ORAL ARGUMENT HELD ON APRIL 4, 2019

No. 18-5289

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO, et al.,

Plaintiffs-Appellees

v.

DONALD J. TRUMP, in his official capacity
as President of the United States, et al.,

Defendants-Appellants

ON APPEAL FROM A DECISION OF THE
U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

APPELLEES' PETITION FOR REHEARING EN BANC

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RULE 35 STATEMENT

1. Exceptional Importance.

The Court should grant rehearing en banc because this case presents a question of exceptional importance: whether the doctrine of administrative "channeling" should, for the first time, be expanded to thwart judicial review of Executive Orders that, together, rewrite an act of Congress.

The statute in question here, the Federal Service Labor-Management Relations Statute (Statute), was deliberately designed to end ad hoc legislation-by-Executive-Order and replace it with permanent, stable legislation enacted by the body given power to legislate in Article I of the Constitution. The three Executive Orders at issue represent the President's attempt to revive the very type of executive-controlled regime that Congress intended the Statute to end. The panel's ruling that the Unions' challenges to the Executive Orders must be channeled will allow the Orders' illegal provisions to persist indefinitely and cause irreversible harm.

Whether the channeling doctrine should be extended to completely stymie the Statute's core purpose is thus a question of exceptional

importance and deserves the full Court's attention. This is especially so given that the panel failed to address at all one of the principal cases on which the Unions and the district court relied, National Mining Association v. Department of Labor, 292 F.3d 849 (D.C. Cir. 2002). By ignoring National Mining, the panel missed the gravamen of the Union's argument: that the cumulative effect of the challenged provisions of the three Executive Orders is to dismantle core elements of the Statute through ultra vires executive action. The piecemeal administrative litigation that the panel has prescribed is wholly insufficient to eradicate the problems that the illegal Executive Order provisions pose. Consequently, this Court should grant rehearing en banc.

2. **Conflict with Circuit Precedent.**

The panel's ruling that the Statute precluded the district court from reviewing the Unions' claims is materially contrary to this Court's ruling in National Mining. National Mining shows that the Unions' claim that the enjoined Executive Order provisions, cumulatively, violate the Statute cannot be meaningfully reviewed through piecemeal administrative actions. 292 F.3d at 856-57. The panel's ruling is also at odds with Jarkesy v. SEC, 803 F.3d 9 (D.C. Cir. 2015). Jarkesy shows

that a dispute is "wholly collateral" where a party would suffer "independent harm caused by the delay" associated with channeling—harm that would not be remedied through the administrative scheme. Id. at 27-28. Rehearing is therefore necessary to secure and maintain uniformity of this Court's decisions.

ARGUMENT

I. This Court Should Grant Rehearing En Banc Because The Panel's Expansion of Channeling to Bar Review of Direct Presidential Interference with a Statute Presents a Question of Exceptional Importance.

The driving purpose of the Statute was to replace the prior Executive Order-dependent regime. Congress thus created, in 1978, a "statutory Federal labor-management program which cannot be universally altered by any President." 124 Cong. Rec. H9637 (daily ed. Sept. 13, 1978) (statement of Rep. Clay).[1]

The President, however, did just that when, in May 2018, he effectively rewrote the Statute through the issuance of the three Executive Orders at issue here. As the district court concluded, the

[1] This Court, in construing the Statute, has relied on statements of "major players in the legislation, such as Representative Clay." OPM v. FLRA, 864 F.2d 165, 169 (D.C. Cir. 1988).

thirteen Executive Order provisions at issue on appeal, collectively, "operate[d] to eviscerate the right to bargain collectively as envisioned in the" Statute. JA50. The offending provisions took critical topics off the bargaining table and made good faith bargaining on other crucial topics impossible. Together, the provisions embodied a presidential attempt to disrupt a statutory scheme that "unquestionably intended to strengthen the position of federal unions and to make the collective-bargaining process a more effective instrument of the public interest." Bureau of Alcohol, Tobacco, & Firearms v. FLRA, 464 U.S. 89, 107 (1983) (BATF). See 5 U.S.C. § 7101(a) (findings and purpose).

Here is one example of the Executive Orders' nullification of the Statute. The Statute places a duty of fair representation on unions and gives union representatives the right to present and process grievances on behalf of the union or on behalf of any employee represented by the union while on official time. See 5 U.S.C. §§ 7114(a)(1), 7121(b)(1)(C)(i), 7131(d). Yet Section 4(a)(v) of Executive Order No. 13,837 categorically prohibits "all employees" from using official time to "prepare or pursue grievances" on behalf of the union or on behalf of any other bargaining unit employee. If the Unions are

forced to challenge ultra vires Executive Order provisions like this one through piecemeal administrative review, grievances will be processed without the union representation guaranteed by the Statute. By the time the Unions' challenge makes its way through the administrative process, those grievances will have grown fatally stale or will have been addressed without the benefit of union expertise.

No court has ever channeled to an administrative agency such a Presidential usurpation of legislative prerogatives. The enjoined Executive Order provisions embody a deliberate overhaul of the Statute to suit the President's policy objectives. The Statute would be subverted each day the provisions are in effect. Throughout the piecemeal litigation that would ensue, the contested provisions of the Orders would remain on the books and be a source of workplace disruption for federal agencies and their employees.

Simply stated, chaos would occur throughout the government for an indefinite period of time as agencies act on the President's ultra vires commands. During that time, the President would be free to disregard the statute that Congress wrote in favor of the one that he wrote, without fear of judicial review in the near future. And, when judicial review

finally arrives, it would not undo the irreparable harm being done in the meantime.

In sum, Congress passed the Statute to codify federal labor relations and to safeguard it from the whims of any President; to promote collective bargaining; and to strengthen federal labor unions. See 5 U.S.C. § 7101(a); BATF, 464 U.S. at 107. It is inconceivable that Congress would have intended claims challenging the President's override of those policy choices to be channeled to an executive branch administrative agency. This case thus presents a question of exceptional importance that warrants rehearing en banc.

II. This Court Should Grant Rehearing En Banc Because the Panel's Decision Conflicts with Circuit Precedent, Which Shows that the Unions' Claims Are Not the Type That Congress Intended to Channel.

The Supreme Court instructs that a court's channeling determination must be based on a statute's "structure, and purpose, [and] its legislative history." Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 207 (1994). A court will conclude that Congress intended that a litigant proceed exclusively through a statutory scheme of administrative and judicial review when (1) "such intent is 'fairly discernible in the statutory scheme'"; and (2) "the litigant's claims are 'of the type Congress

intended to be reviewed within [the] statutory structure.'" Jarkesy, 803 F.3d at 15 (quoting Thunder Basin, 510 U.S. at 207, 212).

To decide whether Congress intended a claim to be channeled, a court will determine "if a finding of preclusion could foreclose all meaningful review; if the suit is wholly collateral to a statute's review provisions; and if the claims are outside the agency's expertise." Id. at 17 (internal quotations omitted). These three considerations are merely "general guideposts" for discerning Congress's intent. Id. No guidepost is dispositive: the analysis is a "holistic" one. Id. at 22. As discussed below, two of these guideposts clearly favor the Unions and compel a conclusion that Congress did not intend to channel the Unions' complaints to the Federal Labor Relations Authority (FLRA).

