No.

IN THE
Supreme Court of the United States

MARIA ESPARRAGUERA,

Petitioner,

v.

DEPARTMENT OF THE ARMY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Elgin* v. *Department of Treasury*, 567 U.S. 1 (2012), this Court held that, where the Civil Service Reform Act directs a federal employee to the Merit Systems Protection Board in connection with a personnel action, judicial review of that action must occur exclusively in the Federal Circuit. *Id.* at 10-21. The Court also explained that, "in an appeal from agency action within the MSPB's jurisdiction," the Federal Circuit's "authority to decide particular legal questions" is *not* "derivative of the MPSB's authority." *Id.* at 18. The Court thus held that the Federal Circuit may review constitutional challenges to personnel actions within the MSPB's jurisdiction, whether or not the MSPB has authority to decide those challenges. *Ibid.*

When a career senior executive is removed from the Senior Executive Service ("SES") for "less than fully successful executive performance," the Civil Service Reform Act entitles her to "an informal hearing before an official designated by the Merit Systems Protection Board." 5 U.S.C. §3592(a), (a)(2). In the decision below, the Federal Circuit held that the "informal hearing" afforded by §3592(a) does not permit MSPB review of a career senior executive's removal from the SES. The court of appeals then held that, because the *MSPB* cannot decide the legality of such removals, the *Federal Circuit* cannot do so either—even with respect to constitutional challenges.

The question presented is:

Whether the Federal Circuit erred in holding that neither it nor the MSPB may review a career senior executive's removal from the Senior Executive Service under 5 U.S.C. §3592(a)(2).

RELATED PROCEEDINGS

The following proceedings are related proceedings within the meaning of Rule 14.1(b)(iii):

- *Esparraguera* v. *Department of the Army*, No. 19-2293 (Fed. Cir.), judgment entered on December 4, 2020; and
- *Esparraguera* v. *Department of the Army, et al.*, No. 1:21-cv-00421-TJK (D.D.C.), currently ongoing.

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PETITION FOR A WRIT OF CERTIORARI

For nearly 35 years, petitioner Maria Esparraguera was a civilian attorney in the Department of the Army with an exemplary record. She rose to the Senior Executive Service ("SES"), the highest level of career civil servants, where she "excelled as a leader" who brought "energy, mentorship, training and inspiration to all her subordinates." C.A. App. 15. Her supervisor, the Deputy Judge Advocate General, declared her "one of the best senior executive employees" he had ever known. C.A. App. 18. This case arises from Esparraguera's removal from the SES, through what Federal Circuit Judge Kimberly Moore described as a "secretive" and "outrageous" ordeal that "horrifically deprived [Esparraguera] of due process."

When career senior executives like Esparraguera are removed from the SES for allegedly deficient performance, the Civil Service Reform Act entitles them to an "informal hearing" before a Merit Systems Protection Board ("MSPB" or "Board") official. 5 U.S.C. § 3592(a). In *Elgin* v. *Department of Treasury*, 567 U.S. 1 (2012), this Court held that, when employees are directed to the MSPB, judicial review must occur in the Federal Circuit.

Notwithstanding *Elgin*, the Federal Circuit refused to hear Esparraguera's case. It held that *neither* the MSPB *nor* the Federal Circuit may review the legality of career senior executive removals under § 3592(a)(2)—including constitutional challenges. It held that to be the case even if *no* court, not even a district court, can provide review. That holding defies *Elgin* and basic rules of statutory construction, and erodes essential protections for thousands of civil servants. This Court should grant review.

OPINIONS BELOW

The court of appeals' opinion (Pet. App. 1a-21a) is reported at 981 F.3d 1328. The Merit Systems Protection Board's Order Referring Record is not reported but appears in the Petition Appendix, *infra*, 22a-25a.

STATEMENT OF JURISDICTION

The court of appeals entered judgment on December 4, 2020 (Pet. App. 1a-21a) and denied rehearing on June 8, 2021 (Pet. App. 26a-27a). On March 19, 2020, by general order, this Court extended the time to file this petition to November 5, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Relevant provisions of the U.S. Constitution, Civil Service Reform Act, 5 U.S.C. § 1101 *et seq.*, and implementing regulations, 5 C.F.R. § 1201.1 *et seq.*, are reproduced in the Appendix (Pet. App. 28a-37a).

STATEMENT

I. LEGAL BACKGROUND

SES performance appraisals and removal decisions are governed by the Civil Service Reform Act of 1978, Pub. L. 95-454, 92 Stat. 1111, codified at 5 U.S.C. § 1101 *et seq.* ("CSRA"), and related regulations.

A. The Senior Executive Service

The Senior Executive Service is a corps of civil servants responsible for ensuring "the executive management of the Government * * * is of the highest quality." 5 U.S.C. § 3131. To recruit and retain highly qualified senior executives, the SES offers benefits (including pay, bonus, and leave) more generous than those available to other federal employees. §§ 3131(1), 5382, 5384, 6304(f).

Career senior executives enjoy tenure protections. They may be removed from the SES only for specific reasons, such as "unsatisfactory" or "less than fully successful" performance, 5 U.S.C. §§ 3592(a), 4314(a)(3), and "misconduct, neglect of duty, malfeasance, or failure to accept a directed reassignment or to accompany a position in a transfer of function," § 7543(a); see § 3393(g).[1]

B. SES Performance Appraisals

Senior executives are annually rated on performance. 5 U.S.C. §§ 4312, 4314(a). The Department of the Army's performance-appraisal system has five rating levels, from Level 1 ("Unsatisfactory") to Level 5 ("Outstanding"). C.A. App. 13; see 5 C.F.R. § 430.305(a)(6). Appraisals can have career-altering consequences. Career senior executives rated "less than fully successful" (below Level 3) may be removed from the SES. 5 U.S.C. § 3592(a)(2). Career senior executives rated "unsatisfactory" *must* be either "removed from" or "reassigned or transferred within" the SES. § 4314(b)(3).

Performance appraisals involve multiple steps. The senior executive's "supervising official" conducts an "initial appraisal" using the five-level rating system. 5 U.S.C. § 4314(c)(2). The initial appraisal is provided to a performance review board ("PRB"), which may conduct further review before recommending a final rating. § 4314(c)(1)-(2). The PRB's recommendation is then sent to the "appointing authority," who assigns a final rating "after considering the recommendations by the [PRB]." § 4314(c)(3). "[B]efore the rating becomes final," how-

[1] *Non*-career senior executives (*e.g.*, political appointees) lack tenure protections and "may be removed from the service at any time." 5 U.S.C. § 3592(c).

ever, the senior executive must be "provided a copy of the appraisal and rating" and "given an opportunity to respond in writing and have the rating reviewed [at] a higher level in the agency." § 4312(b)(3).

C. Removal of Career Senior Executives from the SES

Federal employees removed from their jobs generally may obtain review before MSPB under 5 U.S.C. § 7701. For example, General Schedule employees removed for misconduct are entitled to MSPB review, §§ 7512, 7513(d), as are General Schedule employees removed for unacceptable performance, § 4303(a), (e). Senior executives removed for *misconduct* are likewise entitled to MSPB review under § 7701. § 7543(a), (d).

Career senior executives removed for "less than fully successful executive performance" are treated somewhat differently. 5 U.S.C. § 3592(a)(2). Those executives do not have "the right to initiate an action with the Board under section 7701." § 3592(a). Instead, they are entitled "to an informal hearing before an official designated by the Merit Systems Protection Board at which the career appointee may appear and present arguments." *Ibid.* The statute does not specify how the "informal hearing" is to be conducted, or narrow or define the MSPB official's authority.

The MSPB has issued regulations governing the informal hearing. Under the regulations, the senior executive may *only* "appear and present arguments" and have a "verbatim record of the proceeding" made. 5 C.F.R. § 1201.144(b). The senior executive "has no other procedural rights," such as the right to compel witness attendance. *Ibid.* The regulations also sharply limit the presiding official's role. The presiding official cannot issue a decision on the removal's legality, order reinstate-

ment, or otherwise grant relief from the removal. § 1201.144(b)-(c). Instead, following the hearing, the MSPB compiles a "verbatim record," which is sent to the employing agency, the Office of Special Counsel, and the Office of Personnel Management "for whatever action may be appropriate." *Ibid.*

II. FACTUAL BACKGROUND

A. Esparraguera's Performance Appraisal

Maria Esparraguera was appointed to the SES in 2010. She served as chief counsel at the Army Materiel Command Legal Center at Aberdeen Proving Ground, where she supervised over 50 attorneys in a broad range of matters. C.A. App. 244. In 2015, Esparraguera became Director of Civilian Personnel Labor and Employment Law in the Office of the Judge Advocate General, serving as the Department's highest-ranking civilian personnel attorney. *Ibid.*

In October 2017, Esparraguera began the performance-appraisal process for Fiscal Year 2017. Her supervisor, Deputy Judge Advocate General Stuart Risch, made the initial evaluation. C.A. App. 13-18.[2] Risch lauded Esparraguera as "exceptional" and "one of the best senior executive[s]" he had known in his 30-year career. C.A. App. 18. He remarked that he and the Judge Advocate General "trust her implicitly." *Ibid.* Risch awarded Esparraguera an "Outstanding" (Level 5) rating—the highest possible. C.A. App. 13.

B. The OSC Investigation

Esparraguera later received a letter that her rating was being held in abeyance pending an ongoing investi-

[2] Risch has since been appointed Judge Advocate General.

gation. C.A. App. 255. The letter did not disclose the basis for the investigation.

It turned out the investigation involved an allegation that Esparraguera had committed a prohibited personnel practice ("PPP") in connection with hiring a division chief years earlier in 2014. To better evaluate the top candidates' leadership skills, Esparraguera had recommended—and her superior approved—a rotation where each candidate acted as chief for 30 days. C.A. App. 270-275. The plan proved successful. Following the rotations, a previously divided hiring panel unanimously endorsed one candidate. C.A. App. 276-279.

Following the selection, however, an allegation arose that the rotation improperly favored the successful candidate. The Office of Special Counsel ("OSC") investigated to determine if there were "reasonable grounds" to believe a PPP occurred. 5 U.S.C. § 1214(a)(1)(A). In October 2016, OSC sent the Department a "Summary of Findings" suggesting that, by implementing the rotation, Esparraguera gave the prevailing candidate an improper advantage. C.A. App. 238-241. OSC never provided the Summary to Esparraguera or offered her a chance to respond. See C.A. App. 43.

The Department took no action against Esparraguera upon receiving the Summary. Esparraguera's superiors—by then including the Judge Advocate General and Deputy Judge Advocate General—"did not agree" with OSC's allegations. C.A. App. 479. Esparraguera's supervisor did not mention OSC's allegations in her next performance appraisal, which rated her "Outstanding." C.A. App. 13-18; see p. 5, *supra*.

C. The OSC Report

Sixteen months passed after the Department received and disregarded the Summary of Findings. Then, in February 2018, OSC sent the Department a lengthier Report of Prohibited Personnel Practice ("Report"). C.A. App. 242-254. The Report alleged that Esparraguera had committed a PPP, and urged the Department to take action against her. *Ibid.*

Esparraguera was not allowed to see OSC's Report. C.A. App. 471. She asked the Department for a copy, but OSC "denied approval" for its release. C.A. App. 443.

D. The Special Performance Review Board's Recommendation

In mid-2018, a special PRB was convened to recommend Esparraguera's final rating for FY2017. See C.A. App. 104, 451. The special PRB relied on a two-page "Executive Summary" of the OSC Report. C.A. App. 115-116. The Executive Summary presented a highly misleading account of OSC's allegations. Among other omissions, it did not mention Esparraguera's contemporaneous explanation for the rotation plan—namely, that it would assist the hiring panel in evaluating the top candidates' leadership. C.A. App. 272-275.

Esparraguera was not allowed to respond to the Executive Summary or defend herself before the special PRB. See C.A. App. 44-45, 51, 85. She was not given a copy of the Executive Summary—or even told of the special PRB's *existence*—until *after* the PRB issued its recommendation. See C.A. App. 44-45, 51.

After reviewing the Executive Summary, the special PRB recommended lowering Esparraguera's rating from "Outstanding" (Level 5) to "Unsatisfactory" (Level 1). C.A. App. 13, 85. The governing statute mandated that

Esparraguera be "provided a copy of the appraisal and rating * * * and given an opportunity to respond" "before the rating bec[ame] final." 5 U.S.C. § 4312(b)(3). She was not afforded that opportunity. C.A. App. 104.

Department policies dictate additional procedures where a senior executive is subject to an investigation. C.A. App. 53-56. Those policies provide that, where "the PRB recommends that the affected [senior executive] receive a performance rating below Level 3 (Fully Successful)," the senior executive's *supervisors* "will be notified and provided an opportunity to submit written comments * * * prior to the PRB finalizing its recommendation." C.A. App. 55. Because an "unsatisfactory" rating *requires* that a career senior executive be moved to a different position and can lead to removal from the SES entirely, 5 U.S.C. § 4314(b)(3),[3] that requirement ensures that the supervisors most familiar with the executive's performance can weigh in before the rating becomes final. That did not happen here. Esparraguera's supervisors had continued to rate her performance "Outstanding," despite knowing of OSC's allegations. See C.A. App. 449-451. But they were "never notified or given an opportunity to submit written comments to the PRB" before the PRB's "Unsatisfactory" recommendation was finalized. C.A. App. 105.

