No. 21-686

In the Supreme Court of the United States

MARIA ESPARRAGUERA, PETITIONER

v.

DEPARTMENT OF THE ARMY

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly determined that the Merit Systems Protection Board and the United States Court of Appeals for the Federal Circuit lack jurisdiction to review a career senior executive's removal from the Senior Executive Service for unacceptable performance under 5 U.S.C. 3592(a)(2).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 981 F.3d 1328. The order of the Merit Systems Protection Board (Pet. App. 22a-25a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 4, 2020. A petition for rehearing was denied on June 8, 2021 (Pet. App. 26a-27a). By orders dated March 19, 2020, and July 19, 2021, this Court extended the time within which to file any petition for a writ of certiorari due on or after March 19, 2020, to 150 days from the date of the lower-court judgment, order denying discretionary review, or order denying a timely petition for rehearing, as long as that judgment or order was issued before July 19, 2021. The petition for a writ of certiorari

was filed on November 5, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Civil Service Reform Act of 1978 (CSRA or Act), Pub. L. No. 95-454, 92 Stat. 1111 (5 U.S.C. 1101 *et seq.*), "established a comprehensive system for reviewing personnel action[s] taken against federal employees." *Elgin* v. *Department of the Treasury*, 567 U.S. 1, 5 (2012) (quoting *United States* v. *Fausto*, 484 U.S. 439, 455 (1988)). The Act divides civil service employees into three main groups: the Senior Executive Service (SES), the competitive service, and the excepted service. See 5 U.S.C. 2101a; *Fausto*, 484 U.S. at 441 n.1.

Congress created the SES "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." CSRA § 3(6), 92 Stat. 1113. Congress determined that the SES would "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 Congress instructed that the SES "shall be administered" to "enable the head of an agency to reassign senior executives to best accomplish the agency's mission," "maintain a merit personnel system free of prohibited personnel practices," and "ensure accountability for honest, economical, and efficient Government." 5 U.S.C. 3131(5), (9), and (10).

The SES is comprised of career and noncareer senior executives. 5 U.S.C. 3132(a)(4) and (7). A career senior executive may only be removed from the SES or from

the federal civil service in accordance with the Act. See 5 U.S.C. 3393(g). As relevant here, the Act provides two avenues for removing a career senior executive from her position in the SES.

First, a career senior executive may be removed from the SES 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). Such a removal results in discharge from the civil service, not just the SES. 5 U.S.C. 7542. A career senior executive may appeal such a removal to the Merit Systems Protection Board (Board) under the procedures in 5 U.S.C. 7701, which is the general provision allowing covered federal employees to appeal qualifying adverse employment actions to the Board. 5 U.S.C. 7543(d); see Pet. App. 13a. Section 7701 provides a right to a hearing and decision from the Board, and also provides that the Board must grant appropriate relief to a prevailing employee, which may include reinstatement and back pay. 5 U.S.C. 7701(a)(1) and (b); see 5 U.S.C. 1204(a)(2). The Board's regulations provide that an employee is entitled to a decision from the Board that "mak[es] [a] final disposition of the case" and "include[es] appropriate relief." 5 C.F.R. 1201.111(b)(3). An employee dissatisfied with the Board's final decision in a Section 7701 appeal may seek review in the Federal Circuit, which has exclusive jurisdiction over appeals from such decisions. 5 U.S.C. 7703(a) and (b)(1)(A); 28 U.S.C. 1295(a)(9).

Second, a career senior executive may be removed from the SES "at any time for less than fully successful performance as determined under [5 U.S.C. 4311-4315]." 5 U.S.C. 3592(a)(2). Performance-based removals under Section 3592 result in reassignment to a civil service position outside the SES, rather than removal

from civil service. 5 U.S.C. 3592(a). At a minimum, an employee must be reassigned to a GS-15 position—generally the highest level on the General Schedule—or to an equivalent position. 5 U.S.C. 3594(b)(1) and (c)(1)(A). The employee is also entitled to the same or higher basic pay as she previously received. 5 U.S.C. 3594(c)(1)(B).

