No. 04-484

In the Supreme Court of the United States

NATIONAL TAXPAYERS UNION, PETITIONER

v.

SOCIAL SECURITY ADMINISTRATION, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether, as in *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200 (1994), Congress's adoption of a comprehensive statutory scheme of administrative and judicial review of sanctions imposed under 42 U.S.C. 1320b-10(b) for communications that convey a false impression of endorsement by the Social Security Administration precludes the target of an investigation from circumventing that process by filing a pre-enforcement challenge in district court.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 376 F.3d 239. The opinion of the district court (Pet. App. 14a-25a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 15, 2004. The petition for a writ of certiorari was filed on October 8, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case presents a pre-enforcement challenge to an anticipated administrative penalty proceeding under Section 1140(a)(1) of the Social Security Act, which prohibits communications that use the term "Social Security" in a way that "reasonably could be * * * construed as conveying[] the false impression that such

item is approved, endorsed, or authorized by the Social Security Administration." 42 U.S.C. 1320b-10(a)(1).

Petitioner National Taxpayers Union (NTU) brought this action in response to an informal letter from the Social Security Administration (SSA), advising NTU that one of its mailings violated Section 1140 and requesting voluntary compliance. The SSA letter informed NTU that, if NTU did not voluntarily comply within ten days, SSA would initiate enforcement proceedings. NTU sought to preempt the administrative process by filing this pre-enforcement challenge in federal district court, seeking a declaration that Section 1140 is unconstitutional on its face and as applied to NTU. Both the district court and the court of appeals held, applying *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200 (1994), that the statutory scheme for administrative and judicial review of Section 1140 penalties is exclusive and precludes NTU's pre-enforcement district court suit.

2. a. In the 1980s, Congress determined that a significant number of private entities had adopted misleading marketing techniques that gave individuals the false "impression that they are dealing directly with a Government agency or an organization endorsed by the Federal Government," such as the SSA. See Staffs of the Subcomm. on Oversight and the Subcomm. on Social Security of the House Comm. on Ways and Means, 102d Cong., 2d Sess., *Deceptive Solicitations, WMCP 102-45*, at 1 (Comm. Print 1992) (WMCP 102-45) (C.A. App. 78). To address this problem, in 1988, Congress enacted Section 1140 of the Social Security Act, see Medicare Catrstophic Coverage Act, Pub. L. No. 100-360, § 428(a), 102 Stat. 815 (42 U.S.C. 1320b-10 (1988)), which prohibited the use of symbols, emblems,

or names related to Social Security or Medicare in a manner that the user knew or should have known would convey the false impression that the item was approved by or issued in connection with SSA, and authorized the Secretary of Health and Human Services to impose civil monetary penalties for violations, 42 U.S.C. 1320b-10(a) and (b) (1988).

Congress specifically addressed the administrative procedures by which penalties for violations of Section 1140 would be assessed as well as the manner by which a person against whom a penalty was imposed could seek judicial review. 42 U.S.C. 1320b-10(c)(1) (1988) (incorporating the provisions of Section 1320a-7a(c), (d), (e), (g), and (j)-(*l*)). The House Conference Report specifically expressed the conferees' "intent that, to the extent feasible, the Secretary would use informal methods to deal with potential violations prior to initiating action under this provision." H.R. Conf. Rep. No. 661, 100th Cong., 2d Sess. 240 (1988). If such informal measures were unsuccessful, however, the statute provided that the Secretary could, with the consent of the Attorney General, initiate administrative proceedings, including an opportunity for a hearing before an administrative law judge, to assess a civil penalty. 42 U.S.C. 1320a-7a(c) (1988). Congress also provided that "[a]ny person adversely affected by a determination of the Secretary under this section may obtain a review of such determination in the United States Court of Appeals for the circuit in which the person resides, or in which the claim was presented," 42 U.S.C. 1320a-7a(e) (1988). The statutory scheme specifies the time for filing a petition for review, the extent of the court of appeals' jurisdiction, and the standard of review the

