No. 21-686

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

REPLY FOR PETITIONER

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REPLY FOR PETITIONER

The Civil Service Reform Act reflects the United States' commitment to "protect[ing] senior executives from arbitrary or capricious actions." 5 U.S.C. §3131(7). The government's brief betrays that commitment. It defies the CSRA's design of channeling review of federal personnel actions to the Merit Systems Protection Board and the Federal Circuit. And it is at war not only with statutory text, but also with fundamental due-process and fair-notice principles.

As Judge Moore recognized below—and the government never disputes—Maria Esparraguera was ousted from her career SES position through a "'secretive'" and "'outrageous'" process that denied any chance to defend herself. Pet. 11; see Pet. 7-9, 32-33. Under the CSRA, civil servants subjected to such mistreatment ordinarily would obtain review from the MSPB and Federal Circuit. See *Elgin* v. *Department of Treasury*, 567 U.S. 1, 10-15 (2012). Indeed, the CSRA guarantees career senior executives like Esparraguera an "informal hearing" before the MSPB. §3592(a). But the Federal Circuit held that was just for show: In the court's view, neither the MSPB nor the Federal Circuit can review career senior executive removals under §3592(a)—even for constitutional claims, and even if review is unavailable elsewhere.

The government fails to defend that decision. It never explains why, as a matter of plain meaning, §3592(a)'s "informal hearing" should be construed as an empty ritual that can afford no relief. Nor does it offer any textual basis for precluding Federal Circuit review following such hearings. Far from implementing the statute and this Court's *Elgin* decision, the government seeks to evade them. The government's effort to divert

senior executives to *district court*, followed by regional circuit review, is the "'wasteful and irrational'" scheme Congress *rejected* in the CSRA. *Elgin*, 567 U.S. at 14. And at least one circuit has held that theory constitutionally deficient—for reasons the government's actions in resisting Esparraguera's own district-court action confirm.

The question presented is vitally important to preserving a professional and nonpoliticized civil service. The decision below jeopardizes crucial protections for 7,000 career senior executives. It gives agencies a roadmap for removing disfavored employees without even pretending to follow mandated procedures. And it jettisons integrated CSRA review in favor of the scattershot district-court-and-regional-circuit review the CSRA and *Elgin* repudiate.

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

A. The Decision Below Conflicts with *Elgin*

The CSRA discarded an "'outdated patchwork'"—under which federal personnel-action challenges were litigated "in district courts around the country" and every regional circuit—in favor of an "integrated scheme of administrative and judicial review" in the MSPB and the Federal Circuit. *Elgin*, 567 U.S. at 13-14. *Elgin* thus held that, when the CSRA directs a federal employee to an MSPB proceeding, review *must* occur in the MSPB and the Federal Circuit. *Id.* at 10-15. As the government urged in *Elgin*, employees "should not be permitted to subvert the CSRA's careful design by sidestepping Federal Circuit review in favor of an unauthorized suit in district court." Brief for Respondents 16, in No. 11-45 ("Gov't *Elgin* Br.").

Here, the government concedes that the CSRA directs career senior executives removed under §3592(a)(2) to the MSPB for "an informal hearing before the Board." Opp. 4. Under *Elgin*, judicial review should follow in the Federal Circuit. But the *government* now seeks to sidestep Federal Circuit review in favor of lawsuits (and appeals) all over the country. Opp. 17-18, 22. The conflict with *Elgin* is inescapable. Pet. 13-19.

The government protests that *Elgin* did not involve removal of career senior executives under §3592(a)(2). Opp. 20-21. But *Elgin* broadly recognized that the "CSRA's objective of creating an integrated scheme of review"—channeling review through the MSPB and Federal Circuit—"would be seriously undermined" if employees were "to challenge employing agency actions in district courts across the country." 567 U.S. at 14. That logic does not depend on the specific CSRA provision that channels employees to the MSPB.

Congress knows how to depart from the CSRA's integrated scheme. Pet. 19 (describing exception for non-CSRA discrimination claims). Given the statute's clear preference for streamlined MSPB and Federal Circuit review, a litigant must carry a heavy burden to show that Congress has forsaken integrated review in favor of haphazard district-court actions. The government does not come close to meeting that burden.

