

B. The Union's First Amendment Claim is Wholly Collateral to the Statute's Review Scheme.....18

1. The Parties' Disagreement is About the First Amendment's Reach, Not About Collective Bargaining.....18

2. The Statute's Review Scheme Cannot Provide Full Post-Deprivation Relief.....20

C. The FLRA Has Limited Experience in the First Amendment Prior Restraint Context. 22

CONCLUSION 23

TABLE OF AUTHORITIES

Cases

AFGE, Local 3936 v. FLRA,
239 F.3d 66 (1st Cir. 2001) 22

Bennett v. SEC,
844 F.3d 174 (4th Cir. 2016) 4, 11, 14, 15

Berkley v. Mt. Valley Pipeline, LLC,
896 F.3d 624 (4th Cir. 2018) 4, 11, 14, 15

Bridges v. Colvin,
136 F. Supp. 3d 620 (E.D. Pa. 2015) 9

Dep't of the Treasury v. FLRA,
494 U.S. 922 (1990) 17

Elgin v. Dep't of the Treasury,
567 U.S. 1 (2012) 4, 10, 19

Elrod v. Burns,
427 U.S. 347 (1976) 11

Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.,
561 U.S. 477 (2010) 5

Ivey v. FLRA, 2011 U.S. Dist. LEXIS
122586 (E.D.N.C. Oct. 21, 2011) 9

Jarkesy v. SEC,
803 F.3d 9 (D.C. Cir. 2015) 19, 21, 22

Liverman v. City of Petersburg,
844 F.3d 400 (4th Cir. 2016) 2, 14, 15, 17

Mathews v. Eldridge,
424 U.S. 319 (1976) 21, 22

Nat'l Air Traffic Controllers Ass'n, AFL-CIO v. FSIP,
437 F.3d 1256 (D.C. Cir. 2006) 8

Nat'l Fed'n of Fed. Emples. Local 2189 and Jarman,
68 F.L.R.A. 374 (2015) 22

National Taxpayers Union v. Soc. Sec. Admin.,
376 F.3d 239 (4th Cir. 2004) 16

New York Republican State Committee v. SEC,
799 F.3d 1126 (D.C. Cir. 2015) 17

NTEU v. FLRA,
986 F.2d 537 (D.C. Cir. 1993) 22

NTEU v. King,
961 F.2d 240 (D.C. Cir. 1992) 22

Soc. Sec. Admin. and NTEU,
47 F.L.R.A. 1376 (1993) 22

Sturm, Ruger & Co. v. Chao,
300 F.3d 867 (D.C. Cir. 2002) 18

Teamsters Local Union No. 515 v. NLRB,
906 F.2d 719 (D.C. Cir. 1990) 7

Thunder Basin Coal Co. v. Reich
510 U.S. 200 (1994) ..... passim

Turgeon v. FLRA,
677 F.2d 937 (D.C. Cir. 1982) 9

United States v. NTEU,
513 U.S. 454 (1995) 14, 16, 17

Walton v. Arizona,
497 U.S. 639 (1990) 17

Statutes and Regulations

5 C.F.R. § 2424.2(c) 6

5 C.F.R. § 2425.2 9

5 U.S.C. § 7104(f) 8

5 U.S.C. § 7105(a)(2)(E) 6

5 U.S.C. § 7106(b)(2)-(3) 6

5 U.S.C. § 7116(a) 7

5 U.S.C. § 7116(a)(5) 7

5 U.S.C. § 7117(c)(1) 6

5 U.S.C. § 7118 7

5 U.S.C. § 7118(a)(1) 8, 9

5 U.S.C. § 7119 8

5 U.S.C. § 7123 ..... 5, 9

5 U.S.C. § 7123(a) 6, 7, 10

Fed. R. App. P. 29(a)(4). 2

Other Authorities

Office of the General Counsel, FLRA.gov, https://www.flra.gov/components-offices/components/office-general-counsel-ogc (last visited Oct. 2, 2020) 8

Ralph R. Smith, 277 Cases Awaiting General Counsel Confirmation, FedSmith (Nov. 6, 2019), https://www.fedsmith.com/2019/11/06/277-cases-awaiting-general-counsel-confirmation/ 8

IDENTITY AND INTEREST OF THE AMICUS CURIAE

The National Treasury Employees Union (NTEU) is a federal-sector labor organization that represents nearly 150,000 bargaining unit employees in thirty-three federal agencies and departments.