A career senior executive removed from the SES for performance reasons is "entitled, upon request, to an informal hearing before an official designated by the [Board] at which the career appointee may appear and present arguments." 5 U.S.C. 3592(a). Congress made clear that an informal hearing under Section 3592(a) "shall *not* give the career appointee the right to initiate an action with the Board under section 7701." *Ibid.* (emphasis added). The Board's regulations describe those informal hearings as exercises of its original (rather than appellate) jurisdiction. 5 C.F.R 1201.2(b); see 5 C.F.R. 1201.1, 1201.3.

Congress charged the Office of Personnel Management with implementing the Act's provisions governing removal from the SES. 5 U.S.C. 3596; see 5 C.F.R. 359.201; see also 5 C.F.R. 359.501-359.504 (regulations governing removal for performance reasons under Section 3592(a)). Those regulations provide that the employing agency must notify a career senior executive of a performance-based action at least 30 days before the action's effective date. 5 C.F.R. 359.502(a). And they specify that a career senior executive must request an informal hearing before the Board at least 15 days before the effective date of the removal and that such a hearing "shall be conducted in accordance with the regulations and procedures established by the Board." 5 C.F.R. 359.502(b)(1). In accordance with the

CSRA's requirements, the Office of Personnel Management's regulations confirm that "[n]either the granting nor the conduct of an informal hearing shall provide a basis for appeal to the [Board] under 5 U.S.C. 7701." 5 C.F.R. 359.502(b)(2); see 5 C.F.R. 359.504.

The Board, in turn, has promulgated regulations governing informal hearings arising from performance-based removals from the SES. See 5 C.F.R 1201.143-1201.145. A career senior executive removed for performance reasons is entitled to "appear and present arguments in an informal hearing before" an "official designated" by the Board (who may or may not be an administrative law judge) and to have a "verbatim record of the proceeding" made. 5 C.F.R. 1201.144(a) and (b); see 5 C.F.R. 1201.4(a). The employee "has no other procedural rights before the judge or the Board." *Ibid.* After the informal hearing, "[t]he 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." 5 C.F.R. 1201.144(c). The Board's regulations again confirm that "[t]here is no right * * * to appeal the agency's action or any action by the judge or the Board" in cases proceeding under the informal hearing provisions. 5 C.F.R. 1201.145.

b. A career senior executive is subject to annual performance appraisals. See 5 U.S.C. 4311 *et seq.* A career senior executive who receives a final performance rating of "unsatisfactory" must be either "removed from" or "reassigned or transferred within" the SES. 5 U.S.C. 4314(b)(3). Such an executive "may not appeal any appraisal and rating under any performance appraisal system." 5 U.S.C. 4312(d).

Agencies establish performance review boards (PRBs) to assist in the annual performance review process. See 5 U.S.C. 4314(c)(1). An executive's supervisor provides the PRB with an "initial appraisal." 5 U.S.C. 4314(c)(2). The executive is "provided a copy of the appraisal and rating * * * and is given an opportunity to respond in writing." 5 U.S.C. 4312(b)(3); see 5 C.F.R. 430.311(b)(1) ("The PRB may not review an initial summary rating to which the executive has not been given the opportunity to respond in writing."). The PRB 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 of the agency" regarding the senior executive's performance. 5 U.S.C. 4314(c)(1). Final performance ratings are made by the agency's appointing authority. 5 U.S.C. 4314(c)(3).

2. a. Petitioner was a career senior executive with the Department of the Army who served as Chief Counsel of the Communications-Electronics Command. Pet. App. 6a. In 2014, petitioner chaired a selection committee charged with filling an open division chief position. *Ibid.* The Army's rules required the committee to fill the position with an individual who had at least one year of experience at the GS-14 grade. *Ibid.*; C.A. App. 239-240. The committee interviewed 11 candidates. Pet. App. 6a. Ten of them had met that requirement, but petitioner's preferred candidate had not. *Ibid.* Petitioner proposed an "unorthodox" and "unprecedented" "post-interview rotation plan" in which each of the three finalists would act as the division chief for 30 days. *Ibid.*; see *id.* at 6a-7a. Army human resource specialists

advised petitioner that the rotation "would unfairly advantage" her preferred candidate and "likely result in complaints." *Id.* at 7a; see C.A. App. 239-240. But the rotation plan was implemented. Following the three-month delay created by the rotation plan, petitioner's preferred candidate had spent a year at the GS-14 grade and was hired for the role of division chief. Pet. App. 7a.

