No. _____

In the Supreme Court of the United States

DAREN K. MARGOLIN, APPLICANT

v.

NATIONAL ASSOCIATION OF IMMIGRATION JUDGES

APPLICATION TO STAY THE MANDATE OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT AND REQUEST FOR AN ADMINISTRATIVE STAY

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PARTIES TO THE PROCEEDING

Applicant is Daren K. Margolin, in his official capacity as Director of the Executive Office for Immigration Review.* Applicant's predecessors in office were defendants or appellees below.

Respondent is the National Association of Immigration Judges, affiliated with the International Federation of Professional and Technical Engineers. Respondent was plaintiff-appellant below.

RELATED PROCEEDINGS

United States District Court (E.D. Va.):

National Association of Immigration Judges v. *Neal*,
No. 20-cv-731 (Sept. 21, 2023)

United States Court of Appeals (4th Cir.):

National Association of Immigration Judges v. *Owen*,
No. 23-2235 (June 3, 2025)

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* Director Margolin is substituted for his predecessor in office pursuant to Rule 35.3 of this Court.

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APPLICATION TO STAY THE MANDATE OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT AND REQUEST FOR AN ADMINISTRATIVE STAY

Pursuant to Rule 23 of the Rules of this Court and the All Writs Act, 28 U.S.C. 1651, the Solicitor General, on behalf of Daren K. Margolin, in his official capacity as Director of the Executive Office for Immigration Review, respectfully files this application to stay the mandate of the United States Court of Appeals for the Fourth Circuit pending the disposition of a timely petition for a writ of certiorari and any further proceedings in this Court. The Solicitor General also respectfully requests that the Court issue an administrative stay of the court of appeals' mandate before it issues on December 10, 2025, pending the Court's consideration of this application.

This is the rare case where the court of appeals' decision is so evidently contrary to this Court's precedents that it calls for summary reversal on two independent grounds. This Court should stay the court of appeals' mandate to ensure that developments on remand do not prevent this Court from correcting those manifest errors.

This case began as a textbook application of the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111, which creates a "comprehensive system for reviewing personnel action taken against federal employees," with investiga-

tions by the Office of Special Counsel, agency adjudications before the Merit Systems Protection Board (MSPB), and judicial review in the Federal Circuit. *Elgin* v. *Department of the Treasury*, 567 U.S. 1, 5 (2012) (quoting *United States v. Fausto*, 484 U.S. 439, 455 (1998)). The district court correctly held that the CSRA deprives it of jurisdiction and channels this suit to the MSPB because respondent is challenging a condition of federal employment: a 2021 policy governing what immigration judges can say publicly about matters concerning their official duties. On appeal, the government defended that straightforward proposition. For its part, respondent conceded that Congress's intent to channel claims "is manifest in the CSRA" and merely challenged the district court's conclusion that respondent's challenge was not of the sort Congress intended to channel. Resp. C.A. Br. 17.

The Fourth Circuit—acting sua sponte, and without notice to or input from the parties—took the case onto an entirely different track. Notwithstanding respondent's concession, the panel concluded that, because jurisdictional channeling is a question of "Congressional intent," a "new examination" of intent was needed "in light of changing circumstances around the MSPB and Special Counsel's removal protections." App., *infra*, 20a. The court therefore remanded for the district court to make "a factual record" assessing the CSRA's "functionality." *Id.* at 16a. The court denied rehearing en banc by a 9-6 vote, with one judge voting to deny rehearing on the ground that "only the Supreme Court can bring an effective halt" to the "seeds of real mischief" threatened by the panel's opinion. *Id.* at 39a (Wilkinson, J., concurring in denial of rehearing en banc). The panel opinion threatens to wreak havoc in every CSRA case within the Fourth Circuit—a widely available and popular venue for many challenges involving federal personnel—by requiring every district court to engage in putative fact-finding about the CSRA's "functionality" no matter how self-evident it

is from the statutory text that particular challenges fall within the CSRA's purview. This Court should stay the mandate with a view to summarily reversing the decision on two independent grounds.

First, the Fourth Circuit doubled down on the same error that prompted this Court to summarily reverse the Fourth Circuit last Monday without noted dissent: It "departed dramatically from the principle of party presentation." *Clark* v. *Sweeney*, 2025 WL 3260170 (Nov. 24, 2025) (per curiam). In *Sweeney*, the Fourth Circuit adopted a theory that no party had raised to grant habeas relief to a prisoner. Here, the Fourth Circuit outdid itself by sua sponte adopting an argument that respondent affirmatively *waived*: that even if the CSRA would ordinarily preclude district-court jurisdiction, that jurisdictional bar evaporates if the CSRA is not, as a "factual" matter, "function[ing] as Congress intended." App., *infra*, 16a, 19a. That serious "disregard" for "party presentation principles," *id.* at 49a (Quattlebaum, J., dissenting from denial of rehearing en banc), warranted summarily reversing the Fourth Circuit last week and warrants the same result here.

Second, the court of appeals "fail[ed] to adhere to Supreme Court precedent that is directly on point." App., *infra*, 49a (Quattlebaum, J., dissenting from denial of rehearing en banc). This Court has already held that the CSRA channels federal-employment claims to the MSPB. While the court of appeals thought that it could revisit that precedent based on recent factual developments, it is an elementary principle of interpretation that a statute's meaning is fixed at the time of enactment. "[U]nelected judges" do not get "to update the intent of unchanged congressional statutes if the court believes recent political events * * * alter the operation of a statute from the way Congress intended." *Ibid.* Further, the court of appeals' unheard-of approach to channeling risks "far-reaching implications" for all manner of jurisdic-

tional schemes, which may be textually unambiguous yet susceptible to concerns that those schemes too are purportedly not working as Congress intended. See *id.* at 68a.