A. The Panel's Ruling Conflicts with National Mining, Which Demonstrates That Preclusion Would Foreclose Meaningful Review.

Contrary to the panel's decision, the Unions' argument that the challenged Executive Order provisions, cumulatively, contravene the Statute cannot be meaningfully reviewed through fragmented disputes brought through the administrative scheme. This Court's decision in National Mining shows that channeling is not appropriate where

adjudication requires the assessment of numerous regulations collectively—a task that is not feasible in piecemeal administrative litigation.

In National Mining, the plaintiffs challenged "many" regulations promulgated under the Black Lung Benefits Act as impermissibly retroactive. 292 F.3d at 855. In its preclusion analysis, this Court concluded that assessing this legal claim required an analysis of "all of the regulations [at issue] together as well as the entire rulemaking process." Id. at 858 (emphasis added). This type of analysis, it explained, "would not be feasible in individual adjudications dealing with particular regulatory provisions." Id. Thus, meaningful review of the claim could not be had through the administrative scheme and, consequently, federal district court jurisdiction was not precluded. Id.[2]

The Unions lodged claims below that, like the underlying claim in National Mining, required assessment of the challenged Executive Order provisions cumulatively. They argued that the provisions at issue, collectively, contravened the Statute. See Am. Compl., NTEU v.

[2] This Court has reaffirmed National Mining's core holding multiple times. Arch Coal, Inc. v. Acosta, 888 F.3d 493, 500-01 (D.C. Cir. 2018); Sturm, Ruger & Co. v. Chao, 300 F.3d 867, 875-77 (D.C. Cir. 2002).

Trump, et al., 18-cv-1348 (D.D.C. June 15, 2018), ECF No. 21, Count 7, ¶¶ 131–134; see also Compl., AFSCME v. Trump, et al., 18-cv-1444 (D.D.C. June 18, 2018), ECF No. 1, ¶ 38. The district court agreed, concluding that the provisions, when viewed in their entirety, had the "cumulative effect" of "eviscerat[ing] the right to bargain collectively as envisioned in the" Statute. JA50.

The panel failed to recognize that this "cumulative effect" claim, encompassing numerous provisions across three Executive Orders, could not be meaningfully reviewed through piecemeal administrative actions—i.e., the unfair labor practice or negotiability disputes that might arise over time and involve an Executive Order provision. See National Mining, 292 F.3d at 856-57. District court review, therefore, was not an attempt to "short-circuit the administrative process" (id. at 858): it was the only avenue to meaningful review of their claim that the President's actions were ultra vires. Id.[3]

[3] Further, while a union could file an unfair labor practice (ULP) charge alleging a particular "violation of the Statute" (Panel Op. at 12-13), that charge would never reach the FLRA or any court if the FLRA's General Counsel refused to issue a complaint. 5 U.S.C. § 7118(a)(1); see Turgeon v. FLRA, 677 F.2d 937, 939 (D.C. Cir. 1982) (refusal to issue complaint judicially unreviewable). And although a

The panel thus erred in failing to adhere to National Mining and instead asserting that FLRA review is no "less meaningful than district court review in this case . . . ." Panel Op. at 13-14. In support of this claim, the panel noted that the district court did not grant relief against the President but instead aimed the injunction at his agency subordinates. But this does not demonstrate that district court review and FLRA review are equivalent or anything close to it. The district court assessed the cumulative effect of the challenged Executive Order provisions, and its injunction provided broad relief across the board. The FLRA could do no such thing. It would instead engage, as all agree, in lengthy piecemeal adjudications. As for the district court's aiming its injunction at the President's agencies, that was done to eliminate any

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union might be able to file a grievance alleging a ULP, the possibility of such a grievance reaching the FLRA or a court of appeals would be uncertain. The ability to file a ULP depends, in the first instance, on the subject not being excluded from the agency-specific negotiated grievance procedure. See 5 U.S.C. §§ 7121(a)(2), 7122, 7123(a). Arbitrating the ULP grievance, moreover, would require the union to incur additional, lengthy delays before the matter reaches the FLRA and, possibly, a court of appeals. The Statute's remedial opportunities are therefore profoundly different from those available in Thunder Basin, Elgin v. Dep't of the Treasury, Arch Coal, and Jarkesy. In those cases, the pertinent administrative scheme allowed the aggrieved party to seek review before the administrative agency, without any prior vetting by a third party.

controversy about whether the President could be enjoined; to accomplish that, the injunction targeted those who do the President's bidding, his subordinates.

In sum, the panel failed to assess whether the Unions' "cumulative effect" claim affected the jurisdictional analysis. The panel decision never mentioned National Mining at all, despite the Unions' reliance on the decision and the district court's heavy emphasis on it. JA95-98; Unions' Br. at 20, 28, 30. Its jurisdictional holding cannot be reconciled with National Mining, where this Court ruled that Thunder Basin does not preclude district court jurisdiction over a challenge to the collective effect of unlawful rulemaking.

B. The Court Should Grant Rehearing Because the Panel Did Not Address the Independent Harm that the Unions Will Suffer from Delay, Which Renders the Unions' Challenge Wholly Collateral.

The panel's decision erroneously puts the President's ultra vires actions beyond the judiciary's reach indefinitely, without regard to the irreparable harm that the Unions would suffer while piecemeal administrative actions make their way through the FLRA and, eventually, to a court of appeals. This outcome collides with Jarkesy, which 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. 803 F.3d at 27-28. See Thunder Basin, 510 U.S. at 213 (noting that a challenge is wholly collateral if "full post deprivation relief could not be obtained").

1. **The panel ignored Jarkesy's "independent harm from delay" component.** Jarkesy discusses at length the Supreme Court's decision in Mathews v. Eldridge, 424 U.S. 319 (1976), which upheld federal district court jurisdiction over the plaintiff's due process claim regarding the termination of his Social Security benefits, instead of requiring administrative exhaustion. 803 F.3d at 27-28. As Jarkesy explained, that conclusion, and plaintiff's argument in favor of a pre-termination hearing, "'rest[ed] on the proposition that full relief cannot be obtained at a postdeprivation hearing,' because 'an erroneous termination would damage him in a way not recompensable through retroactive payments.'" Id. at 27 (quoting Mathews). Thus, "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. (quoting Mathews). The Mathews Court therefore concluded that the district court had jurisdiction over the plaintiff's challenge. Id. at 27-28.

Jarkesy imports this type of Mathews analysis from the administrative exhaustion context into the channeling context. Id. Further, Jarkesy asks whether the party bringing the challenge will suffer an "independent harm" from channeling even where the party does not raise a standalone claim alleging such harm. Id. at 14 (describing claims alleged in detail), 28 (assessing independent harm from delay argument).