Two complaints were filed with the Office of Special Counsel, alleging that petitioner had committed a prohibited personnel practice. Pet. App. 7a; see 5 U.S.C. 2302(b)(6) (prohibited personnel practices include "grant[ing] any preference or advantage not authorized by law, rule, or regulation to any * * * applicant for employment * * * for the purpose of improving or injuring the prospects of any particular person for employment"). After an investigation, the Office of Special Counsel determined that "the purpose of the rotation plan" was to give petitioner's preferred candidate "an unfair advantage" in violation of Section 2302(b)(6). C.A. App. 254; see *id.* at 116. It therefore recommended that the Army take corrective and disciplinary action. Pet. App. 8a; C.A. App. 254.

In 2018, following receipt of that recommendation, the Army reprimanded petitioner. Pet. App. 8a-9a; C.A. App. 38-41. It found that her "'decision to change the manner of competition in the middle of the hiring process was harmful to morale and predictably created a perception of unfairness.'" Pet. App. 8a-9a (citation omitted). The Army "reprimand[ed] [petitioner] for fail[ing] to exercise due diligence and exhibiting poor supervisory leadership." C.A. App. 38.

Petitioner's 2017 performance appraisal began before the reprimand. Pet. App. 8a. Petitioner received

an initial rating from her supervisor that was satisfactory. *Ibid.* But the Army held her final rating in abeyance due to its ongoing investigation and convened a special PRB to make a recommendation on her performance rating. *Id.* at 8a-9a. The PRB recommended an unsatisfactory rating of petitioner's leadership. *Id.* at 9a. The Under Secretary of the Army, who was responsible for petitioner's final performance rating, *id.* at 5a, adopted that recommendation, determining that the Office of Special Counsel's findings "completely undermine[d] [her] credibility to serve" and noting that he had "lost confidence in [her] ability to successfully perform [her] duties as an Army Executive," *id.* at 9a (citation omitted; brackets in original). The Under Secretary notified petitioner that she would be removed from the SES for poor performance and reassigned to a GS-15 position. *Id.* at 39a. At the Army's invitation, petitioner submitted a written request for reconsideration, which the Under Secretary denied. *Id.* at 10a.

b. Petitioner requested an informal hearing before one of the Board's designated officials under Section 3592(a). Pet. App. 10a-11a. At the hearing, petitioner's counsel submitted exhibits and read a prepared statement into the record. *Id.* at 11a; C.A. App. 3. Petitioner did not ask the administrative law judge who presided over the informal hearing to review the merits of her removal from the SES or to grant any relief. Pet. App. 11a.

As required by the Board's regulations, the judge issued an Order Referring Record, which summarized the proceedings and referred petitioner's exhibits and the hearing transcript to the Army, the Office of Special Counsel, and the Office of Personnel Management. Pet. App. 11a, 22a-25a; see 5 C.F.R. 1201.144(c). The judge

did not review the merits of petitioner's removal, noting that there "are no provisions" authorizing a judge "to issue a decision or grant any relief." Pet. App. 23a.

3. Petitioner sought review of the Order Referring Record in the court of appeals, which dismissed her appeal for lack of jurisdiction. Pet. App. 1a-21a.

The court of appeals explained that the Federal Circuit has jurisdiction over an appeal from the Board "only if there is a 'final order or final decision' of the Board that has 'adversely affected or aggrieved' an employee." Pet. App. 11a (quoting 5 U.S.C. 7703(a)(1) and 28 U.S.C. 1295(a)(9)). The court further explained that if the Board lacked jurisdiction to review the merits of petitioner's removal from the SES, there was no final order or decision that affected or aggrieved petitioner —and therefore no final order or decision that the court could review. *Id.* at 11a-12a.