The court of appeals' reasoning is manifestly erroneous. Yet its decision risks evading review because the court remanded for further fact-finding. If allowed to proceed, the remand threatens not only intrusive and needless discovery but could moot the current appeal. A win for the government on remand would arguably prevent the government from continuing to seek reversal of the panel opinion. While that would resolve *this* case, the court of appeals' novel jurisdictional rule apparently demands constant relitigation of the present-day "functionality" of the CSRA, App., *infra*, 16a, as well as every agency-review scheme that might be said to have been undermined by subsequent factual events. Indeed, other district courts are already tilting at that windmill, perversely preventing the CSRA from working as Congress actually intended and depriving the MSPB of matters that Congress reserved for its resolution in the first instance.

To mitigate those destabilizing effects, the Solicitor General commits to filing a petition for a writ of certiorari seeking summary reversal in the coming weeks, and well in advance of the February 18, 2026 deadline. But to protect this Court's jurisdiction from being overtaken by events in district court, the Court should stay the court of appeals' mandate pending the filing and disposition of that petition and grant an administrative stay before the mandate issues. Only this Court can halt the ongoing and rapidly spreading uncertainty for countless cases.

STATEMENT

A. Legal Background

1. Before 1978, federal employees could challenge agency actions regarding their employment in district courts nationwide under various statutes and regula-

tions. *Elgin* v. *Department of the Treasury*, 567 U.S. 1, 13-14 (2012). But that "'outdated patchwork'" produced "'wide variations'" in outcomes and a "'wasteful and irrational'" "double layer of judicial review." *Ibid.* (quoting *United States v. Fausto*, 484 U.S. 439, 444-445 (1998)). Congress therefore enacted the CSRA to "establish[] a comprehensive system for reviewing personnel action taken against federal employees." *Id.* at 5 (quoting *Fausto*, 484 U.S. at 455).

The CSRA sets out its review process in "painstaking detail." *Elgin*, 567 U.S. at 11-12. Chapter 23 of the CSRA, 5 U.S.C. 2301 *et seq.*, identifies various "prohibited personnel practice[s]," including a "significant change in duties, responsibilities, or working conditions" in violation of a "law, rule, or regulation implementing, or directly concerning, the merit system principles." 5 U.S.C. 2302(a)(1), (a)(2)(xii), and (b)(12). The merit-system principles include giving all employees "fair and equitable treatment * * * with proper regard for their privacy and constitutional rights." 5 U.S.C. 2301(b)(2). Lower courts have interpreted that language to authorize claims that a personnel action was taken in violation of the Constitution. *E.g.*, *Weaver* v. *U.S. Information Agency*, 87 F.3d 1429, 1432 (D.C. Cir. 1996).

A federal employee who alleges that he has experienced a prohibited personnel practice may file a complaint with the Office of the Special Counsel. 5 U.S.C. 1214(a)(1)(A). The Special Counsel is required to "investigate the allegation to the extent necessary to determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken which requires corrective action." *Ibid.* If the Special Counsel concludes that there are such grounds, he "shall report the determination together with any findings or recommendations" to, *inter alia*, the MSPB and the employing agency. 5 U.S.C. 1214(b)(2)(B). If the agency fails to correct the personnel practice, the Special Counsel may petition the

MSPB for an order directing the agency to take corrective action. 5 U.S.C. 1214(b)(2)(C). Employees who bring certain whistleblower or retaliation claims may also petition the MSPB directly. 5 U.S.C. 1214(a)(3), 1221(a).

Separately, Chapter 75 of the CSRA, 5 U.S.C. 7511 *et seq.*, covers more serious adverse actions like removal or a suspension over 14 days. 5 U.S.C. 7512. For those actions, the agency must provide an internal grievance process with written notice and an opportunity to respond. 5 U.S.C. 7513(b). Employees may then appeal directly to the MSPB without going through the Special Counsel. 5 U.S.C. 7513(d). Under both Chapters 23 and 75, an employee may obtain judicial review of an adverse MSPB decision exclusively in the United States Court of Appeals for the Federal Circuit, with narrow exceptions for certain claims not at issue here. 5 U.S.C. 1214(c), 7703(b)(1)(A); 28 U.SC. 1295(a)(9).

2. Given that "'elaborate' framework," *Elgin*, 567 U.S. at 11 (quoting *Fausto*, 484 U.S. at 443), this Court has repeatedly held that the CSRA precludes other courts' jurisdiction over claims falling within the CSRA's purview.

In *Fausto*, this Court held that the CSRA precluded the Claims Court's jurisdiction over a backpay suit even though the federal employee in question was excepted from the competitive service and lacked the right to appeal an adverse personnel action to the MSPB. 484 U.S. at 442-443, 455. Looking to the "statutory language" and "structure," the Court held that the exclusion of some employees (including the *Fausto* respondent) from the CSRA reflected "a considered congressional judgment that they should not have statutory entitlement to review for adverse action of the type governed by" the statute. *Id.* at 448-449. That scheme enables "a unitary and consistent Executive Branch position on matters involving personnel action," "avoids an 'unnecessary layer of judicial review' in lower federal courts," and pro-

motes "more consistent judicial decisions." *Id.* at 449 (citation omitted).

In *Elgin*, this Court reaffirmed *Fausto*, applying the framework for jurisdictional channeling from *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200 (1994). That framework asks first whether Congress's intent "to preclude initial judicial review" "is 'fairly discernible in the statutory scheme'" and second whether the claims brought are "of the type Congress intended to be reviewed within this statutory scheme." *Id.* at 207, 212 (citation omitted). *Elgin* first held that "the CSRA provides the exclusive avenue to judicial review when a qualifying employee challenges an adverse employment action," even when the employee alleges "that a federal statute is unconstitutional." 567 U.S. at 5. Since the CSRA "entirely foreclose[s] judicial review [for] employees to whom the CSRA *denies* statutory review," "employees to whom the CSRA *grants* administrative and judicial review" cannot bypass the CSRA. *Id.* at 11. *Elgin* then held that the employees' claims were of the type that Congress intended to channel to the MSPB. *Id.* at 15-23. "[T]he MSPB routinely adjudicates some constitutional claims," and the employees were challenging a "CSRA-covered employment action" at the heartland of the MSPB's jurisdiction. *Id.* at 12, 22.