Since the enactment of the Federal Service Labor-Management Relations Statute (the Statute) in 1978, NTEU has frequently litigated constitutional and statutory claims against the federal government in federal district court. Many of those cases have involved the same jurisdictional issue raised here: whether the Statute precludes federal district court jurisdiction over the underlying legal claim. NTEU, moreover, has successfully litigated First Amendment challenges to restrictions on federal employee speech.

NTEU is thus well positioned to explain why the Statute does not divest federal district courts of their jurisdiction over First Amendment claims challenging prior restraints on federal employee speech. Pursuant to Federal Rule of Appellate Procedure 29(a), all parties have consented to the filing of this brief.[1]

[1] No counsel for any party in this action authored this brief in whole or in part, and no party or party's counsel or person other than the amicus

STATEMENT OF THE ISSUE

Whether the district court erred in concluding that the Statute impliedly precludes its subject matter jurisdiction over a First Amendment challenge to a prior restraint on private speech.

INTRODUCTION

The National Association of Immigration Judges (NAIJ) has mounted a First Amendment challenge to a federal agency's prior restraint on its members' speech. The Executive Office for Immigration Review's (EOIR) policies severely constrict judges' speech on important and timely immigration topics. This unlawful prior restraint "squashes speech on matters of public import at the very outset." See Liverman v. City of Petersburg, 844 F.3d 400, 408 (4th Cir. 2016). Like prior restraints that this Court has previously invalidated, this government policy curtails speech on "the operations and policies of the [agency], arguably the 'paradigmatic' matter of public concern." See id.

The silenced immigration judges and the public at large will suffer if the district court's erroneous jurisdictional ruling stands. The Statute's

---

curiae or its members or its counsel contributed money intended to fund preparing or submitting this brief. See Fed. R. App. P. 29(a)(4).

review scheme is designed for bargaining disputes; there is, however, no bargaining claim that could be raised here that would remedy this unconstitutional policy. If the district court's ruling stands, NAIJ's First Amendment claim may never receive judicial review. Moreover, the speech opportunities that will be lost while awaiting any eventual court of appeals review will be irremediable.

The Supreme Court's decision in Thunder Basin Coal Co. v. Reich established a framework for determining whether Congress meant for a plaintiff's claims to be channeled initially through an administrative review scheme. 510 U.S. 200 (1994). If a statute includes an administrative review scheme, a litigant must proceed exclusively through that scheme when the litigant's claims "are of the type Congress intended to be reviewed within [the] statutory structure." Id. at 212. NAIJ's First Amendment prior restraint claims are not, as explained below, the type that Congress intended to be challenged through the Statute.

ARGUMENT

The Statute Does Not Preclude the Union's First Amendment Claim.

Under Thunder Basin, in evaluating congressional intent, a court must examine the litigant's showing and carefully evaluate (1) whether "a

finding of preclusion could foreclose all meaningful judicial review;" (2) whether the plaintiff's claims are "wholly 'collateral' to the statute's review provisions;" and (3) whether the claims are "outside the agency's expertise." See id. at 212-13 (emphasis added). As this Court has instructed, the first factor is the "most important." Bennett v. SEC, 844 F.3d 174, 183 n.7 (4th Cir. 2016); accord Berkley v. Mt. Valley Pipeline, LLC, 896 F.3d 624, 630 (4th Cir. 2018). As discussed below, the Thunder Basin factors, especially the "most important" factor, strongly weigh against preclusion.

A. Proceeding Through the Statute's Scheme Could Foreclose Meaningful Judicial Review.

For two independent reasons, precluding district court jurisdiction could foreclose meaningful judicial review over NAIJ's First Amendment prior restraint claim.

1. If Channeled, the First Amendment Issue Might Not Receive Judicial Review, Which Weighs Heavily Against a Finding of Preclusion.

The first Thunder Basin factor is whether "a finding of preclusion could foreclose all meaningful judicial review." 510 U.S. at 212-13 (emphasis added). The Supreme Court has consistently framed this factor in this way. Elgin v. Department of the Treasury, 567 U.S. 1, 15

(2012); Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 489 (2010). If being relegated to the administrative scheme "could" thwart judicial review of the pertinent legal question, then this prong favors district court jurisdiction. In other words, to avoid preclusion, a litigant does not need to show that proceeding through the scheme would absolutely foreclose the possibility of judicial review of the underlying legal issue.