court should apply to the Secretary's determination. *Ibid.*

Congress revisited the problem of deceptive solicitations relating to Social Security in the 1990s. Hearings revealed that numerous organizations continued to use seemingly-official advertising to deceive senior citizens into paying money for useless information from, or divulging private information to, an entity that they mistakenly believed to be a federal agency. See WMCP 102-45, at 3 (C.A. App. 80) (call to "Social Security Information" listing resulted in $10 charge for "information of no particular use"); *ibid.* ("Many consumers return the cards believing that they are corresponding with a Government agency," only to "receive a phone call or an unannounced personal visit from a sales representative or an insurance agent."). Moreover, the large volume of private mailings that falsely indicated SSA authorization undermined the SSA's own ability to communicate with the public. See *id.* at 5 (C.A. App. 82) ("Such deception potentially interferes with the ability of the Government to effectively correspond with the public and increases the likelihood that true Government mailings will be destroyed without being opened."). See also H.R. Rep. No. 7, 103d Cong., 1st Sess. 47-48 (1993) (reciting the findings of WMCP 102-45, *supra*).

To combat this continuing problem, Congress amended Section 1140 of the Social Security Act to strengthen its enforcement provisions. Social Security Independence and Program Act of 1994, Pub. L. No. 103-296, § 312, 108 Stat. 1526. As amended, the provision prohibits a person from "us[ing], in connection with any item constituting an advertisement, solicitation, * * * or other communication," the term "Social Security" or related terms—

> in a manner which such person knows or should know would convey, or in a manner which reasonably could be interpreted or construed as conveying, the false impression that such item is approved, endorsed, or authorized by the Social Security Administration [or other specified agencies] or that such person has some connection with, or authorization from, [those government agencies].

42 U.S.C. 1320b-10(a)(1).

Among other changes, Congress deleted the requirement that the agency confer with the Department of Justice prior to initiating administrative proceedings, since that step had unduly delayed the administrative process. H.R. Rep. No. 506, 103d Cong., 2d Sess. 71-72 (1994). The House Committee Report stressed, however, that it "expect[ed] that SSA and HCFA would continue their present practice of seeking voluntary compliance under the law before determining whether to refer cases to the Inspector General." *Id.* at 72.[1]

b. By regulation, SSA has adopted a set of rules that, together with the statute, provide a comprehensive scheme for the enforcement of Section 1140. Consistent with Congress's intention, SSA typically sends an initial letter identifying the perceived problem and requesting voluntary compliance. If the organization does not voluntarily amend its solicitations, the Office of the Inspector General will issue written notification identifying the statements in an advertisement or mailing that SSA believes to be problematic and specifying the

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[1] This same Act transferred to SSA Commissioner the functions previously performed by the Secretary of Health and Human Services with respect to SSA programs and activities. See Pub. L. No. 103-296, § 105, 108 Stat. 1472 (42 U.S.C. 901 note).

proposed penalty. See 20 C.F.R. 498.109(a)(2) and (3). The notice explains that the agency's initial determination may be challenged in a hearing before an administrative law judge (ALJ). See 42 U.S.C. 1320a-7a(c)(2); 20 C.F.R. 498.109(a)(5).

The ALJ has the authority to "affirm, deny, increase, or reduce" the penalty initially proposed by the Office of the Inspector General. 20 C.F.R. 498.220(b). The ALJ cannot, however, "[f]ind invalid or refuse to follow Federal statutes or regulations." 20 C.F.R. 498.204(c)(1).

Any party can appeal the ALJ's decision to the Departmental Appeals Board of the United States Department of Health and Human Services (Appeals Board). 20 C.F.R. 498.201, 498.221(a).[2] The Appeals Board has the discretion to affirm, reverse or modify the ALJ's determination, or to decline review. 20 C.F.R. 498.221(h). The Commissioner of Social Security can then reverse or modify the recommended decision of the Appeals Board. 20 C.F.R. 498.222(a). An entity against which a penalty is imposed may seek judicial review of the agency's final decision by filing a petition for review in the relevant United States Court of Appeals within 60 days of being notified of the agency's determination. 42 U.S.C. 1320a-7a(e). The court of appeals may, on the basis of the administrative record, enter a "decree affirming, modifying, remanding for further consideration, or setting aside, in whole or in part, the determina-