B. Factual And Procedural History

1. The Executive Office for Immigration Review (EOIR) is the part of the Department of Justice to which the Attorney General has delegated the authority to adjudicate immigration proceedings. See 8 C.F.R. 1003.0(a) and (b). EOIR employs immigration judges nationwide to determine whether aliens charged with violating immigration law should be ordered removed from the United States. See 8 U.S.C. 1101(b)(4). Immigration judges are subject to broad ethical restrictions to avoid the appearance of bias and to preserve an image of impartiality. See 5 U.S.C. 7321-7326; 5 C.F.R. Pts. 2635 and 3801. Among those is a requirement that immigration judges

seek prior supervisory and ethics approval for written work and speeches. EOIR first formalized that policy in September 2017. C.A. App. 41-45.

In October 2021, EOIR issued the speaking-engagement policy at issue here, which remains in effect. C.A. App. 56-62. The 2021 policy explains that "speaking engagements directly related to the employee's official duties provide the public with the impression that the speech has the imprimatur of the agency, and therefore, require close coordination with the employee's supervisor." *Id.* at 57. The 2021 policy therefore requires immigration judges speaking about "subject matter that directly relates to their official duties" to obtain supervisor approval. *Ibid.* "Supervisors are encouraged to grant appropriate requests." *Ibid.* At the same time, the 2021 policy does not require supervisor approval when immigration judges "speak in a personal capacity about those parts of their lives that do not relate to their job." *Ibid.*

2. Respondent was the labor union representing immigration judges until its decertification in 2022 but is now a "voluntary association of immigration judges." App., *infra*, 69a & n.1. In 2020, respondent sued EOIR's director in the United States District Court for the Eastern District of Virginia, alleging that earlier iterations of the speaking-engagement policy violated the First Amendment and were void for vagueness. Compl. ¶¶ 55-58 (July 1, 2020). Following a remand from an earlier appeal, respondent filed the operative second amended complaint in January 2023, which challenges the 2021 policy on the same grounds. App., *infra*, 69a, 80a. Respondent did not seek preliminary relief as to that policy.

The government moved to dismiss, including on the ground that the CSRA precludes district-court jurisdiction over respondent's claims. App., *infra*, 81a. In opposition, respondent recognized that the threshold question in any jurisdictional preclusion case is "whether Congress's intent to preclude district-court jurisdiction is

fairly discernible in the statutory scheme." D. Ct. Doc. 72, at 22 (Feb. 15, 2023) (citation and internal quotation marks omitted). Here, respondent conceded, "[t]he Supreme Court has already held that such intent is manifest in the CSRA," so "only the second step of the *Thunder Basin* inquiry is at issue." *Ibid.*; see *id.* at 2 ("[T]he CSRA channels judicial review of challenges to covered employment actions."). At that second step, respondent argued that its claims were not of the type that Congress channeled via the CSRA. See *id.* at 22-30.

Consistent with respondent's concession, the district court recognized that "the United States Supreme Court has concluded that it is fairly discernable from the CSRA's scheme that Congress intended to preclude district-court jurisdiction over certain covered actions by covered federal employees." App., *infra*, 92a (citing *Elgin*, 567 U.S. at 11-12). The court then held that respondent's claims fell within that scheme. *Id.* at 92a-112a.

3. In June 2025, the court of appeals vacated and remanded for further proceedings. App., *infra*, 1a-32a. On appeal, respondent again did "no[t] dispute that the CSRA provides the exclusive avenue for review of certain employment-related claims." Resp. C.A. Br. 13. And respondent reiterated its concession that "[t]he Supreme Court has already held that" "'Congress's intent to preclude district court jurisdiction'" "is manifest in the CSRA." *Id.* at 17 (citation omitted). As it had in district court, respondent argued only that its claims fell outside the CSRA. See *id.* at 16-34.

The court of appeals rejected respondent's sole argument that its claims were not of the type that Congress intended to channel via the CSRA. App., *infra*, 20a-31a. As the court explained, respondent alleged "a significant change in working conditions," which is a personnel practice in the heartland of the MSPB's jurisdiction. *Id.* at 24a. That claim could receive "meaningful judicial review" on appeal from the

MSPB to the Federal Circuit. *Id.* at 27a. It was "not wholly collateral to the CSRA scheme." *Id.* at 30a. And the MSPB had relevant expertise on "agency speech policies." *Id.* at 31a. Accordingly, the court recognized that "Congress designed the CSRA to divest district courts of jurisdiction to review legal challenges like those raised by [respondent]." *Ibid.*

Rather than stop there, the court of appeals then reassessed—sua sponte and without supplemental briefing or reargument—whether Congress intended the CSRA to strip district-court jurisdiction generally. App., *infra*, 12a-20a. The court acknowledged that, given this Court's decisions in *Fausto* and *Elgin*, "[i]t has been well-established that Congress's intent for the CSRA to preclude district court jurisdiction is 'fairly discernible in the statutory scheme.'" *Id.* at 14a (quoting *Elgin*, 567 U.S. at 17). But the court stated that post-oral argument developments had "called into question" whether the CSRA was functioning as Congress intended. *Id.* at 15a.