Here, if NAIJ is limited to the Statute's remedial scheme, meaningful judicial review of its First Amendment prior restraint claim most certainly could be foreclosed. That is because the Statute's administrative procedures are meant to resolve collective bargaining disputes. This case does not, however, present such a dispute. It instead presents the issue of whether EOIR's speech policies contravene the First Amendment. This is plainly not the type of question that Congress intended to be taken through the Statute's administrative scheme.

The Statute, at Section 7123 of Title 5, provides for court of appeals review of Federal Labor Relations Authority (FLRA) decisions, with certain exceptions. NAIJ, though, would very likely lack a claim that it

could take to the FLRA at all. There are two pertinent ways to proceed through the Statute to court of appeals review, but neither could apply here.

a. The first potential path to the FLRA (and then, possibly, a court of appeals) would arise if an agency believes that a union proposal is nonnegotiable. See 5 U.S.C. §§ 7105(a)(2)(E), 7123(a). A union such as NAIJ cannot tee up a negotiability dispute by declaring a proposal nonnegotiable as contrary to law (such as the First Amendment). Only an agency can do so. See 5 U.S.C. § 7117(c)(1); 5 C.F.R. § 2424.2(c) (negotiability disputes arise when an agency contends that a proposal is outside the duty to bargain or when the agency head disapproves a provision as contrary to law).

It is implausible, moreover, that NAIJ would be able to manufacture a negotiability dispute through which the First Amendment question could be raised. Any bargaining over EOIR's speech policies, as NAIJ has explained, would be unrelated to their actual substance. See NAIJ Brief (Sept. 28, 2020) at 16-18. It would instead be limited to EOIR's "procedures" for implementing the policies and the "appropriate arrangements" for employees adversely affected by

them. See id. at 17 (quoting 5 U.S.C. § 7106(b)(2)-(3)). And, if EOIR were to declare an NAIJ proposal concerning these statutorily-limited topics to be nonnegotiable, it would be that proposal that would be scrutinized in the resulting FLRA proceeding and in any court of appeals review. The actual substance of EOIR's policy could escape judicial review.

b. The second theoretical route to the FLRA and possible, eventual judicial review would be to bring an unfair labor practice (ULP) claim to the FLRA. See 5 U.S.C. §§ 7118, 7123(a). The Statute delineates what qualifies as a ULP. 5 U.S.C. § 7116(a). The only potential ULP that could come into play in this context would arise if the employing agency refused to bargain in good faith. 5 U.S.C. § 7116(a)(5).

But this potential avenue might easily be foreclosed. If EOIR bargains in good faith—hears NAIJ's concerns and engages in sufficient back-and-forth—but nonetheless does not yield or alter its position, no failure to bargain ULP would result. "Adamant insistence on a bargaining position . . . is not in itself a refusal to bargain in good faith." Teamsters Local Union No. 515 v. NLRB, 906 F.2d 719, 726 (D.C. Cir.

1990). And, if the parties bargained to impasse, their dispute would be resolved by the Federal Services Impasses Panel. See 5 U.S.C. § 7119. The Panel's decision, however, would not be subject to judicial review. See Nat'l Air Traffic Controllers Ass'n, AFL-CIO v. FSIP, 437 F.3d 1256, 1258 (D.C. Cir. 2006).

Even if the employing agency chose to engage in bad-faith bargaining and a ULP could be brought, the path forward would be so uncertain and so lengthy that meaningful judicial review could be foreclosed. A union can request the FLRA General Counsel to issue a ULP complaint, 5 U.S.C. § 7118(a)(1), but this route is foreclosed, indefinitely, because there is no FLRA General Counsel. See Office of the General Counsel, FLRA.gov, https://www.flra.gov/components-offices/components/office-general-counsel-ogc (last visited Oct. 2, 2020).[2]

And even if a General Counsel were eventually appointed, he or she would have discretion over whether to issue a ULP complaint. 5

[2] Indeed, this position, which requires Presidential nomination and Senate confirmation, 5 U.S.C. § 7104(f), has been vacant for nearly three years, creating a backlog of hundreds of cases. See Ralph R. Smith, 277 Cases Awaiting General Counsel Confirmation, FedSmith (Nov. 6, 2019), https://www.fedsmith.com/2019/11/06/277-cases-awaiting-general-counsel-confirmation/.