2. **The Unions will suffer independent harm from delay.** The challenged provisions, especially when viewed in their entirety, present an existential threat to federal sector labor unions for which immediate relief was and still is needed to avoid irreparable harm. See Panel Op. at 6 (noting that emergency relief was sought below and that expedited proceedings were held).

a. It cannot reasonably be disputed that, if the district court's injunction is dissolved and the Unions are forced to pursue their claims through the administrative scheme, they would be harmed in ways that

could not be undone. The government itself has acknowledged the "significant effect[]" that the enjoined Executive Order provisions would instantly have on "ongoing collective bargaining throughout the federal government" if the contested Order provisions were reinstated—i.e., "the positions that agencies take in bargaining," "the tentative agreements and concessions that agencies and unions make in the course of bargaining," and "final collective-bargaining agreement[s]." See Gov't Mot., Doc. No. 1798620 at 2, 6 (filed July 23, 2019).

During the years that it would take their piecemeal disputes to be resolved, the Unions' bargaining positions would be "greatly diminish[ed]," adversely affecting collective bargaining negotiations and collective bargaining agreements because "the possible fruits of bargaining" would be so severely and illegally limited. See NTEU v. Chertoff, 452 F.3d 839, 853 (D.C. Cir. 2006); JA1-29 (attesting to the effect of the Executive Order provisions on collective bargaining). And once agreements are finalized in accordance with the illegal Executive Order provisions, the statutory rights of the Unions and the employees that they represent will be injured in ways that will be irremediable.

b. The effect of the Executive Order provisions' multi-front attack on "official time" illustrates the independent harm from delay that the Unions would suffer. Congress assigned labor organizations the task of "act[ing] for" and "negotiat[ing] collective bargaining agreements covering" the bargaining-unit employees they represent, and it has required them to represent those employees fairly, without regard to union membership. 5 U.S.C. § 7114(a). To enable unions to perform these tasks, Congress has allowed unions to bargain for appropriate amounts of "official time"—time during the work day during which union representational functions can be performed—without any particular quantitative limitation, so long as the amount bargained for is "reasonable, necessary, and in the public interest." 5 U.S.C. § 7131(d); BATF, 464 U.S. at 101-02 (discussing Congress's deliberate decision not to set numerical limits on official time).

The enjoined Executive Order provisions would severely limit uses and amounts of official time in a manner contrary to the Statute. The unlawful provisions completely bar traditional, important uses of official time. A union representative could not use official time to prepare or pursue a grievance brought on behalf of an employee against his or her

agency employer; or to petition Congress regarding conditions of employment. Unions' Br. 36-37, 42-43. The illegal provisions also impose rigid, arbitrary quantitative caps on official time for other representational functions, notwithstanding Congress's deliberate decision to do the opposite. Id. at 37-39, 58-59. An opportunity to provide representation to an employee subjected to illegal or arbitrary agency action or to voice a view on potential or actual legislation affecting federal employees, once lost, simply cannot be recovered.

The enjoined Executive Order provisions' attack on the negotiated grievance process further shows the irreparable harm that would be suffered during piecemeal channeling exercises. Congress has required that each collective bargaining agreement include a broad negotiated grievance procedure culminating in binding arbitration over agency actions within its scope. 5 U.S.C. § 7121(a), (b). Congress has directed that the negotiated grievance procedure cover "any complaint" by an employee or labor organization concerning "any matter relating to the

employment of the employee" or alleged violations of "any law, rule, or regulation affecting conditions of employment." 5 U.S.C. § 7103(a)(9).[4]

The invalidated Executive Order provisions would profoundly dilute the negotiated grievance procedure to prohibit the types of grievances that are of critical importance to employees. For example, challenges to performance reviews and incentive pay would no longer be permitted. Unions Br. 45-47. Once a union loses the opportunity to represent an employee faced with a discriminatory, unfair, or unwarranted agency action in one of these areas, that opportunity is lost forever. See JA22-23 (discussing successful challenges to race and age discrimination at two federal agencies through negotiated grievance procedure). The illegal action itself, moreover, might go unchallenged due to the unavailability of the grievance-arbitration process.

c. The Unions would suffer additional, broader harm if the unlawful Executive Order provisions are allowed to stay in place during the piecemeal and protracted administrative litigation needed to

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[4] Congress excluded only five matters from that procedure, none of which is relevant here. 5 U.S.C. § 7121(c). Except for topics the parties may negotiate to exclude, all other matters fitting within the Statute's expansive definition of "grievance" are subject to the negotiated grievance procedure. 5 U.S.C. § 7121(a)(2).

challenge all of the ultra vires provisions. Union membership would be of less value to employees because unions would not be able to help them in ways that they have been previously able to do. JA23,26. This would inevitably cause membership to drop. JA23,26. The decrease in membership, in turn, would cause the Unions financial loss "that can never be recovered." JA26. Accord JA23.

"The loss in bargaining position by the unions, the disruption of harmonious relationships between the union and the employers, the almost certain decrease in union membership -- these are matters involving intangible values." AFL v. Watson, 327 U.S. 582, 594 (1946). See Int'l Union of Elec., Radio & Machine Workers v. NLRB, 426 F.2d 1243, 1249 (D.C. Cir. 1970) ("Employee interest in a union can wane quickly as working conditions remain apparently unaffected by the union or collective bargaining.").

The district court properly understood that if the Unions were to have "any chance of vindicating" their statutory collective bargaining rights, the relief had to "come quickly." Conair Corp. v. NLRB, 721 F.2d 1355, 1402 (D.C. Cir. 1983) (Ginsburg, J., concurring) (internal quotation omitted). See generally Panel Op. at 6 (noting that case was

"litigated on an expedited briefing schedule"). If too much time passes—as would be the case with the piecemeal channeling of challenges to the enjoined provisions—the relief eventually obtained might be "beside the point." Conair Corp., 721 F.2d at 1402.

The examples above confirm that the enjoined Executive Order provisions would deprive federal sector unions of the ability and resources to perform the duties that Congress assigned to them. See 5 U.S.C. § 7114; JA15-19. Those examples, moreover, pertain to only some of the provisions that have been declared unlawful. There are others aimed at making unions less effective and depriving unions and employees alike of rights for which they have been historically able to bargain. The adverse effects of these deprivations would be irreversible.

In sum, the Unions would face certain irremediable harm from the delays associated with channeling, showing that this dispute is wholly collateral to the Statute's review provisions. The Congress that passed the Statute on the explicit statutory findings that collective bargaining safeguards the public interest and contributes to the effective conduct of public business (5 U.S.C. § 7101(a)) could not have

intended for Unions to suffer irreversible harm while challenging the President's attempt to override the Statute via Executive Order.

CONCLUSION

For the foregoing reasons, the Unions' petition for rehearing en banc should be granted.

Respectfully submitted,

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August 30, 2019

CERTIFICATE OF COMPLIANCE

I hereby certify the foregoing document 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. I further certify that the foregoing document complies with Federal Rule of Appellate Procedure 35(b)(2)(A) because it contains 3708 words, excluding those words exempted by Federal Rule of Appellate Procedure 32(f) and Circuit Rule 32(e)(1).

