

No. 2025-1363

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CHRIS J. KROENUNG,

Petitioner,

v.

DEPARTMENT OF DEFENSE,

Respondent.

On Appeal from the Merit Systems Protection Board in case no.
CH-0752-23-0234-I-1, Judge David R. Lidow.

RESPONDENT-APPELLEE'S BRIEF

BRETT A. SHUMATE

Assistant Attorney General

PATRICIA M. MCCARTHY

Director

TARA K. HOGAN

CATHERINE M. YANG

*Attorneys, Commercial Litigation Branch
Civil Division, U.S. Department of Justice
P.O. Box 480, Ben Franklin Station
Washington, DC 20044
(202) 514-4336*

TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF THE ISSUES.....	1
STATEMENT OF THE CASE.....	2
I. Factual Background.....	2
A. COVID-19 Testing Policy.....	2
B. Mr. Kroenung's Refusal To Follow The Testing Policy.....	5
1. Progressive Discipline	5
2. Continued Refusal To Comply	7
3. Removal Decision	9
II. MSPB Proceedings	10
SUMMARY OF ARGUMENT.....	14
ARGUMENT	15
I. Standard of Review.....	15
II. Most of Mr. Kroenung's Arguments Regarding The Legality of NGA's Testing Policy Are Waived Or Forfeited	15
III. Mr. Kroenung Fails To Establish The "Illegality" of NGA's Testing Policy	18
IV. Mr. Kroenung Fails To Establish Reversible Error By The Board	24
A. Substantial Evidence Supports The Board's Finding That NGA Proved Its Charge of Conduct Unbecoming.....	25
B. Substantial Evidence Supports The Board's Nexus Finding	28
C. Substantial Evidence Supports The Board's Penalty Finding.....	33
CONCLUSION	41

TABLE OF AUTHORITIES

Cases

<i>Apuzza v. NYU Langone Long Island</i> , No. 24-493, 2025 WL 763425 (2d Cir. Mar. 11, 2025)	19
<i>Arredondo v. USPS</i> , 120 F. App’x 789 (Fed. Cir. 2004)	31
<i>Baker v. HHS</i> , 912 F.2d 1448 (Fed. Cir. 1990)	37
<i>Bennett v. MSPB</i> , 635 F.3d 1215 (Fed. Cir. 2011)	15
<i>Bereznak v. Arrow Elecs., Inc.</i> , 23-1318, 2024 WL 4268588 (D. Colo. Aug. 12, 2024)	19
<i>Bieber v. Dep’t of Army</i> , 287 F.3d 1358 (Fed. Cir. 2002)	30, 32, 34
<i>Blank v. Dep’t of Army</i> , 247 F.3d 1225 (Fed. Cir. 2001)	34
<i>Boddie v. United States</i> , 86 F.3d 1178 (Fed. Cir. 1996)	19
<i>Briggs v. MSPB</i> , 331 F.3d 1307 (Fed. Cir. 2003)	18
<i>Brown v. Dep’t of the Navy</i> , 229 F.3d 1356 (Fed. Cir. 2000)	28, 29
<i>Bryant F. v. Del Toro</i> , EEOC Decision No. 2024004121, 2025 WL 369157 (Jan. 22, 2025)	19
<i>Bryant v. Nat’l Sci. Found.</i> , 105 F.3d 1414 (Fed. Cir. 1997)	24
<i>Cali v. Dep’t of the Navy</i> , No. 24-1722, 2024 WL 4985271 (Fed. Cir. Dec. 5, 2024)	21

<i>Carter v. DOJ</i> , 61 F. App'x 703 (Fed. Cir. 2003).....	19
<i>Children's Health Def., Inc. v. Rutgers</i> , 93 F.4th 66 (3d Cir. 2024), <i>cert. denied</i> , 144 S. Ct. 2688 (2024)	21
<i>Cobert v. Miller</i> , 800 F.3d 1340 (Fed. Cir. 2015).....	27, 29, 30
<i>Cooke v. USPS</i> , 67 M.S.P.R. 401 (1995)	26
<i>DeLong v. HHS</i> , 264 F.3d 1334 (Fed. Cir. 2001).....	22
<i>DeWitt v. Dep't of Navy</i> , 747 F.2d 1442 (Fed. Cir. 1984).....	38
<i>Doe v. DOJ</i> , 565 F.3d 1375 (Fed. Cir. 2009).....	29
<i>Doe v. Franklin Square Union Free Sch. Dist.</i> , 100 F.4th 86 (2d Cir. 2024)	22
<i>Douglas v. Veterans Admin.</i> , 5 M.S.P.R. 280 (1981)	32
<i>Elgin v. Department of Treasury</i> , 567 U.S. 1 (2012)	18
<i>Facer v. Dep't of Air Force</i> , 836 F.2d 535 (Fed. Cir. 1988).....	37
<i>Farrell v. Dep't of Interior</i> , 314 F.3d 584 (Fed. Cir. 2002)	32
<i>Feds for Med. Freedom v. Biden</i> , 581 F. Supp. 3d 826 (S.D. Tex. 2022)	12, 23, 28
<i>Fleckenstein v. Dep't of the Army</i> , 63 M.S.P.R. 470 (1994)	26
<i>Game & Tech. Co. v. Wargaming Grp.</i> , 942 F.3d 1343 (Fed. Cir. 2019).....	16, 18

<i>Google Inc. v. SimpleAir, Inc.</i> , 682 F. App’x 900 (Fed. Cir. 2017)	17
<i>Gragg v. U.S. Air Force</i> , 13 M.S.P.R. 296 (1982)	26
<i>Hansen v. DHS</i> , 911 F.3d 1362 (Fed. Cir. 2018).....	15
<i>Harding v. U.S. Naval Acad.</i> , 567 F. App’x 920 (Fed. Cir. 2014)	18
<i>Hayes v. Dep’t of the Navy</i> , 727 F.2d 1535 (Fed. Cir. 1984).....	28
<i>Higgins v. Dep’t of Veterans Affs.</i> , 955 F.3d 1347 (Fed. Cir. 2020).....	34
<i>Howard v. USPS</i> , 44 F. App’x 496 (Fed. Cir. 2022).....	16
<i>Jahn v. Dep’t of Agric.</i> , 45 M.S.P.R. 514 (1990)	26
<i>Jones v. HHS</i> , 834 F.3d 1361 (Fed. Cir. 2016).....	15, 30, 38
<i>Joyce v. DHS</i> , 342 F. App’x 591 (Fed. Cir. 2009)	38
<i>Klaassen v. Tr. of Ind. Univ.</i> , 7 F.4th 592 (7th Cir. 2021).....	22
<i>Kumferman v. Dep’t of Navy</i> , 785 F.2d 286 (Fed. Cir. 1986)	32, 33, 38
<i>Kyocera Wireless Corp. v. Int’l Trade Comm’n</i> , 545 F.3d 1340 (Fed. Cir. 2008).....	16
<i>Lachance v. MSPB</i> , 147 F.3d 1367 (Fed. Cir. 1998).....	24
<i>Lachance v. White</i> , 174 F.3d 1378 (Fed. Cir. 1999).....	26

<i>Lewis v. Fed. Bureau of Prisons</i> , 93 F.4th 1381 (Fed. Cir. 2024).....	15
<i>Lukaszczuk v. Cook Cnty.</i> , 47 F.4th 587 (7th Cir. 2022).....	22
<i>McIntosh v. DoD</i> , 53 F.4th 630 (Fed. Cir. 2022).....	17, 34, 37
<i>MCM Portfolio LLC v. Hewlett-Packard Co.</i> , 812 F.3d 1284 (Fed. Cir. 2015).....	17
<i>Mears v. Dep’t of Agric.</i> , 155 F.3d 569 (Fed. Cir. 1998).....	26, 34
<i>Mings v. DOJ</i> , 813 F.2d 384 (Fed. Cir. 1987).....	38
<i>Mishos v. McKesson Corp.</i> , No. 22-1666, 2024 WL 2784333 (S.D. Ohio May 30, 2024)	19
<i>Miskill v. SSA</i> , 863 F.3d 1379 (Fed. Cir. 2017).....	35, 37
<i>Monsanto Co. v. Scruggs</i> , 459 F.3d 1328 (Fed. Cir. 2006).....	16
<i>Nagel v. HHS</i> , 707 F.2d 1384 (Fed. Cir. 1983).....	26, 33
<i>Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab.</i> , 595 U.S. 109 (2022)	23
<i>Newsome v. Dep’t of Treasury</i> , 338 F. App’x 902 (Fed. Cir. 2009)	27
<i>Nguyen v. DHS</i> , 737 F.3d 711 (Fed. Cir. 2013).....	39
<i>Norris v. Stanley</i> , 73 F.4th 431 (6th Cir. 2023), <i>cert. denied</i> , 144 S. Ct. 1353 (2024).....	21
<i>Oshiver v. OPM</i> , 896 F.2d 540 (Fed. Cir. 1990).....	34