B. The Government's Effort To Foreclose Federal Circuit Review Defies Text and Precedent

The government does not dispute the MSPB had jurisdiction over Esparraguera's case, at the very least to conduct the informal hearing. Opp. 4. Section 3592(a) gives the MSPB jurisdiction where a "career appointee" is "removed from the Senior Executive Service" for performance reasons. See Pet. 20-21. MSPB regulations

thus recognize "[t]he Board has original jurisdiction" in such cases. 5 C.F.R. §1201.121(a); accord §1201.2(b) (cited Opp. 4). Nor does the government contend that the scope of *Federal Circuit* review is limited to issues the MSPB can decide. *Elgin* is clear that 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; see Pet. 16-23; Gov't *Elgin* Br. 37 (discussing 5 U.S.C. §7703(c)).

1. The government instead seeks to preclude Federal Circuit review by urging that orders concluding informal hearings under §3592(a) are not "final order[s] or final decision[s] of the Merit Systems Protection Board." 28 U.S.C. §1295(a)(9); see 5 U.S.C. §7703(b)(1); Opp. 13-16. But it concedes those orders are "the Board's 'last word' and 'conclud[e]'" the MSPB proceedings. Opp. 16; see Pet. 22. They are MSPB "final orders."

The objection that such orders do not resolve claims "on the merits," Opp. 16, defies the statute and *Elgin*. Even assuming such orders cannot grant relief (but see Pet. 23-26), the statute requires only a "final order or final decision," 28 U.S.C. §1295(a)(9), not a final order or decision *on the merits*. *Elgin* recognized that, when the MSPB cannot "decide" certain claims on the merits, it will "create the necessary record" for Federal Circuit review. 567 U.S. at 21. In those cases—like here—the "final order" triggering Federal Circuit jurisdiction will "not 'end[ ] the litigation on the merits,'" Opp. 16, but tee up issues for Federal Circuit review. The petition made that point. Pet. 22-23. The government never responds.

The "final-judgment rule" for *district-court* appeals under 28 U.S.C. §1291, see Opp. 15-16, does not help the government. Section 1291 and its Federal Circuit counterpart, §1295(a)(1), are limited to district-court "final

decisions." Section 1295(a)(9) is broader, giving the Federal Circuit jurisdiction over *both* "final decision[s]" *and* "final order[s]" in MSPB cases. 28 U.S.C. § 1295(a)(9); accord 5 U.S.C. § 7703(b)(1); contrast 28 U.S.C. § 1295(a)(1)-(3), (5), (10) (appeal provisions limited to "final decision[s]"). That "'differing language'" must be given effect. *Russello* v. *United States*, 464 U.S. 16, 23 (1983). The Federal Circuit has jurisdiction over "final order[s]" that terminate MSPB proceedings even if they do not "deci[de]" anything.

The final-judgment rule, moreover, aims to avoid "piecemeal appeals" by ensuring lower-tribunal proceedings are complete before appeal. *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 374 (1981). Here, the Order concluding the informal hearing marked the end of *all* MSPB proceedings concerning Esparraguera's removal. That readily qualifies as an appealable "final order." It is likewise irrelevant that the Order here "refer[red] the matter to other government entities" (which did nothing in response). Opp. 16. Federal Circuit jurisdiction requires only a final order "of the Board," 5 U.S.C. § 7703(b)(1)—not some *other* agency.

The government cannot escape the CSRA's review scheme by urging that orders concluding informal hearings are not "'*of the Board*,'" but merely "entered by the 'official designated by' the Board." Opp. 13-14. The Order here says it was entered "FOR THE BOARD." Pet. App. 25a. The Federal Circuit recognized it is "a Board order." Pet. App. 2a. The government elsewhere describes the Order as "the Board's 'last word'" following "an informal hearing before the Board." Opp. 4, 16. And MSPB hearing officials like the ALJ here routinely enter final orders and decisions for the Board. Cf. § 7701(e)(1) (decision by hearing official "final" absent review by

three-member Board). The notion that an order representing the agency's final word is not an order "of the Board" is frivolous.[1]

2. The government's contention that employees cannot be "'adversely affected or aggrieved'" by an MSPB official's "failure to grant relief he had no authority to grant," Opp. 16 (quoting § 7703(a)(1)), likewise defies *Elgin*. That theory would foreclose judicial review whenever the MSPB lacks authority to decide constitutional claims—contrary to *Elgin*'s holding that judicial review *is* available in such cases. Pet. 22-23. The government offers no response.

