No. ___

IN THE
Supreme Court of the United States

GWYNNE A. WILCOX,
Petitioner,
v.
DONALD J. TRUMP, in his official capacity as President of the United States, and MARVIN E. KAPLAN, in his official Capacity as Chairman of the National Labor Relations Board,
Respondents.

On Petition for a Writ of Certiorari Before Judgment to the United States Court of Appeals for the D.C. Circuit

PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT

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QUESTIONS PRESENTED

1. May Congress constitutionally limit removal of members of the National Labor Relations Board to cases of "neglect of duty or malfeasance in office." 29 U.S.C. § 153(a)?

2. Do federal district courts have authority to provide a non-damages remedy for violations of the NLRB's for-cause removal provision?

RELATED PROCEEDINGS

This case arises from the following proceedings:

- The case remains pending before the U.S. Court of Appeals for the District of Columbia Circuit in *Wilcox v. Trump*, No. 25-5057 (D.C. Cir.).
- The case was before the U.S. District Court for the District of Columbia in *Wilcox v. Trump*, No. 25-334 (D.D.C.) (memorandum and order granting summary judgment to the plaintiff, issued March 6, 2025).
- The case was previously before this Court in *Trump* v. *Wilcox*, No. 24A966.

There are no other proceedings in state or federal court, or in this Court, that are directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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INTRODUCTION

Earlier this year, in this case, this Court denied the government's request for certiorari before judgment to address the constitutionality of a statutory removal restriction governing the National Labor Relations Board under *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). "[T]hat question," the Court held, "is better left for resolution after full briefing and argument." *Trump v. Wilcox*, 145 S. Ct. 1415, 1415 (2025).

A few months later, the Court did the same in *Trump v. Boyle* as to a removal restriction governing the Consumer Product Safety Commission. 145 S. Ct. 2653, 2654 (2025). In doing so, the majority in *Boyle* parted ways with Justice Kavanaugh, who wrote separately to note that he "would have granted certiorari before judgment in this case or in *Wilcox*." *Boyle*, 145 S. Ct. at 2654 (Kavanaugh, J., concurring). A majority of the Court has thus twice considered and rejected the wisdom of granting certiorari before judgment to revisit *Humphrey's Executor*.

Now, the government is asking (half-heartedly) for the same relief again—this time in *Trump* v. *Slaughter*, a case involving removal restrictions governing the Federal Trade Commission—and the respondent, earlier today, has acquiesced in that request. *See* Opp. to Stay Pending Appeal at 39–40, *Trump v. Slaughter*, No. 25A264 (U.S. 2025). But, other than the strategic decision of a single litigant and her counsel to acquiesce in certiorari, nothing has changed. There is no new urgency here, particularly if the Court decides to grant a stay in *Slaughter*, as it did in *Wilcox* and *Boyle*. And there has not yet been a merits decision from the court of appeals in any of these three cases, or in any of the other removal cases working their

way through the pipeline. There is thus no reason for the Court to revisit its prior judgment that these cases should not be rushed to certiorari, but should proceed in the ordinary course. In other words, it remains true that the question "is better left for resolution after full briefing and argument." *Wilcox*, 145 S. Ct. at 1415.

For ninety years, this Court has allowed for-cause removal protections to stand. And for ninety years the law has stood unchallenged by fourteen presidential administrations. No real-world harm will come from allowing the ordinary appellate process to unfold over a few more weeks. But if the Court is nevertheless inclined to grant review to reconsider *Humphrey's Executor* on an accelerated timeline in any case, it should grant review here. If it does so, the Court may also wish to grant certiorari before judgment in this case's companion, *Trump v. Harris*, which would allow the cases to be argued in tandem, as they were in the D.C. Circuit.