Specifically, the court noted that, after oral argument, the President had removed a member of the MSPB, so the MSPB lacked a quorum on the date the opinion was issued. App., *infra*, 16a.* And the court noted that the CSRA's legislative history describe the MSPB and Special Counsel as "*strong and independent*," *ibid.* (quoting S. Rep. No. 969, 95th Cong., 2d Sess. 7 (1978)), but the government has taken the position that the Special Counsel's and MSPB members' statutory removal protections are unconstitutional, *id.* at 19a; see *Trump* v. *Wilcox*, 145 S. Ct. 1415 (2025); *Bessent* v. *Dellinger*, 145 S. Ct. 515 (2025). Those "changing circumstances," the court

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* The panel opinion incorrectly states that the President removed two members of the MSPB. App., *infra*, 16a. One member was removed; one member retired upon the conclusion of his term. See MSPB, *Member Raymond A. Limon Retiring* (Feb. 28, 2025), https://perma.cc/5TTX-MF9V; see Resp. to Pet. for Reh'g 5 n.1 (acknowledging that only one member was terminated). The MSPB regained a quorum on October 28, 2025, when the retiring member was replaced. MSPB, *Board Members*, https://perma.cc/GU8L-A4YK (last visited Dec. 4, 2025).

opined, may warrant "a new examination of Congressional intent." App., *infra*, 20a.

The court of appeals therefore remanded for "the district court to conduct a factual inquiry whether the CSRA continues to provide a functional adjudicatory scheme." App., *infra*, 20a. Although no party had raised that argument, the court of appeals refused to "allow our black robes to insulate us from taking notice of items in the public record, including, relevant here, circumstances that may have undermined the functioning of the CSRA's adjudicatory scheme." *Id.* at 41a.

4. The court of appeals denied the government's petition for rehearing en banc by a 9-6 vote. App., *infra*, 33a-34a.

Judges Wilkinson, King, and Thacker each concurred in the denial of rehearing. App., *infra*, 34a. Judge Wilkinson explained that he did "not agree with the panel opinion," which would "vest the judiciary with a general supervisory authority over both the legislative and executive branch." *Id.* at 39a-40a. But in his view, "only the Supreme Court can bring an effective halt" to those "seeds of real mischief." *Id.* at 39a. En banc review, Judge Wilkinson contended, "can have deleterious consequences" by "[s]hielding significant cases from the Supreme Court for prolonged periods." *Id.* at 37a. Judges King and Thacker, by contrast, stated that they agreed with the panel opinion and wrote separately to respond to Judge Wilkinson's views regarding the appropriate standard for rehearing en banc. *Id.* at 41a-47a.

Judge Quattlebaum, joined by Judges Agee, Richardson, and Rushing, dissented. App., *infra*, 48a-68a. He explained that this Court has already held—"emphatically and directly—that district courts lack jurisdiction over claims like the ones" here. *Id.* at 48a. The panel had no license to "set aside Supreme Court precedent" and "reimagine congressional intent" if "recent political events" "decades after a statute's passage suggest it is not functioning as originally intended." *Id.* at 49a.

That approach, Judge Quattlebaum noted, risked profound "instability" as the CSRA's exclusive review scheme could switch on or off based on "judges' views on political whims of the most recent administration." *Id.* at 65a. And while he would have found the panel's "dramatic ruling" "dubious under any circumstances," "to issue such an opinion without any party raising those issues and without ordering any supplemental briefing magnifies the mistake." *Id.* at 56a. Although the panel had remanded for fact-finding by the district court, that could not "justif[y] its departure from party presentation principles" since the panel's "new functioning-as-intended test" would govern the remand proceedings. *Id.* at 67a-68a.

Chief Judge Diaz and Judge Niemeyer also voted to grant rehearing en banc without authoring or joining a dissent. App., *infra*, 33a-34a.

The government moved to stay the mandate pending the filing and disposition of a timely petition for a writ of certiorari and filed a notice of supplemental authority raising this Court's summary reversal in *Clark* v. *Sweeney*, 2025 WL 3260170 (Nov. 24, 2025) (per curiam). See 12/1/2025 Letter. On December 3, 2025, the panel denied the requested stay. App., *infra*, 114a. Absent action by this Court, the mandate will issue on December 10, 2025. See Fed. R. App. P. 41(b).

ARGUMENT

This Court may grant a stay of the mandate pending a petition for a writ of certiorari when there is "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth* v. *Perry*, 558 U.S. 183, 190 (2010) (per curiam). In "close cases," the Court will "balance the equities and weigh the relative harms to the applicant and to the respondent." *Ibid.*

Those factors favor a stay of the mandate here. The decision below contravenes the party-presentation principle with "far-reaching implications" for federal-personnel actions. App., *infra*, 68a (Quattlebaum, J., dissenting from denial of rehearing en banc). Just last week, this Court summarily reversed the Fourth Circuit for a similar departure from the party-presentation principle. *Clark* v. *Sweeney* (*Sweeney II*), 2025 WL 3260170 (Nov. 24, 2025) (per curiam). And here, the Fourth Circuit compounded the error by defying this Court's decisions regarding CSRA preclusion. The court of appeals' destabilizing decision, however, risks evading this Court's review if the remand is allowed to proceed. A stay of the mandate is warranted to protect this Court's jurisdiction, avoid potentially burdensome and inappropriate remand proceedings, and prevent confusion over federal courts' jurisdiction while this case plays out.

I. THIS COURT IS REASONABLY LIKELY TO GRANT CERTIORARI WITH A FAIR PROSPECT OF REVERSAL

A. The Court Of Appeals' Decision Disregards The Party-Presentation Principle

As the en banc dissenters explained, the panel's decision "shirk[ed] party presentation principles" by reaching out to decide a question that respondent not only did not raise, but affirmatively conceded. App., *infra*, 68a. As this Court's unanimous summary reversal of the Fourth Circuit just last week for the same error illustrates, this Court is reasonably likely to grant certiorari and reverse the Fourth Circuit's "dramatic[]" "depart[ure]" "from the principle of party presentation." *Sweeney II*, 2025 WL 3260170, at *1. A stay of the mandate is therefore appropriate.