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August 30, 2019

On behalf of Appellees

CERTIFICATE OF SERVICE

I certify that, on August 30, 2019, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia 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

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August 30, 2019 On behalf of Appellees

ADDENDUM

Pursuant to Circuit Rule 35(c), the following documents are included in this Addendum:

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued April 4, 2019 Decided July 16, 2019

No. 18-5289

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, ET AL.,
APPELLEES

v.

DONALD J. TRUMP, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES, ET AL.,
APPELLANTS

Appeal from the United States District Court
for the District of Columbia
(No. 1:18-cv-01261)

Joseph F. Busa, Attorney, U.S. Department of Justice, argued the cause for appellants. With him on the briefs were *Hashim M. Mooppan*, Deputy Assistant Attorney General, and *Mark B. Stern*, Attorney, U.S. Department of Justice. *Sarah Carroll*, Attorney, U.S. Department of Justice, entered an appearance.

Andres M. Grajales and *Gregory O'Duden* argued the causes for appellees. With them on the joint brief were *David A. Borer*, *Matthew W. Milledge*, *Larry J. Adkins*, *Julie M. Wilson*, *Paras N. Shah*, *Allison C. Giles*, *Jessica Horne*, *Judith E. Rivlin*, *Teague P. Paterson*, *Michael L. Artz*, *Jefferson D.*

Friday, *David Strom*, and *Suzanne Summerlin*. *Keith R. Bolek* and *Richard J. Hirn* entered appearances.

Victoria L. Bor, *Jonathan D. Newman*, *Harold C. Becker*, *Matthew J. Ginsburg*, *Brian A. Powers*, *Micah Berul*, and *Anthony Tucci* were on the brief for *amici curiae* American Federation of Labor and Congress of Industrial Unions, et al. in support of appellees. *James B. Coppess* entered an appearance.

Mark Gisler and *Jean-Marc Favreau* were on the brief for *amicus curiae* Thomas Wolf, Governor of Pennsylvania, in support of appellees. *Michael J. Gan* entered an appearance.

Adina H. Rosenbaum and *Adam R. Pulver* were on the brief for *amici curiae* Representative Elijah Cummings, et al. in support of appellees.

Before: GRIFFITH and SRINIVASAN, *Circuit Judges*, and RANDOLPH, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* GRIFFITH.

GRIFFITH, *Circuit Judge*: In May 2018, the President issued three executive orders regarding relations between the federal government and its employees. Unions representing federal employees brought suit in the district court challenging various aspects of the orders. The district court concluded that certain provisions in the orders were unlawful and enjoined the President's subordinates in the executive branch from implementing them. We hold that the district court lacked jurisdiction and vacate its judgment.

I

A

In the 1960s, Presidents used executive orders to grant federal employees "limited rights to engage in concerted activity" through unions. *ATF v. FLRA*, 464 U.S. 89, 91-92 (1983); *see* Exec. Order No. 10,988, *Employee-Management Cooperation in the Federal Service*, 27 Fed. Reg. 551 (Jan. 17, 1962); Exec. Order No. 11,491, *Labor-Management Relations in the Federal Service*, 34 Fed. Reg. 17,605 (Oct. 29, 1969). In 1978, Congress enacted the Federal Service Labor-Management Relations Statute (the "Statute" or FSLMRS) to govern labor relations between the executive branch and its employees. The Statute is set forth in Title VII of the Civil Service Reform Act (CSRA), Pub. L. No. 95-454, § 701, 92 Stat. 1111, 1191-1216 (1978) (codified at 5 U.S.C. §§ 7101-35).

The Statute grants federal employees the right to organize and bargain collectively, and it requires that unions and federal agencies negotiate in good faith over certain matters. *See* 5 U.S.C. §§ 7102(2), 7103(a)(14), 7106, 7114, 7117(a)(1); *ATF*, 464 U.S. at 91-92. But except as "expressly provided," the Statute does not limit "any function of, or authority available to, the President which the President had immediately before [its] effective date." Pub. L. No. 95-454, § 904, 92 Stat. at 1224 (codified at 5 U.S.C. § 1101 note).

The Statute also establishes a scheme of administrative and judicial review. Administrative review is provided by the Federal Labor Relations Authority (FLRA), a three-member agency charged with adjudicating federal labor disputes, including "negotiability" disputes and "unfair labor practice" disputes. *See* 5 U.S.C. § 7105(a). In negotiability disputes, the FLRA determines whether agencies and unions must bargain over certain subjects. *Id.* §§ 7105(a)(2)(E), 7117(c)(1). In

unfair labor practice proceedings, the FLRA resolves whether an agency must bargain over a subject, violated the duty to bargain in good faith, or otherwise failed to comply with the Statute. *Id.* §§ 7105(a)(2)(G), 7116(a), 7118. The FLRA's decisions in such disputes are subject to direct review in the courts of appeals. *Id.* § 7123(a), (c).

B

In May 2018, the President issued three executive orders regarding federal labor-management relations. Among other requirements, the "Collective Bargaining Order" provides agencies with certain procedures that they should seek to institute during negotiations with unions. *See* Exec. Order No. 13,836, *Developing Efficient, Effective, and Cost-Reducing Approaches to Federal Sector Collective Bargaining*, 83 Fed. Reg. 25,329, 25,331-32 (May 25, 2018). This order also tells agencies not to negotiate over "permissive" subjects, *id.* at 25,332, defined as those that are negotiable "at the election of the agency" under 5 U.S.C. § 7106(b)(1).

The "Official Time Order" instructs agencies to aim to limit the extent to which collective bargaining agreements authorize "official time," meaning time spent by employees on union business during working hours. *See* Exec. Order No. 13,837, *Ensuring Transparency, Accountability, and Efficiency in Taxpayer-Funded Union Time Use*, 83 Fed. Reg. 25,335, 25,336 (May 25, 2018). This order also establishes rules that limit whether "agency time and resources" may be used by employees on non-government business. *Id.* at 25,337 (capitalization omitted).

The "Removal Procedures Order" tells agencies to seek to exclude from grievance proceedings any dispute over a decision to remove an employee "for misconduct or

unacceptable performance." Exec. Order No. 13,839, *Promoting Accountability and Streamlining Removal Procedures Consistent With Merit System Principles*, 83 Fed. Reg. 25,343, 25,344 (May 25, 2018). Subject to various exceptions, this order also prohibits agencies from resolving disputes over employee ratings and incentive pay through grievance or arbitration proceedings, and it mandates that some subpar employees may have no more than thirty days to improve their performance before being reassigned, demoted, or fired. *Id.* at 25,344-45.

Although numerous, the various challenged provisions of the executive orders fall into three categories: provisions that (1) direct agencies to refuse to bargain over "permissive" subjects based on 5 U.S.C. § 7106(b)(1); (2) establish government-wide rules for employee and agency conduct, which may have the effect of removing mandatory subjects from bargaining based on 5 U.S.C. § 7117(a)(1); and (3) set goals that agencies must pursue during bargaining. The executive orders enforce these goals by directing agencies to "commit the time and resources necessary" to achieve them and by requiring agencies to notify the President through the Office of Personnel Management (OPM) if the goals are not met. 83 Fed. Reg. at 25,331-32, 25,336, 25,344. The orders also require agencies "to fulfill their obligation to bargain in good faith" throughout their dealings with unions. *Id.* at 25,331, 25,336; *see also id.* at 25,344.