This Court's ultimate choice of which case (or cases) it uses to examine the continuing vitality of *Humphrey's Executor* is important, because each independent agency that Congress created has unique features that may control the constitutional analysis. With the NLRB, in particular, Congress revised the agency's design and imposed a form of "separation of powers within the agency." *N.L.R.B. v. United Food & Com. Workers Union, Loc. 23, AFL-CIO*, 484 U.S. 112, 118 n.5 (1987). That structure reserves prosecutorial functions to the General Counsel, who serves at the pleasure of the President and is "independent of the Board's supervision and review." *Id.* at 117–18 & n.5. By contrast, the agency's five-member Board is structured like a court in both form and function, with members acting as a panel of appellate

judges, issuing mostly unanimous decisions by applying federal labor law to the record in the cases that come before it. The Board is also unique in other ways: As Judge Oldham has observed, the NLRB "may be the only agency that needs a court's imprimatur to render its orders enforceable." *Dish Network Corp. v. NLRB*, 953 F.3d 370, 375 n.2 (5th Cir. 2020).

Granting review here would allow the Court to consider these and other steps that Congress took in the National Labor Relations Act to carefully avoid separation-of-powers problems. It would thus give Congress and the courts critical guidance on what (if any) steps that Congress can take to preserve some measure of independence in the future.

To sum up: The Court should not grant certiorari in any case at this time. But, if it does so, it should not consider the fate of *Humphrey's Executor* without directly considering the constitutionality of the NLRB and its unique features.

OPINIONS BELOW

The district court's decision is reported at *Wilcox v. Trump*, 775 F. Supp. 3d 215 (D.D.C. 2025), and reproduced at Pet. App. 143a. The order of the D.C. Circuit special panel granting a stay pending appeal is not reported but is available at 2025 WL 980278, and reproduced at Pet. App. 21a. The order of the en banc D.C. Circuit denying a stay is not reported but is available at 2025 WL 1021435, and reproduced at Pet. App. 1a.

JURISDICTION

The district court entered a final judgment on March 6, 2025. Pet. App. 140a. On the same day, the government filed a notice of appeal to the U.S. Court of Appeals for the

D.C. Circuit. The D.C. Circuit heard expedited argument on the merits on May 16, 2025, and the case remains pending in that court. This Court has jurisdiction over this petition for certiorari before judgment under 28 U.S.C. §§ 1254(1) and 2101(e).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 153(a) provides: "Any member of the [National Labor Relations Board] may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause."

STATEMENT

I. Statutory background

A. Congress created the NLRB as an independent, multimember adjudicative body.

1. Congress established the National Labor Relations Board "in response to a long and violent struggle for workers' rights." Pet. App. 149a. "In the latter part of the nineteenth century and the early decades of the [twentieth] century, the American labor scene was often a sordid spectacle of violence, rioting, demonstrations, and sit-ins." Arnold Ordman, *Fifty Years of the NLRA: An Overview*, 88 W. Va. L. Rev. 15, 15–16 (1985).[1] "The use of armed guards, police, and the military was an all too familiar phenomenon." *Id.* For "the promotion of industrial peace," *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 257 (1939), Congress created the NLRB as an independent and impartial adjudicative body shielded

[1] Unless otherwise noted, all internal quotation marks, citations, alterations, brackets, and ellipses have been omitted from quotations throughout this brief.

from political pressures to serve "in the public interest." *Amalgamated Util. Workers v. Consol. Edison Co. of N.Y.*, 309 U.S. 261, 265 (1940). Congress gave the NLRB exclusive jurisdiction to adjudicate labor disputes and to protect both employers and employees from unfair labor practices. *See* 29 U.S.C. §§ 157–60.

The NLRB "is a paradigmatic example of a multimember group of experts who lead an independent federal office." Pet. App. 155a. Congress determined that the independence of Board members was critical to protect them "from being subject to immediate political reactions at elections." NLRB, 1 *Legislative History of the National Labor Relations Act*, at 1467 (1949). The National Labor Relation Act's sponsor, Senator Robert Wagner, explained that only an autonomous tribunal—"detached from any particular administration that happens to be in power"—could fairly adjudicate disputes between employers and employees. *Id.* at 1428.