<i>Pearson v. Shriners Hosps. for Child., Inc.</i> , 133 F.4th 433 (5th Cir. 2025).....	21
<i>Robinson v. Dep’t of Veterans Affs.</i> , 923 F.3d 1004 (Fed. Cir. 2019).....	36
<i>Rosario-Fabregas v. MSPB</i> , 833 F.3d 1342 (Fed. Cir. 2016).....	19
<i>Sanders v. USPS</i> , 801 F.2d 1328 (Fed. Cir. 1986).....	31
<i>Shipman v. Dep’t of Transp.</i> , 58 F. App’x 481 (Fed. Cir. 2003).....	18
<i>Singh v. USPS</i> , 2022 M.S.P.B. 15 (2022)	35, 37
<i>Smith v. GSA</i> , 930 F.3d 1359 (Fed. Cir. 2019).....	26, 27
<i>Smith v. West</i> , 214 F.3d 1331 (Fed. Cir. 2000).....	18
<i>SmithKline Beecham Corp. v. Apotex Corp.</i> , 439 F.3d 1312 (Fed. Cir. 2006).....	18
<i>Taylor v. Vanderbilt Univ.</i> , No. 23-5285, 2023 WL 10947219 (6th Cir. Nov. 1, 2023).....	19
<i>Wallace v. Dep’t of the Air Force</i> , 879 F.2d 829 (Fed. Cir. 1989).....	16, 37
<i>We The Patriots USA, Inc. v. Hochul</i> , 17 F.4th 266 (2d Cir. 2021).....	22
<i>Webster v. Dep’t of Army</i> , 911 F.2d 679 (Fed. Cir. 1990).....	31, 32, 34
<i>Weston v. Dep’t of Hous. & Urban Dev.</i> , 724 F.2d 943 (Fed. Cir. 1983).....	38
<i>Williams v. SSA</i> , 586 F.3d 1365 (Fed. Cir. 2009).....	35

<i>Woods v. Dep’t of Air Force</i> , 64 F. App’x 777 (Fed. Cir. 2003).....	36
---	----

Statutes

5 U.S.C. § 7703(c)	15
21 U.S.C. § 360bbb-3	21
42 U.S.C. § 12111(2)	19

Regulations

5 C.F.R. § 1201.24(b)	16
-----------------------------	----

Other Authorities

Executive Order No. 13991, 86 Fed. Reg. 7045 (Jan. 20, 2021)	passim
Executive Order No. 14043, 86 Fed. Reg. 50989 (Sept. 9, 2021)	passim
DoDI 1010.10, https://perma.cc/35KX-BRLG (Apr. 28, 2014)	2
DoDI 6055.01, DoD Safety and Occupational Health (SOH) Program, https://perma.cc/5XYY-ZJ8K (Oct. 14, 2014)	2
DoDI 6200.03, Public Health Emergency Management (PHEM) Within the DoD, https://perma.cc/Z7P4-V3C4 (Mar. 28, 2019)	2
Force Health Protection Guidance (Supplement 4), https://perma.cc/CJT4-JGT8 (Mar. 11, 2020)	3
Force Health Protection Guidance (Supplement 13), https://perma.cc/Y7NH-DL2B (Aug. 24, 2020)	3
Force Health Protection Guidance (Supplement 15), https://perma.cc/CSQ4-7KEZ (Jan. 11, 2021)	3

Force Health Protection Guidance (Supplement 23), https://perma.cc/ALJ5-D3MK (Sept. 7, 2021)	4
Safer Federal Workforce Task Force, COVID-19 Workplace Safety: Agency Model Safety Principles, https://perma.cc/9M3R-7S6A (Sept. 13, 2021).....	3, 24
Consolidated DoD Coronavirus Disease 2019 Force Health Protection Guidance, https://perma.cc/2UD3-G9GV (Apr. 4, 2022)	12
Consolidated DoD Coronavirus Disease 2019 Force Health Protection Guidance, https://perma.cc/9AND-2V4F (Aug. 29, 2022).....	20
Consolidated DoD Coronavirus Disease 2019 Force Health Protection Guidance – Revision 4, https://perma.cc/5VNP-2NGB (Jan. 30, 2023)	20

STATEMENT OF RELATED CASES

No other appeal in or from the present civil action has previously been before this or any other appellate court. Counsel for respondent is not aware of any related cases within the meaning of Federal Circuit Rule 47.5(b).

STATEMENT OF THE ISSUES

Petitioner Chris J. Kroenung appeals a final decision of the Merit Systems Protection Board (MSPB or board). In that decision, the MSPB sustained Mr. Kroenung's removal from a national security and combat support agency for his failure to comply with agency policy requiring COVID-19 screening testing. There is no dispute that Mr. Kroenung neither complied with the testing requirement on the specified occasions nor sought any medical or religious accommodation from the policy, and the board rejected his personal disagreement with the policy as a valid basis for his refusal to comply. The board also found nexus between the misconduct and efficiency of the service, citing record evidence of the resulting disruption to Mr. Kroenung's work unit and loss of supervisory trust and confidence. Finally, the board assessed the agency's consideration of all relevant factors and concluded that the seriousness of the misconduct and other aggravating factors outweighed any mitigating factors. Accordingly, the board found the penalty reasonable and sustained Mr. Kroenung's removal. The issues in this case are:

1. Whether Mr. Kroenung has waived his arguments regarding Executive Order 14043, the Emergency Use Authorization statute, and constitutional and separation-of-powers issues, which he did not assert before the board and largely does not develop in his opening brief.
2. Whether Mr. Kroenung's challenges to the legality of the agency's testing policy fail regardless, under extensive authorities that reject his theories.

3. Whether Mr. Kroenung fails to establish reversible error, where substantial evidence supports the board's findings that the agency proved that the charged conduct occurred, nexus, and reasonableness of the penalty.

STATEMENT OF THE CASE

I. Factual Background

A. COVID-19 Testing Policy

The Department of Defense (DoD) has long implemented health protection measures for its unique workforce, both in routine and emergency settings. DoD Instruction (DoDI) 6055.01, for example, sets forth safety and occupational health policy, <https://perma.cc/5XYX-ZJ8K> (Oct. 14, 2014), and DoDI 1010.10 establishes health promotion and disease prevention policy, <https://perma.cc/35KX-BRLG> (Apr. 28, 2014). In emergency settings, DoDI 6200.03 provides for the management of public health emergencies to ensure mission assurance and readiness, <https://perma.cc/Z7P4-V3C4> (Mar. 28, 2019). Those (and other) instructions derive from numerous statutory and non-statutory authorities cited therein and provide the basis for an array of force health protection measures across DoD.

Throughout the COVID-19 pandemic, DoD issued additional force health protection measures, on an ongoing basis as needed, to address the rapidly evolving pandemic conditions. Those measures spanned travel, personal protective equipment, deployment, workplace access, vaccination, testing, and other areas. The various guidance also recognized that DoD components could be “more restrictive” and

implement “additional FHP measures” as needed. *E.g.*, Force Health Protection (FHP) Guidance (Supplement 4), <https://perma.cc/CJT4-JGT8> (Mar. 11, 2020) (travel); FHP Guidance (Supplement 15), <https://perma.cc/CSQ4-7KEZ> (Jan. 11, 2021) (diagnostic and screening testing); *see also* FHP Guidance (Supplement 13), <https://perma.cc/Y7NH-DL2B> (Aug. 24, 2020) (early testing guidance noting that it “does not prohibit or impede surveillance, screening, and asymptomatic testing conducted to decrease operational risk”).

As pertinent here, in December 2021, the Under Secretary of Defense issued updated DoD guidance regarding the screening testing of individuals who were not vaccinated against COVID-19, including civilian employees. Appx104-06, Appx127-29. The updated guidance reflected additional force health protection and workplace safety measures recommended by the Safer Federal Workforce Task Force, which had been established by Executive Order 13991 to “provide ongoing guidance to heads of agencies ... during the COVID-19 pandemic,” “based on public health best practices as determined by CDC and other public health experts.” Appx104; 86 Fed. Reg. 7045, § 4 (Jan. 20, 2021); *see also* Safer Federal Workforce Task Force, COVID-19 Workplace Safety: Agency Model Safety Principles, at 1, 3, <https://perma.cc/9M3R-7S6A> (Sept. 13, 2021) (noting that agencies were not required to establish a screening testing program, “although they may do so”).

The December 2021 DoD guidance required screening testing “at least weekly,” using tests with “FDA approval, 510(K) premarket clearance or [] an FDA

Emergency Use Authorization.” Appx127-29. “[A] negative COVID-19 screening test result” was required “for entry into a DoD facility,” and employees who refused required testing could be “bar[red] ... from their worksites on the installation or facility to protect the safety of others.”¹ Appx127-28.

Following the Under Secretary’s memorandum, the Director of Administration and Management issued supplemental guidance concerning civilian employees on January 10, 2022. Appx102-40. The supplemental guidance reiterated supervisors’ responsibility “to enforce applicable force health protection measures,” including COVID-19 screening testing. Appx102. The guidance also reiterated employees’ responsibility to “provid[e] documentation of negative COVID-19 test results to the appropriate supervisor.” Appx134.

At the time of the events in August 2022 giving rise to Mr. Kroenung’s removal, the testing policy required “[a]t least weekly COVID-19 testing ... when the CDC COVID-19 Community Level is high or medium in the county or equivalent jurisdiction where the DoD facility is located.” Appx252-56; *see also* Appx102.

Employees who teleworked were required to “provide a negative result (from a test

¹ The December 2021 guidance followed several previous revisions that had been issued in September and October 2021 (FHP Supplement 23 and revisions 1 and 2), all of which provided for “COVID-19 screening testing at least weekly” and that “a negative COVID-19 screening test result is required for entry into the worksite in the DoD facility.” *E.g.*, FHP Guidance (Supplement 23), <https://perma.cc/ALJ5-D3MK> (Sept. 7, 2021).

performed within the prior 72 hours) for entry into a DoD facility located in the county where the COVID-19 Community Level is high or medium.” Appx252-56; *see also* Appx134.