U.S.C. § 7118(a)(1). A ULP charge would never reach the FLRA or any court if the General Counsel refused to issue a complaint. Turgeon v. FLRA, 677 F.2d 937, 939 (D.C. Cir. 1982) (holding that General Counsel's decision to decline to issue a ULP complaint is not reviewable by the FLRA or any court). Accord Ivey v. FLRA, 2011 U.S. Dist. LEXIS 122586, at *9 (E.D.N.C. Oct. 21, 2011). Courts have recognized that there is no meaningful review when judicial review could be foreclosed by an agency declining to act. See Bridges v. Colvin, 136 F. Supp. 3d 620, 642-48 (E.D. Pa. 2015).

With the absence of an FLRA General Counsel, NAIJ's remaining option would be to seek review of a ULP claim by filing a grievance through its collectively bargained grievance-arbitration procedure, but only if its collective bargaining agreement permits such grievances. This would add another layer of administrative process before any eventual judicial review. NAIJ would need to proceed through the grievance-arbitration process and then, if it loses, file exceptions with the FLRA. 5 C.F.R. § 2425.2. And only after the FLRA passes upon the ULP claim would NAIJ be able to bring its claims to a court of appeals. 5 U.S.C. § 7123.

Based on NTEU's extensive experience grieving ULPs, these two layers of administrative review for a union-initiated ULP complaint (assuming the agency engaged in bad-faith bargaining) might delay judicial review of NAIJ's prior restraint claim for several years. The Statute's remedial opportunities are thus profoundly different from those available in Thunder Basin and Elgin. In those cases, the pertinent administrative scheme allowed the aggrieved party to proceed directly to the administrative agency whose decision could be appealed to a federal court of appeals.

c. The district court's overly simplified reasoning thus misses the mark. Without discussing Section 7123(a) at all, it concluded that because bargaining over the policy being challenged was permitted, that any legal defects with the policy constituted a bargaining dispute that should be dealt with through the Statute's remedial scheme. JA284-86. That is plainly an insufficient analysis. The government's overbroad restriction on NAIJ members' speech is not a bargaining problem. It is an unconstitutional restraint on speech problem. Congress could not have intended for it to be relegated to the Statute's administrative scheme.

2. Delayed Court of Appeals Review, in Any Event, Would Not Be Meaningful Review for a First Amendment Prior Restraint Claim.

Plaintiffs are denied meaningful review when they are subject to "some additional and irremediable harm beyond the burdens associated with the dispute resolutions process." Bennett, 844 F.3d at 186 n.13; accord Berkley, 896 F.3d at 631 (discussing Bennett). Here, NAIJ has presented ample evidence of such "additional and irremediable harm": declarations detailing speech opportunities prohibited under the challenged policy and the policy's continued chilling effect on immigration judges.

"The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Elrod v. Burns, 427 U.S. 347, 373 (1976). An opportunity to speak, once lost, cannot be remedied later. It is not only the immigration judges but also the public at large who would suffer while NAIJ awaits potential (and far from certain) judicial review of its First Amendment prior restraint claim.

a. The record demonstrates that NAIJ will suffer an irremediable harm separate from the serious burdens of the preclusion

process. As explained below, its members have been barred from speaking on important matters of public policy. Furthermore, the judges have been chilled from attempting to speak to the public in the future on immigration matters.

The "2020 Policy . . . categorically prohibits immigration judges from speaking or writing publicly in their personal capacities about immigration." JA64-65. Under agency policies, immigration judges' requests to speak have been regularly denied. JA65.

For example, Judge Mimi Tsankov's request to speak to a practicing law institute on recent developments in asylum law and the Convention Against Torture was denied. JA66, 112-130. A request by an immigration judge to speak to a law school class about asylum claims and children was turned down. JA66, 107-111. One judge, who had spoken at Continuing Legal Education (CLE) trainings for many years, was informed that "immigration judge participation in CLE events" would no longer be approved. JA55-56. Even Judge Samuel Cole's request to speak to a seventh-grade class on how political asylum requests to the United States are handled was denied, although an

almost identical speaking engagement had been approved in 2017. JA66, 134-149.