Reflecting that congressional judgment, "the Board was designed to be an independent panel of experts that could impartially adjudicate disputes." Pet. App. 151a; *see* 29 U.S.C. § 153(a). Congress imbued the Board with the hallmarks of an independent agency, including statutory removal protection, specified tenure, a multimember structure, and adjudication authority. *See* Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 Cornell L. Rev. 769, 825 (2013).[2] President Franklin D. Roosevelt signed

[2] Unlike some independent agencies, the NLRB does not have a mandatory bipartisanship requirement. But because the President names the Chair and because the Board's members serve staggered terms, every president has the "opportunity to shape its leadership and thereby influence its activities." *Seila Law*, 591 U.S. at 206. The

the Act into law, lauding the creation of "an independent quasi-judicial body." Franklin D. Roosevelt, President of the United States, Statement on Signing the National Labor Relations Act (July 5, 1935); *see also* NLRB, *First Annual Report of the National Labor Relations Board* at 9 n.1 (1936).

As originally enacted in 1935, the NLRA "granted the Board plenary authority over all aspects of unfair labor practice disputes: The Board controlled not only the filing of complaints, but their prosecution and adjudication." *United Food & Com. Workers Union*, 484 U.S. at 117.

Critically, however, Congress changed that structure in the Labor Management Relations Act of 1947 (also known as the Taft-Hartley Act), dividing the Board's "prosecutorial and adjudicatory functions between two entities." *Id.* at 117–18 & n.5. Congress "determine[d] that the General Counsel of the Board should be independent of the Board's supervision and review." *Id.* The Act thus imposed a form of "separation of powers within the agency," dividing the agency's prosecutorial functions from its adjudicative ones. *Id.* at 118 n.5 (citing legislative history).

2. As a result, the NLRB today is a "bifurcated agency." Pet. App. 150a. "The two sides operate independently," with the General Counsel "independent of the Board's control." *Id.*; *see United Food & Com.*

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agency also has a long history and tradition of bipartisanship. The "NLRB has consistently held a 3-2 breakdown in membership: three Board members from the president's party and two Board members from the opposing party." Emma Barudi, *An Assumed Tradition: How the 3-2 Balance of the NLRB Is More Than the Sum of Its Appointments and an Argument for Its Continuation*, 26 N.Y.U. J. Legis. & Pub. Pol'y 817, 819 (2023).

Workers, 484 U.S. at 117–18. On one side of the split are the General Counsel and several Regional Directors, who are charged with prosecuting unfair labor practices and enforcing labor law. *United Food & Com. Workers*, 484 U.S. at 117–18; *see* 29 U.S.C. § 153(d). The General Counsel is appointed by the President, removable at will, and "independent of the Board's" control. *United Food & Com. Workers*, 484 U.S. at 118. The General Counsel is the "final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints … and in respect of the prosecution of [] complaints before the Board." 29 U.S.C. § 153(d). This Court has held that the General Counsel has "unreviewable discretion to refuse to institute an unfair labor practice complaint," *Vaca v. Sipes*, 386 U.S. 171, 182 (1967), as well as exclusive authority to dismiss or informally settle charges, *United Food & Com. Workers*, 484 U.S. at 119–21.

Unlike many other agencies, the NLRB lacks authority to initiate investigatory or enforcement actions on its own. *See Chamber of Com. of U.S. v. NLRB*, 721 F.3d 152, 156 (4th Cir. 2013). "Until a charge is brought, the Board may take no enforcement action." *United Food & Com. Workers*, 484 U.S. at 118–19. Rather, the agency—like a court—may employ "its statutory powers only if and when its processes are invoked by the private parties who invoke those processes." Ordman, *Fifty Years of the NLRA*, 88 W. Va. L. Rev. at 18. This "reactive mandate stands in stark contrast to the proactive roles of other labor agencies." *Chamber of Com.*, 721 F.3d at 156 n.2.