The court of appeals found that the statutory text and context make clear that the CSRA bars the Board from reviewing performance-based employment actions against career senior executives. Pet. App. 12a-17a. The court explained that the Act's "text frames the 'informal hearing' as an opportunity to be heard, not an adversarial forum," and career senior executives are "expressly entitled only to 'appear and present arguments.'" *Id.* at 13a (quoting 5 U.S.C. 3592(a)). The court also emphasized that Section 3592(a) bars such executives from initiating an appellate action with the Board under Section 7701 following performance-based actions. *Ibid.* And the court contrasted the Act's limitations on the Board's consideration of performance-based actions against career senior executives with the Act's detailed procedural protections and review requirements in Section 7701 for both performance-based

actions against non-executives and misconduct-based actions against career senior executives. *Id.* at 13a-15a; see pp. 3-5, *supra*. In light of that "exhaustive structure" of review governing other types of adverse employment actions, the court found that Section 3592(a)'s informal hearing requirement does not empower the Board to review SES removals for performance. Pet. App. 15a (citation and internal quotation marks omitted).

The court of appeals rejected petitioner's argument that the term "hearing" in Section 3592(a) should be construed to require the adjudication of a career senior executive's arguments by a neutral decision-maker who has the authority to overturn the agency's action. Pet. App. 15a-16a. The court found that such a requirement was "too much to divine" from the term "'informal hearing'"—"especially in view of the otherwise exhaustive detail elsewhere in the CSRA." *Id.* at 16a (citation omitted). And the court also declined to adopt that reading to address petitioner's pre-removal and post-removal due process claims, explaining that "the text and structure of the CSRA are clear enough that we could not * * * *expand* the Board's limited jurisdiction where Congress foreclosed review." *Ibid.*

The court of appeals further found that, "given that the Board lacks review authority under [Section] 3592," an Order Referring Record is not a final order or decision of the Board that adversely affects or aggrieves an employee. Pet. App. 17a (citing 5 U.S.C. 7703(a)). The court noted that, when considering appeals from the Board, it applies the final judgment rule, which "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.'" *Ibid.*

(citations omitted). An Order Referring Record is "not 'final'" with respect to an employee's SES removal, the court explained, because "the Board simply act[s] as a ministerial record-developing adjunct" to the agency, creating a "record" for the agency's "ultimate consideration." *Id.* at 18a. The court therefore found that such order in petitioner's case "did not dispose of the 'case' of her removal" because "that case was never before the Board." *Ibid.* The court also found that petitioner was not adversely affected or aggrieved by the order because 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." *Id.* at 18a n.9.

Finally, the court of appeals rejected petitioner's contention that "the presumption of judicial review mandates that [petitioner] have a forum" for her due process claims and that "judicial review must occur in the Federal Circuit." Pet. App. 19a. The court explained that this Court's decision in *Elgin* recognized that "the CSRA channels judicial review of an adverse action exclusively through the Federal Circuit only if it first channels review through the Board." *Ibid.* Because review was unavailable before the Board, the court of appeals found that "even assuming that [petitioner] is correct that she must be able to present her constitutional claim before *a* court, we are unpersuaded that this means *our* court." *Id.* at 19a-20a. But the court expressed "doubt that our lack of jurisdiction leaves * * * constitutional claims unreviewable," noting that district courts routinely "hear constitutional challenges where Board review of an adverse employment action is unavailable." *Id.* at 20a.

4. On February 17, 2021, petitioner filed a complaint in the United States District Court for the District of Columbia, bringing a due-process challenge to her removal from the SES. See Compl., *Esparraguera* v. *Department of the Army*, No. 21-cv-421 (D.D.C. Feb. 17, 2021). The court has not yet entered a decision on the merits in that case.