[2] Although the 1994 amendment transferred authority over SSA programs from the Secretary of Health and Human Services to the Commissioner of Social Security, SSA regulations continue to provide that challenges to proposed civil monetary penalties are to be heard by the Department of Health and Human Services' ALJs and Appeals Board. See 20 C.F.R. 498.201.

tion of the [Commissioner]." *Ibid.* The statute specifies that the Commissioner's findings of fact are conclusive "if supported by substantial evidence on the record considered as a whole." *Ibid.* Finally, the statute provides that "[u]pon the filing of the record with it, the jurisdiction of the court [of appeals] shall be exclusive," except for Supreme Court review. *Ibid.*

SSA may initiate certain enforcement actions concerning Section 1140 in federal district court, see 42 U.S.C. 1320a-7a(k) (SSA can bring an action in district court to enjoin an entity from violating Section 1140); 42 U.S.C. 1320b-10(c)(2) (SSA can file suit to recover a civil monetary penalty), but no statutory provision authorizes an alleged violator to bring a pre-enforcement action in district court.

3. Petitioner NTU sent out a mailing that purported to be an "Official National Survey on Social Security Commissioned by the National Taxpayers Union for the Social Security Administration, White House and Congress of the United States." Pet. App. 3a, 15a (citation omitted). Language inside the mailing reiterated that the survey was an "Official Survey on Social Security," *ibid.*, and identified NTU as an "authorized sponsor" of the survey, C.A. App. 101.

SSA made a preliminary determination that the communication violated Section 1140. Before initiating formal enforcement proceedings, the agency sent a letter to NTU requesting that it voluntarily comply with the provision. See Pet. App. 3a, 15a-16a. NTU promised to correct the problems with its survey. See *id.* at 4a, 16a. But the revised version of the survey contained essentially the same language as the original mailing. The new mailing continued to assert that it was an "Official National Survey on Social Security," commis-

sioned for the White House and Congress, *id.* at 4a, and that NTU was "the authorized sponsor" of the survey, C.A. App. 120.

On November 7, 2002, SSA again sent a letter to NTU requesting voluntary compliance. See Pet. App. 16a; C.A. App. 105. SSA's letter specified that if NTU did not "provide written confirmation of compliance within 10 days of receipt of this letter," the agency would "proceed administratively pursuant to section 1140 and implementing regulations." *Id.* at 105.

NTU responded by letter dated November 22, 2002, in which NTU contested SSA's position that the NTU mailing conveyed a false impression of endorsement or association with SSA. C.A. App. 12. The letter stated that it was "a request for a hearing in the event your letter is deemed to be the imposition of a penalty," but at the same time "reject[ed] [SSA's] right to enforce Social Security Administration's regulatory scheme against it because the regulatory scheme is unconstitutional." *Ibid.* NTU then filed suit in federal district court, on December 6, 2002, seeking a declaration that Section 1140 violated the First Amendment, both on its face and as applied to NTU. See Pet. App. 4a; C.A. App. 5 (Complaint).

Due to the pendency of NTU's district court challenge, SSA did not issue a proposed civil penalty. Thus, the statutory scheme for administrative and judicial review has yet to run its course.

4. The district court, relying on *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200 (1994), dismissed NTU's suit for lack of subject matter jurisdiction. See Pet. App. 16a-24a. In *Thunder Basin*, this Court held that a statutory enforcement scheme, which provided for an administrative hearing and subsequent judicial review

in the court of appeals, "establishe[d] a fairly discernible intent to preclude district court review." 510 U.S. at 216 (internal quotation marks omitted). The district court in this case found that the system of administrative and judicial review established in Section 1140 similarly precludes district court jurisdiction over NTU's pre-enforcement challenge. Pet. App. 20a.