3. On the other side of the split, Congress created an independent, quasi-judicial Board charged with adjudicating appeals of labor disputes. Pet. App. 150a.

Like many other multimember entities, the Board was designed to be an independent panel of experts that could impartially adjudicate disputes. *See* Datla & Revesz, *Deconstructing Independent Agencies*, 98 Cornell L. Rev. at 770–71 (describing the NLRB as a classic example of an agency designed to be independent). The Board is "judicial in character." *Chamber of Com.*, 721 F.3d at 155 & n. 1. It consists of five members appointed by the President "with the advice and consent of the Senate" for staggered five-year terms. 29 U.S.C. § 153(a). One member, designated by the President, serves as the Board's Chair. *See id.*

The Board (unlike the General Counsel) is protected from at-will removal by the President, who is authorized to remove a Board member "upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause." *Id.* Its powers are carefully circumscribed. Relief ordered by the Board is not independently enforceable; the Board must seek enforcement in a federal court of appeals. 29 U.S.C. §§ 154, 160(e). Compliance with an order of the Board is not obligatory until entered as a decree by a court. *In re NLRB*, 304 U.S. 486, 495 (1938). The Board does have authority, after issuance of a complaint by the General Counsel, to "petition any United States district court for appropriate temporary relief or restraining order" while the dispute is pending at the NLRB—a power akin to a court's power to enter an injunction preserving its own jurisdiction. 29 U.S.C. § 160(j); *Starbucks Corp. v. McKinney*, 602 U.S. 339, 342 (2024). But the relief is "temporary," and the Board lacks authority to enter or enforce such an order on its own. *See* 29 U.S.C. § 160(j).

The Board also has only highly circumscribed rulemaking power, authorizing it "to make, amend, and rescind, in the manner prescribed by [the Administrative Procedure Act], such rules and regulations as may be necessary to carry out the provisions of [the NLRA]." 29 U.S.C. § 156. Almost all of the Board's rules "concern rules of practice before the Board and other procedural and housekeeping measures." Jeffrey S. Lubbers, *The Potential of Rulemaking by the NLRB*, 5 FIU L. Rev. 411, 413 n.19 (2010). The Board's rare efforts at substantive rulemaking have been rebuffed by the courts. *Chamber of Com.*, 721 F.3d at 155 (striking down a workplace notice rule as exceeding the Board's rulemaking authority); *Chamber of Com. of U.S. v. NLRB*, 723 F. Supp. 3d 498, 508 (E.D. Tex. 2024) (vacating the joint-employer rule).[3]

B. The NLRB fits squarely into a long tradition of modest restrictions imposed by Congress and upheld by this Court.

1. The Constitution provides explicit procedures for the "Appointments" of "Officers of the United States." U.S. Const. art. II, § 2, cl. 2. But "[t]here is no express provision respecting removals." *Myers v. United States*, 272 U.S. 52, 109 (1926). The authority to remove executive-branch officials (at least by means other than

[3] Other than a rule on health care bargaining units and the joint-employer rule, a subject on which the courts have suggested that the NLRB is due no deference, *see Browning-Ferris Indus. of Cal., Inc. v. NLRB*, 911 F.3d 1195 (D.C. Cir. 2018), "the Board's CFR chapter only contains three other substantive rules," covering "jurisdictional standards for colleges and universities, and two relatively insignificant workplaces—symphony orchestras, and horse/dog racing." Lubbers, *The Potential of Rulemaking by the NLRB*, 5 FIU L. Rev. at 413; *see* 29 C.F.R. §§ 103.1, 103.2, 103.3.

impeachment) was not discussed at the Constitutional Convention. *See id.* at 109–10. And the Constitution likewise says nothing about the number and structure of executive-branch departments—leaving those details to Congress.