C

The American Federation of Government Employees (AFGE) and sixteen other federal labor unions immediately challenged the executive orders in four separate suits against the President, OPM, and the Director of OPM. *AFGE v. Trump*, 318 F. Supp. 3d 370, 391 (D.D.C. 2018). The suits were

consolidated before the district court in June 2018. *Id.* at 392. As explained by the district court, the unions asserted four types of claims: (1) The executive orders are unlawful because the President has no authority "at all" to issue executive orders in the field of federal labor relations; (2) The executive orders violate the Constitution, specifically the Take Care Clause and the First Amendment right to freedom of association; (3) The executive orders and their various provisions violate particular requirements of the Statute; and (4) The executive orders' "cumulative impact" violates the right to bargain collectively as guaranteed by the Statute. *Id.* at 391-92.

Some of the unions moved for preliminary injunctions, but all parties ultimately agreed to the district court's proposal that the dispute be resolved on cross-motions for summary judgment, litigated on an expedited briefing schedule.

The district court issued its decision in late August 2018. The court first held that it had subject matter jurisdiction, rejecting the government's argument that jurisdiction belonged exclusively to the FLRA and (on direct review from the FLRA) the courts of appeals. *Id.* at 395-409. On the merits, the district court ruled that the President has constitutional and statutory authority to issue executive orders in the field of federal labor relations generally, but nine provisions of these executive orders violated the Statute: Some did so by removing from the bargaining table subjects that "must" or "may" be negotiable, others by preventing agencies from bargaining in good faith. *Id.* at 412-33. The court enjoined the President's subordinates within the executive branch from implementing these provisions. *Id.* at 440; Order at 2-3, *AFGE v. Trump*, No. 1:18-cv-1261 (D.D.C. Aug. 24, 2018), Dkt. No. 57.[*]

[*] The district court also held that several provisions of the executive orders were consistent with the Statute, *AFGE*, 318 F.

The government appealed, arguing that the district court lacked subject matter jurisdiction and erred in holding unlawful the various provisions of the executive orders. We have jurisdiction over the appeal under 28 U.S.C. § 1291. We review the district court's subject matter jurisdiction de novo. *Capitol Hill Grp. v. Pillsbury, Winthrop, Shaw, Pittman, LLC*, 569 F.3d 485, 489 (D.C. Cir. 2009).

II

We reverse because the district court lacked subject matter jurisdiction. The unions must pursue their claims through the scheme established by the Statute, which provides for administrative review by the FLRA followed by judicial review in the courts of appeals.

A

"Within constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider." *Bowles v. Russell*, 551 U.S. 205, 212 (2007). District courts have jurisdiction over civil actions arising under the Constitution and laws of the United States, 28 U.S.C § 1331, but Congress may preclude district court jurisdiction by establishing an alternative statutory scheme for administrative and judicial review. To determine whether Congress has done so, we use the two-step framework set forth in *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994). Under that framework, "Congress intended that a litigant proceed exclusively through a statutory

Supp. 3d at 437-39; rejected the Take Care Clause claim, *id.* at 439; and did not address the First Amendment claim because the only provision of the executive orders challenged under the First Amendment was held unlawful under the Statute, *id.* at 430 n.16. The unions do not contest these decisions on appeal.

scheme . . . when (i) such intent is 'fairly discernible in the statutory scheme,' and (ii) the litigant's claims are 'of the type Congress intended to be reviewed within [the] statutory structure.'" *Jarkesy v. SEC*, 803 F.3d 9, 15 (D.C. Cir. 2015) (quoting *Thunder Basin*, 510 U.S. at 207, 212); *see Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 489 (2010).

Here, the district court concluded that the first step is satisfied. *AFGE*, 318 F. Supp. 3d at 396-97. The parties do not dispute this conclusion on appeal, nor could they. "With the FSLMRS, as with all of the CSRA: 'Congress passed an enormously complicated and subtle scheme to govern employee relations in the federal sector.'" *AFGE v. Sec'y of the Air Force*, 716 F.3d 633, 636 (D.C. Cir. 2013) (quoting *Steadman v. Governor, U.S. Soldiers' & Airmen's Home*, 918 F.2d 963, 967 (D.C. Cir. 1990)). The scheme "provides the exclusive procedures by which federal employees and their bargaining representatives may assert federal labor-management relations claims." *Id.* at 638; *see AFGE v. Loy*, 367 F.3d 932, 935 (D.C. Cir. 2004). Thus, we can fairly discern that Congress intended the statutory scheme to be exclusive with respect to claims within its scope.

The parties' dispute arises at the second step. There, the district court held that the unions' claims are not "of the type" Congress intended for review within the statutory scheme. *AFGE*, 318 F. Supp. 3d at 397-409. We disagree.

B

Claims "will be found to fall outside of the scope of a special statutory scheme in only limited circumstances, when (1) a finding of preclusion might foreclose all meaningful judicial review; (2) the claim[s] [are] wholly collateral to the

statutory review provisions; and (3) the claims are beyond the expertise of the agency." *Arch Coal, Inc. v. Acosta*, 888 F.3d 493, 500 (D.C. Cir. 2018); *see Free Enter. Fund*, 561 U.S. at 489; *Thunder Basin*, 510 U.S. at 212-13. These considerations do not form "three distinct inputs into a strict mathematical formula." *Jarkesy*, 803 F.3d at 17. Rather, they serve as "general guideposts useful for channeling the inquiry into whether the particular claims at issue fall outside an overarching congressional design." *Id.* In this case, all three considerations demonstrate that the unions must pursue their claims through the statutory scheme and not before the district court.

1

First, "all meaningful judicial review" is not foreclosed by requiring the unions to proceed through the statutory scheme. *See Arch Coal*, 888 F.3d at 500. The unions argue that the scheme does not provide for meaningful judicial review because they are unable to obtain "pre-implementation" review of the executive orders or immediate relief barring all agencies from implementing the executive orders. This argument is foreclosed by the Supreme Court's decision in *Thunder Basin* and our decision in *AFGE v. Secretary of the Air Force*, 716 F.3d 633 (D.C. Cir. 2013).