E. Esparraguera's Removal from the SES

On September 4, 2018, the Department's Under Secretary finalized Esparraguera's "Unsatisfactory" rating and ordered her "removal from the Senior Executive

[3] Likewise, any "less than fully successful" rating can lead to removal from the SES, 5 U.S.C. § 3592(a)(2); multiple such ratings may *require* removal, § 4314(b)(4).

Service" for "unacceptable performance" under 5 U.S.C. § 3592(a)(2). Pet. App. 39a. She was demoted to a non-attorney GS-15 position. *Ibid.* The Under Secretary expressly based his removal decision on "the Performance Review Board's recommendation based on findings from the [OSC] Report" accusing Esparraguera of a PPP. Pet. App. 38a.

Esparraguera still had not seen OSC's Report. She received it weeks later, when OSC and the Department finally authorized its disclosure "now that an action has been taken based on the report." C.A. App. 443.[4]

III. PROCEEDINGS BELOW

A. The Informal MSPB Hearing

After receiving the removal notice, Esparraguera timely requested an "informal hearing" from the MSPB under 5 U.S.C. § 3592(a). Pet. App. 10a-11a. An MSPB-designated administrative law judge ("ALJ") presided. Before and during the hearing, the ALJ declared that MSPB regulations prevented him from issuing a decision on the legality of Esparraguera's removal or granting any relief. C.A. App. 137, 762, 841.

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[4] After receiving OSC's Report in early 2018, the Department conducted its own investigation into the alleged PPP. C.A. App. 256-257. The internal investigation's conclusions were released September 5, 2018, the day *after* the removal notice. Contrary to the Report and removal notice, the internal investigation *failed to substantiate* the alleged PPP, and resulted in only a written reprimand. C.A. App. 38-39, 631. There is no indication, however, that the special PRB and Under Secretary were informed of the internal investigation's conclusions. When Esparraguera requested materials from the investigation, the Department represented that it produced no "report," "documents or other tangible material[s]." C.A. App. 443.

At the informal hearing, Esparraguera "submitted a slew of exhibits" disputing the charges "into evidence and read a prepared statement into the record." Pet. App. 11a. She argued that the Department violated her constitutional due-process rights when it removed her from the SES without adequate notice of the charges against her or opportunity to respond. C.A. App. 851-856. She also argued that, at least as implemented by MSPB regulations, the informal hearing afforded under § 3592(a) was constitutionally deficient. C.A. App. 857. Due process, she explained, requires a post-removal hearing before an official who can decide the legality of her removal and grant relief. C.A. App. 851-856. Because "no decision [would] issue in th[e] proceeding," Esparraguera maintained that the MSPB's application of § 3592(a) did "not meet the constitutional standard." C.A. App. 857. The ALJ again responded that he was "constrained by [MSPB] regulations" and would not issue a decision. C.A. App. 858. The Department offered no objection to Esparraguera's evidence and presented no evidence, witnesses, or rebuttal. C.A. App. 851-856; Pet. App. 11a.

After the hearing, the ALJ issued an Order Referring Record on behalf of the MSPB ("Order"). Pet. App. 22a-25a. The Order compiled the record, including Esparraguera's arguments and evidence challenging her removal. Pet. App. 11a, 22a-25a; 5 C.F.R. § 1201.144(b). The Order reiterated that the ALJ would not "issue a decision or grant any relief," and concluded all MSPB proceedings regarding Esparraguera's removal. Pet. App. 23a, 25a.

The MSPB sent copies of the record to the Department, the Office of Personnel Management, and OSC "for whatever action they may deem appropriate." Pet. App. 25a. It did not require those agencies to take any action, and none did.

B. Federal Circuit Proceedings

1. Esparraguera appealed to the Federal Circuit, which has jurisdiction over appeals from "final order[s] * * * of the [Merit Systems Protection] Board." 5 U.S.C. § 7703(b)(1); see 28 U.S.C. § 1295(a)(9).

Esparraguera challenged her removal on constitutional due-process grounds. Among other things, the Department had not given her notice or an opportunity to respond before removal. Her removal was expressly based on the OSC Report, Pet. App. 38a, but the Report was *deliberately withheld* from her until after "action ha[d] been taken based on the report," C.A. App. 443. Esparraguera also argued that she did not receive constitutionally adequate process *after* removal. Instead, she received an empty hearing before an official powerless to rectify error.

At oral argument, Judge Kimberly Moore expressed her view that Esparraguera "was horrifically deprived of due process." Oral Arg. 31:46-31:58 in No. 19-2293 (Fed. Cir. Oct. 9, 2020).[5] Esparraguera's removal, Judge Moore remarked, was the culmination of a

> secretive process that took [Esparraguera] out of the ability to respond, without knowledge of what was going on, where even the very supervisor who supervised her for many years and who continued to think she was outstanding, was cut out of the process of deciding what her performance review should be for that year. I think that behavior was outrageous. And I absolutely think it violates due process.

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[5] Available at http://oralarguments.cafc.uscourts.gov/default.aspx?fl=19-2293_10092020.mp3.

Id. at 31:58-32:25.

2. The Federal Circuit nonetheless held it lacked jurisdiction to review Esparraguera's removal and dismissed her appeal. Pet. App. 1a-21a.

The court asserted that its "jurisdiction" to hear Esparraguera's challenges to her removal "depend[ed] on whether the Board had jurisdiction to review Ms. Esparraguera's removal." Pet. App. 11a. "[I]f the Board cannot review her removal," the court stated, "neither can we." Pet. App. 12a. According to the court, "the Board had no jurisdiction over the removal." Pet. App. 19a. "[T]he Board cannot review the removal of an SES employee in an informal hearing under § 3592." Pet. App. 12a. The informal hearing, the court declared, is merely "an opportunity [for the employee] to be heard," not an occasion for the Board to exercise "review power" over a senior executive's removal. Pet. App. 13a-14a.

Having found *the MPSB* could not review Esparraguera's removal, the Federal Circuit concluded that *it* could not review her removal either—even with respect to constitutional claims. Pet. App. 17a-19a. The court stated that its "jurisdiction over the Board is restricted to an appeal brought under 5 U.S.C. § 7703 from 'a final order or final decision.'" Pet. App. 17a (quoting 28 U.S.C. § 1295(a)(9)). The court did not deny the MSPB's Order Referring Record was the MSPB's last word regarding Esparraguera's removal. See Pet. App. 17a-18a. It nonetheless held that the Order was not "'final' with respect to Ms. Esparraguera's removal" because "the Board was not empowered under § 3592 to review Ms. Esparraguera's removal." Pet. App. 18a. In the court's view, the CSRA "channels judicial review of an adverse action exclusively through the Federal Circuit only if it first

channels *review* through the Board." Pet. App. 19a (emphasis added).

The Federal Circuit thus held that career senior executives removed from the SES under § 3592(a)(2) may not obtain review before the MSPB *or* the Federal Circuit—even for "constitutional issues." Pet. App. 19a. The court opined that review *might* be available in "district courts." Pet. App. 20a. But it made "clear" its "holding * * * [did] not depend on whether judicial review might be available elsewhere." *Ibid.*

REASONS FOR GRANTING THE PETITION

In *Elgin* v. *Department of the Treasury*, 567 U.S. 1 (2012), this Court addressed the CSRA's "'comprehensive system for reviewing personnel action taken against federal employees.'" *Id.* at 5. The Court made clear that, when the CSRA directs a federal employee to an MSPB proceeding, review must proceed through the MSPB and then the Federal Circuit—*not* district courts.

Despite *Elgin*, the Federal Circuit held below that *neither* the Federal Circuit *nor* the MSPB may review a career senior executive's removal under § 3592(a)(2)—even with respect to constitutional claims. Although § 3592(a) grants those employees an MSPB "informal hearing," the court of appeals held that hearing is an empty ceremony that does not allow any MSPB official to decide the removal's legality. And because *the MSPB* purportedly cannot decide the removal's legality, the Federal Circuit held that *it* lacks authority to decide that question too. Instead, the Federal Circuit opined, review should occur (if at all) in *district courts*.

That decision upends the CSRA's careful structure and *Elgin*'s careful analysis. The CSRA was enacted to *avoid* "widespread judicial review" of employment issues

in district courts (and courts of appeals) scattered across the country. *Elgin*, 567 U.S. at 14. By shunting review *away* from the MSPB and Federal Circuit—and *toward* district courts—the decision below gets things exactly backward. Worse, the court refused to decide whether review is actually available in district court, contrary to the strong presumption of judicial review—and the stronger-still presumption of review for *constitutional* claims.

The Federal Circuit's justifications for its result exacerbate the errors. The Federal Circuit asserted that, because the MSPB purportedly cannot review SES removals under §3592(a)(2), the Federal Circuit cannot either. But *Elgin* expressly *rejected* the notion that the Federal Circuit's jurisdiction is derivative of the MSPB's authority to grant relief. As *Elgin* explained, the Federal Circuit has full authority to resolve any challenges to personnel actions over which the MSPB *has jurisdiction*—whether or not the MSPB can *decide challenges* to those actions. There can be no question the MSPB has jurisdiction when career senior executives are removed from the SES for performance reasons: Section 3592(a) provides for an MSPB hearing in such cases, and the MSPB's regulations expressly state that it has jurisdiction. Thus, even assuming *the MSPB* cannot review §3592(a)(2) removals, that does not prevent *the Federal Circuit* from providing review.

The Federal Circuit also erred in holding that §3592(a)'s "informal hearing" does not allow MSPB review. The ordinary meaning of a "hearing" is a proceeding before a *decisionmaker* capable of granting relief. Nothing in the CSRA counsels, much less compels, the Federal Circuit's contrary construction. Indeed,

reading §3592(a) to deny prompt post-removal review renders the statute unconstitutional.

Absent swift correction, the Federal Circuit's decision threatens to deprive countless career senior executives of effective review and undermine safeguards against politicization of the career SES. And by rendering the informal MSPB hearing meaningless—and cutting off any prospect of Federal Circuit review, even for constitutional claims—the decision below destroys the efficient review the CSRA was meant to provide. Even if some senior executives might bear the expense of seeking review in district court, standalone lawsuits cannot provide the prompt post-removal review that due process requires. And if it turns out that district courts *lack* jurisdiction in such cases, career senior executives who proceed in district court in reliance on the decision below will unwittingly sacrifice any review properly available through the MSPB and Federal Circuit. This Court's intervention is urgently needed.

I. THE DECISION BELOW CONFLICTS WITH *ELGIN* AND THE CSRA'S INTEGRATED REVIEW SCHEME

A. When the CSRA Directs Employees to the MSPB, *Elgin* Requires Review To Occur in the Federal Circuit

This Court addressed the CSRA's "'comprehensive system for reviewing personnel action taken against federal employees'" in *Elgin*. 567 U.S. at 5. *Elgin* makes clear that, when the CSRA directs an employee to the MSPB, review must take place in the Federal Circuit. *Id.* at 10-15. That is true, the Court held, whether or not the MSPB has authority to decide the employee's challenge. *Id.* at 16-18.

In *Elgin*, several federal employees were removed for failure to register for the Selective Service. 567 U.S. at 6-7. One employee (Elgin) attempted to challenge his removal before the MSPB, arguing that the Selective Service statute was unconstitutional. *Id.* at 7; see 5 U.S.C. § 7701. The MSPB dismissed his case, stating that it lacked authority to decide a statute's constitutionality. *Elgin*, 567 U.S. at 7.

Instead of appealing the MSPB's order to the Federal Circuit, Elgin filed a district-court action raising the same constitutional challenges. *Elgin*, 567 U.S. at 7-8. The other employees—who had not pressed claims before the MSPB—joined that suit. *Ibid.* The district court denied relief on the merits. The First Circuit, however, ordered the case dismissed for lack of jurisdiction. It held the CSRA's comprehensive review scheme required judicial review of the employees' removals to occur *in the Federal Circuit*, precluding district-court jurisdiction over their claims. *Id.* at 8.

This Court affirmed, holding that the CSRA required review to proceed exclusively through the MSPB and Federal Circuit. It explained that the CSRA had replaced an "'outdated patchwork'" of laws that allowed employees "to challenge employing agency actions in district courts around the country," followed by "appeals in all of the Federal Courts of Appeals." *Elgin*, 567 U.S. at 14. That "widespread judicial review" had "produced 'wide variations'" in rulings and imposed "a double layer of judicial review" that Congress deemed "'wasteful and irrational.'" *Id.* at 14. In place of that haphazard system, the CSRA established an "'integrated scheme of administrative and judicial review'" that generally channels review of federal personnel actions through the MSPB and Federal Circuit. *Id.* at 13-14.