The founders understood, however, that Congress could impose limits on the President's discretion to remove certain officers. Hamilton assumed that the advice and consent of the Senate "would be necessary to displace as well as to appoint" officers. The Federalist No. 77, at 407. Although Madison disagreed that the Senate played such a direct role, he believed that an executive-branch official exercising adjudicative functions "should not hold his office at the pleasure of the executive." 1 Annals of Cong. 481-82, 636 (1789) (Joseph Gales ed., 1834). And in *Marbury v. Madison*, Chief Justice Marshall, backed by a unanimous Court, adopted the same view, writing that not all executive officers need be "removable at the will of the executive." 5 U.S. (1 Cranch) 137, 162 (1803).

From the beginning, Congress imposed removal limits to protect the ability of executive officials to fairly adjudicate matters coming before them. In establishing the territorial courts (a form of "legislative court[]" housed in the executive branch), the First Congress "fixed the terms of the office of the judges of those courts during 'good behavior'"—a provision that, this Court later held, Congress "was competent … to prescribe." *McAllister v. United States*, 141 U.S. 174, 186 (1891). Before the Civil War, Congress established the Court of Claims—another legislative court whose judges were likewise shielded from arbitrary removal. *See Humphrey's Executor*, 295 U.S. at 629. Congress granted similar removal protections to, for example, the Board of General Appraisers (the

predecessor to the Court of International Trade) in 1890 and the Board of Tax Appeals in 1924.[4]

2. Reflecting this settled understanding, Congress has since the founding included removal protections in statutes creating a range of impartial, expert-driven agencies to insulate them from outside influence. Datla & Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 Cornell L. Rev. at 770.

In 1790, Congress created the five-member Sinking Fund Commission "to perform economically critical executive and policy functions," providing that two of its members could not be removed by the President. Pet. App. 112a (Millett, J., dissenting). The following year, Congress gave the President "no removal authority" over members of the Bank of the United States. *Id.*

Rather than eliminating the President's removal authority entirely, Congress in many cases provided that members of these bodies could be removed only for cause. Beginning nearly 150 years ago with the Interstate Commerce Commission, Congress restricted the President's ability to remove officers absent "inefficiency, neglect of duty, or malfeasance in office." Interstate Commerce Act, Pub. L. No. 49-41, ch. 104, § 11, 24 Stat. 379, 383 (1887). When Congress established the Federal Reserve Board in 1913, it provided that Board members may only be "removed for cause." Federal Reserve Act, Pub. L. No. 63-43, ch. 6, § 10, 38 Stat. 251, 260–61 (1913). Likewise, in creating the Federal Trade Commission in

[4] *See* Act of June 10, 1890, Pub. L. No. 51-407, ch. 407, § 12, 26 Stat. 131, 136–38 (1890) (Board of General Appraisers); Act of 1924, Pub. L. No. 68-176, ch. 234, § 900, 43 Stat. 253, 337 (1924) (Board of Tax Appeals).

1914, Congress specified that the agency's members could be removed only "for inefficiency, neglect of duty, or malfeasance in office." Federal Trade Commission Act, Pub. L. No. 63-203, ch. 311, § 1, 38 Stat. 717, 717–18 (1914). Over the following decades, Congress established numerous additional independent agencies with similar for-cause removal protections, including, among others, the Federal Radio Commission in 1927, the Federal Power Commission in 1930, and the Federal Communications Commission in 1934. *See* Datla & Revesz, *Deconstructing Independent Agencies*, 98 Cornell L. Rev. at 771 n.2.

For half a century, these removal protections operated to protect independent agencies without controversy. In 1935, this Court in *Humphrey's Executor* unanimously upheld the constitutionality of such protections. The Court made clear that Congress had the power to require the President to show "inefficiency, neglect of duty, or malfeasance in office" to remove FTC Commissioners. 295 U.S. at 619. Congress's authority to create multimember regulatory agencies like the FTC, the Court explained, "includes, as an appropriate incident, power to fix the period during which [its members] shall continue, and to forbid their removal except for cause in the meantime." *Id.* at 629.