1. Our legal system "is designed around the premise that [parties represented by competent counsel] know what is best for them, and are responsible for advancing the facts and argument entitling them to relief." *United States* v. *Sineneng-Smith*, 590 U.S. 371, 375-376 (2020) (quoting *Castro* v. *United States*, 540

U.S. 375, 386 (2003) (Scalia, J., concurring in part and concurring in the judgment)) (brackets in original). A court should therefore ordinarily "rely on the parties to frame the issues for decision" with the court serving as "neutral arbiter of matters the parties present." *Id.* at 375 (quoting *Greenlaw* v. *United States*, 554 U.S. 237, 243 (2008)).

In *Sineneng-Smith*, this Court vacated a Ninth Circuit decision that "departed so drastically from the principle of party presentation as to constitute an abuse of discretion." 590 U.S. at 375. There, a criminal defendant had challenged her conviction on the ground that the statute did not apply to her conduct and, if it did, it violated the First Amendment as applied. *Id.* at 374. But the court of appeals moved the case "onto a different track," "nam[ing] three *amici* and invit[ing] them to brief and argue issues framed by the panel," including whether the statute was facially unconstitutional. *Ibid.* The court assigned the parties "a secondary role," permitting them to file supplemental briefs and participate in oral argument, but ultimately holding the statute facially unconstitutional. *Id.* at 375. That "takeover of the appeal," this Court held, was impermissible. *Id.* at 379. Although courts are "not hidebound by the precise arguments of counsel," "the Ninth Circuit's radical transformation of th[e] case [went] well beyond the pale." *Id.* at 380.

When the Fourth Circuit disregarded those principles recently and "departed dramatically from the principle of party presentation," this Court deemed summary reversal appropriate. *Sweeney II*, 2025 WL 3260170, at *1. In *Sweeney*, a state prisoner alleged that his counsel was constitutionally ineffective in failing to voir dire the jury after one juror revealed that he had visited the crime scene. *Ibid.* A divided Fourth Circuit panel—over Judge Quattlebaum's dissent—granted a new trial on the alternative theory that "the judge's own shortcomings" had "exacerbated" counsel's failures. *Sweeney* v. *Graham* (*Sweeney I*), 2025 WL 800452, at *8 (Mar. 13, 2025). By

"granting relief on a claim that [the prisoner] never asserted and the State never had the chance to address," the Fourth Circuit clearly "transgressed the party-presentation principle." *Sweeney II*, 2025 WL 3260170, at *2.

2. The Fourth Circuit's transformation of this case exceeds the judicial self-help that this Court rebuked in *Sineneng-Smith* and *Sweeney*. In those cases, the court took "a turn at bat," *Sweeney II*, 2025 WL 3260170, at *1—granting relief to an appellant on a novel legal theory that the appellant had not advanced. Here, the court of appeals did one better, adopting a legal theory that respondent affirmatively *waived*. In both district court and before the panel, respondent expressly conceded that this Court's decisions holding that the CSRA precludes district-court jurisdiction controlled such that "only the second step of the *Thunder Basin* inquiry" (*i.e.*, whether the CSRA precludes *these* claims) "is at issue here." Resp. C.A. Br. 17; D. Ct. Doc. 72, at 22. Yet the panel took it upon itself to revisit a point that the parties were not disputing. App., *infra*, 12a.

The panel also *rejected* the argument that respondent actually made: that its claims fell outside the CSRA. App., *infra*, 20a-31a. In *Sineneng-Smith*, by contrast, the court of appeals did not address the as-applied argument pressed by the defendant. See 590 U.S. at 374. And in *Sweeney*, the court of appeals agreed with the prisoner that his counsel had rendered ineffective assistance but granted relief only because of additional errors by the trial judge. *Sweeney I*, 2025 WL 800452, at *8, *14. Here, by granting relief only after concluding that respondent's actual argument failed, the court of appeals confirmed that its intervention made all the difference.

Moreover, the court of appeals did not give the parties an opportunity to respond to its novel theory. The court sua sponte took "judicial notice" of post-oral argument developments that led it to have "serious questions as to whether the CSRA's

adjudicatory scheme continues to function as intended." App., *infra*, 15a-16a. In *Sineneng-Smith*, by contrast, the panel permitted the parties to file supplemental briefs and participate in oral argument where the appellant could confirm that she agreed with the panel's proposed course. 590 U.S. at 379. The panel here wrested the case even more wholly out of the parties' hands.

3. In opposing rehearing en banc, respondent disputed that the panel had "'radical[ly] transform[ed]'" the appeal, arguing that respondent had "maintained all along that the *Thunder Basin* framework is not satisfied" and the panel merely resolved the case by questioning whether the CSRA precludes *any* suits rather than just respondent's. Resp. to Pet. for Reh'g 12. But at that level of generality, the decisions that this Court repudiated in *Sineneng-Smith* and *Sweeney* would have equally comported with party presentation. The defendant in *Sineneng-Smith* argued all along that her conviction violated the First Amendment; the court of appeals just held that the violation was a facial one instead of as applied. See 590 U.S. at 374-375. And in *Sweeney*, the prisoner argued all along that his trial was marred by a juror's unauthorized crime-scene visit; the court just attributed those failures to the trial judge, not only defense counsel. *Sweeney I*, 2025 WL 800452, at *8. This Court reversed those decisions because courts may not enter the fray of advocacy by crafting their own arguments, even if they bear some high-level resemblance to the parties'.