B. Mr. Kroenung’s Refusal To Follow The Testing Policy

Mr. Kroenung is a former employee of the National Geospatial-Intelligence Agency (NGA), a DoD component and member of the Intelligence Community. Appx1. At the time of his removal, he was assigned to the Terminal Enroute Procedures Branch under supervisor Justin Nahlik, responsible for developing flight approach and landing procedures for military pilots using information contained in classified and secured systems. Appx2, Appx100, Appx338. Mr. Kroenung was also undergoing training in the Geo-areas unit, which analyzes the accuracy of aeronautical data from assigned countries and transfers that data to a secured NGA database for publication to military pilots. Appx2, Appx342, Appx357. His job and training required an in-office presence on a military installation due to the use of classified and secured networks. Appx100, Appx287, Appx330, Appx347.

1. Progressive Discipline

After the testing policy went into effect, Mr. Kroenung arrived at his military installation in January 2022 without documentation of a negative test. Appx100. His Deputy Division Chief directed him to test and provide documentation of a negative result, per the testing policy, because the nature of his job required “com[ing] into the office to obtain data and enter data/complete production within [a] classified system.”

Id. Mr. Kroenung refused to comply. *Id.* As a result, on February 17, 2022, his supervisor, Mr. Nahlik, issued a written reprimand for conduct unbecoming a federal employee due to Mr. Kroenung's failure to follow agency policies. Appx95-98. The reprimand afforded Mr. Kroenung seven days to comply and noted that continued noncompliance would "result in more severe disciplinary action, up to and including removal." Appx96. The reprimand also provided information on seeking reasonable accommodations. *Id.* Mr. Kroenung did not request any such accommodation, religious or medical, and he did not comply with the testing requirement as directed in the reprimand. Appx362, Appx89.

Mr. Kroenung's failure to follow agency policy continued after the compliance period in his reprimand. At the start of the following two weeks, on March 1 and 7, 2022, he "continued to refuse to test[] pursuant to the Agency's COVID-19 testing program." Appx89. Given Mr. Kroenung's continued refusal to comply with agency policy, NGA proposed a ten-day suspension for conduct unbecoming a federal employee. Appx88-92. The notice provided Mr. Kroenung an opportunity to respond with information on "why the reason(s) are inaccurate and why the proposed action should not be effected." Appx90.

Mr. Kroenung's response contended that the testing requirement violated the Americans with Disabilities Act (ADA) and discriminated based on vaccination status, was rushed and ineffective, and that his requests to take leave and telework instead of testing had been denied. Appx85. After considering Mr. Kroenung's reply, NGA

imposed the ten-day suspension. Appx80-83. The suspension notice again included information on seeking reasonable accommodations. Appx82. It also provided seven days “from the end of [the] suspension to comply with the Agency’s COVID-19 testing program” and cautioned that continued noncompliance “will result in more severe disciplinary action, up to and including removal.” Appx81. Mr. Kroenung neither requested an accommodation nor came into compliance with the testing policy. Appx362, Appx262.

2. Continued Refusal To Comply

Instead, on the morning of his return from suspension, Mr. Kroenung requested to take leave or telework until testing was no longer required. Appx263. Mr. Nahlik approved the unscheduled leave request for that immediate week, August 1 through 5, 2022, and explained that “this is not sustainable as we’ve continued to experience mission degradation in your absence.” Appx262. Mr. Nahlik thus requested that Mr. Kroenung report the following week so that he could perform his on-site training and, if community transmission levels were such that testing was required, to provide documentation of a negative test. *Id.* In response, Mr. Kroenung stated unequivocally that his “status on refusing to test has not changed nor will it change.” *Id.*

During the following week of August 8, 2022, community transmission levels necessitated testing under agency policy. Appx252, Appx258. Likewise, community transmission levels the next week of August 15 required testing under agency policy.

Appx252, Appx260. But at the start of each of those weeks, Mr. Kroenung informed his supervisor that he was “refusing to test” and was “not complying with testing.” Appx265, Appx268. Mr. Kroenung requested to telework or use leave, but Mr. Nahlik reiterated that “unscheduled annual leave was not sustainable” and, further, due to Mr. Kroenung’s on-site responsibilities, it was not “possible to telework to do [his] job.” Appx265. Mr. Nahlik permitted Mr. Kroenung to request sick leave if he were sick. *Id.* Mr. Nahlik also noted that upon completion of training, “which requires in-office representation, ad hoc telework possibilities can be reassessed.” Appx271, Appx287. Mr. Kroenung, however, maintained that he “still [was] not complying with testing.” Appx268.

Because Mr. Kroenung continued to refuse to follow the agency’s testing policy and had previously received progressive discipline for the same conduct, NGA proposed his removal for conduct unbecoming a federal employee. Appx75-78, Appx270-71. Mr. Kroenung’s refusal for each of the weeks of August 8 and 15, 2022 constituted two separate specifications for the charge. Appx76. The notice reiterated guidance on seeking a reasonable accommodation and provided Mr. Kroenung the opportunity to respond with information on “why the reason(s) are inaccurate and why the proposed action should not be effected.” Appx77-78.

Mr. Kroenung did not request a medical or religious accommodation. Appx362. His response largely repeated the same contentions he made in reply to his earlier suspension. Appx71-72. He argued that the testing policy violated the ADA

and discriminated based on vaccination status, was rushed and ineffective, that his requests to take leave and telework had been denied, and that CDC guidance had recently changed. *Id.*

3. Removal Decision

NGA's deciding official, Vietta Williams, issued her decision on February 28, 2023. Appx58-69. She concluded that NGA employees are expected at all times to "follow[] applicable NGA policies," and Mr. Kroenung's continued failure to do so raised concerns with his "judgment, reliability, and trustworthiness." Appx63. Ms. Williams determined that Mr. Kroenung's refusal to follow policy left him "unable to perform the mission-essential requirements" of his job, "placed a strain on his organization's mission," and impacted management's "confidence and trust in him to do the job." Appx65. She further found that Mr. Kroenung had received clear and ample notice of the unacceptable conduct; progressive discipline had not been effective at "convey[ing] to him the importance of following Agency directives"; and alternative sanctions would not deter future misconduct, given Mr. Kroenung's repeated and recent statements "that he will continue to refuse to comply." Appx63, Appx67-69.

Ms. Williams also considered neutral and mitigating factors. Appx62-69. She accounted for the mitigating factor of Mr. Kroenung being "forthcoming about his refusal to test" based on his "disagree[ment] with the implementation of the requirement." Appx68. She considered Mr. Kroenung's past work record, which was

successful “when [he was] able to accomplish the mission-essential requirements of his position.” Appx64. And she assessed the consistency of the penalty with that imposed on others similarly situated, finding that factor neutral. Appx65.

Based on the totality of the information, Ms. Williams concluded that the charge of conduct unbecoming was substantiated, mitigating factors did not justify a lesser penalty, and removal was “reasonable” and “warranted to promote the efficiency of the service.” Appx59, Appx69.

II. MSPB Proceedings

Mr. Kroenung appealed his removal to the board. Appx27-31. The grounds for his appeal were the same arguments he made previously: that the testing policy violated the ADA and discriminated based on vaccination status, was rushed and ineffective, that his requests to take leave and telework had been denied, and that CDC guidance had changed. Appx31. Mr. Kroenung retained counsel for his appeal. Appx228, Appx337.

In advance of Mr. Kroenung’s requested hearing, the administrative judge directed the parties to submit their pre-hearing statements of facts and issues, noting specifically that “the appellant must include any and all defenses.” Appx224-27. Mr. Kroenung’s initial submission repeated the same points listed in his materials initiating the appeal. Appx231-32. Another submission the next day presented two general issues: (1) “Whether the testing mandate, which served as the justification for Mr. Kroenung’s termination, was lawful” and (2) “whether the Agency enforced the

testing mandate in a manner that could justify Mr. Kroenung's termination."

Appx283-84.

The administrative judge held a hearing on January 17, 2024. Appx337-67. Four witnesses provided testimony. Mr. Nahlik testified about his supervision of Mr. Kroenung, NGA's testing policy, Mr. Kroenung's repeated refusals to comply, the reasons why Mr. Kroenung could not rely on leave or telework instead of reporting to work, and the negative impact of Mr. Kroenung's refusals on the mission and on supervisory confidence in him. Appx338-48. Jo-Ellen Adkins, the proposing official, testified about her role in the disciplinary process and the reasons why she proposed removal. Appx348-52. The deciding official, Ms. Williams, testified about her role and the factors she considered in reaching her decision, including the use of progressive discipline, the effect of Mr. Kroenung's refusals on his job and supervisors, the unlikelihood of rehabilitation, and the insufficiency of lesser penalties. Appx352-56. Finally, Mr. Kroenung testified about his reasons for refusing to comply with the testing policy, his perceptions of how he could perform his job, and other employees granted reasonable accommodations from the testing policy. Appx357-63. When asked to specify his objection to the testing policy, Mr. Kroenung responded that he did not believe "it was consistent with [the] Americans Disability Act," that it discriminated based on vaccination status, and it "should have ended due to the fact that the Omicron variant ... had mild symptoms." Appx358, Appx362.