In the ninety years since *Humphrey's Executor*, this Court has repeatedly reaffirmed it. In *Wiener v. United States*, the Court unanimously rejected a presidential claim to at-will removal authority over the War Claims Commission. 357 U.S. 349 (1958). And in *Morrison v. Olson*, a nearly unanimous Court rejected a challenge to a removal restriction on an Independent Counsel. 487 U.S. 654 (1988). Congress has relied on that precedent to structure dozens of additional multimember agencies

headed by officers protected from at-will removal, including the NLRB—which Congress established just over a month after *Humphrey's Executor* and modeled on the agency structure upheld there. *See* J. Warren Madden, *Origin and Early Years of the National Labor Relations Act*, 18 Hastings L.J. 571, 572 (1967).[5]

A majority of the Court refused to "revisit" these precedents in *Seila Law LLC v. CFPB*, 591 U.S. 197, 204 (2020) ("[W]e need not and do not revisit our prior decisions allowing certain limitations on the President's removal power."). Although the Court found the novel structure of the single-director CFPB unconstitutional, *id.* at 238, one solution on which seven Justices agreed would be to "convert[] the CFPB into a multimember agency," as in *Humphrey's Executor*. *Id.* at 237 (Roberts, C.J., joined by Alito and Kavanaugh, JJ.); *see also id.* at 298 (Kagan, J., joined by Ginsburg, Breyer, and Sotomayor, JJ., concurring in the judgment with respect to severability and dissenting in part).

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[5] *See, e.g.*, 42 U.S.C. § 7412(r)(6)(B) (Chemical Safety and Hazard Investigation Board); 42 U.S.C. § 1975(e) (Commission on Civil Rights); 42 U.S.C. § 7171(b)(1) (Federal Energy Regulatory Commission); 5 U.S.C. § 7104(b) (Federal Labor Relations Authority); 46 U.S.C. § 46101(b)(5) (Federal Maritime Commission); 5 U.S.C. § 1202(d) (Merit Systems Protection Board); 30 U.S.C. § 823(b)(1) (Mine Safety and Heath Review Commission); 29 U.S.C. § 153(a) (National Labor Relations Board); 45 U.S.C. § 154 (National Mediation Board); 49 U.S.C. § 1111(c) (National Transportation Safety Board); 42 U.S.C. § 5841(e) (Nuclear Regulatory Commission); 29 U.S.C. § 661(b) (Occupational Safety and Health Review Commission); 39 U.S.C. § 502(a) (Postal Regulatory Commission); 49 U.S.C. § 1301(b)(3) (Surface Transportation Board); 39 U.S.C. § 202(a)(1) (United States Postal Service Board of Governors).

II. Factual and procedural background

The Senate confirmed Ms. Wilcox as a member of the Board in September 2023 for a term (her second) of five years. Pet. App. 88a. In open disregard of the NLRA's for-cause removal provision, a letter sent by email to Ms. Wilcox on behalf of the President on January 27, 2025, informed her that she was "hereby removed from the office of Member[] of the National Labor Relations Board"—more than three years before her term was to expire—without identifying any neglect of duty or malfeasance by Ms. Wilcox and without providing her with notice or a hearing. *Id.* By reducing the NLRB to just two remaining members, the President's removal of Ms. Wilcox eliminated a quorum—paralyzing the agency's operations. *See* 29 U.S.C. § 153(b) (providing that the Board requires at least three members for a quorum).

The district court found that Ms. Wilcox's removal was a "blatant violation" of the National Labor Relations Act. 29 U.S.C. § 153(a). Pet. App. 149a. Indeed, the government has never attempted to argue otherwise. *Id.* at 26a. Instead, the government tries to justify its admitted violation of the NLRA's unambiguous statutory terms by resorting to a novel and expansive interpretation of Article II. Pet. App. 147a-148a. The district court found these "constitutional arguments to excuse this illegal act [to be] contrary to Supreme Court precedent and over a century of practice." *Id.* at 155a. Accordingly, the district court granted Ms. Wilcox's motion for summary judgment and awarded her both declaratory judgment and injunctive relief. *Id.* at 140a–142a.