Because of these denials, immigration judges came to believe that requests for approval to speak were "futile." JA66-67; see JA55 (stating that it is understood that inviting an immigration judge to speak "is a futile exercise"). Even worse, judges feared they would face retaliation if they violated the agency's speech restrictions. JA67. The agency often issued denials without reasons and after lengthy delays. JA63, 65-66. In one case, the agency denied a request that had been pending for three months and issued the denial, after repeated inquiries by the judge, only two days before the speaking event. JA112-130. Accordingly, judges have begun to submit fewer requests and have chosen not to seek out speaking or writing opportunities. JA66-68. It "became known . . . that immigration judges were generally no longer permitted to participate in . . . immigration-related events." JA54-55.

These restrictions affect not only the judges but the public as well. The American Immigration Lawyers Association now relies on retired judges, who may be less familiar with recent developments in immigration law and policy, to speak because "inviting sitting

immigration judges to participate would be futile." JA56. The public thus loses access to judges who "have unique insights into the nation's immigration system." JA250-51; see Liverman, 844 F.3d at 408 (concluding that the interests of "'potential audiences'" as well as potential speakers in the restricted speech, were "manifestly significant") (quoting United States v. NTEU, 513 U.S. 454, 458 (1995)).

This detailed evidence of irremediable harm stands in stark contrast to the record in cases such as Berkeley, which involved landowners upset about a possible pipeline. See 896 F.3d at 627-28. The Berkley appellants made "unsupported assertions" with no corroborating evidence and "no detailed arguments" about why their injuries were irreparable. Id. at 632. Here, NAIJ presented multiple specific examples, with supporting documentary evidence, of speech being suppressed and chilled. JA65-68; JA54-56.

b. In conflict with this Court's teachings, the district court failed to evaluate NAIJ's evidence of the irremediable harm that its members would suffer during the channeling process. See Bennett, 844 F.3d at 186 n.13; Berkley, 896 F.3d at 631-32. Despite this Court's admonition that such harm "may, in effect, deny a plaintiff meaningful judicial review"

(Berkley, 896 F.3d at 631), the district court did not address NAIJ's supporting evidence in its preclusion analysis or in its irreparable harm analysis. See JA283-90.

Instead of engaging with NAIJ's irreparable harm argument, the district court misconstrued it. The district court stated that NAIJ was asking it to conclude "that an assertion of a First Amendment violation excuses it from the required administrative proceedings." JA286. What is being sought, however, is much narrower: a recognition that a First Amendment prior restraint claim in which a sufficient showing of irreparable harm is made merits immediate judicial review.

c. This Court has never channeled a First Amendment prior restraint claim, and it certainly has not precluded such a claim where irreparable harm would be suffered during the channeling process. Indeed, this Court has fiercely protected the private speech of public employees in the face of overbroad prior restraints. See Liverman 844 F.3d at 408-09 (invalidating an agency policy prohibiting employee speech "that would tend to discredit or reflect unfavorably on" the agency).

Where this Court has precluded a First Amendment challenge to a restriction on a narrow category of speech, moreover, it has expressly emphasized that it was not faced with a prior restraint claim. See National Taxpayers Union v. Soc. Sec. Admin., 376 F.3d 239, 241 n.1 (4th Cir. 2004). Furthermore, National Taxpayers Union involved a very different type of speech. As Judge Wilkinson explained, it did not involve "a pre-enforcement challenge to a statute that seeks to silence criticism of the operation of a government program." Id. at 244 (Wilkinson, J., concurring). Instead, "[a]ll that was at issue [was] a statute that forbids the impersonation of a federal agency by a private organization bent on sowing confusion among beneficiaries of a program." Id.

This Court's appreciation for the unique nature of First Amendment prior restraint claims is consistent with Supreme Court precedent. Only one year after Thunder Basin, the Supreme Court evaluated a First Amendment prior restraint challenge to a federal statute that NTEU and individual federal employees brought against the federal government. See NTEU, 513 U.S. at 461. "Emphasizing that the honoraria ban [at issue] impeded a 'broad category of

expression' and 'chills potential speech before it happens,'" the Supreme Court concluded that the government's application of the statute violated the First Amendment. See Liverman, 844 F.3d at 407 (quoting NTEU, 513 U.S. at 467-68).