At the very end of the hearing, Mr. Kroenung's counsel "request[ed] the

opportunity for briefing” on “the legal authority for the testing mandate,” given that “Executive Order 14043 ... was enjoined as of January, 2022.”² Appx366. Agency counsel responded that the referenced injunction “was specific to the vaccination [mandate]. It’s clear that there was no injunction on a testing policy. To this day, the DoD testing policy has never been declared illegal.” Appx367. The administrative judge denied the request for briefing because “that was an issue that was never brought to, certainly, [his] attention.” Appx367.

The administrative judge issued his decision on October 8, 2024, affirming Mr. Kroenung’s removal. Appx1-15. The judge first determined that NGA had proven Mr. Kroenung’s commission of the acts alleged in support of the charge of conduct unbecoming. Appx7-8. In particular, the judge noted that Mr. Kroenung did “not dispute having been aware of the policy” and his “admi[ssion] that he did not follow the agency’s COVID-19 testing policy on August 8 and 15, 2022, the time period

² Executive Order 14043 mandated COVID-19 vaccination of federal employees and was preliminarily enjoined by a United States district court on January 21, 2022. *Feds for Med. Freedom v. Biden*, 581 F. Supp. 3d 826 (S.D. Tex. 2022), *vacated as moot*, No. 22-40043, 2024 WL 4299029 (5th Cir. Sept. 26, 2024). The preliminary injunction did not extend to or discuss COVID-19 testing requirements or other workforce safety protocols. *Id.* Federal agencies, including DoD, ceased enforcement of the vaccination mandate, and there was no allegation of noncompliance with the preliminary injunction. *See* No. 3:21-cv-356 (S.D. Tex.); *see also* Appx88 (referencing January 24, 2022 guidance on “EO 14043 Nationwide Injunction”). When DoD subsequently consolidated its various COVID-19 guidance documents, it explicitly noted that the portions requiring vaccination were “not currently in effect” due to a preliminary injunction, while maintaining other (non-enjoined) force health protection measures such as weekly testing. *E.g.*, Consolidated DoD Coronavirus Disease 2019 FHP Guidance § 2.2, <https://perma.cc/2UD3-G9GV> (Apr. 4, 2022).

cited in the specifications pertaining to his proposed removal.” Appx8. The judge also considered Mr. Kroenung’s objection that the testing policy was “ineffective and unlawful,” but concluded that the objection was a “personal belief[] as to the validity of the testing mandate,” which was “lawfully adopted per DoD guidance.” Appx8.

Next, the administrative judge found nexus between Mr. Kroenung’s conduct and the efficiency of the service. Appx9-10. The judge “credit[ed] testimony from agency management officials noting the mission degradation that had occurred and would continue due to [Mr. Kroenung’s] inability to report to duty onsite, and the impact on other staff members having to redistribute [his] job duties.” Appx9. The judge further found that Mr. Kroenung’s refusals to comply with agency policy had “adversely affected the agency’s trust and confidence in his ability to follow instructions.” Appx9-10.

Finally, the administrative judge determined that removal was a reasonable penalty. Appx10-14. The judge recounted the testimony of agency officials on the relevant factors and found that testimony “credibl[e].” Appx12. The judge addressed Mr. Kroenung’s contention that he should have been permitted to take leave or telework, finding “compelling and persuasive” his supervisor’s testimony that those options “were unworkable from the agency’s perspective” because of his on-site job responsibilities. Appx13. The judge also considered the assertion that other employees had been given accommodations from the testing policy. *Id.* The judge found that those purported “comparators each had distinguishing characteristics that

render them inapposite for comparison.” *Id.* For instance, the accommodations were the result of those employees going through the reasonable accommodations process for medical or religious reasons—which Mr. Kroenung admitted he had not pursued—and/or those employees’ responsibilities did not require an in-office presence. Appx13-14.

The administrative judge’s decision became final on November 12, 2024. Appx15.

SUMMARY OF ARGUMENT

Mr. Kroenung has largely waived the arguments he puts before the Court, most of which he did not assert before the board and does not meaningfully develop in his opening brief in any case. Even if the Court considers Mr. Kroenung’s new arguments, it should readily reject them. Extensive authorities contradict Mr. Kroenung’s challenge to the lawfulness of NGA’s testing policy, and the only case on which he relies (a district court’s preliminary injunction of a vaccination mandate) is plainly inapposite to this appeal of a removal for failure to comply with a testing policy.

On the remaining issues, Mr. Kroenung’s assertions find little, if any, support in the record or law and invite the Court to reweigh the evidence and determine anew the three elements underlying his removal. That is not the Court’s role. Under the established standard of review, substantial evidence supports the board’s findings that NGA proved that Mr. Kroenung failed to follow the agency’s testing policy on the

dates charged, there was nexus between the misconduct and efficiency of the service, and the penalty of removal was reasonable upon consideration of all relevant factors.

The Court should therefore affirm the judgment below.

ARGUMENT

I. Standard of Review

Judicial review of MSPB decisions is limited by statute. A board decision must be affirmed unless it is (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (2) obtained without procedures required by law, rule, or regulations having been followed; or (3) unsupported by substantial evidence.

5 U.S.C. § 7703(c); *Bennett v. MSPB*, 635 F.3d 1215, 1218 (Fed. Cir. 2011). The Court reviews questions of law *de novo* and findings of fact for substantial evidence. *Hansen v. DHS*, 911 F.3d 1362, 1366 (Fed. Cir. 2018). Substantial evidence is simply “more than a mere scintilla” of evidence, and the Court “do[es] not reweigh evidence on appeal.” *Jones v. HHS*, 834 F.3d 1361, 1366, 1369 (Fed. Cir. 2016). The petitioner bears the burden of establishing reversible error under these standards. *Id.* at 1366. The Court can affirm the decision below “on any ground supported by the record.” *Lewis v. Fed. Bureau of Prisons*, 93 F.4th 1381, 1385 (Fed. Cir. 2024).

II. Most of Mr. Kroenung’s Arguments Regarding The Legality of NGA’s Testing Policy Are Waived Or Forfeited

As an initial matter, Mr. Kroenung argues throughout his brief that the testing policy was “illegal,” with references to Executive Order 14043, the Emergency Use

Authorization (EUA) statute, the major questions and nondelegation doctrines, the Tenth Amendment, and other constitutional and separation-of-powers principles. Br. 22, 28-31, 40-54. He did not raise these arguments before the MSPB and cannot raise them now for the first time. The opening brief also largely does not develop these arguments, thus forfeiting them a second time. *Game & Tech. Co. v. Wargaming Grp.*, 942 F.3d 1343, 1350-51 (Fed. Cir. 2019); *Monsanto Co. v. Scruggs*, 459 F.3d 1328, 1341 (Fed. Cir. 2006).

This Court generally does not “consider issues not raised before an administrative agency.” *Wallace v. Dep’t of the Air Force*, 879 F.2d 829, 832 (Fed. Cir. 1989). Raising an issue generally will not do; “the issue must be raised with sufficient specificity and clarity that the tribunal is aware that it must decide the issue, and in sufficient time that the agency can do so.” *Id.* For example, when a party’s prehearing submission does not identify or develop the specific issue he later raises, he waives that argument. *Id.* at 833; *see Kyocera Wireless Corp. v. Int’l Trade Comm’n*, 545 F.3d 1340, 1352 (Fed. Cir. 2008); *Howard v. USPS*, 44 F. App’x 496, 498 (Fed. Cir. 2022). That is because the purpose of the prehearing submissions is to define the issues in the case. Appx225 (requiring the parties’ “statement of facts and issues (the appellant must include any and all defenses)” prior to the prehearing conference); *see* 5 C.F.R. § 1201.24(b) (an appellant “may not raise a new claim or defense after ... the end of the conference(s) held to define the issues in the case”).

None of Mr. Kroenung’s submissions to the administrative judge (or even the

agency)—including his prehearing submissions—mentioned the new arguments he now advances. Appx31, Appx72, Appx85, Appx232, Appx283. Rather, he argued that the testing policy was, in the most general terms, not “lawful,” Appx283—and specifically, that it violated the ADA and discriminated based on vaccination status, was rushed and ineffective, that his requests to take leave and telework had been denied, and that CDC guidance had changed. Appx31, Appx72, Appx85, Appx232. Mr. Kroenung’s new theories on appeal regarding Executive Order 14043, the EUA statute, and other issues raised in passing have been forfeited. *See also McIntosh v. DoD*, 53 F.4th 630, 643 (Fed. Cir. 2022) (finding argument forfeited, where the employee argued illegality generally before the board but “never specifically pointed to” the new theory of illegality she raised on appeal).

Counsel’s “few scattered sentences at the oral hearing below” also do not preserve the issues for appeal. *MCM Portfolio LLC v. Hewlett-Packard Co.*, 812 F.3d 1284, 1294 n.3 (Fed. Cir. 2015); *see Google Inc. v. SimpleAir, Inc.*, 682 F. App’x 900, 904 (Fed. Cir. 2017). This is particularly so because Mr. Kroenung’s counsel mentioned only the ADA and that Executive Order 14043 requiring vaccination had been enjoined—he was silent as to the EUA statute or any of the constitutional and separation-of-powers issues Mr. Kroenung now seeks to pursue. Appx366. Indeed, when Mr. Kroenung was asked to describe his objections to the testing policy, he identified an even narrower set of issues: his belief that the policy violated the ADA and was not necessary because “the Omicron variant ... had mild symptoms.”

Appx358, Appx362. Thus, Mr. Kroenung’s claim (Br. 19-20) that he tried to raise a broader range of issues below, but was denied the opportunity to do so, rings hollow.