The government appealed and sought an emergency stay pending appeal. A deeply divided special panel of the D.C. Circuit agreed and issued a stay over a dissent,

setting out its reasoning in three fractured opinions. Pet. App. 22a–83a. The en banc D.C. Circuit then vacated the panel's stay order, noting that this Court "has repeatedly stated that it was not overturning the precedent established in *Humphrey's Executor* and *Wiener* for multimember adjudicatory bodies." *Id.* at 3a.

The government then asked this Court to grant certiorari before judgment and reinstate the stay. The Court refused to grant certiorari before judgment but stayed the case "pending the disposition of the appeal" in the D.C. Circuit "and disposition of a petition for a writ of certiorari, if such a writ is timely sought." Slip Op. 2. The Court recognized that the President's removal power was "subject to narrow exceptions recognized by our precedents," and declined to "ultimately decide in this posture whether the NLRB … falls within such a recognized exception." Slip Op. 1. Although the Court thought that "the Government is likely to show that … the NLRB … exercise[s] considerable executive power" the Court pointedly left the merits for "resolution after full briefing and argument." Slip Op. 1.

The appeal remains pending before a D.C. Circuit merits panel on a "highly expedited schedule." *Id.* at 3a. As of the date of this filing, the merits have been fully briefed and oral argument was held on May 16, 2025. A decision by the D.C. Circuit is expected any day.

REASONS FOR GRANTING THE PETITION

I. This Court should not grant certiorari before judgment to revisit *Humphrey's Executor*.

This Court properly rejected the government's request to grant certiorari before judgment in this case, *Harris*, and *Boyle*. The respondent's decision in *Slaughter*

to acquiesce to certiorari before judgment should not alter this Court's earlier conclusion. The Court should thus deny certiorari before judgment in that case, too.

As Ms. Wilcox explained when she was last before this Court, the Court should refuse the government's attempts to rush the Court's normal procedures in an effort to narrow or overrule *Humphrey's Executor*. The "extremely rare occurrence" of certiorari before judgment, *Coleman v. Paccar, Inc.*, 424 U.S. 1301, 1304 n.* (1976) (Rehnquist, J., in chambers), is only appropriate if "the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." S. Ct. R. 11 (citing 28 U.S.C. § 2101(e)). None of the pending cases raising the *Humphrey's Executor* issue currently meet that "very demanding standard." *Mount Soledad Mem'l Ass'n v. Trunk*, 573 U.S. 954, 954 (2014) (Alito, J., statement respecting the denial of certiorari before judgment). The best course of action is for this Court to decide whether to narrow or overrule *Humphrey's Executor* only after receiving the benefit of the full analysis of the court of appeals in these cases.

Cases that have warranted the unusual step of certiorari before judgment are not just important; they often contend with pressing deadlines or an urgent need for clarity. *See, e.g., Dep't of Com. v. New York*, 588 U.S. 752, 766 (2019) (census needed to be finalized for printing by a particular date); *Whole Woman's Health v. Jackson*, 595 U.S. 30 (2021) (providers' pre-enforcement challenge to a Texas statute regarding abortion access). There's no such deadline or urgency in this case. To the contrary, the status quo of traditional multimember agencies has existed since the founding, and this Court's approval of

such restrictions has stood since 1935. That the government now wants (for the first time) to challenge that long tradition does not warrant the extreme haste it urges. That is all the more true given that it was the government's own actions that created the "emergency" about which it now complains.

Even in a case of "paramount public importance" concerning presidential immunity, President Trump urged, and this Court agreed, to resolve it "in a cautious, deliberative manner—not at breakneck speed." Br. in Opp. to Pet., *United States v. Trump*, 2023 WL 8934358 (U.S. 2023), at *1. As President Trump put it then in an opposition to a request for certiorari before judgment, "*importance* does not automatically necessitate *speed*." *Id.* at *19. So too here.