When the Supreme Court issued its decision in NTEU, it was presumably aware of its recently established Thunder Basin framework. See, e.g., Walton v. Arizona, 497 U.S. 639, 653 (1990) ("judges are presumed to know the law"); New York Republican State Committee v. SEC, 799 F.3d 1126, 1131 (D.C. Cir. 2015) (observing that the court's "willingness to exercise jurisdiction without comment" reflects an understanding of its previous jurisdictional ruling). The Supreme Court, moreover, had recently scrutinized the Statute. See generally Dep't of the Treasury v. FLRA, 494 U.S. 922 (1990). It nevertheless proceeded to the merits of NTEU's claim and held that a prior restraint that broadly impeded and chilled potential speech violated the First Amendment. See NTEU, 513 U.S. at 467-68. This Court should reverse and remand so that the district court may do the same.

In sum, this Court should not relegate First Amendment rights in the prior restraint context to an inadequate administrative avenue if, as here, irreparable harm would occur during the channeling process. For those NAIJ members who lose speech opportunities while proceeding through the statutory scheme, any eventual judicial relief would not be meaningful. See Berkley, 896 F.3d at 631.

B. The Union's First Amendment Claim is Wholly Collateral to the Statute's Review Scheme.

The second Thunder Basin factor asks whether the plaintiff's claims are "wholly 'collateral' to the statute's review provisions." 510 U.S. at 212-13. For two independent reasons, NAIJ's First Amendment prior restraint claim is wholly collateral to the Statute's review scheme and therefore should not be channeled.

1. The Parties' Disagreement is About the First Amendment's Reach, Not About Collective Bargaining.

NAIJ's First Amendment claim is wholly collateral to the Statute's review provisions because it does not "'require[] interpretation of the parties' rights and duties'" under the Statute. See Sturm, Ruger & Co. v. Chao, 300 F.3d 867, 874 (D.C. Cir. 2002) (quoting Thunder Basin, 510

U.S. at 214). It does not, in fact, pertain to the parties' collective bargaining rights or obligations at all.

Put differently, NAIJ's First Amendment claim is "wholly collateral" to the Statute's review scheme because it does not aim to get the same type of relief that could be sought through the Statute's review provisions. See Jarkesy v. SEC, 803 F.3d 9, 22-23 (D.C. Cir. 2015) (noting that the "wholly collateral" prong is "related" to the "meaningful review" prong). NAIJ is not seeking to obtain an order that the government engage in further bargaining over the policy at issue. It is seeking, instead, to have a governmental policy declared unconstitutional and enjoined so that its members may engage in protected speech. The government, in contrast, believes the underlying policy is lawful. Additional bargaining will not resolve this disagreement over the First Amendment's parameters.

This distinguishes NAIJ's First Amendment claim from the constitutional claims lodged in Elgin. In that case, Mr. Elgin's constitutional claims were geared towards challenging his removal from the federal service, something for which Congress created a specific administrative scheme. See 567 U.S. at 6-8. That is not the situation

here. NAIJ's First Amendment claim does not, at its core, seek further negotiations. It is a challenge to a prior restraint on speech that NAIJ believes violates the First Amendment. It is therefore wholly collateral to the Statute's review provisions.

The district court's conclusion to the contrary rests entirely on its observation that the parties bargained over the 2017 version of the policy at issue. JA286. In its view, that makes NAIJ's First Amendment challenge a "bargaining dispute" in the same way that Mr. Elgin's constitutional claims were a mechanism for disputing his removal. JA286-87 (relying on Elgin). NAIJ could pursue further collective bargaining, according to the district court, and resolve any bargaining claims through the scheme (getting, potentially, more bargaining). JA287-88. That overly simplistic analysis misses the mark. As discussed, the underlying problem here is not a bargaining issue. It is a restriction on private speech issue that more time at the bargaining table will not alleviate.

2. The Statute's Review Scheme Cannot Provide Full Post-Deprivation Relief.

The irremediable harm that NAIJ's members would suffer while the First Amendment prior restraint claim is channeled shows that the claim

is "wholly collateral" to the Statute's review provisions. Thunder Basin itself recognizes that a constitutional challenge is wholly collateral if "full post deprivation relief could not be obtained" through the scheme. See 510 U.S. at 213. The D.C. Circuit has likewise recognized that where a litigant would suffer "independent harm caused by the delay" associated with channeling, "full relief" could not be obtained through the scheme, and district court jurisdiction is thus merited. See Jarkesy, 803 F.3d at 27-28.