Nor does the constitutional nature of some of Mr. Kroenung’s new arguments permit him to raise them here for the first time. The Supreme Court in *Elgin v. Dep’t of Treasury* expressly held that a petitioner must pursue and develop his constitutional claims before the MSPB in order to seek further review by this Court. 567 U.S. 1, 18-19 (2012) (citing *Briggs v. MSPB*, 331 F.3d 1307 (Fed. Cir. 2003), which considered the constitutional arguments *raised before*, though not decided by, the MSPB). And this Court has repeatedly held that it will not consider constitutional arguments “not raised” before the MSPB. *Smith v. West*, 214 F.3d 1331, 1334 (Fed. Cir. 2000); *see Harding v. U.S. Naval Acad.*, 567 F. App’x 920, 924 (Fed. Cir. 2014); *Shipman v. Dep’t of Transp.*, 58 F. App’x 481, 482 (Fed. Cir. 2003). The Court should apply the same principles here.

III. Mr. Kroenung Fails To Establish The “Illegality” of NGA’s Testing Policy

Mr. Kroenung’s assertions of illegality also fail on their own terms—to the limited extent he has developed them in his opening brief.³

A. One of the two arguments Mr. Kroenung has preserved—that “the test

³ Mr. Kroenung incorrectly argues that there are some issues on which “Respondent goes first.” Br. 40-41. As the petitioner, Mr. Kroenung must raise and develop all the arguments he wishes to pursue on appeal “in the opening brief.” *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1319 (Fed. Cir. 2006); *see Game & Tech.*, 942 F.3d at 1350.

is illegal under the ADA” (Br. 40)—would have the Court go beyond its limited jurisdiction. Claims regarding the ADA can only be brought with the Equal Employment Opportunity Commission or the appropriate district court, and they cannot be asserted against the federal government. 42 U.S.C. § 12111(2), (5)(B) (excluding “the United States” from the definition of a “covered entity”); *Rosario-Fabregas v. MSPB*, 833 F.3d 1342, 1347 n.1 (Fed. Cir. 2016); *Carter v. DOJ*, 61 F. App’x 703, 704 (Fed. Cir. 2003); *Boddie v. United States*, 86 F.3d 1178, at *1 (Table) (Fed. Cir. 1996).

In any event, courts with jurisdiction have uniformly held that COVID-19 mitigation measures, including testing, do not violate the ADA. *E.g.*, *Apuṣṣa v. NYU Langone Long Island*, No. 24-493, 2025 WL 763425, at *2 (2d Cir. Mar. 11, 2025); *Taylor v. Vanderbilt Univ.*, No. 23-5285, 2023 WL 10947219, at *2 (6th Cir. Nov. 1, 2023); *Mishos v. McKesson Corp.*, No. 22-1666, 2024 WL 2784333, at *4 (S.D. Ohio May 30, 2024); *Bereznak v. Arrow Elecs., Inc.*, 23-1318, 2024 WL 4268588, at *9 (D. Colo. Aug. 12, 2024); *Bryant F. v. Del Toro*, EEOC Decision No. 2024004121, 2025 WL 369157, at *2 (Jan. 22, 2025). Mr. Kroenung’s suggestion that a mitigation measure necessarily violates the ADA when it differs from CDC guidance (Br. 14, 40) is neither supported by the EEOC documents he cites nor any known caselaw.

B. The only other (related) argument Mr. Kroenung has preserved is that

the CDC updated its guidance on August 11, 2022.⁴ Br. 41. But he does not explain why a change in CDC guidance would make NGA's policy illegal, when NGA and DoD possess their own authority to implement the health protection measures needed for their unique workforce. The CDC guidance itself recognized that some settings might necessitate different responses. *See* ECF No. 24-3 at 104. So did the Safer Federal Workforce Task Force. Appx294 ("Each federal agency should apply this guidance according to the situation in their workplace or workforce."). DoD continued to assess that its testing policy was needed, in updated guidance issued on August 29, 2022. *See* Consolidated DoD Coronavirus Disease 2019 FHP Guidance, at 15, <https://perma.cc/9AND-2V4F> (Aug. 29, 2022); *id.* at 6-7 (explaining that DoD uses CDC and other guidance "as the starting point for developing COVID-19 policy and guidance," and incorporates such guidance "as appropriate"); *see also* Appx134 ("To the extent any non-DoD guidance is inconsistent with DoD guidance, the DoD guidance is controlling for DoD."). And when DoD assessed that the testing policy was no longer needed for its workforce, it removed that requirement in January 2023. *See* Consolidated DoD Coronavirus Disease 2019 FHP Guidance – Revision 4, at 6, <https://perma.cc/5VNP-2NGB> (Jan. 30, 2023). That other agencies might have made different assessments at various points, *e.g.*, Appx310, says nothing about DoD's

⁴ Mr. Kroenung's characterization that the CDC "call[ed] for an immediate stop to the testing programs" (Br. 41) is not supported by the material he cites. *See* Br. 14 (citing ECF No. 24-3 at 104 ("screening testing of asymptomatic people without known exposure will no longer be recommended in most community settings")).

assessment for its particular workforce.

C. Mr. Kroenung's assertion that "the test is illegal under the EUA statutes" and "violates a Constitutional liberty right" (Br. 40, 47-54) fares no better. As noted above, Mr. Kroenung did not raise these arguments before the board and, under *Elgin* and this Court's precedents, cannot pursue them now for the first time.

Regardless, the EUA statute, 21 U.S.C. § 360bbb-3, "governs the conduct of the Secretary of Health and Human Services, not the [DoD or NGA]." *Calif. v. Dep't of the Navy*, No. 24-1722, 2024 WL 4985271, at *4 (Fed. Cir. Dec. 5, 2024); see *Children's Health Def., Inc. v. Rutgers*, 93 F.4th 66, 76 (3d Cir. 2024), *cert. denied*, 144 S. Ct. 2688 (2024). On that basis alone, Mr. Kroenung cannot establish that NGA's testing policy violated the EUA statute. Furthermore, the statute "addresses the interaction between the medical provider and the person receiving the [EUA product], not the interaction between an employer and an employee receiving [an EUA product]." *Norris v. Stanley*, 73 F.4th 431, 438 (6th Cir. 2023), *cert. denied*, 144 S. Ct. 1353 (2024). And the statute only requires that "patients are 'informed' of their 'option to accept or refuse,'" and of the "'consequences' for 'refusing.'" *Pearson v. Shriners Hosps. for Child., Inc.*, 133 F.4th 433, 445 (5th Cir. 2025). "[T]here is no unqualified right to decide whether to 'accept or refuse' an EUA product without consequence." *Children's Health Def.*, 93 F.4th at 76. Mr. Kroenung had the "option to accept or refuse" to follow the testing policy, and he was informed of the "consequences" of refusal. 21 U.S.C. § 360bbb-3(e)(1)(A)(ii)(III); Appx81, Appx96, Appx265. That is all the

EUA statute requires, if it even applies here.

Nor has Mr. Kroenung shown that the testing policy violated substantive due process. If “there is no fundamental right to refuse vaccination,” *Children’s Health Def.*, 93 F.4th at 78, then there is no fundamental right to refuse a less intrusive mitigation measure such as testing. *See Doe v. Franklin Square Union Free Sch. Dist.*, 100 F.4th 86, 95-98 (2d Cir. 2024) (rejecting challenge to a requirement for “experimental” masks); *Klaassen v. Tr. of Ind. Univ.*, 7 F.4th 592, 592-93 (7th Cir. 2021) (requirement that students be vaccinated or else wear masks and test for COVID-19 does not implicate a fundamental right).

Further, although Mr. Kroenung presents the right as being “free from uninformed, unwanted, unconsented-to, or unaccountable investigatory medicine” (Br. 51), he had that choice and, indeed, exercised it by refusing to test. Thus, Mr. Kroenung’s actual interest is in his continued employment—and federal employment is not a fundamental right. *DeLong v. HHS*, 264 F.3d 1334, 1341-42 (Fed. Cir. 2001); *see also Lukaszczyk v. Cook Cnty.*, 47 F.4th 587, 602 (7th Cir. 2022); *We The Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 293-94 (2d Cir. 2021). Mr. Kroenung’s identification of a “property right in his continued employment” (Br. 54) does not support the *substantive* due process claim he asserts. *DeLong*, 264 F.3d at 1341.

D. Mr. Kroenung also fails to establish that NGA’s testing policy was an “unlawful[] exten[sion]” of Executive authority. Br. 41-47. Again, Mr. Kroenung did not raise this argument below and cannot do so now. In any case, the argument in his

opening brief is largely undeveloped, with entire sections missing. We respond only to those arguments that have been developed to a discernible degree.

The bulk of Mr. Kroenung’s argument appears to concern Executive Order 14043, which mandated vaccination for federal employees and was preliminarily enjoined by a district court. Br. 41-45. But NGA’s testing policy was distinct from Executive Order 14043, which only addressed vaccination. That is clear from the face of the Executive Order. 86 Fed. Reg. 50989 (President Biden “determin[ing] that ... it is necessary to require COVID-19 vaccination for all Federal employees”). It is equally clear from the preliminary injunction order Mr. Kroenung cites. *Feds for Med. Freedom*, 581 F. Supp. 3d at 829 (preliminarily enjoining the “presidential mandate that all federal employees consent to vaccination against COVID-19”). Indeed, before the MSPB, Mr. Kroenung’s counsel conceded the distinction between “the vaccine mandate” and “the testing mandate.” Appx344; *see also* Appx367 (NGA counsel explaining that “there was no injunction on a testing policy. To this day, the DoD testing policy has never been declared illegal.”).⁵

⁵ Mr. Kroenung’s contention that the preliminary injunction “implicitly covered” testing (Br. 11) is baseless. *See Feds for Med. Freedom*, 581 F. Supp. 3d 826 (containing no discussion of testing). Mr. Kroenung’s reliance on *National Federation of Independent Business v. Department of Labor*, 595 U.S. 109 (2022), is also misplaced. That case involved a Department of Labor rule promulgated under the Occupational Safety and Health Act and applicable to “roughly 84 million workers” across “the Nation’s work force”—including States and private employers—that required vaccination, with the only exception for workers who tested “at their own expense and on their own time.” *Id.* at 113. That has no bearing on a DoD testing policy, issued under different

Continued on next page.