As we have explained, independent agencies differ from each other in key ways. Resolving these cases will therefore require a thorough and nuanced understanding of each agency's unique history, structure, and authority. Getting these agency-specific nuances right is critical, not only for the agencies at issue, but also for lower courts considering the application of any rule this Court articulates. *See Seila Law*, 591 U.S. at 219 n.4 (relying on the Court's description of the 1935 FTC). Allowing the D.C. Circuit to nail down these specifics can only benefit this Court's review. *See Moyle v. United States*, 603 U.S. 324, 336–37 (2024) (Barrett, J., concurring) (cautioning against "jump[ing] ahead of the lower courts, particularly on an issue of such importance").

The Court will not have to wait much longer in this case. The issue in this case and *Harris* was already fully briefed and argued before the D.C. Circuit months ago. Given that a decision by that court is likely imminent,

there is no reason not to wait for its considered judgment on these issues. Once the D.C. Circuit issues its decision, the aggrieved party can petition this Court for certiorari as usual. As part of that process, this Court can consider which case (or combination of cases) presents the best vehicle for deciding the continuing vitality of *Humphrey's Executor*.

II. If the Court is nevertheless inclined to grant certiorari before judgment, it should grant it here.

If, however, this Court is inclined to grant certiorari now on the *Humphrey's Executor* question, it should grant it in this case. It would be a mistake for this Court to resolve the *Humphrey's Executor* question without also considering the issues raised here. If it does, the Court risks overlooking key agency-specific features and painting with too broad a brush.

Unlike other agencies, Congress has taken specific steps with the NLRB to resolve separation-of-powers concerns. Although the NLRA as originally enacted gave the Board "plenary authority over all aspects of unfair labor practice disputes," Congress changed that with the Taft-Hartley Act, creating a unique internal "separation of powers within the agency." *United Food & Com. Workers Union*, 484 U.S. at 118 n.5. Today, the NLRB's adjudicatory and prosecutorial functions are divided between the Board, whose five members act like a panel of appellate judges, and a General Counsel, who is "independent of the Board's supervision and review" and removable by the President at will. *Id.* at 118.

Moreover, unlike many other agencies, the NLRB also lacks authority to initiate investigatory or enforcement actions on its own. *See Chamber of Com.*, 721 F.3d at 156.

"Because of the reactive nature of the Board's functions," it has "no roving investigatory powers." *Id.* The NLRB also "may be the only agency that needs a court's imprimatur to render its orders enforceable." *Dish Network*, 953 F.3d at 375 n.2 (Oldham, J.). And Congress gave the agency constrained rulemaking authority, allowing it to enact only "such rules and regulations as may be necessary to carry out the provisions of [the NLRA]." 29 U.S.C. § 156. This Court should not reconsider Congress's authority to create independent agencies under *Humphrey's Executor* without considering what effect these and other statutory limits might have on the constitutionality of an independent agency's removal restrictions.

No matter how this Court resolves the *Humphrey's Executor* question, it is bound to leave other agencies under a cloud of uncertainty. Deciding this case would not just resolve that uncertainty as to the NLRB; it would also give the lower courts needed guidance as they consider the constitutionality of the diverse range of statutory provisions intended to guarantee agency independence. *See generally* Datla & Revesz, *Deconstructing Independent Agencies*, 98 Cornell L. Rev. 769. It would, in particular, give the Court the opportunity to shed light on what steps Congress can take to preserve independent agencies in the face of separation of powers concerns—as Congress attempted to do with the NLRA.

CONCLUSION

This Court should not grant certiorari before judgment to revisit *Humphrey's Executor* on an accelerated timeline in any case. But if the Court nevertheless chooses to do so, it should grant the petition for a writ of certiorari before judgment here.

Respectfully submitted,

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