5. The court of appeals affirmed. Pet. App. 1a-13a. The court found that the administrative review procedures underlying Section 1140 "are nearly indistinguishable from those at issue in *Thunder Basin*." *Id.* at 12a. Furthermore, "the claims asserted [by NTU] are of the type Congress intended to be adjudicated, at least initially, through the administrative review scheme." *Ibid.*

The court of appeals observed that *Thunder Basin*, had "noted that it might be appropriate to bypass administrative review in cases involving 'claims considered "wholly collateral" to a statute's review provisions and outside the agency's expertise.'" Pet. App. 9a (quoting 510 U.S. at 212). But, the court determined, "[s]uch is not the case here." *Ibid.* The court observed that "NTU brought this action in anticipation of imminent enforcement proceedings, and its arguments amount to defenses to enforcement of § 1140." *Id.* at 11a n.3.

Judge Wilkinson concurred separately to emphasize that the statute at issue "forbids the impersonation of a federal agency by a private organization bent on sowing confusion among beneficiaries of a program," and that "[i]n this context, Congress had unquestionable authority to adopt the administrative procedures that it did." Pet. App. 13a.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review therefore is not warranted.

1. The court of appeals correctly held, following this Court's decision in *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200 (1994), that the district court lacked jurisdiction over NTU's pre-enforcement challenge to SSA's preliminary finding of a Section 1140 violation. As the court observed, the administrative review procedures underlying Section 1140 "are nearly indistinguishable from those at issue in *Thunder Basin*," Pet. App. 12a, in which this Court held that a comprehensive statutory scheme of administrative and judicial review demonstrates Congress's intent to preclude a pre-enforcement challenge that would circumvent the agency's opportunity fully to consider the issues presented.

a. In *Thunder Basin*, this Court concluded that the statutory review procedure created to enforce the Federal Mine Safety and Health Amendments Act of 1977 (Mine Act), 30 U.S.C. 801 *et seq.*, "prevents a district court from exercising subject-matter jurisdiction over a pre-enforcement challenge to the Act." 510 U.S. at 202. In reaching that conclusion, the Court considered several factors, including "the statute's language, structure, and purpose, its legislative history, and whether the claims can be afforded meaningful review." *Id.* at 207 (citation omitted).

In examining the language and structure of the Mine Act, the Court first noted that the statute "establishes a detailed structure for reviewing [statutory or regulatory] violations." *Thunder Basin*, 510 U.S. at 207.

After the Mine Safety and Health Administration issues a citation, the operator can challenge that determination in a proceeding before an administrative law judge. *Ibid.* The mine operator can then seek review before an administrative commission, and ultimately in the court of appeals, whose jurisdiction "'shall be exclusive' * * * except for possible Supreme Court review." *Id.* at 208 (quoting 30 U.S.C. 816(a)(1)). The court of appeals "must uphold findings of the Commission that are substantially supported by the record," *ibid.*, and may only consider challenges that have first been raised in a timely fashion before the agency, *id.* at 207 (citing 30 U.S.C. 815(a) and (d)).

The administrative review scheme established by Section 1140 is virtually identical to that considered in *Thunder Basin*. After SSA has made an initial determination that an organization has violated Section 1140 and proposed a penalty, the alleged violator can challenge that determination in a hearing before an administrative law judge. See 42 U.S.C. 1320a-7a(c)(2); 20 C.F.R. 498.202(a). The alleged violator can then seek review by the Appeals Board, 20 C.F.R. 498.221(a), and ultimately in the court of appeals, whose jurisdiction, as under the Mine Act, "shall be exclusive" except for possible Supreme Court review. 42 U.S.C. 1320a-7a(e). As under the Mine Act, Section 1320a-7a(e) requires that a party first present its arguments to the agency, before allowing review in the court of appeals, in which the agency's factual determinations must be upheld if "supported by substantial evidence" in the administrative record. *Ibid.*

Moreover, as the court of appeals recognized, the enforcement schemes underlying both the Mine Act and Section 1140 "specifically authorize[] district courts to

exercise jurisdiction over certain actions brought by the agency *but not* by private parties." Pet. App. 8a; see *Thunder Basin*, 510 U.S. at 209.