ARGUMENT

The court of appeals correctly held that both it and the Board lacked jurisdiction to review petitioner's performance-based removal from the SES and her associated due process claims. The court's decision does not conflict with any decision of this Court or another court of appeals. Nor does the question presented otherwise warrant this Court's review. To the contrary, that question appears to have arisen in only a handful of cases in the four decades the CSRA has been in effect. Further review is unwarranted.

1. The court of appeals correctly held that the statutory text and context demonstrate that the CSRA deprives both the Board and the Federal Circuit of jurisdiction to review petitioner's performance-based removal from the SES.

As an initial matter, the court of appeals correctly held that petitioner was not entitled to Board review of her removal and reassignment to a GS-15 position. The Board only has jurisdiction over those adverse personnel actions that are "made appealable to it by law, rule, or regulation." *Carley* v. *Department of the Army*, 413 F.3d 1354, 1356 (Fed. Cir. 2005). Although certain employees may appeal adverse personnel actions to the Board "under section 7701," 5 U.S.C. 7513(d), a career

senior executive removed for performance reasons cannot. Rather than authorizing review by the Board, the CSRA provides that such an executive is "entitled, upon request, to an informal hearing before *an official designated by* the [Board] at which the career appointee may appear and present arguments." 5 U.S.C. 3592(a) (emphasis added). And Congress expressly specified that "such hearing shall not give the career appointee the right to initiate an action with the Board under section 7701." *Ibid.*; see 5 U.S.C. 7542 (providing that the subchapter of the CSRA conferring a right to an appeal under Section 7701 on career SES employees removed from the civil service for misconduct "does not apply to * * * a removal under section 3592"). The court therefore correctly determined that the Board lacked jurisdiction to review petitioner's removal from the SES.

The court of appeals likewise correctly concluded that it lacked jurisdiction to review petitioner's removal from the SES. The court may exercise only the jurisdiction conferred on it by Congress. See *United States* v. *Mottaz*, 476 U.S. 834, 848 n.11 (1986). As relevant here, Congress has granted the Federal Circuit jurisdiction to review "an appeal from a final order or final decision of the [Board], pursuant to sections 7703(b)(1) and 7703(d) of title 5." 28 U.S.C. 1295(a)(9). Section 7703(b)(1), in turn, permits the Federal Circuit to review a "final order or final decision *of the Board*." 5 U.S.C. 7703(b)(1)(A) (emphasis added); see 5 U.S.C. 7703(d) (providing for a Federal Circuit appeal of a Board decision when the Office of Personnel Management notices an appeal). But Congress specifically made Section 7701 review by the Board unavailable when a career senior executive is removed for performance reasons. 5 U.S.C. 3592(a). And no statute grants the Federal

Circuit jurisdiction to hear appeals from the ministerial record-transfer order entered by the "official designated by" the Board after an informal hearing under Section 3592(a).

2. Petitioner's contrary arguments contradict the statutory scheme that Congress adopted in the CSRA.

a. Petitioner renews her contention that the phrase "'informal hearing'" in Section 3592(a) guarantees career senior executives the right to "'present arguments'" to the Board and the right to receive a Board "decision based on those arguments." Pet. 24 (citation and emphasis omitted). But Congress explicitly closed the door to Section 7701, which provides for that type of review. Instead, Congress provided that the employee is entitled only to an "informal hearing before an official designated by the [Board]." 5 U.S.C. 3592(a). Unlike in Section 7701, Congress made no provision for review by the Board itself and pointedly gave the designated official no authority to review the removal or otherwise grant relief. *Ibid.*[1]

Petitioner's purported plain-meaning argument (Pet. 23-25) ignores Section 3592(a)'s omission of any provision for review by the Board itself; fails to properly account for the entire phrase ("*informal* hearing"); ignores Section 3592(a)'s bar on Section 7701 appeals; and does not grapple with Congress's clear choice to provide

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[1] Section 7701 allows the Board to refer a case appealed to it under that provision to an administrative law judge or other Board employee. 5 U.S.C. 7701(b)(1). But the decisions of such judges or employees may be appealed to the Board by either party or reviewed on the Board's own motion. 5 U.S.C. 7701(e). Section 3592(a), in contrast, makes no provision for Board review of any action taken by the officer designated to conduct the informal hearing authorized by that provision.