The suggestion that Esparraguera is not aggrieved because she "acknowledged the limits of [the informal] hearing," Opp. 16, is baseless. Before the MSPB, Esparraguera acknowledged that MSPB *regulations* bar ALJs from deciding the legality of senior-executive removals—as the presiding ALJ repeatedly declared. C.A. App. 847; see C.A. App. 137, 762. Esparraguera objected that those restrictions rendered the MSPB's implementation of § 3592(a) unconstitutional. C.A. App. 853-857; see Pet. 10; Esparraguera C.A. Br. 47-58. The ALJ again ruled he could not issue a decision or grant relief. C.A. App. 858. Nothing more was needed to preserve Esparraguera's claims—or render her "adversely affected or aggrieved" once the ALJ's ruling ripened into the appealable final Order.

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[1] Even if § 3592(a) does not expressly provide for review by the three-member Board, Opp. 14 n.1, the Order was entered "FOR THE BOARD." Whether Board members can review such orders at most implicates Appointments Clause issues—not presented here—that do not affect whether an order is final for appeal purposes. Cf. *United States* v. *Arthrex, Inc.*, 141 S. Ct. 1970, 1987-1988 (2021).

The government's insistence on an order issued "*in a Section 7701 appeal* [to the MSPB]," Opp. 3 (emphasis added); see Opp. 13, 16, 20-21, again defies the statute. Federal Circuit jurisdiction is not limited to orders and decisions *issued in § 7701 appeals*—it extends to *any* "final order or final decision of the Board." 5 U.S.C. § 7703(b)(1); see 28 U.S.C. § 1295(a)(9). That includes final orders in cases, like this one, within the MSPB's "original" jurisdiction. See Pet. 21 n.6.

C. The Statute Gives the MSPB Authority To Grant Relief

The government's position also rests on the artifice that, although the CSRA affords career senior executives an "informal hearing" before an MSPB official, 5 U.S.C. § 3592(a), that hearing is a meaningless exercise that cannot provide relief. However, as the petition showed—and the government nowhere disputes—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); see Pet. 24. This Court likewise recognizes that post-removal "hearings" are proceedings before an adjudicator empowered to rectify error. See *Cleveland Bd. of Ed.* v. *Loudermill*, 470 U.S. 532, 546-547 (1985); Pet. 26-28. And "informal" simply means the hearing is "conducted in a more relaxed manner." Black's 1398. Section 3592(a)'s "informal hearing" is thus a (relaxed) proceeding before a *decisionmaker* who can remedy unlawful action. Pet. 23-26.

The government offers no competing textual analysis. It accuses Esparraguera of "fail[ing] to properly account for the entire phrase ('*informal* hearing')." Opp. 14. But Esparraguera explained why an *informal* hearing does not mean an *ineffectual* hearing. Pet. 24 (citing Black's).

It is the government that refuses to account for the text's plain meaning, citing no authority for its atextual view.

The government instead observes that career senior executives removed under § 3592(a)(2) cannot "initiate an action with the Board *under section 7701*." § 3592(a) (emphasis added); see Opp. 12-13, 14-15, 20-21. But just as the CSRA does not limit *Federal Circuit* review to § 7701 cases, see p. 7, *supra*, nothing limits *MSPB* review to § 7701 cases. To the contrary, the CSRA *authorizes* MSPB review outside § 7701, such as when agencies pursue personnel actions against ALJs. See § 7521(a); Pet. 25. That career senior executives removed for performance do not proceed "under section 7701" says nothing about their right to review under § 3592.

D. The Federal Circuit Rendered § 3592(a) Unconstitutional

Like other employees removable only for cause, career senior executives have a protected property interest in their appointments. Pet. 26-27 & n.9. Accordingly, they may be deprived of their appointments only if the government follows constitutionally adequate procedures—including a "prompt" post-removal hearing before a competent decisionmaker. *Gilbert* v. *Homar*, 520 U.S. 924, 935 (1997); see Pet. 27-28. The Federal Circuit nonetheless held that § 3592(a) *denies* career senior executives post-removal MSPB and Federal Circuit review—even for constitutional claims, and even if review is unavailable elsewhere. Pet. App. 20a. That renders the statute doubly unconstitutional: It *both* fails to provide the prompt review due process requires *and* denies any judicial forum for constitutional claims. Pet. 28-30.

Recognizing as much, the government promises that career senior executives *can* obtain review of constitutional claims by suing in district court. Opp. 17-18. That

patch—while inconsistent with *Elgin*—may avoid the problem of denying all review of constitutional claims. But at least one circuit has held that approach constitutionally inadequate, because it fails to meet the due-process-specific requirement of a *prompt* post-removal hearing. A standalone "lawsuit does not satisfy the requirement of promptness," the Seventh Circuit has held, "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). The petition invoked that case. Pet. 30. Yet the government ignores it, seeking to avoid review on a theory that conflicts with Seventh Circuit precedent.