Thus, as in *Thunder Basin*, the "text and structure" of the statute "indicate Congress' intention that challenges * * * be adjudicated, at least initially, in the administrative review process." Pet. App. 8a.

b. The legislative history of Section 1140 further indicates Congress's intent to establish an exclusive review mechanism. See *Thunder Basin*, 510 U.S. at 209-211 (examining the legislative history of the Mine Act). In enacting Section 1140, Congress incorporated by reference the civil enforcement procedures used for addressing Medicare and Medicaid fraud. See 42 U.S.C. 1320b-10(c)(1). Notably, in developing these procedures, the Conference Committee rejected provisions in the House version of the bill that would have permitted alleged violators to challenge final agency determinations in a trial *de novo* in district court. Cf. H.R. Conf. Rep. No. 208, 97th Cong., 1st Sess. 950 (1981), with H.R. 3982, 97th Cong., 1st Sess. § 1128A(d)(2)(B) (1981) (recommendation of Ways and Means Committee). As the court of appeals determined, this legislative history "suggests that Congress intended pre-enforcement challenges * * * to be adjudicated in the first instance by the administrative agency rather than the district courts." Pet. App. 9a.

c. The court of appeals also properly determined that "the claims asserted in this case are 'of the type Congress intended to be reviewed within this statutory structure.'" Pet. App. 9a (quoting *Thunder Basin*, 510 U.S. at 212).

As the court of appeals observed, *Thunder Basin* suggested that a district court might have jurisdiction

over claims that were "wholly collateral to a statute's review provisions and outside the agency's expertise." Pet. App. 9a (internal quotation marks omitted). But NTU's claims were not "wholly collateral" to the administrative scheme. See *id.* at 9a, 10a n.3.

Although cloaked in constitutional terms, NTU's as-applied challenge is closely entwined with its argument that it did not violate Section 1140. NTU asserts that its survey contained "no * * * suggestion" that it was "approved, endorsed or authorized by any part of the government." NTU C.A. Br. 24. If upheld, NTU's argument would amount to a defense on the merits against SSA's initial finding that NTU violated Section 1140. See 42 U.S.C. 1320b-10(a)(1) (prohibiting only communications that "reasonably could be * * * construed as conveying[] the false impression" that they were authorized or endorsed by the SSA). Such "defenses to enforcement of § 1140" must be presented in proceedings before the agency prior to raising them on direct review in the court of appeals. Pet. App. 11a n.3; 42 U.S.C. 1320a-7a(e).

Moreover, NTU can plainly obtain meaningful judicial review of its constitutional claims through the statutory scheme provided in Section 1140. As this Court stated in *Thunder Basin*, even when an agency does not itself decide constitutional questions, "constitutional claims * * * can be meaningfully addressed in the Court of Appeals." 510 U.S. at 215; see *Shalala* v. *Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 23 (2000) ("[A] court reviewing an agency determination under [42 U.S.C.] § 405(g) has adequate authority to resolve any statutory or constitutional contention that the agency does not, or cannot, decide."); *Weinberger* v. *Salfi*, 422 U.S. 749, 762 (1975) (administrative exhaus-

tion prior to judicial consideration of constitutional claims "is not only of unquestionable constitutionality, but it is also manifestly reasonable, since it assures the Secretary the opportunity prior to constitutional litigation" to apply the statute in a manner that may moot the constitutional claim). Thus, as the court of appeals recognized, even if SSA does not "decide the constitutional claims presented by [NTU]" during the administrative proceedings, the court "[could] do so at the appropriate time." Pet. App. 10a.