At the en banc stage, respondent also claimed that "the only reason [it] did not press the theory raised by the panel is because the factual developments relied upon by the panel post-dated briefing and oral argument." Resp. to Pet. for Reh'g 12-13. But if respondent thought those developments were relevant, it was free to bring them to the panel's attention. See Fed. R. App. P. 28(j). Respondent presumably did not for the reason stated in its brief: "The Supreme Court has already held that"

"'Congress's intent to preclude district court jurisdiction'" "is manifest in the CSRA." Resp. C.A. Br. 17. Intervening factual developments do not change the meaning of a statute or permit a court of appeals to disregard binding Supreme Court precedent.

Respondent also asserted that CSRA channeling goes to subject-matter jurisdiction, and courts must consider jurisdictional questions sua sponte. Resp. to Mot. to Stay Mandate 7-8. But that confuses arguments that a court lacks jurisdiction with arguments that a court *has* jurisdiction. Courts, of course, "have an independent obligation to determine whether subject-matter jurisdiction exists." *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500, 514 (2006). And a party cannot forfeit or waive a "jurisdictional *defect*." *Hamer* v. *Neighborhood Housing Servs. of Chi.*, 583 U.S. 17, 20 (2017) (emphasis added). But "arguments *for* jurisdiction are not exempt from principles of party presentation and forfeiture." *Monsalvo Velázquez* v. *Bondi*, 604 U.S. 712, 743 (2025) (Thomas, J., dissenting) (emphasis added); *e.g.*, *TransUnion LLC* v. *Ramirez*, 594 U.S. 413, 434 n.6 (2021) (deeming theory of Article III standing forfeited). The panel was not free to *expand* the district court's jurisdiction on a theory that respondent had disavowed.

Respondent also claimed below that the government "waived its party presentation argument." Resp. to Mot. to Stay Mandate 6. That is plainly incorrect. In its petition for rehearing en banc, the government explained (at 17) that "[t]he panel's analysis is * * * not based upon the arguments of the parties or the facts in the record" and thus "contravenes the party presentation principle." In its stay motion, the government (at 6) reiterated that this Court's precedent "was sufficiently clear that [respondent] did not even contest the issue." And after this Court's decision in *Sweeney*, the government filed a notice of supplemental authority highlighting the panel's similar "deviation from the party-presentation principle" and urging that the

panel decision be withdrawn or stayed on that basis. 12/1/2025 Letter 2. The party-presentation argument is amply preserved for this Court's review.

B. The Court Of Appeals' Decision Contravenes Controlling Supreme Court Precedent Regarding CSRA Preclusion

1. A stay of the mandate is also appropriate because this Court is reasonably likely to grant certiorari and reverse the court of appeals' failure to follow on-point Supreme Court precedent. *Elgin* squarely holds that "those employees to whom the CSRA *grants* administrative and judicial review" may not seek "extrastatutory review" outside the CSRA. *Elgin*, 567 U.S. at 11. That channeling scheme applies to "claims that an agency took adverse employment action in violation of an employee's First * * * Amendment rights," *id.* at 12—respondent's central claim here.

That should have been the end of the inquiry as to whether the CSRA precludes review in district court. The court of appeals recognized that respondent alleges a "prohibited personnel practice" covered by Chapter 23 of the CSRA. App., *infra*, 23a. And the court acknowledged this Court's precedent holding that Congress "intended covered employees appealing covered agency actions to proceed exclusively through the statutory review scheme." *Id.* at 14a; see pp. 6-7, *supra*. Because respondent is bringing a CSRA-covered claim on behalf of CSRA-covered employees, the CSRA precludes the district court's jurisdiction over this suit.

The court of appeals read this Court's cases to preclude jurisdiction only when the CSRA "functions as Congress intended," while leaving open what happens when the MSPB and Special Counsel are not functioning "adequately and efficiently." App., *infra*, 14a-15a. Nothing in this Court's precedents supports that ad hoc exception. *Elgin* categorically states that "covered employees appealing covered agency actions" must "proceed exclusively through the statutory review scheme." 567 U.S. at 10. The

Court thus rejected an "exception" for constitutional challenges to federal statutes because "[t]he availability of administrative and judicial review under the CSRA generally turns on the type of civil service employee and adverse employment action at issue," not whether the employee is bringing a constitutional challenge to a federal statute. *Id.* at 12. Likewise, nothing in the CSRA's text or structure supports an evolving exception based on whether the MSPB is operating "adequately and efficiently." App., *infra*, 15a. Like any other covered employees challenging covered employment actions, respondent's members must "proceed exclusively through the statutory review scheme." *Elgin*, 567 U.S. at 10.

Even if the court of appeals thought that intervening factual developments cast doubt on *Elgin* and *Fausto*, its disregard of those precedents was improper. The "prerogative" to overrule one of this Court's precedents belongs to this Court "alone." *State Oil Co.* v. *Khan*, 522 U.S. 3, 20 (1997). A court of appeals cannot disregard "Supreme Court precedent that is directly on point" just by questioning its vitality. App., *infra*, 49a (Quattlebaum, J., dissenting from denial of rehearing en banc).

2. Even on its own terms, the court of appeals' analysis is untenable. The court framed the inquiry as a search for "Congressional Intent" and tautologically opined that it "would defeat congressional intent" if the MSPB and Special Counsel did not "function[] as Congress intended." App., *infra*, 13a, 15a. But the meaning of a statute "is fixed at the time of enactment." *Wisconsin Cent. Ltd* v. *United States*, 585 U.S. 274, 284 (2018). *Fausto* thus recognized the CSRA's preclusive effect based on "the statutory language" and "the structure of the statutory scheme." 484 U.S. at 449. And *Elgin* likewise "examine[d] the CSRA's text, structure, and purpose." 567 U.S. at 10. Those fixed sources of meaning do not "allow[] unelected judges to update the intent of unchanged congressional statutes" based on later "political events."

App., *infra*, 49a (Quattlebaum, J., dissenting from denial of rehearing en banc).