Consistent with that streamlined system, the Court held that, where the CSRA gives the MSPB jurisdiction over a particular kind of employee and particular kind of employment action, review of that action *must* proceed through the MSPB and then the Federal Circuit. *Elgin*, 567 U.S. at 14; see *id.* at 10-21. Review may *not* proceed in district court. *Id.* at 10-21.

That remains true where the MSPB "professe[s] [a] lack of authority to decide" the employee's claims, as the MSPB had done regarding Elgin's constitutional challenge. *Elgin*, 567 U.S. at 18. Whether or not *the MSPB* can rule on an employee's challenge, the Court held, "*the Federal Circuit* has authority to consider and decide [the employee's] constitutional claims." *Id.* at 21 (emphasis added). And even if the MSPB cannot issue a decision, it has the "tools to create the necessary record" to facilitate Federal Circuit review. *Ibid.*

That reasoning controls here. When a career senior executive is removed from the SES for performance reasons, the CSRA gives the MSPB jurisdiction over her case by providing for an "informal hearing" before an MSPB official where the employee can build a record challenging her removal. 5 U.S.C. § 3592(a); see 5 C.F.R. § 1201.121(a). Esparraguera did just that, developing a voluminous record showing how her unlawful removal violated due process (and statutes and policies). Pet. App. 11a. Once those MSPB proceedings concluded, judicial review should have been available from the Federal Circuit, which "has authority to consider and decide [her] constitutional" and other claims. *Elgin*, 567 U.S. at 21; see 5 U.S.C. § 7703(c).

B. The Federal Circuit's Decision Defies *Elgin* and the CSRA

Notwithstanding *Elgin* and the CSRA, the Federal Circuit refused review. It did not deny that, when a career senior executive is removed under § 3592(a)(2), the CSRA expressly channels her to an MSPB proceeding. Under *Elgin*, Federal Circuit review should then follow. But the Federal Circuit held that *neither* the MSPB *nor* the Federal Circuit may rule on the removal's legality. Pet. App. 12a-19a. The Federal Circuit refused to decide whether review is available in *any* court. Pet. App. 20a. But it opined that, *if* review is available, it must come from "district courts" and *not* the Federal Circuit. Pet. App. 20a.

That defies *Elgin*. *Elgin* instructs that, under the CSRA's "'integrated scheme of administrative and judicial review,'" employees statutorily channeled to the MSPB must obtain review *exclusively* through the MSPB and Federal Circuit. 567 U.S. at 14. *Elgin rejects* the notion that review should proceed in district courts. *Id.* at 13-14. And it *rejects* the view that the MSPB's inability to grant relief precludes review in the Federal Circuit. *Id.* at 18. Yet the decision below embraced precisely the approach *Elgin* rejects. Pet. App. 20a. The conflict is inescapable.

The Federal Circuit's decision threatens to "seriously undermin[e]" the CSRA's streamlined review system. *Elgin*, 567 U.S. at 14. That system is premised on "the primacy of the MSPB for administrative resolution of disputes over adverse personnel action, and the primacy of the United States Court of Appeals for the Federal Circuit for judicial review." *United States* v. *Fausto*, 484 U.S. 439, 449 (1988) (citations omitted). The decision below takes exactly the opposite approach. It redirects

career senior executives *away* from the MSPB and Federal Circuit and *toward* "district courts across the country." *Elgin*, 567 U.S. at 14.

Congress knew how to create exceptions to Federal Circuit review: It authorized district-court review following MSPB proceedings in limited circumstances where employees raise discrimination claims under non-CSRA statutes. See 5 U.S.C. § 7703(b)(2); *Kloeckner* v. *Solis*, 568 U.S. 41, 44-46 (2012). By endorsing district-court review in the *absence* of any such exception, the Federal Circuit thwarted the statutory structure and "reintroduce[d] the very potential for inconsistent decision-making and duplicative judicial review that the CSRA was designed to avoid." *Elgin*, 567 U.S. at 14.

II. THE DECISION BELOW IS WRONG

A. The Federal Circuit Can Review Removals of Career Senior Executives Under § 3592(a)(2) Even If the MSPB Cannot

The Federal Circuit held that *it* lacks jurisdiction to review SES removals under § 3592(a)(2) because (in its view) *the MSPB* cannot review such removals. Pet. App. 11a, 16a-20a. As discussed below, the court's premise is mistaken: The MSPB *can* review § 3592(a)(2) removals. See pp. 23-26, *infra*. But the Federal Circuit's reasoning fails regardless.

1. The Federal Circuit wrongly assumed that its "jurisdiction depends on whether the Board had jurisdiction *to review* Ms. Esparraguera's removal." Pet. App. 11a (emphasis added). *Elgin* held the opposite: The Federal Circuit's "authority to decide particular legal questions" is *not* "derivative of the MSPB's authority" to decide those questions. 567 U.S. at 18.

That follows directly from the statutory text: "In *any* case" appealed from a final MSPB order, the Federal Circuit "*shall* review the record and hold unlawful and set aside *any agency action*" that is (among other things) "not in accordance with law" or "obtained without procedures required by law, rule, or regulation having been followed." 5 U.S.C. § 7703(c) (emphasis added). The statute does not limit that review to issues the MSPB previously decided. To the contrary, the Federal Circuit has elsewhere recognized that, "[e]ven if" the MSPB cannot review a particular agency determination, the Federal Circuit "would still review" the decision under its obligation to "'set aside any agency action * * * not in accordance with law.'" *Sayers* v. *Dep't of Veterans Affairs*, 954 F.3d 1370, 1377 (Fed. Cir. 2020) (quoting § 7703(c)).

That principle carries particular force where, as here, constitutional claims are involved. See *Elgin*, 567 U.S. at 10, 18. Administrative agencies generally cannot declare statutes unconstitutional. See *id.* at 16-17. In *Elgin*, for example, the MSPB declared it lacked authority to decide the constitutionality of the statute underlying Elgin's removal. *Id.* at 7. But that was no obstacle to *Federal Circuit* review of the issue. *Id.* at 17-18. Likewise here, the Federal Circuit's ability to decide Esparraguera's constitutional challenges to her removal does not depend on whether the MSPB has authority "to review Ms. Esparraguera's removal." Pet. App. 11a. So long as the MSPB has jurisdiction over Esparraguera's case—and it does—the Federal Circuit is empowered to review the legality of her removal.

2. Insofar as the Federal Circuit believed "the Board had no jurisdiction over the removal" *at all*, Pet. App. 19a (emphasis added), it again erred. MSPB jurisdiction depends "only on the nature of the employee and the

employment action at issue." *Elgin*, 567 U.S. at 18. Where, as here, a "career appointee" is "removed from the Senior Executive Service" for performance reasons, § 3592(a) gives the MSPB jurisdiction by providing for an "informal hearing" before an MSPB official. Consistent with that provision, MSPB regulations expressly state that "*[t]he Board has original jurisdiction* over * * * removals of career appointees from the Senior Executive Service for performance reasons." 5 C.F.R. § 1201.121(a) (emphasis added); accord § 1201.2(b). The MSPB's jurisdiction over Esparraguera's removal—as distinguished from authority "to review" her removal, Pet. App. 11a—should be beyond dispute.

Tellingly, while the MSPB refused to rule on Esparraguera's claims, it did *not* dismiss her case for lack of jurisdiction; it issued an order "for the Board." Pet. App. 25a (capitalization altered); cf. *Elgin*, 567 U.S. at 20-21. Thus, while MSPB jurisdiction over a personnel action is a prerequisite to Federal Circuit review, see *Elgin*, 567 U.S. at 17-18, that condition is satisfied here.[6]

3. By statute, the Federal Circuit "shall" have jurisdiction over "an appeal from a final order or final decision of the Merit Systems Protection Board." 28 U.S.C. § 1295(a)(9); accord 5 U.S.C. § 7703(b)(1)(A). In such an

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[6] While MSPB regulations describe its jurisdiction in § 3592(a)(2) cases as "original" rather than "appellate" jurisdiction, Pet. App. 12a n.5, that is irrelevant. As the decision below conceded, the Federal Circuit's jurisdiction is *not* limited to "appellate" MSPB proceedings brought under 5 U.S.C. § 7701. See § 7703(b)(1); *Horner* v. *MSPB*, 815 F.2d 668, 671 (Fed. Cir. 1987); Pet. App. 13a n.6. Orders from "original" Board proceedings—*e.g.*, where agencies pursue personnel actions against ALJs, see 5 U.S.C. § 7521; 5 C.F.R. § 1201.2(c)—are likewise appealable to the Federal Circuit, see *Berlin* v. *Dep't of Labor*, 772 F.3d 890, 894 (Fed. Cir. 2014).

appeal, the CSRA guarantees "judicial review" to "[a]ny employee * * * adversely affected or aggrieved by" that "final order or decision." §7703(a)(1). The Order issued by the ALJ here—refusing any relief—was the "final order" of the MSPB regarding Esparraguera's removal from the SES. It was the MSPB's last word regarding Esparraguera's removal. It concluded the MSPB hearing she received under §3592(a). And it wholly disposed of the matter before the MSPB. No further MSPB proceedings, decisions, or orders will follow. Particularly given that "statutorily created finality requirements should, if possible, be construed so as not to cause * * * potentially irreparable injuries to be suffered," *Mathews* v. *Eldridge*, 424 U.S. 319, 332 n.11 (1976), the Order is properly considered a "final order" for appeal purposes.

The Federal Circuit did not deny the Order "was the *last* action from the Board related to [Esparraguera's] removal." Pet. App. 17a. The court nonetheless declared the Order "not 'final' with respect to Esparraguera's removal" because "the Board was not empowered under §3592 to review Esparraguera's removal." Pet. App. 18a. That is just another way of saying the Federal Circuit's jurisdiction depends on the MSPB's review authority—a notion *Elgin* rejects.

If MSPB orders were not "final" whenever the MSPB cannot review an employee's removal and instead serves as a "record-developing adjunct," Pet. App. 18a, the Federal Circuit would *never* have jurisdiction to hear constitutional challenges that the MSPB is unable to decide. But *Elgin* (again) holds the opposite: Even if the MSPB cannot "decide" an employee's claims, it can still "create the necessary record" for Federal Circuit review. 567 U.S. at 21; see *id.* at 19-21. In such cases, the appealable "final order" will not adjudicate the employ-

ee's claims, but instead compile an evidentiary record—as the Order did here.[7]

The Federal Circuit's assertion that a "party cannot be 'adversely affected or aggrieved' within the meaning of [§ 7703(a)(1)'s judicial-review provision] by the Board's failure to grant relief that it had no authority to grant," Pet. App. 18a n.8, is makeweight. That logic would (again) foreclose Federal Circuit review whenever the MSPB professes it cannot decide an employee's constitutional challenge, (again) contrary to *Elgin*. An employee is properly considered "adversely affected or aggrieved" by a final MSPB order, and entitled to judicial review, whenever that order fails to grant relief from an unlawful personnel action—whether or not the MSPB could have granted that relief. That is the case here.

B. The MSPB Has Authority To Review Career Senior Executive Removals Under § 3592(a)(2)

The Federal Circuit also erred in ruling that the MSPB lacks review authority when career senior executives are removed under § 3592(a)(2). Its efforts to justify that result only place it in deeper conflict with this Court's precedents.

1. Section 3592(a) entitles a career senior executive removed from the SES for allegedly deficient perfor-

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[7] The Federal Circuit suggested that in § 3592(a)(2) cases the MSPB serves as an "adjunct" *to an employing agency*. Pet. App. 18a. The statute assigns the MSPB no such role, which would be at odds with the MSPB's traditional role of *reviewing* employing agencies. Even assuming MSPB regulations recognize such an "adjunct" role, regulations cannot "regulate the scope of the judicial power vested by [a] statute." *Adams Fruit Co.* v. *Barrett*, 494 U.S. 638, 650 (1990). In all events, Federal Circuit jurisdiction requires only a final order "of the Board"—not some other agency. 5 U.S.C. § 7703(b)(1).

mance to "an informal hearing before an official designated by the Merit Systems Protection Board at which the career appointee may appear and present arguments." 5 U.S.C. §3592(a). The ordinary meaning of a "hearing" is a "setting in which an affected person presents arguments *to a decision-maker*." Black's Law Dictionary 836 (10th ed. 2014) (emphasis added). Thus, when §3592(a) entitles a person to "present arguments" to an MSPB "official" at a "hearing," that indicates the official will *make a decision* based on those arguments. And while the hearing is "informal," that simply means it is "conducted in a more relaxed manner," *id.* at 1398 ("informal proceeding")—not that it cannot result in a decision providing relief.

Where a tenured civil servant is removed from her position, moreover, due process requires a prompt "post-termination hearing" before an adjudicator empowered to rectify error. *Cleveland Bd. of Ed.* v. *Loudermill*, 470 U.S. 532, 546-547 (1985); see pp. 26-28, *infra* (discussing due-process requirements). It makes sense to construe a statutory right to a post-removal "hearing" as providing a hearing *that satisfies the requirements of due process*. That the hearing is "informal" does not suggest it must fall short of constitutional standards or be incapable of rectifying error.

2. The Federal Circuit identified no language in §3592 or elsewhere in the CSRA stating that the informal hearing cannot provide meaningful review.