Indeed, the courts of appeals have resolved numerous petitions for review under Section 1320a-7a(e) that have presented constitutional claims. See, *e.g.*, *Woodstock Care Ctr.* v. *Thompson*, 363 F.3d 583, 587-588 (6th Cir. 2003) (challenge to imposition of civil monetary penalty, including constitutional due process claim, initially filed in district court, but transferred to court of appeals, which exercised jurisdiction under 42 U.S.C. 1320a-7a); *Bernstein* v. *Sullivan*, 914 F.2d 1395, 1400-1403 (10th Cir. 1990) (constitutional challenge to retroactive application of enlargement of statute-of-limitations); *Scott* v. *Bowen*, 845 F.2d 856 (9th Cir. 1988) (constitutional challenges to Civil Monetary Penalties Law); *Mayers* v. *United States HHS*, 806 F.2d 995 (11th Cir. 1986), cert. denied, 484 U.S. 822 (1987) (same).

As in *Thunder Basin*, "[n]othing in the language and structure of [Section 1140] or its legislative history suggests that Congress intended to allow [alleged violators] to evade the statutory-review process by enjoining the [SSA] from commencing enforcement proceedings, as [NTU] sought to do here." 510 U.S. at 216. The court of appeals thus correctly concluded that the district court lacked jurisdiction over NTU's pre-enforcement challenge. See Pet. App. 12a.

2. NTU's assertion (Pet. 7-10) that the court of appeals' application of *Thunder Basin* conflicts with other appellate court decisions is unconvincing. Those other decisions, to the extent they deal with the same issue at all,[3] merely reflect various courts' determinations that particular claims, involving different factual scenarios and different statutory schemes, are "wholly

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[3] Three of the cases cited by NTU as evidence of a purported disagreement among the circuits involve the distinct question of whether a particular claim was "ripe" for judicial resolution. See *Rocky Mountain Radar, Inc.* v. *FCC*, 158 F.3d 1118, 1122-1123 (10th Cir. 1998) (*Thunder Basin* not "germane" to question of court of appeals' jurisdiction over petition for review of agency's final determination, under which "marketing of RMR's product was permanently prohibited"), cert. denied, 525 U.S. 1147 (1999); *Commodity Trend Serv., Inc.* v. *CFTC*, 233 F.3d 981, 985-986 (7th Cir. 2000) (addressing ripeness, without reference to *Thunder Basin* or a statutory scheme mandating a particular method for obtaining judicial review); *Commodity Trend Serv., Inc.* v. *CFTC*, 149 F.3d 679, 681, 690 (7th Cir. 1998) (same). Here, the court of appeals did not hold that NTU's dispute with SSA was not "ripe," but that NTU must litigate the issue through the statutorily-prescribed process.

NTU's reliance on *Czerkies* v. *United States Department of Labor*, 73 F.3d 1435 (7th Cir. 1996), is also misplaced. There, the Seventh Circuit distinguished *Thunder Basin* on the ground that the government's proffered construction of 5 U.S.C. 8128(b) would foreclose *any* judicial review of the plaintiff's constitutional claims, and specifically did not question decisions in which, as here, there was "found a statutory bar to *pre-enforcement* constitutional challenges * * * [but where] the door remained open to post-enforcement constitutional challenges." *Czerkies*, 73 F.3d at 1439. While NTU argues (Pet. 9-10) that this case is like *Czerkies* because the SSA does not have authority to declare Section 1140 unconstitutional, NTU ignores this Court's holding in *Illinois Council on Long Term Care* that that possibility does not excuse a party from the obligation first to proceed through the statutorily-mandated administrative process, which may narrow, or even moot, any constitutional claims. See 529 U.S. at 23-24. See also *Salfi*, 422 U.S. at 762.

collateral" to the administrative review scheme. See *Thunder Basin*, 510 U.S. at 212. The mere fact that other courts have found specific claims to be "wholly collateral" to a particular administrative proceeding in no way casts doubt on the holding of the court of appeals in this case or suggests a need for further review by this Court.