To the extent Mr. Kroenung’s challenge is to the Safer Federal Workforce Task Force and Executive Order 13991 establishing it (Br. 6-7, 9, 42), that argument also lacks merit. The Task Force issued *guidance*. Appx294 (“The purpose of this guidance is to provide federal agencies with strategies to consider ...”); 86 Fed. Reg. 7045, § 4(e) (“The Task Force shall provide ongoing guidance to heads of agencies ...”). The guidance explicitly stated that “[e]ach federal agency should apply this guidance according to the situation in their workplace or workforce.” Appx294; *see also* <https://perma.cc/9M3R-7S6A> (noting that agencies are not required to, but may, establish a screening testing program). Mr. Kroenung’s underdeveloped argument does not explain how such guidance could constitute Executive overreach.

For these reasons, the Court should reject Mr. Kroenung’s challenges to the legality of NGA’s testing policy, which he references throughout his brief.

IV. Mr. Kroenung Fails To Establish Reversible Error By The Board

The board found that NGA had proven all three requirements to sustain a charge against an employee: (1) “that the charged conduct occurred,” (2) “a nexus between the conduct and the efficiency of the service,” and (3) “that the penalty imposed was reasonable.” *Bryant v. Nat’l Sci. Found.*, 105 F.3d 1414, 1416 (Fed. Cir. 1997); Appx6-14. Substantial evidence supports each of those findings.

authorities, applicable only to the federal employees within DoD’s purview, and supplying the tests and duty time used for testing. *E.g.*, Appx127-28.

A. Substantial Evidence Supports The Board's Finding That NGA Proved Its Charge of Conduct Unbecoming

NGA charged Mr. Kroenung for conduct unbecoming a federal employee—specifically, failure to comply with the agency's testing policy on August 8 and 15, 2022.⁶ Appx76. There is no dispute that during those weeks, community transmission levels necessitated employee testing under agency policy. Appx102, Appx252, Appx257-60. Nor does Mr. Kroenung dispute that he “refused to take a Covid test before coming into work each week that the agency ordered him to.” Br. 26. Thus, substantial evidence supports the board's finding that NGA “proved the charge of conduct unbecoming based on [Mr. Kroenung's] repeated refusal to follow agency COVID-19 testing policy” on the weeks in question. Appx6-8.

Mr. Kroenung challenges this finding on two grounds. The first, that compliance with agency policy did not require him to test (Br. 29), is utterly without support. The policy required testing when community transmission levels were medium or high. Appx252, Appx102. Transmission levels for the NGA facility Mr. Kroenung worked in (NCW) were high the week of August 8 and medium the week of August 15, 2022, thus requiring testing under agency policy. Appx257-60. And the board noted Mr. Kroenung's “admi[ssion] that he did not follow the agency's COVID-19 testing policy on August 8 and 15, 2022, the time period cited in the

⁶ Because of the general nature of a “conduct unbecoming” charge, the board properly looked to the specifications to identify the conduct at issue. Appx6-7; *see Lachance v. MSPB*, 147 F.3d 1367, 1371 (Fed. Cir. 1998).

specifications.” Appx8. Mr. Kroenung’s reference to weeks when transmission levels were low (Br. 29) is therefore irrelevant to whether the charged conduct occurred. So is his reference to telework, as telework was not an option for the weeks at issue. Appx13, Appx265, Appx287, Appx342, Appx347 (record evidence that “telework is not an option at this time” because Mr. Kroenung “was in training status at the time,” which “required him to be in the building to work on a higher [classified] network,” and that his job more generally required an in-office presence at least “40 hours” “[e]very two weeks”).

Mr. Kroenung’s other argument, that the policy was “unlawful” (Br. 26-29), also fails. This Court has long held that “Government employees may not refuse [an order] merely because of disagreements with management.” *Nagel v. HHS*, 707 F.2d 1384, 1387 (Fed. Cir. 1983) (cleaned up); see *Mears v. Dep’t of Agric.*, 155 F.3d 569, at *2 (Fed. Cir. 1998) (Table) (“Ms. Mears was required to obey the agency order, despite any belief that it may have been improperly effected.”). Cf. *Lachance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999) (in the whistleblower context, “[p]olicymakers and administrators have every right to expect loyal, professional service from subordinates” even when the subordinate disagrees with an order). The board has held similarly. E.g., *Gragg v. U.S. Air Force*, 13 M.S.P.R. 296, 299 (1982); *Jahn v. Dep’t of Agric.*, 45 M.S.P.R. 514, 521 (1990), *aff’d*, 935 F.2d 281 (Fed. Cir. 1991) (Table).⁷

⁷ Mr. Kroenung incorrectly asserts (Br. 26) that the *Gragg* line of cases lost force
Continued on next page.

Smith v. GSA, 930 F.3d 1359 (Fed. Cir. 2019) is not to the contrary; indeed, it is consistent with our position. There were two separate charges in *Smith*: failure to follow policy and failure to follow supervisory instruction. *Id.* at 1368. Regarding failure to follow policy, *Smith* held that a policy must apply to an employee for an agency to charge him with failure to follow that policy. *Id.* There is no question that NGA's testing policy applied to Mr. Kroenung, who never requested a medical or religious exemption. Appx362. Regarding failure to follow supervisory instruction, *Smith* explained that the instruction must be proper and noted indicators of propriety, such as whether the agency had a "formal policy" consistent with the instruction and whether other employees received the same instruction. 930 F.3d at 1368. Here, there was a formal policy requiring testing that applied to all employees. Appx102, Appx252.

In any event, the board found that the testing policy "was lawfully adopted per DoD guidance," which directed testing and drew on an extensive list of authorities, the Safer Federal Workforce Task Force guidance, and DoD's longstanding authority to implement force health protection measures. Appx8; *see supra* at 2-4. Mr. Kroenung has not shown that the testing policy was unlawful (much less "clearly

after *Fleckenstein v. Dep't of the Army*, 63 M.S.P.R. 470 (1994). The board has clarified that *Fleckenstein* means that an employee need not obey an order that will cause him irreparable harm. *Cooke v. USPS*, 67 M.S.P.R. 401, 408 (1995), *aff'd*, 73 F.3d 380 (Fed. Cir. 1995) (Table) (employee not entitled to disobey an order he disagreed with, even though the board ultimately found the order improper). Mr. Kroenung has never established that following NGA's testing policy would cause him irreparable harm.

unlawful,” Br. 28-29) for the reasons discussed above in Section III.

B. Substantial Evidence Supports The Board’s Nexus Finding

To establish nexus, an agency must show that “the employee’s misconduct is likely to have an adverse impact on the agency’s performance of its functions.” *Brown v. Dep’t of the Navy*, 229 F.3d 1356, 1358 (Fed. Cir. 2000). “[I]t is beyond dispute that failure to follow instructions or abide by requirements affects the agency’s ability to carry out its mission.” *Cobert v. Miller*, 800 F.3d 1340, 1351 (Fed. Cir. 2015) (cleaned up); see *Newsome v. Dep’t of Treasury*, 338 F. App’x 902, 905 (Fed. Cir. 2009) (“by its nature,” such a failure “affects the efficiency of service”). Additionally, “[i]t is not [the Court’s] duty to find nexus” in the first place, but to determine “whether the MSPB affirmance of the agency conclusion on the nexus issue” is supported by substantial evidence. *Hayes v. Dep’t of the Navy*, 727 F.2d 1535, 1539 (Fed. Cir. 1984).

Here, the board found nexus satisfied based on “the mission degradation that had occurred and would continue due to [Mr. Kroenung’s] inability to report to duty onsite, and the impact on other staff members having to redistribute [his] job duties.” Appx9. The board also found nexus in that Mr. Kroenung’s “failure to comply with the agency’s testing policy adversely affected the agency’s trust and confidence in his ability to follow instructions.” Appx9-10. Each of those findings was based on record evidence, such as supervisory testimony that Mr. Kroenung’s failure to comply meant “[he] couldn’t finish his training,” “couldn’t do the mission,” “increased [his colleagues’] workload,” and resulted in lack of “confidence that he would comply with

anything that he disagreed with.” Appx343; *see* Appx349-50, Appx354 (similar testimony from the proposing and deciding officials), Appx62-69 (documentary assessment that the “continued failure to adhere to Agency policies call[ed] into question his judgment, reliability, and trustworthiness,” made Mr. Kroenung “unable to perform the mission-essential requirements of his organization and position,” and “placed a strain on his organization’s mission as others have had to do his job in his stead”). This consistent evidence of nexus more than satisfies the substantial evidence standard.