The Federal Circuit instead noted that, while §3592(a) grants career senior executives an "informal hearing" before an MSPB official, the statute also states that the "hearing shall not give the career appointee the right to initiate an action with the Board under section 7701." 5 U.S.C. §3592(a); see Pet. App. 13a. The court then ob-

served that § 7701 "speaks extensively on the substance and procedure of appeals of other adverse actions." Pet. App. 13a-14a. The absence of such "details" in § 3592(a), the court concluded, must mean § 3592(a) does not allow review at all. Pet. App. 14a.

The fact that § 3592(a) is less "detail[ed]" than § 7701 does not imply that the statute denies review. It simply reinforces what the statute's plain language already makes clear—that Congress intended an "informal hearing" under § 3592(a) to be *less formal* than an action under § 7701. It also suggests Congress expected the MSPB to define the "details" of review (within lawful bounds). Congress did just that elsewhere in the CSRA. When agencies seek to take personnel actions against ALJs, Congress tersely provided for a "hearing before the Board," 5 U.S.C. § 7521(a), without spelling out the Board's "procedure, powers, and standard of review," Pet. App. 14a. The *details* of that hearing are then supplied by MSPB regulations. 5 C.F.R. §§ 1201.137-.142. It makes sense that Congress would adopt a similar approach in § 3592(a). Like ALJs, senior executives constitute a relatively small number of high-ranking civil servants. Congress could find it appropriate to give the MSPB flexibility in handling such cases—while finding more detailed instructions appropriate with respect to § 7701, which covers millions of employees.[8]

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[8] Career senior executives and ALJs of course differ in some ways; most notably, ALJs are generally "Officers of the United States." See *Lucia* v. *SEC*, 138 S. Ct. 2044, 2055 (2018). While some career senior executives hold titles that make them Officers of the United States, see, *e.g.*, 83 Fed. Reg. 29,312, 29,324 (June 22, 2018) (certain administrative patent judges), career senior executives are not *per se* Officers. There is no contention Esparraguera was an Officer.

The Federal Circuit erred in invoking *Fausto*'s observation that, where "Congress '[does] not include [certain employees] in provisions for administrative and judicial review,'" courts may infer that Congress meant "review on the merits [to be] unavailable." Pet. App. 14a (quoting *Fausto*, 484 U.S. at 448-449). In *Fausto*, the CSRA did not give the affected employee *any* means for proceeding before the MSPB; the Court held that reflected a congressional judgment to withhold any review of his suspension. 484 U.S. at 442-443, 447-448. Here, by contrast, Congress *expressly granted* career senior executives removed under § 3592(a)(2) an MSPB hearing. *Fausto* also involved purely *statutory* claims, and did not address review of *constitutional* claims like Esparraguera's. See *Elgin*, 567 U.S. at 11 n.4. *Fausto* is irrelevant.

C. The Federal Circuit's Ruling Renders § 3592(a) Unconstitutional

In reading § 3592(a) to deny both MSPB and Federal Circuit review—even for constitutional claims—the Federal Circuit rendered the statute unconstitutional.

The Due Process Clause forbids the government to deprive a person of "property" without "constitutionally adequate procedures." *Loudermill*, 470 U.S. at 541. Public employees have a protected property interest when they can be removed from their positions only for specific reasons. In *Loudermill*, for example, this Court found a property interest where employees were "entitled to retain their positions 'during good behavior and efficient service.'" *Id.* at 538. Career SES employees similarly may be removed from the SES only for cause, such as "misconduct," 5 U.S.C. § 7543(a), or "less than fully successful executive performance," § 3592; see § 4314(b)(3). Those limits on removal give career senior

executives like Esparraguera a property interest in their SES appointments.

Esparraguera was deprived of that property interest when the Department removed her from the SES. Before removal, Esparraguera possessed a career SES appointment; after removal, she did not. She also suffered the "loss of other benefits" that accompany an SES appointment, including paid leave and a guarantee of higher pay. Pet. App. 5a; see 5 U.S.C. §§ 3131(1), 5384, 6304(f). That deprivation required constitutionally adequate procedures—procedures Esparraguera did not receive.[9]

Due process generally requires that an employee receive *pre*-removal notice and opportunity to respond. *Loudermill*, 470 U.S. at 542. That of course did not happen here: Before removal, Esparraguera was not

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[9] The government argued below that Esparraguera suffered no deprivation because, upon removal from the SES, she was placed in a GS-15 position rather than fired outright. The Federal Circuit did not adopt that view. And that view is plainly wrong. A property interest exists when a "specific benefi[t]" can be taken away only for specific reasons. *Board of Regents of State Colleges* v. *Roth*, 408 U.S. 564, 576 (1972). Here, the specific benefit of a career SES appointment could be taken away only for cause. Taking away that appointment thus constituted a deprivation of property. That Esparraguera was *demoted* to a lower-ranking position, rather than *terminated* from employment entirely, speaks to the severity of the deprivation, not whether a deprivation occurred. The circuits consistently recognize that, where a "statute or regulation places substantive restrictions on the discretion to demote an employee," demotion constitutes a deprivation of property requiring due process. *Hennigh* v. *City of Shawnee*, 155 F.3d 1249, 1254 (10th Cir. 1998); see *Nguyen* v. *Dep't of Homeland Sec.*, 737 F.3d 711, 718 (Fed. Cir. 2013); *Ciambriello* v. *County of Nassau*, 292 F.3d 307, 321 (2d Cir. 2002); *Wheaton* v. *Webb-Petett*, 931 F.2d 613, 615-617 (9th Cir. 1991).

allowed to see, much less respond to, the Report on which her removal was based. See C.A. App. 443; pp. 7-9, *supra*. But even where an employee receives a minimally adequate pre-removal hearing, that satisfies due process only "so long as a *full adversarial hearing* is provided afterwards." *Locurto* v. *Safir*, 264 F.3d 154, 171 (2d Cir. 2001) (emphasis added) (citing *Loudermill*, 470 U.S. at 545-546). That post-removal hearing must be "prompt." *Gilbert* v. *Homar*, 520 U.S. 924, 935 (1997). And it must, at minimum, require the government to prove its allegations to a decisionmaker "empowered to * * * rectify error," such as by ordering reinstatement. *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U.S. 1, 22 (1978); see *Reeves* v. *Claiborne Cty. Bd. of Ed.*, 828 F.2d 1096, 1101 (5th Cir. 1987); *Benavidez* v. *City of Albuquerque*, 101 F.3d 620, 626 (10th Cir. 1996).

The Federal Circuit, however, construed § 3592(a) *not* to provide that constitutionally required process. Although the statute afforded Esparraguera an "informal hearing," 5 U.S.C. § 3592(a), the court declared that the hearing "bore none of the adversarial hallmarks of adjudication" and did not allow the MSPB or Federal Circuit to provide any relief whatsoever. Pet. App. 18a. Due process's demands may be flexible, but a scheme that provides *no* meaningful post-removal process plainly falls short of the constitutional mark.

The Federal Circuit declared that, because it purportedly lacked jurisdiction, it could not "reach" the question whether SES removals involve "deprivation of a due process interest * * * that would necessitate an adjudicatory hearing." Pet. App. 16a. That supposed obstacle is imaginary. Courts routinely consider whether a "construction of a statute would raise serious constitutional problems"—including statutes bearing on "jurisdiction."

INS v. *St. Cyr*, 533 U.S. 289, 299-300 (2001) (collecting cases). The presumption of judicial review specifically instructs courts to construe jurisdictional statutes "to avoid the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Webster* v. *Doe*, 486 U.S. 592, 603 (1988). The Federal Circuit was "obligated" to address constitutional implications of its construction. *St. Cyr*, 533 U.S. at 300. It abdicated.

The Federal Circuit also stated that, "even if Ms. Esparraguera were correct" that its construction falls short of constitutional requirements, the CSRA was "clear enough" that the court could not order post-removal review as a "reasonable remedy." Pet. App. 16a. That is absurd. It is a "cardinal principle" of statutory construction that, "where an otherwise acceptable construction of a statute would raise serious constitutional problems," "'every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.'" *Edward J. DeBartolo Corp.* v. *Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). Here, there is a readily available saving construction with ample statutory support. See pp. 23-26, *supra*. The Federal Circuit was obligated to adopt it.

Absent a saving construction, moreover, an unconstitutional provision must be held invalid—not enforced. The Federal Circuit could not refuse to provide a remedy just because that would arguably "expand" the MSPB's jurisdiction. Pet. App. 16a (emphasis omitted). As other courts have found, if a statute unconstitutionally restricts review, the proper remedy is to restore review by declaring the restriction unenforceable. See, *e.g.*, *Osorio-Martinez* v. *Attorney General*, 893 F.3d 153, 177-178 (3d Cir. 2018).

Finally, the Federal Circuit suggested review "*might* be available" in "district courts." Pet. App. 20a (emphasis added). That is no defense of its construction, because the court refused to decide whether district-court review is *actually* available: It made "clear" its "holding * * * *does not depend* on whether judicial review might be available elsewhere." Pet. App. 20a (emphasis added). The Federal Circuit thus held that § 3592(a) forecloses MSPB and Federal Circuit review despite assuming that no *other* forum could provide review—even for constitutional claims. That runs headlong into the presumption of judicial review and the "'serious constitutional'" problem with "constru[ing]" a "federal statute * * * to deny any judicial forum for a colorable constitutional claim." *Webster*, 486 U.S. at 603.[10]

Even if district-court review is available, requiring an employee to file a *separate lawsuit* cannot cure the due-process violation. A standalone "lawsuit does not satisfy the requirement of promptness, which is essential if the employee is to pursue time-sensitive remedies such as reinstatement." *Baird* v. *Bd. of Ed. for Warren Cmty. Unit Sch. Dist. No. 205*, 389 F.3d 685, 692 (7th Cir. 2004) (citing *Loudermill*, 470 U.S. at 547).

The Federal Circuit presumed that it does not matter whether review occurs before it or some other court. Pet. App. 19a-20a ("assuming that Ms. Esparraguera is correct that she must be able to present her constitutional claim before *a* court, we are unpersuaded that this means *our* court"). But the premise of the CSRA is that

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[10] Esparraguera believes the proper forum for judicial review is the Federal Circuit. Nonetheless, out of an abundance of caution, she has filed a district-court action challenging her removal. *Esparraguera* v. *Dep't of the Army*, No. 1:21-cv-00421-TJK (D.D.C.).

it *does* matter: The statute replaced an "'outdated patchwork'" of review "in district courts across the country," *Elgin*, 567 U.S. at 13-14, with an integrated system that recognizes "the primacy of the United States Court of Appeals for the Federal Circuit for judicial review," *Fausto*, 484 U.S. at 449. This Court has repeatedly granted certiorari to clarify which courts may hear federal employees' claims and provide "clear guidance about the proper forum for [their] claims." *Elgin*, 567 U.S. at 15; see *Fausto*, 484 U.S. 439; *Perry* v. *MSPB*, 137 S. Ct. 1975, 1980 (2017); *Kloeckner*, 568 U.S. at 49. It should do so again here.

III. THE QUESTION PRESENTED IS IMPORTANT

Whether career senior executives removed under § 3592(a)(2) can obtain MSPB and Federal Circuit review—especially of constitutional claims—is an important question to individual employees and the civil service alike. One of the CSRA's central goals is to channel review of federal personnel actions to a single court. The Federal Circuit's decision reverses that choice for the SES, a category that includes more than 7,000 career senior executives across every Cabinet department and myriad agencies.[11] Those senior executives have important management responsibility "directing organizational units" and "supervising work" essential to the smooth functioning of government. Pet. App. 4a.

Career senior executives, moreover, have a "significan[t]" "private interest in retaining" their positions.

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[11] See Office of Personnel Mgmt., *Senior Executive Service Fiscal Year 2014-2018*, pp. 3-4, https://www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/reports-publications/ses-summary-2014-2018.pdf.

Loudermill, 470 U.S. at 543. The SES is the highest echelon of the career civil service. A career SES appointment is typically the culmination of decades of exemplary service—as it was for Esparraguera before her unjustified removal. Meaningful review of removal efforts protects those employees from being unconstitutionally deprived of their life's work.

There is also a powerful *public* interest in providing those protections. Consistent with its objective of "attract[ing] and retain[ing] highly competent senior executives," Congress directed that the SES be administered to "protect senior executives from arbitrary and capricious actions." 5 U.S.C. §3131(1), (7). This Court has long recognized that "[i]t is preferable to keep a qualified employee on than to train a new one." *Loudermill*, 470 U.S. at 544. That insight is especially apt with respect to career senior executives—seasoned public servants who, by virtue of their qualifications and experience, often possess invaluable institutional knowledge, leadership skills, and reservoirs of goodwill from colleagues, subordinates, and supervisors alike.