specific procedural mechanisms to differently situated employees—without extending such mechanisms to career senior executives like petitioner.

b. Petitioner also renews (Pet. 19-23) her arguments that, regardless of the nature of the Board's authority in this case, the Federal Circuit was required to review her due process claims. Those arguments are meritless. As an initial matter, petitioner's reliance on Section 7703(c) is misplaced. That provision requires the Federal Circuit to "review the record and hold unlawful and set aside" unlawful "agency action, findings, or conclusions" in any case that is properly before the court. 5 U.S.C. 7703(c). But Section 7703(a) does not expand the Federal Circuit's jurisdiction beyond its statutory limits, which, as discussed, do not encompass review of a designated official's ministerial order referring the record of an informal hearing following a performance-based removal of a career senior executive. See pp. 13-14, *supra*.

In any event, petitioner errs in asserting (Pet. 21-23) that the Board issued "a final order or decision" that "adversely affected or aggrieved" her and that is reviewable by the Federal Circuit. 5 U.S.C. 7703(a)(1). Section 7703 imposes a "final judgment rule" that generally limits the Federal Circuit's "jurisdiction to appeals from a decision or order that 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Weed* v. *Social Sec. Admin.*, 571 F.3d 1359, 1361 (Fed. Cir. 2009) (citations omitted). The final judgment rule applies to petitions for review of Board actions. *Ibid.*; *Haines* v. *Merit Sys. Prot. Bd.*, 44 F.3d 998, 999 (Fed. Cir. 1995).

The Order Referring Record that results from an informal hearing under Section 3592(a) is not a final judgment of the Board. An Order Referring Record does not "end[] the litigation on the merits" because there was never any litigation on the merits. *Weed*, 571 F.3d at 1361 (citations omitted). Nor does such an order create a "judgment" to "execute." *Ibid.* (citations omitted). The order merely refers the matter to other government entities—the Office of Special Counsel, the Office of Personnel Management, and the employing agency—for any substantive consideration that they deem appropriate. 5 C.F.R. 1201.144(c).

And a career senior executive who is removed for performance reasons is not "adversely affected or aggrieved," 5 U.S.C. 7703(a)(1), by the designated official's failure to grant relief he had no authority to grant. Moreover, petitioner here was not "adversely affected or aggrieved," *ibid.*, by the designated official's exercise of his limited authority to collect a record. Indeed, at the informal hearing petitioner acknowledged the limits of that hearing. See C.A. App. 137, 847-848, 891; see also 859-860 (statements by petitioner's counsel at the informal hearing that "the agency has absolutely no role in" the informal hearing "nor does [Section] 7701 apply," and that "it is very clear by statute that [as to Section] 7701, all of the procedures in that do not apply"). Nor has petitioner pointed to any request made at the hearing that was denied by the designated official. That the order was the Board's "last word" and "concluded" petitioner's informal hearing, Pet. 22, did not transform it into a final order; it neither ended litigation nor adversely affected or aggrieved petitioner.

c. Petitioner finally asserts that the decision below "renders [Section] 3592(a) unconstitutional" by

"depriv[ing]" petitioner of her property interest in her SES appointment without "constitutionally adequate procedures" required by the Due Process Clause, U.S. Const. Amend. V. Pet. 26-27 (capitalization and emphasis omitted). That is incorrect.

Petitioner primarily argues (Pet. 28-31) that the court of appeals' determination that it lacked jurisdiction to consider her due process claims deprived her of due process. Petitioner's argument fails because she—and other similarly situated career senior executives who are removed from their SES positions for performance reasons—may bring such claims in federal district court. Cf. *Coleman* v. *Napolitano*, 65 F. Supp. 3d 99, 105 (D.D.C. 2014) (finding that "this Court has subject matter jurisdiction to hear * * * constitutional due process claim[s], which cannot be reviewed under the CSRA by the [Board] nor subsequently appealed to the Federal Circuit" and collecting similar cases).