In resisting the board’s nexus finding, Mr. Kroenung first reiterates that the testing policy was unlawful. Br. 30. He identifies no applicable authority for this argument; the district court decision he cites discussed preliminary injunction factors, not nexus between misconduct and efficiency of the service. *Feds for Med. Freedom*, 581 F. Supp. 3d at 836.

Mr. Kroenung then contends that nexus is lacking because he characterizes his misconduct as “off-duty.” Br. 30-31. But his citation to *Doe v. DOJ*, 565 F.3d 1375 (Fed. Cir. 2009) and the dissent in *Brown*, 229 F.3d 1356, is inapposite because both cases discussed private misconduct. In *Doe*, an employee was removed for private sexual misconduct even though it was not actionable under agency policy, 565 F.3d at 1378—a factual scenario plainly not present here. Further, in *Doe*, the Court remanded for articulation of the standard when “private dishonesty rises to the level of misconduct that adversely affects the ‘efficiency of the service.’” *Id.* at 1380. The

concern was that discipline might otherwise issue based on a “subjective moral compass” that does not provide “notice as to what off-duty behavior is prohibited.” *Id.* at 1380-81. Likewise, the dissent in *Brown* was concerned with a private adulterous relationship, which “predated [the employee’s] position ... and had no causal connection with his job.” 229 F.3d at 1364.

There was no “private,” “subjective,” “off-duty” misconduct here. Mr. Kroenung undisputedly had notice of the requirements under the agency’s testing policy, and he unequivocally refused to test pursuant to that policy when he was required to report to work. Appx8, Appx362. That is quintessential on-the-job misconduct. *Cobert*, 800 F.3d at 1351.⁸

Mr. Kroenung also asserts that the board applied a “presumption” of nexus (Br. 30-31), but the board did no such thing. Rather, the board assessed the record evidence and “credit[ed] testimony from agency management officials” that discussed the impact of Mr. Kroenung’s refusal to comply with policy on the mission, his colleagues’ workloads, and his supervisor’s trust and confidence in his ability to do his job. Appx9-10; *see* Appx343, Appx349-50, Appx354. What Mr. Kroenung calls an improper presumption is simply the board’s finding that NGA met its burden of proof to demonstrate nexus by a preponderance of the evidence.

⁸ Agency guidance even distinguishes between a charge of “failure to follow agency policies,” as here, and “off-duty misconduct,” Appx199-200, confirming that Mr. Kroenung’s argument has no traction.

Mr. Kroenung's next claim, that the "agency made no showings on its mission" (Br. 32), fails for the same reason. His supervisor specifically testified about the effect of his refusal to comply with the testing policy on the mission: "[H]e couldn't come into work. He couldn't finish his training. He couldn't do the mission. Our mission was to, you know, provide military pilots ... aviation stuff so they can fly their airplanes, and him not coming into work for that long a period of time affected our mission." Appx343; *see id.* ("He had certain countries that he was in charge [of], and him not coming into work ma[d]e me give those countries to other people so that I increased their workload because this mission has to be done."). The board found that testimony, and similar testimony from other officials, credible. Appx9-10. These credibility determinations "are virtually unreviewable on appeal." *Bieber v. Dep't of Army*, 287 F.3d 1358, 1364 (Fed. Cir. 2002). Mr. Kroenung's arguments invite the Court to reweigh the evidence, which it cannot do. *Jones*, 834 F.3d at 1369.

Mr. Kroenung's contention that his absence from work, not his refusal to follow policy, was what led to mission disruption (Br. 32) is difficult to understand. Under the testing policy, an employee required to test and who refused to do so was not permitted to enter the NGA worksite. Appx127-28, Appx252. Mr. Kroenung's inability to do his work was the direct result of his refusal to comply with the testing requirement.

Moreover, the board also found nexus based on management's lost trust and confidence in Mr. Kroenung's ability to adhere to agency policies. Appx9-10. That

lost trust resulted from his refusal to follow testing policy, not his absence from work. *Id.*; see Appx343 (Mr. Kroenung's supervisor testifying: "I didn't have any confidence that he would comply with anything that he disagreed with"; "I didn't have confidence that he would follow the policies of the government at any time"; "if he didn't like something, was he just not going to do it?"). NGA, a combat support agency within DoD and member of the Intelligence Community, is a sensitive employment setting in which trust is paramount. See *Webster v. Dep't of Army*, 911 F.2d 679, 687 (Fed. Cir. 1990) (affirming removal of civilian employee at a military installation where, among other things, his refusal to follow orders "affected his supervisors' confidence in [his] ability to perform his duties" (cleaned up)). Any contrary and unsupported suggestion by Mr. Kroenung (Br. 33) does not undercut the substantial evidence for the board's conclusion. See *Sanders v. USPS*, 801 F.2d 1328, 1332 (Fed. Cir. 1986) (loss of trust in an employee establishes the requisite nexus); *Arredondo v. USPS*, 120 F. App'x 789 (Fed. Cir. 2004) (affirming nexus finding based on testimony that employee's failure "to follow his supervisor's instructions could result in a breakdown in authority").

Finally, Mr. Kroenung briefly argues that NGA should have reassigned him to a different position. Br. 33-34. This does not pertain to nexus, however, and it fails even in the reasonableness-of-penalty context. As explained in the next section, agencies have significant discretion in selecting the penalty for misconduct, and substantial evidence supports the board's finding that the penalty here was reasonable.

C. Substantial Evidence Supports The Board's Penalty Finding

The board found that NGA appropriately considered the relevant factors set forth in *Douglas v. Veterans Admin.*, 5 M.S.P.R. 280 (1981), and that the penalty of removal was reasonable. Appx10-14. “It is well-established that selecting the penalty for employee misconduct is left to the agency’s discretion,” and the Court does not disturb that choice unless it is “*totally unwarranted* in light of the relevant factors.” *Webster*, 911 F.2d at 685; *see Farrell v. Dep’t of Interior*, 314 F.3d 584, 594 (Fed. Cir. 2002) (requiring affirmance unless the penalty is “grossly disproportionate”). The Court “does not require the Board to consider every one of the 12 Douglas factors mechanistically by a preordained formula.” *Farrell*, 314 F.3d at 594. “The Board need only determine that the agency considered the factors significant to the particular case.” *Kumferman v. Dep’t of Navy*, 785 F.2d 286, 291 (Fed. Cir. 1986).

Here, the board found that the deciding official “provided a credible, detailed explanation” of how she “fully and carefully considered the relevant Douglas factors,” and it described the most salient portions of the deciding official’s testimony. Appx12-14; *see Bieber*, 287 F.3d at 1364 (credibility determinations are “virtually unreviewable”). The board also addressed, and rejected, the two arguments Mr. Kroenung made—that the agency should have adopted his proposed solutions, and that other employees received accommodations from the testing policy. Appx13-14. The board explained that it found “compelling and persuasive” the supervisory testimony “that the solutions suggested by [Mr. Kroenung] were unworkable from the

agency’s perspective,” and that the purported comparators “each had distinguishing characteristics that render them inapposite for comparison.” *Id.* All “factors significant to the current case” were considered, *Kumferman*, 785 F.2d at 291, and substantial evidence supports the board’s findings.

Notably, Mr. Kroenung does not identify any *Douglas* factor that he claims NGA failed to consider. And although he offers three overall arguments for why he believes the board erred in reviewing the reasonableness of the penalty, none provides a basis for the Court to disturb the board’s determination.

1. Mr. Kroenung’s argument that the penalty should be mitigated because the testing policy was unlawful, enjoined, and later rescinded (Br. 34-35, 38-41) fails for multiple reasons.

Under this Court’s precedent, an employee’s belief that an order was unlawful “d[oes] not lessen the gravity of the offense”; “all that is required” in assessing reasonableness of penalty is that the board consider the *Douglas* factors “relevant to petitioner’s case.” *Nagel*, 707 F.2d at 1386. There is no dispute that the board did so here. Likewise, it is beyond reasonable dispute that NGA’s testing policy was never enjoined, and Mr. Kroenung’s insistence to the contrary finds no support. In any event, a challenge to the validity of a policy does not alter the deference afforded to an agency’s choice of penalty. An unbroken line of cases holds that this Court’s review of a penalty is “highly deferential.” *Webster*, 911 F.2d at 685; *Bieber*, 287 F.3d at 1365; *see McIntosh*, 53 F.4th at 638, 643 (same, even when the employee contested the

propriety of the instruction she was directed to follow). *See also* Section III (explaining why Mr. Kroenung’s arguments on illegality fail on their merits).

Further, regarding the later policy change (in January 2023) to remove the testing requirement, Mr. Kroenung never raised that issue before the board, either in written submissions or at the hearing that occurred a full year *after* the policy change. Appx232, Appx281-85, Appx337-67. “[T]he impropriety of seeking a reversal of the board’s decision on the basis of assertions never presented to the presiding official or to the board” is “clearly establishe[d].” *Oshiver v. OPM*, 896 F.2d 540, 542 (Fed. Cir. 1990); *see McIntosh*, 53 F.4th at 643 (“this argument was never made to the Board, and so it is forfeited”). This argument also fails even if the Court considers it: Mr. Kroenung undisputedly refused to follow the policy that was in effect at the time of the events giving rise to his removal. *See Mears*, 155 F.3d at *2 (rejecting argument that “the agency has since changed its policy”).