This case starkly illustrates those stakes. Through more than three decades of federal service, Maria Esparraguera developed a "well-deserved reputation as a go-to source of advice and counsel" whose "extraordinary efforts were felt across the Federal government." C.A. App. 781. Even after the events giving rise to this case, Deputy Judge Advocate General Risch continued to laud her "astute legal acumen, leadership, and vision," declaring her "one of the absolute best senior executive employees [he had] served with during over 31 years of service." C.A. App. 782; see *ibid.* ("There is no better senior leader at this level."); C.A. App. 780 ("An absolute subject matter expert in her field, there is no one more

skilled at identifying and fixing gaps in efficiencies in our Agency."). But all of that was thrown away on a whim, based on allegations in a Report that Esparraguera was *not allowed to see* and *never allowed to challenge*. The civil service suffers when such talent is discarded without even a semblance of fair notice and due process. And withholding review in cases like this will deter other qualified candidates from pursuing SES positions that could subject them to the same arbitrary fate. It is hard to imagine a result more at odds with Congress's objective "to attract and retain highly competent senior executives." 5 U.S.C. §3131(1).

The Federal Circuit's decision also defangs statutory protections designed to shield the SES from "improper political interference" and prevent spoils-system purges of career senior executives. 5 U.S.C. §3131(13); see §3592(b) (restricting career SES removals following appointment of new agency head). This case provides a blueprint for agencies seeking to evade those restrictions: Purport to remove a disfavored career senior executive for unsatisfactory performance, deny her access to any material to challenge the removal, and argue the statute provides no recourse to the MSPB or Federal Circuit—even for blatant constitutional violations. The decision below paves the way for precisely the sort of politicization of the SES that Congress sought to prevent.

IV. THIS CASE IS AN IDEAL VEHICLE

This case is an ideal vehicle. The question presented was vigorously litigated below and addressed in a lengthy opinion. It presents a pure question of law and—insofar as factual issues may be relevant—the government has never disputed any relevant facts. Given the Federal Circuit's specialized jurisdiction, there is no real prospect of a circuit conflict developing. Nor would further perco-

lation within the Federal Circuit assist this Court's review. The precedential decision below will control in the event another career senior executive removed under § 3592(a)(2) attempts to seek Federal Circuit review.

For that reason, this petition may present the Court's *only* reasonable opportunity to address the question presented. *Not* because the issue is unimportant or unusual—to the contrary, it affects thousands of federal employees' civil-service protections—but because the decision below makes it exceedingly unlikely that other affected employees will undertake the time and expense needed to (futilely) litigate the issue through the MSPB and the Federal Circuit before bringing the issue to this Court for review.[12]

Because the decision below renders § 3592(a)'s informal hearing meaningless and any Federal Circuit appeal futile, all future challenges are likely to proceed directly to district court. If it turns out that district courts lack jurisdiction—and that challenges to § 3592(a)(2) removals must proceed through the MSPB and Federal Circuit after all—those employees may unwittingly sacrifice *any* opportunity for review. See 5 U.S.C. § 3592(a)(2) (deadline for requesting informal MSPB hearing). They would

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[12] Nor should the Court await resolution of Esparraguera's district-court action. See p. 30, n.10, *supra*. Requiring Esparraguera to litigate a standalone lawsuit to completion before seeking the streamlined Federal Circuit review promised by the CSRA would be perverse in the extreme. Nor would the district-court action shed further light on the question presented. The parties there are proceeding on the assumption that the Federal Circuit lacks jurisdiction to hear Esparraguera's claims. There is no reason to think the district court (or court of appeals) in that case will contradict the Federal Circuit's view of its own jurisdiction. If there *were* some prospect, that would only add to the need for immediate review.

suffer the same fate as the employees in *Elgin* who sued in district court without timely invoking available MSPB procedures, leaving them with no remedy at all. See *Elgin*, 567 U.S. at 7, 20-21 & n.10. Rather than set a trap for unwary civil servants, the Court should take this opportunity to provide "clear guidance about the proper forum for the employee[s'] claims." *Id.* at 15.

* * *

This Court granted review in *Elgin* to prevent district courts from enlarging their jurisdiction at the expense of the Federal Circuit. Likewise here, the Court should grant review—and reverse—to prevent the Federal Circuit from externalizing its jurisdiction onto district courts at the expense of civil servants and the CSRA.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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NOVEMBER 2021

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

MARIA ESPARRAGUERA,
Petitioner,

v.

DEPARTMENT OF THE ARMY,
Respondent.

2019-2293

Petition for review of the Merit Systems Protection Board in No. CB-3592-18-0022-U1.

OPINION

December 4, 2020

LUCAS M. WALKER, MoloLamken LLP, Washington DC, argued for petitioner. Also represented by JEFFREY A. LAMKEN; MATTHEW JASON FISHER, CHICAGO, IL; CONOR DIRKS, DEBRA LYNN ROTH, Shaw, Bransford & Roth P.C., Washington, DC.

MOLLIE LENORE FINNAN, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for respondent. Also rep-

resented by JEFFREY B. CLARK, CLAUDIA BURKE, ROBERT EDWARD KIRSCHMAN, JR.; NADIA K. PLUTA, Office of General Counsel, United States Office of Personnel Management, Washington, DC; JASON R. CHESTER, United States Army Corps of Engineers, United States Department of the Army, Alexandria, VA.

Before PROST, *Chief Judge*, LOURIE and MOORE, *Circuit Judges*.

PROST, *Chief Judge*.

This is a case about jurisdiction. Maria Esparraguera was removed for performance reasons from her senior executive position as the top labor lawyer at the Department of the Army ("Army") and placed instead into another high-level position at the same agency but outside the Senior Executive Service ("SES"). On appeal, Ms. Esparraguera effectively seeks to obtain review of the Army's removal decision and insists that she was deprived of constitutionally protected property and liberty interests without due process. By statute, Ms. Esparraguera cannot avail herself of the ordinary appellate provisions of the Merit Systems Protection Board ("Board") for this kind of removal. But she petitions for review of a Board order made under 5 U.S.C. § 3592(a), a narrow provision permitting a career senior executive removed for performance reasons to instead "appear and present arguments" at an "informal hearing." The resulting order, however, simply forwarded Ms. Esparraguera's evidence and arguments to her employer, the Army, for consideration—as well as to the United States Office of Special Counsel ("OSC") and Office of Personnel Management ("OPM"). For the reasons below, the appealed order—styled an "Order Referring Record"—is not a

"final order or decision" of the Board, as required for our appellate jurisdiction over her removal. And because we lack jurisdiction, we must dismiss this appeal.

I

A

The federal civil service is divided into three parts: the competitive service, the excepted service, and the Senior Executive Service ("SES"). 5 U.S.C. §§2101a, 2102, 2103; *United States* v. *Fausto*, 484 U.S. 439, 441 n.1 (1988). This case concerns whether the Board can review the performance-based removal of employees from the SES.

Because SES cases are rare, a brief background on the SES itself is useful.

The Civil Service Reform Act of 1978 ("CSRA") reformed the federal civil service and "established a comprehensive system for reviewing personnel action[s] taken against federal employees." *Elgin* v. *Dep't of the Treasury*, 567 U.S. 1, 5 (2012) (quoting *Fausto*, 484 U.S. at 455); see also Pub. L. No. 95-454, 92 Stat. 1111. The SES was designed to "provide the flexibility needed by agencies to recruit and retain the highly competent and qualified executives needed to provide more effective management of agencies and their functions, and the more expeditious administration of the public business." CSRA, sec. 3(6), 92 Stat. at 1113. The statutory framework governing the SES is meant to "ensure that the executive management of the Government of the United States is responsive to the needs, policies, and goals of the Nation and otherwise is of the highest quality." 5 U.S.C. §3131. And its administration is meant to "enable the head of an agency to reassign senior executives to best accomplish the agency's mission," to "maintain a merit personnel system free of prohibited personnel

practices," and to "ensure accountability for honest, economical, and efficient Government." *Id.* §3131(5), (9), (10).

Senior executives are high-level federal employees who do not require presidential appointment but who nonetheless exercise significant responsibility—including directing organizational units, supervising work, and determining policy—and who may be held accountable for their projects or programs. *Id.* §3132(a)(2); *Fausto*, 484 U.S. at 441 n.1. Occupying significant positions of trust, senior executives are selected, in no small part, for their leadership abilities.[1] The SES is but a small arm of the federal civil service: about 8,000 federal employees are among the SES, whereas more than 1.8 million are not.[2]

There are two relevant mechanisms by which senior executives may be removed from the SES. First, senior executives may be removed—not only from the SES but from federal employment entirely—for "misconduct, neglect of duty, malfeasance, or failure to accept a directed reassignment or to accompany a position in a transfer of function." 5 U.S.C. §7543(a). This pathway to removal includes procedural protections like those available for covered employees in the competitive and excepted services. *Id.* §7543(b), (d); cf. *id.* §§7512, 7513. Second, sen-

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[1] See, *e.g.*, OPM, *Senior Executive Service: Executive Core Qualifications*, https://www.opm.gov/policy-data-oversight/senior-executive-service/executive-core-qualifications/.

[2] See OPM, *Senior Executive Service Report 2017*, at 3 (2018), https://www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/reports-publications/ses-summary-2017.pdf; OPM, *Federal Executive Branch Characteristics (FEBC) FY 2010–2018*, at 5, https://www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/reports-publications/federal-executive-branch-characteristics-2010-2018.pdf.

ior executives may be removed from the SES under another set of procedures for "unsatisfactory" or "less than fully successful" performance. *Id.* §§3592(a), 4314(a)(3). Senior executives with "career" status who are removed in this way are guaranteed continued federal employment at the same pay grade. *Id.* §3594. The loss of SES status, however, is accompanied by the loss of other benefits—and, of course, prestige. See, *e.g.*, *id.* §§3131(1), 5384, 6304(f).

To gauge performance, each agency is required to establish a performance appraisal system to rate senior executives from "outstanding" to "unsatisfactory" in one or more "critical elements." 5 U.S.C. §§4312, 4314(a); 5 C.F.R. §430.305; see, *e.g.*, J.A. 13. Performance ratings are ultimately made by an agency's "appointing authority," see 5 U.S.C. §4314(c)(3); for the Army, final performance rating authority has been delegated to the Under Secretary. J.A. 6, 177–78. To assist in making an ultimate performance determination, each agency is also required to establish one or more performance review boards ("PRBs"). 5 U.S.C. §4314(c)(1). During performance appraisal, a senior executive's supervisor (or other rating official) provides the PRB with an "initial appraisal." *Id.* §4314(c)(2). The senior executive is "provided a copy of the appraisal and rating . . . and is given an opportunity to respond in writing and have the rating reviewed by an employee . . . in a higher level in the agency." *Id.* §4312(b)(3); see also 5 C.F.R. §430.311(b)(1); J.A. 55. The PRB then reviews any "response by the senior executive to the initial appraisal" and may "conduct such further review as the [PRB] finds necessary." 5 U.S.C. §4314(c)(2). The PRB then "make[s] *recommendations* to the appropriate appointing authority" as to the senior executive's performance. *Id.* §4314(c)(1)

(emphasis added). OPM is tasked with ensuring that each agency's performance appraisal system is adequate. See 5 U.S.C. § 4312(c)(1), (3); 5 C.F.R. § 430.314.

The final rating is significant: its consequences range from performance awards to removal. See 5 U.S.C. § 4314(b)(2)–(4). Nonetheless, a senior executive "may not appeal any appraisal and rating under any performance appraisal system." *Id.* § 4312(d).

B

1

As Chief Counsel of the Army's Communication-Electronics Command ("CECOM"), Ms. Esparraguera facilitated the selection of Rick Bechtel to replace a retiring division chief. The resulting chain of events led to her removal from the Senior Executive Service and, ultimately, to this appeal.

In 2014, a business-law division chief within CECOM announced his intent to retire. The resulting open position required a candidate to have had at least one year of experience at the GS-14 grade. The selection committee, chaired by Ms. Esparraguera, interviewed eleven candidates to fill the resulting vacancy. Mr. Bechtel was among Ms. Esparraguera's three favored finalists after the interview. But unlike the other ten candidates, Mr. Bechtel was a few months shy of the required time at GS-14, having been in his prior position for less than one year and at CECOM itself only since 2013. The other ten interviewed candidates were qualified.

No hiring decision, however, was made at that time. Rather, Ms. Esparraguera proposed an unorthodox—indeed, unprecedented—post-interview rotation plan for the final selection. See J.A. 273. Under the plan, each of the three finalists, including Mr. Bechtel, would act as

the division chief for thirty days, and the decision would be made afterward. In three decades of service, Ms. Esparraguera had *never* used a post-interview rotation plan to hire anyone, nor was she aware of anyone in the Army ever using such a plan. J.A. 250–51.

Ms. Esparraguera consulted with human-resources specialists, who advised her both that the highly unusual trial rotation would unfairly advantage Mr. Bechtel (as he would then satisfy the time-in-grade requirement) and likely result in complaints, and that a time-in-grade waiver for Mr. Bechtel would not be approved (as there was no shortage of qualified candidates). J.A. 239–40, 245–48. Further, Ms. Esparraguera's deputy chief counsel advised that the selection of Mr. Bechtel, who lacked substantial CECOM experience, would "tear the division apart." J.A. 269. As OSC later explained after investigating, a rotation would "delay[ ] a permanent appointment in an important leadership position and force[ ] both employees and customers to adapt to three leadership changes in a three-month span." J.A. 252.