In *Thunder Basin*, a mining company's employees designated two non-employees to serve as their representatives. 510 U.S. at 204. Believing this violated the National Labor Relations Act (NLRA), the company refused to post their contact information. *Id.* This refusal would ordinarily have drawn a citation from the mine safety agency, but before that could occur, the company filed a pre-enforcement challenge in the district court, arguing that the designation of non-employees as union representatives violated the NLRA. *Id.* at

204-05, 213-14, 216. The Supreme Court held that the district court's jurisdiction was precluded by the statutory scheme, which provided for review before the Mine Safety and Health Review Commission followed by appeal to the circuit courts. *Id.* at 218. Critically, that review was held "meaningful" even though there was no way for the company to assert its pre-enforcement challenge, whether before the Commission or the district court. *Id.* at 212-16. The company was required to wait until the mine safety agency issued a citation and initiated concrete enforcement proceedings before the Commission. *Id.* at 216. Only through those proceedings—not before the district court—could the company challenge the designation of the non-employees as violating the NLRA. *Id.* Here, *Thunder Basin* instructs that the unions are not necessarily entitled to raise a pre-implementation challenge in the district court, and that Congress may require them to litigate their claims solely through the statutory scheme, at least so long as they can eventually obtain review and relief.

Air Force provides the same guidance, but more emphatically and in the specific context of the Statute's scheme for review. The case began with a regulation requiring certain civilian employees to wear Air Force uniforms. *See AFGE v. Sec'y of the Air Force*, 841 F. Supp. 2d 233, 235 (D.D.C. 2012). AFGE and its local unions brought an Administrative Procedure Act (APA) suit in the district court, challenging the regulation as arbitrary and capricious, unlawful under various provisions of Titles 10 and 18 of the U.S. Code, and in excess of the Secretary's authority under Title 10. *Id.* We held that the district court lacked jurisdiction, explaining that the Statute "provides the exclusive procedures by which federal employees and their bargaining representatives may assert federal labor-management relations claims," and "'federal employees may not circumvent'" the Statute "by seeking

judicial review outside [its] procedures." *Air Force*, 716 F.3d at 636, 638 (quoting *Steadman*, 918 F.2d at 967).

This was so even though AFGE and its local unions could not obtain immediate review of their "pre-implementation" claims before the FLRA, nor could they obtain their preferred form of relief. Instead, the statutory scheme provided the local unions with more modest "administrative options" for challenging the uniform regulation, followed by judicial review in the courts of appeals. *Id.* at 636-38. For example, a local union could attempt to bargain over the dress code, and if the Air Force refused to bargain, the local union could raise a negotiability dispute with the FLRA. *Id.* at 637 (citing 5 U.S.C. § 7117(c)). A local union could also use a grievance proceeding to adjudicate a claim that the dress code violated Title 10. *Id.* at 637-38 & n.4 (citing 5 U.S.C. § 7121). Or a union could challenge the dress code by filing unfair labor practice charges. *Id.* at 638 (citing 5 U.S.C. §§ 7116(a), 7118(a)). We acknowledged that the unions "may not prevail using one of these procedures or would prefer to challenge the Air Force instructions by some other means," such as an APA suit in district court, but "that does not mean their claims may be brought outside the [Statute's] exclusive remedial scheme." *Id.*

In fact, we went even further, holding that the unions were required to raise their challenges through the scheme even if that made it *impossible* to obtain particular forms of review or relief. The Statute "can preclude a claim from being brought in a district court even if it *forecloses* the claim from administrative review" and provides no other way to bring the claim. *Id.* (emphasis added). For example, AFGE did not wish to challenge the uniform regulation on a concrete "local-by-local" basis through the FLRA but rather sought to do so on a "nationwide" basis in an APA suit before the district court. *Id.*

at 639. The statutory scheme provided no way to assert such a "nationwide" attack, but that did not mean AFGE could resort to the courts. *Id.* at 638. Rather, it meant AFGE "may not raise the claim at all." *Id.* Even plaintiffs with "nationwide" or "systemwide" challenges may not "circumvent" the scheme established by the Statute. *Id.* at 639 (internal quotation marks omitted). We also acknowledged that even though the scheme might not afford the unions the same relief they sought in district court, the Statute still precluded the district court from exercising jurisdiction: "[I]t is the comprehensiveness of the statutory scheme involved, not the adequacy of specific remedies thereunder, that counsels judicial abstention." *Id.* at 638 (internal quotation marks omitted).

We need not determine the extent to which *Air Force* would allow a statutory scheme to foreclose review and relief. This case does not test *Air Force*'s outer bounds because the unions here are not cut off from review and relief. Rather, they can ultimately obtain review of and relief from the executive orders by litigating their claims through the statutory scheme in the context of concrete bargaining disputes.

On the present record, it appears that the Statute provides the unions with several "administrative options" for challenging the executive orders before the FLRA, followed by judicial review. *See id.* at 637. First, if an agency follows the executive orders' goal-setting provisions while bargaining with a union, the union could charge in an unfair labor practice proceeding that the agency's adherence to those provisions amounted to bad-faith bargaining in violation of the Statute. The FLRA could then determine whether the agency had done so, and whether the agency may continue pursuing those goals during bargaining.

Also, if an agency refuses to bargain over various subjects based on the executive orders' government-wide rules, the unions could charge in a negotiability or unfair labor practice dispute that the agency had refused to bargain over mandatory matters in violation of the Statute. In response, the government could argue (as it does here) that 5 U.S.C. § 7117(a)(1) authorizes it to remove subjects from bargaining in this way, and the FLRA could then determine whether the government is correct. *See, e.g.*, *Nat'l Fed'n of Fed. Emps. Local 15*, 33 F.L.R.A. 436, 438-39 (1988); *AFSCME Local 3097 Union*, 31 F.L.R.A. 322, 345-47 (1988); *cf. IRS v. FLRA*, 996 F.2d 1246, 1252 (D.C. Cir. 1993) (reviewing the FLRA's holding as to whether a government-wide rule displaced the duty to bargain under the Statute, indicating that the FLRA may hear such claims).

The same sequence could occur if an agency refuses to bargain over permissive subjects as directed by the executive orders. The union could charge the agency with violating the Statute, and the government could respond (as it does here) by invoking 5 U.S.C. § 7106(b)(1), which states that certain subjects are negotiable "at the election of the agency." The FLRA could then determine whether the agency may refuse to bargain in this way.

These administrative options might enable the unions to obtain from the FLRA much of the review and relief that they sought from the district court. The unions worry that the FLRA cannot address all of their claims, especially their broader claims: that the President acted ultra vires or violated the Take Care Clause, the First Amendment, or the Statute in issuing the executive orders. And the unions argue that the FLRA cannot entertain suits against the President. Even if true, the latter point does not appear to make FLRA review any less meaningful than district court review in this case, where the

unions stated that injunctive relief against the President's subordinates in executive branch agencies was sufficient to afford them the relief they sought and the district court did not grant injunctive relief against the President. *See* Tr. of Mot. Hr'g at 133-34, *AFGE v. Trump*, No. 1:18-cv-1261 (D.D.C. July 25, 2018), Dkt. No. 56; Order at 2-3, *AFGE v. Trump*, No. 1:18-cv-1261 (D.D.C. Aug. 24, 2018), Dkt. No. 57. Instead, the unions obtained an order directing that the President's subordinates may not implement various provisions of the executive orders during bargaining. Order at 2-3, *AFGE v. Trump*, No. 1:18-cv-1261 (D.D.C. Aug. 24, 2018), Dkt. No. 57. On this record, it appears that the unions may seek similar orders through the statutory scheme. Indeed, the government has even taken the position that the FLRA would have the authority to resolve the unions' broad statutory claims, specifically those asserting that the executive orders are invalid or ultra vires under the Statute. *See* Tr. of Oral Arg. at 42:16-43:19 (April 4, 2019).