In adopting this view, the D.C. Circuit relied not only on Thunder Basin, but also Mathews v. Eldridge, 424 U.S. 319 (1976), which upheld federal district court jurisdiction over a due process claim regarding the termination of Social Security benefits, instead of requiring administrative exhaustion. Jarkesy, 803 F.3d at 27-28. As Jarkesy explained, the "plaintiff's claim of entitlement to a pre-termination hearing was 'entirely collateral' to his claim of entitlement to benefits: even if he succeeded on the latter claim and eventually received the benefits, the independent harm caused by the delay would remain." Id. at 27 (quoting Mathews).

The same is true here. Even if NAIJ's First Amendment prior restraint claim could eventually receive judicial review through the Statute's review provisions, which we show is unlikely, see supra at 6-10, a

successful outcome would not remedy the lost speech opportunities that would occur while NAIJ awaits such judicial review. See supra, Section A. Thunder Basin, Mathews, and Jarkesy show that this unavailability of full post-deprivation relief renders NAIJ's First Amendment claim wholly collateral to the Statute's review scheme.

C. The FLRA Has Limited Experience in the First Amendment Prior Restraint Context.

NAIJ's First Amendment prior restraint claim is outside of the FLRA's expertise. Generally, the FLRA's "jurisdiction extends only to statutory, not constitutional, claims." AFGE, Local 3936 v. FLRA, 239 F.3d 66, 71 (1st Cir. 2001) (citing NTEU v. King, 961 F.2d 240, 243 (D.C. Cir. 1992)). The FLRA, nevertheless, may take potential First Amendment questions "into account" when choosing between competing interpretations of the Statute. See NTEU v. FLRA, 986 F.2d 537, 540 (D.C. Cir. 1993); Nat'l Fed'n of Fed. Emples. Local 2189 and Jarman, 68 F.L.R.A. 374, 378 (2015). Despite that discretion, the FLRA appears to have limited experience in the First Amendment prior restraint area. See Soc. Sec. Admin. and NTEU, 47 F.L.R.A. 1376 (1993) (declining to address potential First Amendment issues with statutory ruling on incomplete factual record).

CONCLUSION

For the foregoing reasons, NTEU respectfully asks this Court to reverse the district court's ruling that the Statute precludes its jurisdiction over NAIJ's First Amendment claim.

Respectfully submitted,

/s/ Gregory O'Duden

GREGORY O'DUDEN
General Counsel

/s/ Larry J. Adkins

LARRY J. ADKINS
Deputy General Counsel

/s/ Julie M. Wilson

JULIE M. WILSON
Deputy General Counsel

/s/ Paras N. Shah

PARAS N. SHAH
Assistant Counsel

/s/ Allison C. Giles

ALLISON C. GILES
Assistant Counsel

NATIONAL TREASURY EMPLOYEES UNION
1750 H Street, N.W.
Washington, D.C. 20006
(202) 572-5500
greg.oduden@nteu.org
larry.adkins@nteu.org
paras.shah@nteu.org
julie.wilson@nteu.org
allie.giles@nteu.org

October 5, 2020 Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE

I hereby certify this response complies with the requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in 14-point Century, a proportionally spaced font, and that it complies with the typeface and type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because it contains 4132 words, excluding those words exempted by Federal Rule of Appellate Procedure 32(f).

/s/ Paras N. Shah

PARAS N. SHAH
Assistant Counsel

NATIONAL TREASURY EMPLOYEES UNION
1750 H Street, N.W.
Washington, D.C. 20006
(202) 572-5500
paras.shah@nteu.org

CERTIFICATE OF SERVICE

I certify that, on October 5, 2020, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit through the appellate CM/ECF system. I further certify that the foregoing document is being served on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF.

/s/ Paras N. Shah

PARAS N. SHAH
Assistant Counsel

NATIONAL TREASURY EMPLOYEES UNION
1750 H Street, N.W.
Washington, D.C. 20006
(202) 572-5500
paras.shah@nteu.org