Nonetheless, the trial rotation went forward at Ms. Esparraguera's behest. This three-month delay in selection meant that, by early 2015, Mr. Bechtel finally satisfied the time-in-grade requirement. After evaluation under a rubric designed and applied by Ms. Esparraguera, see J.A. 269, Mr. Bechtel was selected and the other two finalists were passed over. Before long, two complaints were filed with OSC alleging that Ms. Esparraguera had committed a prohibited personnel practice. J.A. 244.

Shortly thereafter, Ms. Esparraguera was reassigned within the SES, becoming the Army's senior-most attorney on civilian employment matters.

OSC investigated the allegations. It concluded that it "believe[d] Ms. Esparraguera's actions violated 5 U.S.C. §2302(b)(6)." J.A. 241; see 5 U.S.C. §2302(b)(6) (classifying as prohibited personnel practice the granting of "any preference or advantage not authorized by law, rule, or regulation to any . . . applicant . . . for the purpose of improving . . . the prospects of any particular person for employment"). In October 2016, OSC sent the Army a summary of its findings. J.A. 238–41. A copy of the summary was provided a few weeks later to Ms. Esparraguera through her supervisor. J.A. 43. In the summary, OSC recommended corrective and disciplinary action. J.A. 241.

In February 2018, OSC sent another report to the Secretary of the Army, noting that earlier attempts "to resolve this matter" had "not been successful." J.A. 242. At greater length, the report asserted that there was "no credible business reason" for the rotation plan, which was a "dramatic departure from past practice." J.A. 251. Finding that the purpose of the plan was to "provide Bechtel . . . an unfair advantage," OSC again recommended corrective and disciplinary action. J.A. 254; see also J.A. 115–16, 242.

By the time this report was sent, the performance appraisal process for fiscal year 2017 had already begun. Ms. Esparraguera received positive initial ratings, but in early 2018 she received a letter stating that the Army was holding her final rating in abeyance due to an ongoing investigation. J.A. 255. As a result of OSC's reporting, the Army had begun an internal investigation, and it eventually interviewed Ms. Esparraguera in May 2018. J.A. 43–44, 256–57, 282. After its investigation, the Army reprimanded Ms. Esparraguera, explaining that her "de-

cision to change the manner of competition in the middle of the hiring process was harmful to morale and predictably created a perception of unfairness." J.A. 38; see also J.A. 631 ("Though the written reprimand mentioned that OSC's report found a prohibited personnel practice as background information, [it] did not rely on that particular finding . . . , and [the] reprimand is based not on your intent but on your actions."). The reprimand was temporary, to be removed from her file after one year. J.A. 39.

The Army, however, also convened a special PRB to make a recommendation to the Under Secretary about Ms. Esparraguera's final performance rating. The PRB recommended a "level 1" unsatisfactory-performance rating for leadership—and *only* for leadership—because of the rotation scheme. J.A. 6, 13.[3] The PRB apparently did not make its rating known to Ms. Esparraguera before forwarding its recommendation to the Under Secretary.

On September 4, 2018, the Under Secretary adopted the recommendation and notified Ms. Esparraguera that she was being removed from the SES for performance reasons—though not from federal service entirely. J.A. 6–8. The Under Secretary concurred with OSC's findings, which he felt "completely undermine[d] [her] credibility to serve" as "the Army's chief personnel attorney" and noted that he had "lost confidence in [her] ability to successfully perform [her] duties as an Army Executive." J.A. 6. Because Ms. Esparraguera was a career appoin-

[3] Under the Army's SES performance appraisal system, a rating from level 1 (unsatisfactory) to level 5 (outstanding) is assigned to each of five critical elements of performance. The overall performance rating is calculated from a weighted average of the five, but if any one element is "unsatisfactory," the overall performance rating is also "unsatisfactory." See J.A. 13–18.

tee in the civil service, she was placed into a GS-15 position with the Army—the highest pay grade in the General Schedule.[4] J.A. 6–7.

3

At the Army's invitation, Ms. Esparraguera submitted a detailed written request for reconsideration. J.A. 442. In that request, she explained at length her disagreement with the PRB, with OSC's account, and with the Army's summary of the findings, as well as her subjective intent in devising the rotation plan. J.A. 103–07, 430–32. The Under Secretary denied the request. J.A. 775. Ms. Esparraguera also submitted an administrative grievance of her reprimand, which was likewise denied. J.A. 471, 630–31.

Ms. Esparraguera then requested an informal hearing under 5 U.S.C. § 3592(a)(2), which entitled her to "appear

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[4] Notably, the Army did not remove Ms. Esparraguera for "misconduct" under 5 U.S.C. § 7543. That would be a different case.

Instead, the Army removed Ms. Esparraguera for poor performance under § 3592. See also *id.* § 4314(b)(3). Although such a removal is not accompanied by a statutory or regulatory right to an appeal, 5 U.S.C. §§ 3592(a), 4312(d); 5 C.F.R. § 359.504; see also *infra* Section II.A, the decision to remove her in this manner guaranteed Ms. Esparraguera placement into an upper-echelon civil service position with no loss in current pay and with retention of career tenure. 5 U.S.C. §§ 3592(a), 3594; J.A. 6–7. Further, a performance-based removal lacks a misconduct charge's opprobrium. See *Harrison* v. *Bowen*, 815 F.2d 1505, 1518 (D.C. Cir. 1987).

It is true that the same conduct might merit either removal pathway. But we have previously recognized that the agency may elect to pursue either. *Berube* v. *Gen. Servs. Admin.*, 820 F.2d 396, 398–99 (Fed. Cir. 1987), superseded by statute on other grounds as recognized in *Lachance* v. *Devall*, 178 F.3d 1246, 1253 (Fed. Cir. 1999). Importantly, the government's choice to pursue a poor performance rating protects the employee from wholesale removal from federal employment.

and present arguments" before an "official designated by the Board." At that hearing, Ms. Esparraguera submitted a slew of exhibits designated A through UU into evidence and read a prepared statement into the record. J.A. 3. The Army neither presented evidence nor objected to the entry of these exhibits. J.A. 3. Ms. Esparraguera did not expressly ask the Board to review her removal—and it did not. The Board official issued the Order Referring Record at issue in this case, which summarized the proceedings and referred the transcript and exhibits to the Army, as well as to OSC and OPM. J.A. 2; 5 C.F.R. § 1201.144(c). The Army did not change its mind. This appeal followed.

II

On appeal, Ms. Esparraguera alleges due process violations surrounding her performance appraisal and removal—including the Army's purported failure to follow certain required procedures related to her notice and opportunity to respond—and contends that the Board should have been empowered to review her removal. The government contends that the Board cannot review her removal, that there was no deprivation without due process, and that we lack jurisdiction over this appeal.

We have jurisdiction to determine our own jurisdiction. *E.g.*, *Rosado* v. *Wyman*, 397 U.S. 397, 403 n.3 (1970). But we have jurisdiction over the Board only if there is a "final order or final decision" of the Board that has "adversely affected or aggrieved" an employee. 28 U.S.C. § 1295(a)(9); 5 U.S.C. § 7703. As we explain below, here our jurisdiction depends on whether the Board had jurisdiction to review Ms. Esparraguera's removal—because if it did not, the appealed order would not have been a "final order or final decision" that "adversely af-

fected or aggrieved" her. In short, if the Board cannot review her removal, neither can we.

A

We first consider whether Ms. Esparraguera's removal was reviewable by the Board. For the reasons below, we conclude that the Board cannot review the removal of an SES employee in an informal hearing under § 3592.

The Board has "only that jurisdiction conferred on it by Congress." *Dow* v. *Gen. Servs. Admin.*, 590 F.3d 1338, 1341–42 (Fed. Cir. 2010) (quoting *Cruz* v. *Dep't of the Navy*, 934 F.2d 1240, 1243 (Fed. Cir. 1991) (en banc)); see, *e.g.*, 5 U.S.C. § 7701(a) (appellate jurisdiction over employees' actions). A career appointee removed from the SES for "less than fully successful executive performance" is entitled upon request to an "informal hearing" before a Board-designated official. 5 U.S.C. § 3592(a). We must accordingly determine whether, through § 3592, Congress conferred the Board with appellate jurisdiction over the removal itself.[5]

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[5] Arguing in favor of jurisdiction, Ms. Esparraguera points to the Board's regulations conferring *original* jurisdiction over "removals of career appointees from the Senior Executive Service for performance reasons." Appellant's Br. 58 n.13 (citing 5 C.F.R. §§ 1201.2, 1201.121(a)). But these regulations concern the Board's authority to hold the informal record-collecting hearing itself, not to review another agency's actions. This is evident from the Board's related procedural regulations, which spell out the nature of the informal hearing. See 5 C.F.R. §§ 1201.143–.145, 1201.2(b). What Ms. Esparraguera seeks is what the Board calls *appellate* jurisdiction, which the regulations do not confer in this case. See *id.* § 1201.3(a)(10) (not listing such removals among the Board's SES-related appellate jurisdiction). It is under the "appellate jurisdiction" label that the Board's regulations place review of an agency's removal decisions generally. See *id.* § 1201.3. Regardless, the regulations could not confer jurisdiction beyond what the statute grants.

We begin with the text, which reads, in relevant part:

> [T]he career appointee shall, at least 15 days before the removal, be entitled, upon request, to an informal hearing before an official designated by the Merit Systems Protection Board at which the career appointee may appear and present arguments, but such hearing shall not give the career appointee the right to initiate an action with the Board under section 7701 of this title, nor need the removal action be delayed as a result of the granting of such hearing.

5 U.S.C. § 3592(a).

The text frames the "informal hearing" as an opportunity to be heard, not an adversarial forum. By statute, the appointee is expressly entitled only to "appear and present arguments." *Id.* The provision makes no mention of any other procedural options, such as the right to representation or the right to call witnesses. It provides no right to compel the agency to appear. Further, the hearing "shall not give the career appointee the right to initiate an action with the Board under [5 U.S.C. §] 7701," *id.*, which is the general provision that governs all appellate proceedings for covered employees for "any action" that "is appealable to the Board," *id.* § 7701(a).[6]

That short provision is all the CSRA has to say about informal hearings for performance-based SES removals. In contrast, the CSRA speaks extensively on the sub-

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[6] Ms. Esparraguera suggests that *our* appellate jurisdiction under § 7703 is not limited to Board orders made under § 7701. Reply Br. 5–6. That much is true. *Horner* v. *MSPB*, 815 F.2d 668, 671 (Fed. Cir. 1987). But for us to review the Army's removal, the Board must have been able to do so too. And Ms. Esparraguera has pointed to no provision outside § 7701 conferring the Board with appellate jurisdiction over agency removal decisions.

stance and procedure of appeals of other adverse actions. See, *e.g.*, 5 U.S.C. § 7701(a) (providing for a right of action for employee as to "any action which is appealable"), (b)(3) (expressly providing the Board authority under § 7701 to mitigate an adverse action), (c) (expressly delineating standards of review), (d) (explaining intervention rights), (e) (spelling out finality of decisions), (f)–(h) (permitting Board control of case consolidation, attorney fees, and settlement), (k) (empowering the Board to promulgate regulations to carry out the purpose of the section); *id.* § 7543(d) (expressly providing that an SES employee removed for misconduct is "entitled to appeal" substance of removal); *id.* § 3595(c) (expressly providing that SES employee removed under reduction in force is "entitled to appeal" procedural compliance of removal).

Indeed, the "exhaustive[]" structure of the "comprehensive system" of review established by the CSRA is instructive. See *Elgin*, 567 U.S. at 5, 11. The CSRA "prescribes in great detail the protections and remedies applicable" to adverse personnel actions, "including the availability of administrative and judicial review." *Fausto*, 484 U.S. at 443. The Supreme Court has previously stated that, given the "comprehensive nature of the CSRA," the fact that Congress "[did] not include [certain employees] in provisions for administrative and judicial review" was a "considered congressional judgment" that review on the merits was unavailable. *Id.* at 448–49.

We see no reason that Congress would use but two words—"informal hearing"—to give the Board review authority, thereby leaving the Board in the dark about its procedure, powers, and standard of review—details that it took great pains to spell out for other kinds of reviewable actions. Indeed, if the words of § 3592 *were* enough to imbue review power, we do not see why § 7701 would then

be so detailed, or why Congress would have needed to affirmatively spell out in other instances what the Board *could* review.

For example, it is significant that the CSRA expressly gave *non*-executives the right to appeal performance-based actions, spelling out specific procedural requirements, but provided no parallel provision for senior executives. *E.g.*, 5 U.S.C. § 4303(b) (providing for attorney representation, notice of specific instances of unacceptable performance, opportunity to answer orally in writing, and right to written decision specifying instances of unacceptable performance), (e)–(f) (specifying appeal rights). Similarly, the CSRA expressly conferred on senior executives removed for *misconduct* the right to appeal, with similar requirements. *Id.* § 7543(b), (d). Further, Congress chose in the CSRA to make PRB performance ratings simply a "recommendation" to the appointing authority and expressly made final performance ratings unappealable. *Id.* §§ 4312(d), 4314(c). Accordingly, we conclude that the Board lacks the authority to review the substance of the removal.