The fact that the CSRA might operate differently today than Congress envisioned in 1978 cannot alter its preclusive effect. This Court rejected an analogous argument in *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44 (1996). There, the Court held that Congress's "intricate" scheme for enforcing the Indian Gaming Regulatory Act against States precludes plaintiffs from enforcing those same requirements against state officers under *Ex parte Young*, 209 U.S. 123 (1903). 517 U.S. at 74. This Court reached that conclusion, however, only after holding unconstitutional the statutory provision authorizing suit against the State itself. *Id.* at 75-76. In other words, the statutory remedy did not function at all. Despite that infirmity, this Court did not feel free to "rewrite the statutory scheme in order to approximate what we think Congress might have wanted had it known that [the statute] was beyond its authority." *Id.* at 76. If the wholesale invalidation of a remedial scheme does not alter its preclusive effect, the panel's qualified concerns about the MSPB's and Special Counsel's independence and efficiency a fortiori cannot alter the CSRA's preclusive effect. As in *Seminole Tribe*, the correction of any perceived flaw in the CSRA's operation needs to "be made by Congress, and not by the federal courts." *Ibid.*

The court of appeals' reasoning effectively repackages the question whether the MSPB's and Special Counsel's removal protections are severable from the rest of the CSRA as a factual question about the CSRA's functionality. But "severability presents a pure question of law." *Seila Law LLC* v. *CFPB*, 591 U.S. 197, 234 (2020) (plurality opinion). And this Court has repeatedly held that an agency head's unconstitutional removal protection does not invalidate an entire statutory scheme. *E.g.*, *id.* at 236-237; *Free Enter. Fund* v. *PCAOB*, 561 U.S. 477, 508 (2010). The court of appeals identified no basis for a different result here.

3. The court of appeals' newly minted test for CSRA preclusion is unworkable and will sow considerable "instability." App., *infra*, 65a (Quattlebaum, J., dissenting from denial of rehearing en banc). Courts have no way to "divine what Congress would or would not have done differently had it known about the political environment today." *Ibid.* The court of appeals' proposed inquiry into whether the CSRA is operating "as Congress intended," *id.* at 15a (panel opinion), boils down to nothing more than "judges' views on political whims of the most recent administration." *Id.* at 65a (Quattlebaum, J., dissenting from denial of rehearing en banc).

The sheer amorphousness and novelty of the court of appeals' functioning-as-intended test compounds its mischief. The court remanded for the district court to develop "a factual record" about "the functionality of the CSRA's adjudicatory scheme," but said nothing about what facts might bear on the CSRA's "functionality." App., *infra*, 16a. Instead, the court of appeals took "judicial notice" of developments that it thought "raise[d] serious questions" as to the CSRA's operation. *Id.* at 15a-16a. First, the government has taken the position in separate litigation that the Special Counsel and MSPB members may be removed by the President at will. *Id.* at 15a. And second, at the time of the panel's opinion, the MSPB lacked a quorum, *ibid.*—a development that disappeared before the court denied rehearing en banc, by which point the MSPB had regained a quorum, see p. 10 n.*, *supra*.

Neither of those developments requires further fact-finding. This Court has already held that the government is likely to show that MSPB members are removable at will, *Trump* v. *Wilcox*, 145 S. Ct. 1415 (2025), and is poised to address that question in the analogous context of the Federal Trade Commission this Term, *Trump* v. *Slaughter*, No. 25-332 (oral argument scheduled Dec. 8, 2025). And whether the MSPB currently has a quorum (it does) does not require an evidentiary hearing. The

court of appeals' apparent belief that some additional, unspecified facts might shed light on how the circa-1978 Congress would have viewed the MSPB's operations today only underscores the baseless and unworkable nature of that inquiry.

Such uncertainty has disruptive consequences. If the CSRA's preclusive effect is a question of fact, every district court reviewing a claim that should be covered by the CSRA would need to evaluate the CSRA's present "functionality" for itself. That answer could change over the course of litigation, with district-court jurisdiction toggling on or off based on courts' individualized assessments of the CSRA's operations. Consider just the MSPB's quorum requirement: The MSPB lacked a quorum between January 7, 2017, and March 3, 2022; between March 28 and April 7, 2025; and between April 9 and October 28, 2025. See MSPB, *Frequently Asked Questions About the Lack of Quorum Period and Restoration of the Full Board* (Nov. 14, 2025), https://perma.cc/KWG5-AVYX. If the absence of a quorum means that the CSRA is not "function[ing] as intended," App., *infra*, 16a, that would suggest that this lawsuit was properly filed in district court in 2020; should have been dismissed in favor of the MSPB in 2022 following the restoration of a quorum; could have returned to district court when the MSPB lost its quorum on March 28, 2025; needed to be dismissed again for two days in April when the MSPB briefly regained a quorum; might have returned to district court when the quorum was broken on April 9; and should presently be dismissed after the quorum was restored on October 28. Congress surely did not intend for the CSRA to permit suits to blink in and out of existence that way.

Notably, despite the five-year period when the MSPB lacked a quorum between 2017 and 2022, no court has endorsed the Fourth Circuit's functionalist approach to jurisdiction or treated this Court's precedents in *Fausto* and *Elgin* as optional. Instead, during that period, courts routinely channeled claims to the MSPB, notwith-

standing the lack of a quorum. *E.g.*, *Franken* v. *Bernhardt*, 763 Fed. Appx. 678, 681-682 (10th Cir. 2019); *Griener* v. *United States*, 900 F.3d 700, 703-705 (5th Cir. 2018); *Rodriguez* v. *United States*, 852 F.3d 67, 82-84 (1st Cir. 2017). The court of appeals' novel rule threatens to cause disruption over the jurisdictional effect of the CSRA that could evolve on a day-to-day basis.