But we need not map the precise contours of the FLRA's authority to adjudicate the claims in this case. For even if the FLRA could not address the claims, circuit courts could do so on appeal from the FLRA. The statutory scheme provides that the courts of appeals "shall have jurisdiction of the [FLRA] proceeding and of the question determined therein" and "may make and enter a decree affirming and enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the [FLRA]." 5 U.S.C. § 7123(a), (c). Also, the courts of appeals generally may not consider objections that were not at least "urged" before the FLRA. *Id.* § 7123(c). Reviewing similar statutory schemes, the Supreme Court has explained that "[i]t is not unusual for an appellate court reviewing the decision of an administrative agency to consider a constitutional challenge to a federal statute that the agency concluded it lacked authority to decide," *Elgin v. Dep't of*

Treasury, 567 U.S. 1, 18 n.8 (2012), and we recently elaborated that "it is of no dispositive significance" whether the agency "has the authority to rule" on constitutional claims so long as the claims "can eventually reach 'an Article III court fully competent to adjudicate' them," *Jarkesy*, 803 F.3d at 19 (quoting *Elgin*, 567 U.S. at 17); *accord Bank of La. v. Fed. Deposit Ins. Corp.*, 919 F.3d 916, 925-26 (5th Cir. 2019). We see no reason why the scheme here would prevent us from resolving the unions' constitutional or statutory challenges even if the FLRA could not.

The unions argue, and the district court concluded, that we would not be able to address such challenges because our jurisdiction is entirely "derivative" of the FLRA's. Union Br. 16-18; *AFGE*, 318 F. Supp. 3d at 400. As the district court put it, the Statute does not authorize us "to hear matters that are beyond the scope of the FLRA's jurisdiction," *AFGE*, 318 F. Supp. 3d at 400, because it merely grants us jurisdiction over the FLRA "proceeding" and "the question determined therein" and authorizes us to affirm, modify, or set aside only the FLRA's order, *id.* (quoting 5 U.S.C. § 7123(c)). We once suggested in a footnote that the Statute would not allow us to review constitutional claims that the FLRA could not consider. *Nat'l Fed'n of Fed. Emps. v. Weinberger*, 818 F.2d 935, 940 n.7 (D.C. Cir. 1987). But this suggestion cannot survive the Supreme Court's decision in *Thunder Basin*, which involved a statutory scheme that used nearly identical language, conferring on appellate courts jurisdiction over the Mine Safety and Health Review Commission's "proceeding" and "the questions determined therein," with the authority to affirm, modify, or set aside the Commission's order. 30 U.S.C. § 816(a)(1); *see* 510 U.S. at 208. The Supreme Court held that this scheme allowed the courts of appeals to "meaningfully address[]" statutory and constitutional claims even if the Commission could not. *Thunder Basin*, 510 U.S. at 215.

Likewise, *Sturm, Ruger & Co. v. Chao*, 300 F.3d 867, 868 (D.C. Cir. 2002), involved a statute that used the same language to empower us to review the orders of the Occupational Safety and Health Review Commission, *see* 29 U.S.C. § 660(a). This scheme, we explained, permitted us to meaningfully address constitutional claims on appeal from the Commission. *Sturm*, 300 F.3d at 874; *see also Jarkesy*, 803 F.3d at 19 (nondelegation challenge must be channeled through the Securities and Exchange Commission, followed by review in this court, even if the Commission cannot resolve the challenge). The same language in the FSLMRS leads to the same conclusion: we may review the unions' broad statutory and constitutional claims on appeal from an FLRA proceeding even if the FLRA cannot.

This conclusion is confirmed by our decision in *AFGE v. Loy*, 367 F.3d 932 (D.C. Cir. 2004). There, several unions alleged in district court that an agency directive prohibiting airport security screeners from engaging in collective bargaining was "ultra vires" and violated the First and Fifth Amendments of the Constitution. *Id.* at 934, 936. We held that the district court lacked jurisdiction and the unions were required to pursue even their constitutional claims through the FSLMRS's scheme. *Id.* at 936-37. Our decision might have been different, we acknowledged, if the scheme "preclude[d] all judicial review of" the constitutional claims. *Id.* (quoting *Thunder Basin*, 510 U.S. at 215 n.20). But we found "unwarranted" the "assumption" that the courts of appeals would not be able to review the claims on appeal from the FLRA. *Id.* at 937. So too here. As we have explained, we see no reason to think that the unions' claims would be "unreviewable" by an appellate court through the statutory scheme. *See id.*; *see also Steadman*, 918 F.2d at 967 ("Congress passed an enormously complicated and subtle scheme to govern employee relations in the federal sector," and "federal

employees may not circumvent that structure even if their claim is based as well on the Constitution.").

Requiring the unions here to proceed through the FSLMRS's scheme does not foreclose "all meaningful judicial review." *See Arch Coal*, 888 F.3d at 500. Although the unions are not able to pursue their preferred systemwide challenge through the scheme, they can ultimately obtain review of and relief from the executive orders by litigating their claims in the context of concrete bargaining disputes. Such review, according to *Thunder Basin*, *Air Force*, and *Loy*, qualifies as meaningful.

2

For many of the same reasons, the unions' claims are not "wholly collateral" to the statutory scheme. *See Arch Coal*, 888 F.3d at 500. This consideration is "related" to whether "meaningful judicial review" is available, and the two considerations are sometimes analyzed together. *Jarkesy*, 803 F.3d at 22. In its most recent decision on this subject, the Supreme Court determined whether the plaintiffs' challenge was "wholly collateral" to a statutory scheme by asking whether the plaintiffs "aimed to obtain the same relief they could seek in the agency proceeding." *Id.* at 23 (citing *Elgin*, 567 U.S. at 22). The Supreme Court concluded that they did, because their challenge was of the type that was "regularly adjudicated" through the statutory scheme and the statutory scheme empowered the agency and the reviewing appellate court to provide the relief sought by the plaintiffs. *Elgin*, 567 U.S. at 22.

The unions' challenge in this case is of the type that is regularly adjudicated through the FSLMRS's scheme: disputes over whether the Statute has been violated. And the unions ask

the district court for the same relief that they could ultimately obtain through the statutory scheme, namely rulings on whether the executive orders are lawful and directives prohibiting agencies from following the executive orders during bargaining disputes. Their challenge is not wholly collateral to the statutory scheme.