Nor does the Board have the authority to review the removal for procedural compliance. Elsewhere in the CSRA, Congress expressly made procedural compliance reviewable for career senior executives who were removed pursuant to a reduction in force. See 5 U.S.C. § 3595(c). That the CSRA says nothing about reviewability of procedural compliance for performance appraisals confirms that Congress did not provide for Board review.

Accordingly, the "exhaustive" structure of the CSRA favors unreviewability. Accord *Fausto*, 484 U.S. at 448–49.

Ms. Esparraguera makes two arguments about the text. She argues that the ordinary meaning of "hearing"

is "a setting in which an affected person presents arguments to a decision-maker," and that we should therefore construe "informal hearing" as an "adjudicatory hearing at which the agency carries the burden of proving its charges before a neutral adjudicator empowered to overturn the agency's action." Appellant's Br. 54–55. We disagree. This is too much to divine from two words, especially in view of the otherwise exhaustive detail elsewhere in the CSRA.

Second, Ms. Esparraguera contends that because a post-removal hearing is "widely understood to be a fundamental feature of due process," we should "construe a statutory right to a post-removal 'hearing' as providing a hearing that satisfies the requirements of due process." Appellant's Br. 55 (emphasis omitted). But this argument presupposes the deprivation of a due process interest—and specifically one that would necessitate an adjudicatory hearing. For the reasons explained above and below, we cannot reach Ms. Esparraguera's due process arguments. But even if Ms. Esparraguera were correct about this interest and its deprivation, the CSRA is "comprehensive." *Elgin*, 567 U.S. at 10–11; *Fausto*, 484 U.S. at 448. And the text and structure of the CSRA are clear enough that we could not, as a reasonable remedy, *expand* the Board's limited jurisdiction where Congress foreclosed review.

In summary, Congress did not make this kind of removal reviewable by the Board.[7] Accordingly, we hold

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[7] We are not the first to say so. The Board and at least one district court have already held that performance-based SES removals are unreviewable by the Board. See *Greenhouse* v. *Geren*, 574 F. Supp. 2d 57, 67 (D.D.C. 2008) (citing *Charrow* v. *Fed. Ret. Thrift Inv. Bd.*, 102 M.S.P.R. 345, 349 (M.S.P.B. 2005)).

that a Board official in a § 3592 hearing has no authority to review an SES appointee's removal.

B

The jurisdictional question for us remains as follows: given that the Board lacks review authority under § 3592, is the Order Referring Record a "final order or decision" of the Board by which Ms. Esparraguera was "adversely affected or aggrieved"? We conclude that it is not.

We are a court of limited jurisdiction. *Morris* v. *Off. of Compliance*, 608 F.3d 1344, 1346 (Fed. Cir. 2010) ("The jurisdiction of this court is 'limited to those subjects encompassed within a statutory grant of jurisdiction.'" (quoting *Ins. Corp. of Ir.* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 701 (1982))). And our jurisdiction over the Board is restricted to an appeal brought under 5 U.S.C. § 7703 from "a final order or final decision." 28 U.S.C. § 1295(a)(9). In turn, § 7703 requires that an "employee or applicant" be "adversely affected or aggrieved by a final order or decision" of the Board." 5 U.S.C. § 7703(a).

Ms. Esparraguera argues that because the Order Referring Record was the *last* action from the Board related to her removal, it was "final." But "final" does not merely mean "last in time."

We apply the "final judgment rule" to Board appeals. *Weed* v. *Soc. Sec. Admin.*, 571 F.3d 1359, 1361 (Fed. Cir. 2009) (citing 5 U.S.C. § 7703; 28 U.S.C. § 1295(a)(9)). That rule provides that an order or decision is ordinarily "final" only if it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Id.* (quoting *Allen* v. *Principi*, 237 F.3d 1368, 1372 (Fed. Cir. 2001)); see also *Kaplan* v. *Conyers*, 733 F.3d 1148, 1153–54 (Fed. Cir. 2013) (en banc) ("[T]his court lacks ju-

risdiction to review non-final Board decisions.").[8] Finality is a "historic characteristic of federal appellate procedure." *Flanagan* v. *United States*, 465 U.S. 259, 263 (1984) (quoting *Cobbledick* v. *United States*, 309 U.S. 323, 324 (1940)).

The Order Referring Record was not "final" with respect to Ms. Esparraguera's removal. As discussed, the Board was not empowered under § 3592 to review Ms. Esparraguera's removal, and the proceeding bore none of the adversarial hallmarks of adjudication. Rather, the Board simply acted as a ministerial record-developing adjunct to the Under Secretary, enabling Ms. Esparraguera to enter her arguments and evidence into the record for the Under Secretary's ultimate consideration. See also, *e.g.*, *Morrison* v. *Dep't of the Navy*, 876 F.3d 1106, 1109–11 (Fed. Cir. 2017) (deeming order not "final" where the Board simply forwarded a case to another decisionmaker for further proceedings). The Order therefore did not dispose of the "case" of her removal; that case was never before the Board.[9]

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[8] Alternatively, a "small class" of collateral orders are "final" for review purposes where they "resolve important questions separate from the merits." *Kaplan*, 733 F.3d at 1153–54. Ms. Esparraguera makes no argument that this is such an order.

[9] Ms. Esparraguera also argues that she was "adversely affected or aggrieved" by the Order Referring Record because it did not "grant relief from her removal." See Appellant's Br. 2. But the Board had no power to review her removal in any capacity. A party cannot be "adversely affected or aggrieved" within the meaning of the statute by the Board's failure to grant relief that it had no authority to grant. The government also suggests that Ms. Esparraguera forfeited her arguments by not affirmatively asking the Board official during her hearing to rule on the merits or correct a due process violation—in other words, that she cannot be "adversely affected or aggrieved" by the order because she did not expressly ask for the relief she now seeks. Appellee's Br. 27–29. Our futility doctrine compli-

Finally, Ms. Esparraguera argues that the presumption in favor of judicial review mandates that she have a forum for her constitutional challenge. And she argues that, under *Elgin*, judicial review must occur in the Federal Circuit in cases involving CSRA-related removals. Appellant's Br. 3–4; Reply Br. 14 n.3.

We are not persuaded that *Elgin* requires (or even empowers) *this court* to review the due process question under these circumstances. To be sure, *Elgin* held that we, as opposed to district courts, have jurisdiction over constitutional issues associated with certain challenges to adverse actions under the CSRA. See 567 U.S. at 11–12, 18–19, 21. But that holding was premised on the petitioners in that case being "covered employees challenging a covered adverse employment action" under the CSRA—which meant that the Board could review the challenged action, and that this court could review the Board's decision and the accompanying constitutional issues. *Id.* at 21. In other words, under *Elgin*, the CSRA channels judicial review of an adverse action exclusively through the Federal Circuit only if it first channels review through the Board.

In contrast, here the Board had no jurisdiction over the removal and we have no "final order" to review. Cf. *id.* at 18 (noting Federal Circuit's authority to decide constitutionality "in an appeal from agency action within the MSPB's jurisdiction"). And as we have discussed, our jurisdiction is limited by statute: we cannot decide a case simply because a claim arises under the Constitution. So even assuming that Ms. Esparraguera is correct that she must be able to present her constitutional claim

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cates forfeiture, see *Arthrex, Inc.* v. *Smith & Nephew, Inc.*, 941 F.3d 1320, 1339 (Fed. Cir. 2019), but we need not reach that question.

before *a* court, we are unpersuaded that this means *our* court.

At any rate, we also doubt that our lack of jurisdiction leaves Ms. Esparraguera's constitutional claims unreviewable. We observe, as does the government, that district courts have indeed been willing even after *Elgin* to hear constitutional challenges where Board review of an adverse employment action is unavailable. *E.g.*, *Coleman* v. *Napolitano*, 65 F. Supp. 3d 99, 103–05 (D.D.C. 2014) (holding that a district court had jurisdiction to hear plaintiff's due process claim where Board review was unavailable under the CSRA); *Davis* v. *Billington*, 51 F. Supp. 3d 97, 106–09 (D.D.C. 2014) (same); *Lamb* v. *Holder*, 82 F. Supp. 3d 416, 422–24 (D.D.C. 2015) (same); accord *Semper* v. *Gomez*, 747 F.3d 229, 241–42 (3d Cir. 2014) (concluding that a "federal employee who could not pursue meaningful relief through a remedial plan that includes some measure of meaningful judicial review" would not be precluded by the CSRA from bringing a district court constitutional challenge); see also *Webster* v. *Doe*, 486 U.S. 592, 603–04 (1988) (holding that a constitutional claim was reviewable in district court even where the substance of the underlying termination decision was not). To be clear, our holding today does not depend on whether judicial review might be available elsewhere. That is not the question before us. The question today concerns only the scope of our narrow statutory grant of jurisdiction. And our jurisdiction has clearly been constrained by Congress.

* * *

In summary, we hold that, with respect to her removal, Ms. Esparraguera was not adversely affected or aggrieved by a "final order or final decision of the Merit Systems Protection Board." See 28 U.S.C. § 1295(a)(9); 5

U.S.C. § 7703(a)(1). We therefore lack jurisdiction over the due process question.

III

We have considered Ms. Esparraguera's remaining arguments and find them unpersuasive. For the reasons discussed above, the Board lacks jurisdiction to review Ms. Esparraguera's removal and, accordingly, so do we. We therefore dismiss this appeal without reaching the due process question.

DISMISSED

APPENDIX B

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ADMINISTRATIVE LAW JUDGE

MARIA ESPARRAGUERA,
Appellant,

v.

DEPARTMENT OF THE ARMY,
Agency.

DOCKET NO. CB-3592-18-0022-U-1

ORDER REFERRING RECORD

June 20, 2019

This proceeding arises from a decision of the Department of the Army (Agency) to remove Appellant Maria Esparraguera from the Senior Executive Service (SES) position of Director, Civilian Personnel, Labor and Employment Law, Office of the Judge Advocate General in Washington, D.C., and to reassign her as a Supervisory Human Resources Specialist, GS-0201-15 position at Aberdeen Proving Ground. On September 26, 2018, Appellant filed a request for an informal hearing pursuant to 5 C.F.R. §1201.143. On June 5, 2019, the undersigned

Administrative Law Judge (ALJ)[1] held an informal hearing at MSPB Headquarters in Washington, D.C.

Removals from the SES for performance-based reasons are governed by 5 U.S.C. §3592(a). Under that provision, a career SES appointee "may be removed from the [SES] to a civil service position outside of the [SES] . . . at any time for less than fully successful executive performance as determined under [5 U.S.C. Chapter 43] . . . ." 5 U.S.C. §3592(a). The career appointee "shall, at least 15 days before the removal, be entitled, upon request, to an informal hearing before an official designated by the Merit Systems Protection Board at which the career appointee may appear and present arguments, but such hearing shall not give the career appointee the right to initiate an action with the Board under section 7701 of this title, nor need the removal action be delayed as a result of the granting such hearing." *Id.* The Board's regulations provide that, upon conclusion of the proceeding, a copy of the record will be referred "to the Special Counsel, the Office of Personnel Management, and the employing agency for whatever action may be appropriate." 5 C.F.R. §1201.144(c).

The underlying statute and implementing regulations make the scope of these proceedings limited in nature. The role of the undersigned ALJ as the official designated by the Board to conduct the informal hearing is also limited. There are no provisions for the judge (designated official) to issue a decision or grant any relief. 5 U.S.C. §3592(a). The regulations also provide there is no right under 5 U.S.C. §7703 to appeal the agency action

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[1] Pursuant to an Interagency Agreement with the Merit Systems Protection Board (MSPB), the U.S. Coast Guard is providing Administrative Law Judge services for proceedings in accordance with 5 C.F.R. §§1201.143 – 1201.145 and 5 U.S.C. §3592.

within the MSPB. See 5 C.F.R. §1201.145. However, this does not preclude some other basis for seeking relief. *E.g. Greenhouse* v. *Geren*, 574 F.Supp[.]2d 57 (D. D.C. 2008).

In keeping with the regulations, my actions in conducting the informal hearing were focused on developing the record. Prior to the hearing, Appellant submitted exhibits A – UU to the record, by uploading the same to the Board's electronic repository. At the hearing, Appellant, through counsel, read a prepared argument into the record and moved for admission of Exhibits A – UU. The Agency did not object to Exhibits A – UU and they were admitted into the record without any changes. The Agency did not present evidence.

Appellant moved to keep the record open for forty-eight (48) hours to potentially submit an additional document for the record. The ALJ granted Appellant's request and ruled that the record would remain open for 48 hours following the close of the hearing to allow Appellant to offer additional evidence for the record. The AU also ruled that the Agency would have three working days from receipt of Appellant's additional evidence to lodge any objection. Appellant did not submit any additional evidence to the record within the 48-hour period or to date. At the end of the informal hearing, Appellant's counsel read Appellant's closing argument into the record and requested that she be permitted to upload a copy of that closing argument to the MSPB electronic docket. The ALJ granted that request. After the hearing, Appellant uploaded a copy of "Appellant's Hearing Argument" into the MSPB electronic docket and it is part of the record for this proceeding. The record is now closed.