None of the decisions cited by NTU indicates that another court of appeals would have ruled differently on the facts of this case. NTU places its greatest emphasis on a supposed conflict between the Fourth Circuit's approach and two decisions of the D.C. Circuit. See Pet. 5, 7, 9 (citing *Time Warner Entm't Co.* v. *FCC*, 93 F.3d 957 (D.C. Cir. 1996), and *Action for Children's Television* v. *FCC*, 59 F.3d 1249 (D.C. Cir. 1995), cert. denied, 516 U.S. 1072 (1996)). Neither decision of the D.C. Circuit conflicts with that of the Fourth Circuit here. In *Action for Children's Television*, the court held that the district court had jurisdiction to consider a constitutional challenge to the FCC forfeiture statute because "review of a commission order imposing a forfeiture * * * would itself be in the district court." *Id.* at 1256. NTU does not suggest that review of an SSA order imposing a civil penalty under Section 1140 would be in the district court, because 42 U.S.C. 1320a-7a(e) expressly provides that such review must be sought in the court of appeals.

Time Warner is also fully consistent with the Fourth Circuit's holding here because the D.C. Circuit emphasized that the district court had jurisdiction over a constitutional challenge only to the extent the "case is entirely independent of any agency proceedings, whether actual or prospective." 93 F.3d at 965. See *ibid.* (district court had jurisdiction over "a facial chal-

lenge to a statute's constitutionality so long as that challenge is not raised in a suit challenging the validity of agency action taken pursuant to the challenged statute"). The other decisions upon which NTU relies similarly involved claims that were found to be "wholly collateral" to the agency action.[4]

There is no sense in which NTU's action is "entirely independent" of prospective agency action. Rather, as the Fourth Circuit emphasized, "NTU brought this action in anticipation of imminent enforcement proceedings," in response to SSA's initial attempt to resolve the dispute informally, and NTU's "arguments amount to defenses to enforcement of § 1140." Pet. App. 11a n.3 (citing *Time Warner*, 93 F.3d at 957).

3. NTU urges (Pet. 10-11) that its suit should escape the rule of *Thunder Basin* because it raises a "facial" challenge to Section 1140. But petitioner's facial overbreadth claim is not "wholly collateral" to the administrative review scheme.

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[4] See, *e.g.*, *Merritt* v. *Shuttle, Inc.*, 245 F.3d 182, 190-192 (2d Cir. 2001) (holding that 49 U.S.C. 46110, which confers jurisdiction on courts of appeals to review an FAA order suspending a pilot's license, did not bar a pilot's FTCA action arising out of injuries sustained in an air crash as a result of FAA's negligence, because the pilot could not have brought the FTCA claim before the ALJ); *Crist* v. *Leippe*, 138 F.3d 801, 803 (9th Cir. 1998) (district court would have jurisdiction over a "broad" constitutional challenge that was *not* "inescapably intertwined" with the agency's order); *Kreschollek* v. *Southern Stevedoring Co.*, 78 F.3d 868, 874-875 (3d Cir. 1996) (district court could exercise jurisdiction over a constitutional claim that was "entirely collateral to [the plaintiff's] claim of entitlement to benefits" under the statute); *Mace* v. *Skinner*, 34 F.3d 854, 859-860 (9th Cir. 1994) (holding that plaintiffs' "broad challenge to allegedly unconstitutional FAA practices" were "not based on the merits of his individual situation," and thus his suit was not "inescapably intertwined" with review of a particular order) (citation omitted).

Prior to addressing NTU's facial First Amendment challenge, a court should first examine whether petitioner violated Section 1140, see *Christopher* v. *Harbury*, 536 U.S. 403, 417 (2002) (noting "the obligation of the Judicial Branch to avoid deciding constitutional issues needlessly"), and, if so, should then consider NTU's as-applied challenge, *Renne* v. *Geary*, 501 U.S. 312, 324 (1991) ("It is not the usual judicial practice, . . . nor do we consider it generally desirable, to proceed to an overbreadth issue unnecessarily—that is, before it is determined that the statute would be valid as applied.") (quoting *Board of Tr. of State Univ.* v. *Fox*, 492 U.S. 469, 484-485 (1989)). NTU has never conceded that it committed a statutory violation. To the contrary, NTU contends that "only an *unreasonable* person" could interpret its survey as approved, endorsed or authorized by the SSA. NTU C.A. Br. 21. As the court of appeals found, such an argument is precisely the kind that "Congress intended to be adjudicated, at least initially, through the administrative review scheme." Pet. App. 12a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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