The government does not dispute that where, as here, judicial review is unavailable under the CSRA for a particular employment-related constitutional claim, a federal employee may be entitled to bring a freestanding action for equitable relief. This Court's decision in *Webster* v. *Doe*, 486 U.S. 592 (1988), requires Congress to make a "heightened showing" of its intent "to deny *any* judicial forum for a colorable constitutional claim." *Id.* at 603 (emphasis added); see *Elgin* v. *Department of the Treasury*, 567 U.S. 1, 9 (2012). The government acknowledges that the CSRA does not contain a "heightened showing" of congressional intent to foreclose review of constitutional claims altogether. Accordingly, because federal law provides no avenue for senior career executives removed from the SES for per-

formance reasons to obtain judicial review of due process claims in the Federal Circuit, those executives may, after exhausting any administrative remedies, bring such claims under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, which provides a cause of action for judicial review of "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. 704.[2]

And, contrary to petitioner's suggestion (Pet. 29-30), due process concerns do not require the Court to broaden the Federal Circuit's appellate jurisdiction beyond the plain terms of the relevant statutory provisions. Where, as here, an employee's claims can be "meaningfully addressed" by another federal court, a case does "not present the serious constitutional question that would arise if an agency statute were construed to preclude all judicial review of a constitutional claim." *Elgin*, 567 U.S. at 9 (quoting *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 215 & n.20 (1994)) (internal quotation marks omitted). In such a situation, if "Congress' intent to preclude" one federal court's jurisdiction is "'fairly discernable in the statutory scheme,'" that is the end of the inquiry. *Id.* at 9-10 (citations omitted). Here, Congress clearly precluded the Federal Circuit from exercising appellate jurisdiction over an

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[2] That a federal district court has jurisdiction over a properly exhausted constitutional claim does not suggest that any particular constitutional claim has merit. For example, the government has argued in petitioner's district court case that removal from the SES and reassignment to a GS-15 position with the same pay does not constitute a taking of any property interest under the Due Process Clause. See Mem. of Law in Support of Defs.' Mot. to Dismiss Pl.'s Compl. at 17-21, *Esparraguera*, No. 21-cv-421 (July 2, 2021).

Order Referring Record like the one entered in petitioner's case, see pp. 13-16, *supra*, and there is no due process problem with permitting constitutional claims that have been administratively exhausted to proceed in district court.

Petitioner errs in asserting that "requiring an employee to file a separate lawsuit" in district court would violate due process because such a suit would not provide a "'prompt[]'" remedy. Pet. 30 (citations and emphasis omitted). As discussed, this Court has recognized that "channel[ing] judicial review of a constitutional claim to a particular court" does not raise constitutional concerns. *Elgin*, 567 U.S. at 9. Petitioner provides no evidence that district court litigation would proceed more slowly than Federal Circuit review. Nor does she provide any evidence that hypothetical district court proceedings in any given case would be slow enough to implicate any promptness requirements that the Due Process Clause might impose on federal courts.

Petitioner also suggests (Pet. 28-29) that, by construing Section 3592(a) to permit an informal hearing where an official designated by the Board gathers information without issuing a decision, the court of appeals read Section 3592(a) in a manner that violated her due process right to a post-removal hearing. But the court correctly determined that it lacked jurisdiction over that claim. See Pet. App. 12a, 19a-20a. And, because such a constitutional challenge to the Board's procedures, if colorable, may be brought in district court, see pp. 17-18, *supra*, there was no problem (due process or

otherwise) with the court of appeals declining to consider that challenge because it fell outside its jurisdiction. Contra Pet. 29.[3]

3. The court of appeals' decision does not conflict with any decision of this Court. In particular, the decision below is entirely consistent with this Court's decision in *Elgin*. In that case, this Court held that federal employees who were "in the 'competitive service'" and met the other requirements that "entitled" them to Board review of an adverse employment action *under Section 7701* could not bring in federal district court a constitutional challenge to a federal statute that resulted in their termination. *Elgin*, 567 U.S. at 5 (citation omitted); see *id.* at 6, 11-12. The Court found that any such claim must be brought as part of the Section 7701 proceedings—which are commenced in front of the Board and, if an employee takes an appeal, continue in the Federal Circuit. *Id.* at 16-21.