Elgin did not hold there are no "constitutional concerns" with relegating employees to standalone lawsuits. Opp. 19. *Elgin* addressed only the problem of "'preclud[ing] all judicial review of a constitutional claim.'" 567 U.S. at 9. It did not address due process's promptness requirement—unsurprisingly, as it held employees' claims had to proceed through streamlined CSRA review and *not* cumbersome district-court litigation.

The government denies "district court litigation would proceed more slowly than Federal Circuit review." Opp. 19. That blinks reality. In *Elgin*, the government urged that "filing suit in district court was 'wasteful and irrational,' because it initiated two rounds of duplicative judicial review: the district court would review the agency's action, and then on appeal the court of appeals would conduct 'essentially the same review' all over again." Gov't *Elgin* Br. 27.

The government ignores its litigating position in Esparraguera's protective district-court action, see Pet. 30 n.10, which the government has *moved to dismiss* for

lack of jurisdiction. According to the government, career senior executives cannot sue in district court—even after a §3592(a) informal hearing—unless they also file a *separate* complaint with the Office of Special Counsel and OSC declines to pursue their claims. See Mem. in Support of Mot. To Dismiss 13-16, *Esparraguera* v. *Dep't of Army*, No. 1:21-cv-421-TJK (D.D.C. July 2, 2021) (ECF #18-1). The government cannot credibly contend that its approach—which would ping-pong employees from employing agencies, to the MSPB, to OSC, to district courts, to regional courts of appeals—offers anything like the CSRA's prompt, streamlined review.

II. This Is An Excellent Vehicle To Address An Important Question

The government does not dispute this case is an ideal vehicle. It identifies no obstacle to review and offers no reason why further percolation would aid consideration of the question presented. Because the question involves the Federal Circuit's exclusive jurisdiction over MSPB appeals, a circuit conflict is unlikely to arise.

The decision below jeopardizes civil-service protections for more than 7,000 career senior executives—the highest-ranking nonpolitical federal employees. Recognizing their importance to "honest, economical, and efficient Government," Congress mandated that career senior executives be protected "from arbitrary or capricious actions" by making them removable from the SES only for cause and only under specified procedures. 5 U.S.C. §3131(7), (10); see §3393(g); Pet. 2-4, 7-8, 31-33. The decision below eviscerates those protections.

Maria Esparraguera was a model senior executive—an "extraordinary" lawyer whose "superior leadership and exceptional legal counsel" "astound[ed]" the Deputy Judge Advocate General. C.A. App. 782; see Pet. 5, 32-33.

But the Department ousted her from the SES without even *pretending* to follow required procedures: It deliberately withheld the (unsubstantiated) OSC Report that supposedly justified her removal; convened a performance review board in secret; fed OSC's accusations to the PRB while hiding that the Department's own investigation found *no* prohibited personnel practice; never allowed Esparraguera to respond before her "Unsatisfactory" rating became final; and froze out supervisors who lauded her performance. Pet. 7-9 & n.4, 11, 32-33. Yet the Federal Circuit declared that neither it nor the MSPB could do anything about those blatant violations, simply because the Department incanted § 3592(a)(2).

By creating an enormous, unjustified loophole in civil-service protections, the decision below exposes *every single career senior executive* to the same danger of arbitrary and unlawful treatment. The government's success with its "'outrageous'" behavior here, Pet. 11, can only embolden future abuse. Those drastic consequences defeat any suggestion that the issue is niche or unimportant: It strikes at the heart of protections for thousands of civil servants.

The government understates the number of cases *directly* affected by the question presented. While the MSPB does not publicly disclose how many § 3592(a) informal hearings it conducts, the docket number of Esparraguera's case—No. CB-3592-18-0022—indicates *at least* 22 such hearings in 2018 alone. Pet. App. 22a. That figure would doubtless be far higher if MSPB regulations did not render the hearing an empty formality. Regardless, denying *dozens of the highest-ranking federal employees* meaningful review each year is reason enough for this Court's intervention.

Suing in district court is no answer. That is the approach the CSRA abandons. Dedicating themselves to public service, career senior executives must live on government wages. The expense and delay accompanying standalone suits will deter even meritorious claims. See also pp. 8-10, *supra*. And suing in district court is meaningless if—as in *Elgin*—district courts *lack jurisdiction* because the CSRA channels review through the MSPB and Federal Circuit. See Pet. 34-35. Only this Court can definitively resolve that question.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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