II. A STAY OF THE MANDATE IS NECESSARY TO PROTECT THIS COURT'S JURISDICTION AND AVOID DESTABILIZING INTERIM EFFECTS

1. The destabilizing uncertainty inherent in the Fourth Circuit's test is already beginning to manifest. At least one district court has already relied on the decision below to permit a challenge to a federal personnel action to proceed in district court. *Elev8 Balt., Inc.* v. *Corporation for Nat'l & Cmty. Serv.*, 2025 WL 1865971, at *18 (D.M.D. July 7, 2025). Another district court has adopted similar reasoning without attribution. *AFGE* v. *OPM*, 2025 WL 2633791, at *12-*14 (N.D. Cal. Sept. 12, 2025). And litigants have begun pressing those arguments as well, both within the Fourth Circuit and without. *E.g.*, *Abramowitz* v. *Lake*, 2025 WL 2480354, at *6 (D.D.C. Aug. 28, 2025); Mot. for Preliminary Injunction Mem. at 38 n.12, *AFSCME* v. *Trump*, No. 25-cv-3306 (D.D.C. Sept. 19, 2025), D. Ct. Doc. 4-1; Reply Br. at 19, *Strickland* v. *Moritz*, No. 24-2056 (4th Cir. June 12, 2025).

Worse, those consequences extend beyond federal personnel actions. Congress has set up numerous administrative-review schemes that preclude district-court jurisdiction. The Federal Trade Commission (FTC) Act, for example, generally channels challenges to FTC actions to the FTC, with judicial review in the courts of appeals. *Axon Enter.* v. *FTC*, 598 U.S. 175, 185 (2023). Likewise, the Federal Mine Safety and Health Amendments Act of 1977 generally channels mine-safety proceedings to the Federal Mine Safety and Health Review Commission (FMSHRC) with

court-of-appeals review. *Thunder Basin*, 510 U.S. at 204, 218. But both the FTC and FMSHRC have statutory removal protections that the government considers unconstitutional. See 15 U.S.C. 41; 30 U.S.C. 823(b). If qualms about an agency's "independence," App., *infra*, 16a, permit ignoring Congress's decision to channel claims to that agency, it could be open season on agency-review processes in the Fourth Circuit.

2. The court of appeals' amorphous remand, however, risks insulating its erroneous decision from this Court's review. Respondent has conspicuously failed to disclaim its intent to seek "extensive discovery into the Office of Special Counsel's and MSPB's operations," declaring that any discussion of discovery would "put[] the cart before the horse." C.A. Resp. to Mot. to Stay Mandate 9. A protracted remand with discovery disputes—followed by an inevitable appeal to the Fourth Circuit—could easily take years. All the while, litigants and the government would have no way of knowing which of the numerous agency-review schemes remain standing and which litigants are free to bypass and head straight to district court.

A decision from this Court reversing the court of appeals could cut off that needless remand at any time. But if the government *wins* on remand, this Court could lose its authority to decide the case altogether. If the district court concludes that the CSRA is sufficiently functional or accepts one of the government's other bases for dismissal, see App., *infra*, 81a, that would resolve this case. But the "far-reaching implications" of the panel's opinion would remain on the books, *id.* at 68a (Quattlebaum, J., dissenting from denial of rehearing en banc), and the government—as the prevailing party—would arguably have no way to appeal or otherwise seek relief from the panel's novel test. All the while, the costs of jurisdictional uncertainty would continue to mount. Rather than leave its own jurisdiction in the hands of the district court, this Court should stay the mandate and resolve the government's forth-

coming petition for a writ of certiorari in an orderly fashion.

3. The government also faces irreparable harm from the prospect that courts will wield amorphous fact-finding to indefinitely thwart the MSPB—an executive-branch agency—from resolving matters within its purview. Whatever developing a "factual record" on the CSRA's "functionality" actually means, App., *infra*, 16a, what it entails is indefinite delay as district courts thwart the CSRA's statutory design. Moreover, as noted, respondent is unwilling to disavow even "extensive discovery into the Office of Special Counsel's and MSPB's operations," C.A. Resp. to Mot. to Stay Mandate 9, suggesting that the inevitable result will be a fishing expedition into the agencies' operations that would raise serious separation-of-powers concerns. See *Cheney* v. *U.S. District Court*, 542 U.S. 367, 381-382 (2004). Rather than invite those disputes in a case where this Court is substantially likely to reverse, the better approach is to stay the mandate and head off a futile remand.

On the other side of the ledger, respondent has no countervailing interests that could justify releasing the mandate. Respondent's members have been subject to EOIR's current speaking-engagement policy since 2021, App., *infra*, 73a, yet respondent never sought preliminary relief as to that policy. Respondent should not be heard to complain four years later that its members would face irreparable harm while this Court considers the government's petition, least of all when the government commits to filing expeditiously in the coming weeks. If anything, this Court's swift review would benefit both sides, avoiding a circuitous and likely fruitless detour to district court. "[O]nly the Supreme Court can bring an effective halt" to the "real mischief" threatened by the panel's decision. *Id.* at 39a (Wilkinson, J., concurring in denial of rehearing en banc). Staying the mandate would be the swiftest route to that end.

III. THE COURT SHOULD ISSUE AN ADMINISTRATIVE STAY

For the reasons above, the court of appeals' decision threatens destabilizing effects and forum-shopping by plaintiffs seeking to evade Congress's channeling scheme for federal personnel actions and untold other agency-review schemes. Further district-court proceedings, however, risk mooting the appeal and insulating the court of appeals' erroneous decision from this Court's review. To preserve the status quo and protect this Court's jurisdiction, the Solicitor General respectfully requests an administrative stay of the mandate prior to its scheduled issuance on December 10, 2025.

CONCLUSION

This Court should stay the court of appeals' mandate. In addition, the Court should administratively stay the mandate by December 10, 2025, pending the Court's consideration of this application.

Respectfully submitted.

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Solicitor General

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