The Court in *Elgin* did not consider whether the Federal Circuit has jurisdiction to review a designated official's ministerial order referring the record compiled during an informal hearing under Section 3592(a). Nor does the decision in *Elgin* otherwise suggest that the court of appeals' resolution of the question presented is flawed. Rather, the Court in *Elgin* noted that "[t]he availability of administrative and judicial review

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[3] Petitioner does not appear to raise in this Court an independent due process challenge to the pre-removal process she received from the Army. See Pet. 27-28. But in any event, such a claim, which would seem to be an as-applied challenge to petitioner's particular treatment in this particular case, see Pet. 7-9, 27-28, would properly be brought in district court.

under the CSRA generally turns on the type of civil service employee and adverse employment action at issue." 567 U.S. at 12. The Court also highlighted that, in portions of the Act that were not at issue in *Elgin*, "the CSA's 'elaborate' framework demonstrates Congress' intent to entirely foreclose judicial review to employees to whom the CSRA denies statutory review." *Id.* at 11 (citation and emphasis omitted). The court of appeals correctly applied those principles and determined that, as to the small number of career senior executives who are removed from the SES for performance reasons, the Act precludes any review of the validity of the agency's action by the Board—and likewise precludes Federal Circuit review of the designated official's order referring the record.

Contrary to petitioner's suggestion (Pet. 17), *Elgin* did not broadly hold that, as long as the Board hosts any sort of proceeding regarding an adverse employment action, the Federal Circuit has appellate jurisdiction over all related constitutional claims. Rather, the Court in *Elgin* construed the nature and scope of appeals from the Board to the Federal Circuit in cases where claims could only be channeled through Section 7701. But the Board has the authority to review and reverse agency action in Section 7701 proceedings. In contrast, Section 3592(a) strips the Board of such authority in cases like petitioner's and generally prevents the Board from issuing a final order or decision that adversely affects or aggrieves an employee—which means the Federal Circuit does not have appellate jurisdiction over any claims brought by petitioner, even constitutional claims. See pp. 12-14, 18-19, *supra*.

4. Petitioner likewise identifies no conflict between the court of appeals' decision and the decision of any

other court of appeals. The court of appeals' decision was unanimous, and no judge noted a dissent from the denial of rehearing en banc. Pet. App. 26a-27a. And the government is not aware of a decision from *any* court or agency that conflicts with the decision below. To the contrary, the question presented has seldom arisen at all. Petitioner does not cite any prior judicial decision addressing the issue, and the government is aware of only one. See *Greenhouse* v. *Geren*, 574 F. Supp. 2d 57, 67 (D.D.C. 2008). A question that has arisen so infrequently does not warrant this Court's review.

Petitioner is wrong to assert that "this petition may present the Court's only reasonable opportunity to address the question presented." Pet. 34 (emphasis omitted). It is true that the court of appeals' decision is precedential, and therefore presumably will be followed by that court in future cases. But nothing in the decision below prevents another career senior executive from raising the question presented in that court and filing a petition for a writ of certiorari presenting the same question in this Court.

What is more, petitioner has filed a case in the United States District Court for the District of Columbia, challenging her removal from the SES on the basis of due process. See p. 12, *supra*. In the unlikely event that the court in that case finds that it lacks jurisdiction to consider constitutional claims arising out of a performance-based action taken against a career senior executive, petitioner can appeal that determination to the United States Court of Appeals for the District of Columbia Circuit—and, if necessary, petition for a writ of certiorari in this Court. Cf. *Kloeckner* v. *Solis*, 568 U.S. 41, 49 & n.3 (2012) (explaining that the Court had granted certiorari to review a conflict among the Federal Circuit

and the regional circuits over whether a particular type of Board decision was reviewable in district court or in the Federal Circuit).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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