A transcript of the informal hearing was completed and has been uploaded to the record. Appellant previous-

ly uploaded all of her exhibits (Exs. A – UU) to the record and she moved for their admission into the record at the June 5, 2019 hearing with no changes. The Agency did not present exhibits or any other evidence at the informal hearing. Therefore, the ALJ did not require Respondent to upload exhibits A through UU again after the hearing. The record is now complete.

Pursuant to 5 C.F.R. §1201.144(c), the record and hearing transcript in this matter are hereby referred to the Office of Special Counsel, the Office of Personnel Management, and the Department of the Army (Agency) for whatever action they may deem appropriate.

FOR THE BOARD: s/ Michael J. Devine
Michael J. Devine
Administrative Law Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

MARIA ESPARRAGUERA,
Petitioner,

v.

DEPARTMENT OF THE ARMY,
Respondent.

2019-2293

Petition for review of the Merit Systems Protection Board in No. CB-3592-18-0022-U-1

ON PETITION FOR PANEL REHEARING
AND REHEARING EN BANC

June 8, 2021

Before MOORE, *Chief Judge*[*], NEWMAN, LOURIE, DYK, PROST[**], O'MALLEY, REYNA, WALLACH[***], TARANTO, CHEN, HUGHES, and STOLL, *Circuit Judges*.

PER CURIAM.

ORDER

Maria Esparraguera filed a combined petition for panel rehearing and rehearing en banc. A response to the petition was invited by the court and filed by the Department of the Army. The petition was first referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

The mandate of the court will issue on June 15, 2021.

FOR THE COURT

June 8, 2021
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

[*] Chief Judge Kimberly A. Moore assumed the position of Chief Judge on May 22, 2021.

[**] Circuit Judge Sharon Prost vacated the position of Chief Judge on May 21, 2021.

[***] Circuit Judge Evan J. Wallach assumed senior status on May 31, 2021.

APPENDIX D

RELEVANT CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

1. The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. Title 5 of the United States Code provides in relevant part as follows:

§ 3592. Removal from the Senior Executive Service

(a) Except as provided in subsection (b) of this section, a career appointee may be removed from the Senior Executive Service to a civil service position outside of the Senior Executive Service—

(1) during the 1-year period of probation under section 3393(d) of this title, or

(2) at any time for less than fully successful executive performance as determined under subchapter II of chapter 43 of this title,

except that in the case of a removal under paragraph (2) of this subsection the career appointee shall, at least 15 days before the removal, be entitled, upon request, to an informal hearing before an official designated by the Merit Systems Protection Board at which the career appointee may appear and present arguments, but such hearing shall not give the career appointee the right to initiate an action with the Board under section 7701 of this title, nor need the removal action be delayed as a result of the granting of such hearing.

(b) (1) Except as provided in paragraph (2) of this subsection, a career appointee in an agency may not be involuntarily removed—

(A) within 120 days after an appointment of the head of the agency; or

(B) within 120 days after the appointment in the agency of the career appointee's most immediate supervisor who—

(i) is a noncareer appointee; and

(ii) has the authority to remove the career appointee.

(2) Paragraph (1) of this subsection does not apply with respect to—

(A) any removal under section 4314(b)(3) of this title; or

(B) any disciplinary action initiated before an appointment referred to in paragraph (1) of this subsection.

(c) A limited emergency appointee, limited term appointee, or noncareer appointee may be removed from the service at any time.

* * * * *

§ 7703. Judicial review of decisions of the Merit Systems Protection Board

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

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

(b) (1) (A) Except as provided in subparagraph (B) and paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review shall be filed within 60 days after the Board issues notice of the final order or decision of the Board.

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

(2) Cases of discrimination subject to the provisions of section 7702 of this title shall be filed under section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e–16(c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C.

633a(c)), and section 16(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216(b)), as applicable. Notwithstanding any other provision of law, any such case filed under any such section must be filed within 30 days after the date the individual filing the case received notice of the judicially reviewable action under such section 7702.

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

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

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

(3) unsupported by substantial evidence;

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

(d) (1) Except as provided under paragraph (2), this paragraph shall apply to any review obtained by the Director of the Office of Personnel Management. The Director may obtain review of any final order or decision of the Board by filing, within 60 days after the Board issues notice of the final order or

decision of the Board, a petition for judicial review in the United States Court of Appeals for the Federal Circuit if the Director determines, in the discretion of the Director, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive. If the Director did not intervene in a matter before the Board, the Director may not petition for review of a Board decision under this section unless the Director first petitions the Board for a reconsideration of its decision, and such petition is denied. In addition to the named respondent, the Board and all other parties to the proceedings before the Board shall have the right to appear in the proceeding before the Court of Appeals. The granting of the petition for judicial review shall be at the discretion of the Court of Appeals.

(2) This paragraph shall apply to any review obtained by the Director of the Office of Personnel Management that raises no challenge to the Board's disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8), or 2302(b)(9)(A)(i), (B), (C), or (D). The Director may obtain review of any final order or decision of the Board by filing, within 60 days after the Board issues notice of the final order or decision of the Board, a peti-

tion for judicial review in the United States Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction if the Director determines, in the discretion of the Director, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive. If the Director did not intervene in a matter before the Board, the Director may not petition for review of a Board decision under this section unless the Director first petitions the Board for a reconsideration of its decision, and such petition is denied. In addition to the named respondent, the Board and all other parties to the proceedings before the Board shall have the right to appear in the proceeding before the court of appeals. The granting of the petition for judicial review shall be at the discretion of the court of appeals.

3. Title 5 of the Code of Federal Regulations provides in relevant part as follows:

§ 1201.2. Original jurisdiction.

The Board's original jurisdiction includes the following cases:

(a) Actions brought by the Special Counsel under 5 U.S.C. 1214, 1215, and 1216;

(b) Requests, by persons removed from the Senior Executive Service for performance deficiencies, for informal hearings; and

(c) Actions taken against administrative law judges under 5 U.S.C. 7521.

* * * * *

§ 1201.121. Scope of jurisdiction; application of subparts B, F, and H.

(a) *Scope.* The Board has original jurisdiction over complaints filed by the Special Counsel seeking corrective or disciplinary action (including complaints alleging a violation of the Hatch Political Activities Act), requests by the Special Counsel for stays of certain personnel actions, proposed agency actions against administrative law judges, and removals of career appointees from the Senior Executive Service for performance reasons.

(b) *Application of subparts B, F, and H.*

(1) Except as otherwise expressly provided by this subpart, the regulations in subpart B of this part applicable to appellate case processing also apply to original jurisdiction cases processed under this subpart.

(2) Subpart F of this part applies to enforcement proceedings in connection with Special Counsel complaints and stay requests, and agency actions against administrative law judges, decided under this subpart.

(3) Subpart H of this part applies to requests for attorney fees or compensatory damages in connection with Special Counsel corrective and disciplinary action complaints, and agency actions against administrative law judges, decided under this subpart. Subpart H of this part also applies to requests for consequential damages in connection with Special Counsel corrective action complaints decided under this subpart.

(c) The provisions of this subpart do not apply to appeals alleging non-compliance with the provisions of chapter 43 of title 38 of the United States Code relating to the employment or reemployment rights or benefits to which a person is entitled after service in the uniformed services, in which the Special Counsel appears as the designated representative of the appellant. Such appeals are governed by part 1208 of this title.

* * * * *

§ 1201.144. Hearing procedures; referring the record.

(a) The official designated to hold an informal hearing requested by a career appointee whose removal from the Senior Executive Service has been proposed under 5 U.S.C. 3592(a)(2) and 5 CFR 359.502 will be a judge, as defined at §1201.4(a) of this part.

(b) The appointee, the appointee's representative, or both may appear and present arguments in an informal hearing before the judge. A verbatim record of the proceeding will be made. The appointee has no other procedural rights before the judge or the Board.

(c) The judge will refer a copy of the record to the Special Counsel, the Office of Personnel Management, and the employing agency for whatever action may be appropriate.

APPENDIX E

UNDER SECRETARY OF THE ARMY
WASHINGTON

SEP 04 2018

MEMORANDUM FOR Ms. Maria D. Esparraguera, Director, Civilian Personnel, Labor and Employment Law, Office of The Judge Advocate General, Washington, DC

Subject: Removal from Senior Executive Service for Unacceptable Performance

1. This memorandum serves as official notice that I am directing your removal from the Senior Executive Service (SES) for unacceptable performance, pursuant to 5 CFR 359, Subpart E. I am initiating this action based on authority delegated to me. Your removal from the SES and placement will become effective on 14 October 2018 (no earlier than 30 days from receipt of this memorandum). This memorandum also serves as official notice that pursuant to 5 CFR 359, Subpart G, you will be placed in the following civilian service position: Supervisory Human Resources Specialist, GS-0201-15, Training Management Division, Civilian Human Resources Agency, Aberdeen Proving Ground, MD.

2. For the Fiscal Year 2017 performance appraisal period, you received an "Unsatisfactory'" final rating of record, effective 4 September 2018. A senior executive receiving an "Unsatisfactory" rating must be reassigned or transferred within the SES, or removed from the SES.

3. In reaching my decision to remove you from the SES, I considered the Performance Review Board's recommendation based on findings from the Office of Special Counsel's (OSC) Report of Prohibited Personnel Practice, OSC File No. MA-15-2692, dated 9 February 2018.

The OSC investigation concluded that you committed a prohibited personnel practice by conducting an improper post-recruitment candidate rotation as part of the selection process for a GS-15 supervisory attorney. The OSC investigation found that you gave a specific candidate an unfair advantage by extending the timeline for the selection, which allowed him to meet Army's time in grade requirement. I concur with OSC's findings.

4. In my judgment, OSC's finding that you committed a prohibited personnel practice during your appointment as Chief Counsel, U.S. Army Communications-Electronics Command completely undermines your credibility to serve effectively in any senior leadership position, let alone that of the Department of the Army's chief personnel attorney. As a result, I have lost confidence in your ability to successfully perform your duties as an Army Executive and find it necessary to direct your removal from the Senior Executive Service based on your unacceptable performance.

5. As noted above, you have placement rights to another position outside the Senior Executive Service, because at the time of your appointment to the SES you held a career appointment. Your placement into the position of Supervisory Human Resources Specialist, GS-0201-15, Training Management Division, Civilian Human Resources Agency, Aberdeen Proving Ground, MD will be effective on 14 October 2018. A position description is enclosed. You are entitled to saved basic pay.

6. You have no statutory or regulatory right to appeal my decision to remove you from the SES for performance reasons. My decision to remove you from the SES cannot be grieved.

7. You are entitled, upon request, to an informal hearing before the U.S. Merit Systems Protection Board

(Board). You must submit your request for an informal hearing to the Clerk of the Board no later than 15 days before the effective date of your removal from the SES. If your request is late, it may be dismissed as untimely. The requirements for an informal hearing with the MSPB are set forth in detail in Title 5, Code of Federal Regulation (CFR), Part 1201. A copy of this regulation is available at the MSPB's website at http://www.mspb.gov. Alternatively, your request may be filed electronically by using the Internet filing option available at the Board's website www.mspb.gov/e-appeal.html. An informal hearing gives you no right to appeal your removal to the Board under 5 U.S.C. 7701, nor will it delay the effective date of your removal.

U.S. Merit Systems Protection Board
Office of the Clerk of the Board
1615 M Street NW
Washington, DC 20419

Voice: (202) 653-7200
Fax: (202) 653-7130

8. A copy of Standard Form (SF) 50, Notification of Personnel Action, effecting your removal from the SES, will be sent to you under a separate cover.

9. You do have the right to file a discrimination complaint, if you believe my decision to remove you from the SES was based on your race, color, religion, sex, national origin, physical or mental disability, age and/or reprisal. You should initiate contact with the HQDA Directorate of Equal Employment Opportunity within 45 days of the effective date of your removal from the SES. The address and telephone numbers for that office are listed below. Should you elect to file a complaint of discrimination, your compliant will be processed in accordance with

Equal Employment Opportunity Commission regulations found at Title 29, Code of Federal Regulations, Part 1614.

Directorate of EEO
Building 1458
9301 Chapek Road
2d Floor, Room 2SE1904
Fort Belvoir, Virginia 22060-5527

Voice: (703) 545-1255 or (703) 545-4520
Fax: (703) 806-2316

10. You may be eligible for a Discontinued Service Retirement annuity under 5 U.S.C. 8414 based on your removal from the SES for less than fully successful performance.

11. Please be advised that based on your removal for unacceptable performance, you are not eligible for non-competitive reinstatement to the SES.

12. I request that you sign and date the acknowledgment portion of this memorandum. Your acknowledgment of receipt does not constitute agreement with my decision. Please note that refusal to acknowledge receipt in no way affects the validity of this action.

s/ Ryan D. McCarthy

Encl

Ryan D. McCarthy

Receipt Acknowledgment:

_____ _____

Maria D. Esparraguera Date