Moreover, Mr. Kroenung asserts that his arguments go to *Douglas* factors 10 (potential for employee rehabilitation) and 12 (adequacy of alternative sanctions to deter future misconduct). Br. 38-39. These factors primarily consider the *employee’s* prior actions and attitudes, such as whether the employee made “substantial behavior changes” and how they responded to progressive discipline. *Higgins v. Dep’t of Veterans Affs.*, 955 F.3d 1347, 1356 (Fed. Cir. 2020); *Blank v. Dep’t of Army*, 247 F.3d 1225, 1228 (Fed. Cir. 2001). Here, the board credited the deciding official’s testimony that these were aggravating—not mitigating—factors, given Mr. Kroenung’s “open refusal to

comply” and “statements to his supervisor suggesting that he would not change his stance on the issue.” Appx12-13. That the policy changed more than a year later does not mitigate the fact that Mr. Kroenung took no steps to alter his behavior or attitude while the policy was in effect. *See also* Appx343 (testimony that Mr. Kroenung’s supervisor “didn’t have any confidence that he would comply with anything that he disagreed with”; “I didn’t have confidence that he would follow the policies of the government at any time”).

2. Mr. Kroenung’s argument that “there was a similarly situated comparator” (Br. 35-38) also does not withstand scrutiny. A proper comparator must be “substantially similar,” such as “proof that [they were] in the same work unit, with the same supervisor, and [were] subjected to the same standards governing discipline.” *Miskill v. SSA*, 863 F.3d 1379, 1384 (Fed. Cir. 2017); *see Williams v. SSA*, 586 F.3d 1365, 1368-69 (Fed. Cir. 2009) (noting that the inquiry is highly fact-dependent); *Singh v. USPS*, 2022 M.S.P.B. 15, ¶ 13 (2022).⁹ Most importantly here, the record established that the alleged comparators did not engage in substantially similar misconduct—*i.e.*, refuse to follow testing policy. As the board found, each “had distinguishing characteristics that render them inapposite for comparison.” Appx13;

⁹ Mr. Kroenung emphasizes that his alleged comparators were not required to have the same supervisor as him (Br. 35-36), but the caselaw continues to hold that “[i]n most cases, employees from another work unit or supervisory chain will not be proper comparators,” and the board did not distinguish on that basis anyway. *Singh*, 2022 M.S.P.B. ¶ 13; *see Miskill*, 863 F.3d at 1384; *Williams*, 586 F.3d at 1368.

see Appx331-32 (Mr. Katze “test[ed] at home”; Mr. Glascock “complied with testing requirements”; and Mr. Leggins requested and received a “reasonable accommodation”), Appx362-63 (Mr. Kroenung admitting the same at the hearing). Mr. Kroenung does not challenge the board’s finding with respect to these three individuals.

Nor does Mr. Kroenung establish a fourth comparator, Dave Atkinson, based on a one-sentence stipulation about *another* employee’s “aware[ness]” that Mr. Atkinson “never tested but was allowed on at least two occasions to come in person to work.” Br. 35; Appx331. In addition to being purely anecdotal, *see* Appx13, Mr. Kroenung failed to satisfy his burden of showing that Mr. Atkinson engaged in the same misconduct and was otherwise substantially similar.¹⁰ In fact, Mr. Kroenung testified that he believed Mr. Atkinson had an accommodation from the testing policy, Appx361—which would necessarily mean that Mr. Atkinson had not failed to follow the policy. Further, as Mr. Kroenung acknowledges (Br. 29), there were periods of time when community transmission levels did not require testing under NGA’s policy. But Mr. Kroenung did not show that transmission levels required testing under NGA policy on the two unidentified occasions when Mr. Atkinson

¹⁰ Mr. Kroenung incorrectly asserts that NGA bore the burden of establishing potential comparators. Br. 36. The “burden to show disparate treatment among similarly-situated individuals” lies with the employee. *Robinson v. Dep’t of Veterans Affs.*, 923 F.3d 1004, 1017 (Fed. Cir. 2019); *see Woods v. Dep’t of Air Force*, 64 F. App’x 777, 779 (Fed. Cir. 2003) (“a petitioner must demonstrate that similarly situated employees were treated differently for the same offense”).

reported for work without testing. That Mr. Atkinson did not work in Mr. Kroenung's unit or share a supervisor, Appx331, Appx341, only underscores that he is not a proper comparator. *See Miskill*, 863 F.3d at 1384; *Singh*, 2022 M.S.P.B. ¶ 13. Thus, the record supports the board's finding that each putative comparator "had distinguishing characteristics that render them inapposite for comparison." Appx13.

Even if Mr. Kroenung had demonstrated the existence of a proper comparator, he did not show that any such comparator was "*knowingly* treated differently." *Facer v. Dep't of Air Force*, 836 F.2d 535, 539 (Fed. Cir. 1988); *see Baker v. HHS*, 912 F.2d 1448, 1458 (Fed. Cir. 1990); *Singh*, 2022 M.S.P.B. 15, ¶ 13. On the contrary, NGA confirmed that the penalty of removal was "consistent with penalties imposed on other employees for similar offenses," and agency officials testified that they treated Mr. Kroenung consistently with other employees. Appx65, Appx341, Appx349.

3. Mr. Kroenung additionally takes issue with NGA's (not the board's) assessment of three *Douglas* factors. Br. 39. Again, not having raised any of these arguments with the board, Mr. Kroenung waived them. *Wallace*, 879 F.2d at 832; *McIntosh*, 53 F.4th at 643. They also fail on their own terms.

Regarding *Douglas* factor 2 (employee job level and employment type), Mr. Kroenung ignores that NGA assessed this as an aggravating factor because his position was "a special trust position" and his misconduct was "directly related to the job." Appx62-63. These are relevant factors when determining the reasonableness of a penalty. *See DeWitt v. Dep't of Navy*, 747 F.2d 1442, 1445 (Fed. Cir. 1984). This

Court has explained, for example, that law enforcement officers hold a “unique position of trust” that agencies can consider in determining an appropriate penalty. *Mings v. DOJ*, 813 F.2d 384, 390 (Fed. Cir. 1987); *see Joyce v. DHS*, 342 F. App’x 591, 593 (Fed. Cir. 2009). No less is true of an aeronautical analyst whose job requires access to classified systems. Appx100, Appx342; *see Kumferman*, 785 F.2d at 291-92. Mr. Kroenung’s focus on his nonsupervisory role (Br. 39) is therefore immaterial.

Regarding *Douglas* factor 8 (notoriety of the offense and impact on the agency’s reputation), NGA determined that tolerating Mr. Kroenung’s refusal to follow policy “in the midst of a global pandemic creates an impression of defiance and disregard for the health and safety of the NGA workforce,” not to mention “disregard for the properly promulgated regulations and guidance of the Executive Branch.” Appx66. Mr. Kroenung’s disagreement with the specificity of this assessment does not suffice to demonstrate reversible error. Consideration of the potential impact on an agency’s reputation is wholly appropriate, and this Court does not reweigh the evidence (or weigh it in the first instance). *See Weston v. Dep’t of Hous. & Urban Dev.*, 724 F.2d 943, 949 (Fed. Cir. 1983) (affirming penalty that, among other things, addressed misconduct with “the potential of compromising [the employee’s] reputation” and was “correctly found by the MSPB to be ‘extremely serious’”); *Jones*, 834 F.3d at 1369.

Mr. Kroenung’s final argument, regarding *Douglas* factor 7 (consistency with agency’s table of penalties), is hard to follow. To the extent he contends that this factor could not be aggravating because the table of penalties already provides harsher

penalties for a third offense, he provides no support for that proposition. The table of penalties identifies a *range* of penalties for a third offense—“5-Day Suspension to Removal,” Appx66, Appx199—and NGA determined that the most serious penalty, removal, was warranted due to the third occurrence of misconduct.

Insofar as Mr. Kroenung argues that NGA “double-counted” his past misconduct, he misunderstands the law on double punishment. As this Court has explained, the board (though not the Court) has prohibited two separate instances of discipline for the same act of misconduct. *Nguyen v. DHS*, 737 F.3d 711, 716-17 (Fed. Cir. 2013). That principle does not apply here. Although Mr. Kroenung was reprimanded, suspended, and ultimately removed for the same general reason—refusal to follow testing policy—the specific acts of misconduct were distinct. His reprimand was based on misconduct on January 3, 2022, Appx96; his suspension was based on misconduct on March 1 and 7, 2022, Appx89; and his removal was based on misconduct on August 8 and 15, 2022, Appx76. Following Mr. Kroenung’s logic would eliminate the concept of progressive discipline.

In sum, the board did not abuse its discretion in affirming Mr. Kroenung’s removal, given the seriousness of his misconduct and its impact on his workplace and colleagues. Substantial evidence supports the board’s finding that “removal is warranted under the circumstances and is within the tolerable bounds of reasonableness and promotes the efficiency of the service.” Appx14.

CONCLUSION

For these reasons, the judgment of the board should be affirmed.

Respectfully submitted,

BRETT A. SHUMATE
Assistant Attorney General

PATRICIA M. MCCARTHY
Director

TARA K. HOGAN
Assistant Director

/s/ Catherine M. Yang
CATHERINE M. YANG
Trial Attorney
Commercial Litigation Branch
Civil Division
U.S. Department of Justice
P.O. Box 480, Ben Franklin Station
Washington, DC 20044
(202) 514-4336
Catherine.m.yang@usdoj.gov

October 14, 2025

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) and Federal Circuit Rule 32(b)(1) because it contains 10,191 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Word for Microsoft 365 in Garamond 14-point font, a proportionally spaced typeface.

/s/ Catherine M. Yang
CATHERINE M. YANG