3

Finally, the unions' claims are not "beyond the expertise" of the FLRA. *See Arch Coal*, 888 F.3d at 500. Many of their claims allege that the executive orders direct agencies to violate the Statute by refusing to bargain over mandatory subjects or by taking actions that are inconsistent with the duty to bargain in good faith. These matters lie at the core of the FLRA's "specialized expertise in the field of federal labor relations." *AFGE Council of Locals No. 214 v. FLRA*, 798 F.2d 1525, 1528 (D.C. Cir. 1986). The FLRA has "primary responsibility for administering and interpreting" the Statute, *id.*; *see* 5 U.S.C. § 7105(a), and it serves the "'special function of applying the general provisions of the [Statute] to the complexities' of federal labor relations," *Nat'l Fed'n of Fed. Emps. Local 1309 v. Dep't of Interior*, 526 U.S. 86, 99 (1999) (quoting *ATF*, 464 U.S. at 97). In doing so, the FLRA "regularly construes" the Statute and adjudicates whether governmental actions violate the Statute. *See Elgin*, 567 U.S. at 23. Indeed, unlike Article III courts, the FLRA's "ordinary course of business" involves determining whether subjects are mandatory bargaining topics or whether the government has bargained in good faith. *See Jarkesy*, 803 F.3d at 28. The FLRA's familiarity with federal labor-management relations is thus more than "helpful background knowledge." *AFGE*, 318 F. Supp. 3d at 408. It is expertise that goes to the core issues in this case.

The district court concluded that this consideration weighed in favor of exercising its jurisdiction because the FLRA's expertise was "potentially helpful" but "not essential to resolving" the unions' claims. *Id.* at 408-09 (capitalization omitted). But that is not the law. The question we must ask is whether agency expertise may be "brought to bear on" the claims, not whether the expertise is essential. *Jarkesy*, 803 F.3d at 29.

The district court also viewed the unions' claims as "primarily" concerned with "separation-of-powers issues" and "whether a statute or the Constitution has authorized the President to act in a particular way"—issues that are the "bread and butter of the Judicial Branch." *AFGE*, 318 F. Supp. 3d at 408 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 597 (1952) (Frankfurter, J., concurring), and *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). As already discussed, many of the claims are not so grand, but rather require interpreting the FSLMRS—the very law that the FLRA is charged with administering and interpreting. Regardless, the Supreme Court has "clarified" that "an agency's relative level of insight into the *merits* of a constitutional question is not determinative." *Jarkesy*, 803 F.3d at 28-29 (citing *Elgin*, 567 U.S. at 22-23). Even in the absence of constitutional expertise, an agency's expertise in other areas may still weigh in favor of administrative review if the agency could "obviate the need to address" broad constitutional and statutory claims by resolving a case on other grounds or if the agency could "alleviate constitutional concerns" through its interpretation of its statute. *Id.* at 29 (quoting *Elgin*, 567 U.S. at 22-23); *see Bank of La.*, 919 F.3d at 929-30. That is the case here. The FLRA could "moot the need to resolve" the unions' constitutional claims by concluding that the Statute bars agencies from implementing the executive orders. *See Jarkesy*, 803 F.3d at 29; *cf. AFGE*, 318 F. Supp. 3d at 430 n.16 (doing just that by declining to

resolve the First Amendment claim after concluding that the provision at issue ran afoul of the Statute). Also, the FLRA "could offer an interpretation of the [Statute] in the course of the proceeding" that might alleviate or "shed light on" the constitutional concerns. *See Jarkesy*, 803 F.3d at 29. After all, "there are precious few cases involving interpretation of statutes authorizing agency action in which our review is not aided by the agency's statutory construction." *Id.* (quoting *Mitchell v. Christopher*, 996 F.2d 375, 379 (D.C. Cir. 1993)). Because the FLRA's expertise can be "brought to bear" on the unions' claims in these ways, "we see no reason to conclude that Congress intended to exempt" the claims from the statutory scheme. *Id.* (quoting *Elgin*, 567 U.S. at 23).

III

All three considerations demonstrate that the unions' claims fall within the exclusive statutory scheme, which the unions may not bypass by filing suit in the district court. *See Arch Coal*, 888 F.3d at 500. Lacking jurisdiction, the district court had no power to address the merits of the executive orders. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998); *Kaplan v. Cent. Bank of the Islamic Republic of Iran*, 896 F.3d 501, 510 (D.C. Cir. 2018). We therefore reverse the judgment of the district court holding that it had jurisdiction, and we vacate the district court's judgment on the merits.

So ordered.

CERTIFICATE OF PARTIES AND AMICI

The underlying district court action involved four separate lawsuits that were consolidated by the district court. The plaintiffs in district court and appellees here are: American Federation of Government Employees, AFL-CIO; National Treasury Employees Union; National Federation of Federal Employees, FD1, IAMAW, AFL-CIO; International Association of Machinists and Aerospace Workers, AFL-CIO; Seafarers International Union of North America, AFL-CIO; National Association of Government Employees, Inc.; International Brotherhood of Teamsters; Federal Education Association, Inc.; Metal Trades Department, AFL-CIO; International Federation of Professional and Technical Employees, AFL-CIO; National Weather Service Employees Organization; Patent Office Professional Association; National Labor Relations Board Union; National Labor Relations Board Professional Association; Marine Engineers' Beneficial Association/National Maritime Union, No. 1 PCD, AFL-CIO; American Federation of State, County and Municipal Employees, AFL-CIO; and American Federation of Teachers, AFL-CIO.

The defendants in district court and appellants here are: Donald J. Trump, in his official capacity as President of the United States; the U.S. Office of Personnel Management; and Margaret Weichert, in her official capacity as Acting Director of the Office of Personnel Management.

The following were amici in district court and are also amici on appeal: Representatives Elijah E. Cummings, Peter T. King, William Clay, Sr. and Jim Leach; and Governor Tom Wolf. Additional amici on appeal are: National Nurses Organizing Committee/National Nurses United; International Brotherhood of Electrical Workers, AFL-CIO; International Union of Operating Engineers, AFL-CIO; and American Federation of Labor & Congress of Industrial Organizations, AFL-CIO.

Respectfully submitted,

/s/ Paras N. Shah

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August 30, 2019 On behalf of Appellees

CORPORATE DISCLOSURE STATEMENT

Pursuant to Circuit Rule 26.1, the undersigned counsel hereby certifies as follows:

Appellees American Federation of Government Employees, AFL-CIO; National Treasury Employees Union; National Federation of Federal Employees, FD1, IAMAW, AFL-CIO; International Association of Machinists and Aerospace Workers, AFL-CIO; Seafarers International Union of North America, AFL-CIO; National Association of Government Employees, Inc.; International Brotherhood of Teamsters; Federal Education Association, Inc.; Metal Trades Department, AFL-CIO; International Federation of Professional and Technical Employees, AFL-CIO; National Weather Service Employees Organization; Patent Office Professional Association; National Labor Relations Board Union; National Labor Relations Board Professional Association; Marine Engineers' Beneficial Association/National Maritime Union, No. 1 PCD, AFL-CIO; American Federation of State, County and Municipal Employees, AFL-CIO; and American Federation of Teachers, AFL-CIO, are all non-profit membership organizations. Each serves as the exclusive bargaining representative of units of

employees of the federal government pursuant to 5 U.S.C. §§ 7101-7135. None of the Appellees has a parent company. No publicly held company has any ownership interest in any of the Appellees.

Respectfully submitted,

/s/ Paras N. Shah

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