No. 24A966

In the Supreme Court of the United States

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,

Applicants,

v.

GWYNNE A. WILCOX,

Respondent.

RESPONSE OF GWYNNE A. WILCOX IN OPPOSITION TO THE APPLICATION FOR A STAY

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INTRODUCTION

The government seeks emergency relief against the enforcement of a statute that has been on the books for nearly a century. In all that time, no prior administration has attempted to remove a member of the National Labor Relations Board. Nevertheless, the government now claims that its need to remove Gwynne Wilcox is urgent—so urgent that it asks this Court to override the en banc D.C. Circuit's denial of a stay, jettison a century of settled interbranch practice, and signal the overruling of bedrock precedents of this Court that have engendered strong reliance interests. The better course is restraint.

Despite its extraordinary request, the government identifies no concrete injury that would result from allowing this case to be resolved through the normal course—only an abstract claim (at 4) that the district court's order harms "the President" and our "system of separated powers." But if the President were truly concerned about his ability to shape the NLRB's direction, he could have secured a Board majority simply by filling its two other vacant seats. Removing Ms. Wilcox would instead deprive the NLRB of a quorum, bringing its appellate decision making to a halt. The Executive has no legitimate Article II interest in completely shutting down an adjudicatory body created by Congress. And, as the D.C. Circuit recognized, the assertion of irreparable harm collapses into the merits, because the "claimed intrusion on presidential power only exists if *Humphrey's Executor*"—which upheld a virtually identical limit on removal—is "overturned." App. 3a.

Over the past two centuries, Congress has embedded modest for-cause removal restrictions in the structure of numerous multimember agencies and Article I tribunals. In *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), and *Wiener v. United States*, 357 U.S. 349 (1958), this Court unanimously upheld removal restrictions for multimember

adjudicatory bodies like the NLRB. Indeed, Congress modeled the NLRB's removal limit on the restriction upheld in *Humphrey's Executor*—as it has also done for numerous other bodies. Just as life tenure allows Article III judges to decide cases free from political pressure or the threat of removal for unpopular decisions, the Board's removal protections ensure its legitimacy as a neutral arbiter of labor disputes. As this Court has recognized, an adjudicative body can't be expected to fairly apply the law to the facts with "the Damocles' sword of removal" hanging over its head. *Wiener*, 357 U.S. at 355–56.

If *stare decisis* means anything, it means that these important precedents can't be casually cast aside on the emergency docket. For this Court to indicate that the government is likely to succeed in its challenge would be to "call[] into question the constitutionality of dozens of federal statutes conditioning the removal of officials on multimember decision-making bodies—everything from the Federal Reserve Board and the Nuclear Regulatory Commission to the National Transportation Safety Board and the Court of Appeals for Veterans Claims." App. 83a. Every action of every one of those bodies would become subject to newfound constitutional challenges overnight. It is "hard to imagine a precedent whose overruling could more radically upend existing institutions." Daniel B. Rice & Jack Boeglin, *Confining Cases to Their Facts*, 105 Va. L. Rev. 865, 917 (2019).

The government makes no effort to distinguish Article I courts, like the Tax Court, from the agencies it now claims are unconstitutionally structured. Nor is the government able to meaningfully distinguish the Federal Reserve Board, whose independence is critical to the nation's economic welfare. At a time when the President is publicly pressuring the Fed Chair on monetary policy, experts warn that any signal from this Court that the Fed's

independence is in jeopardy will further unsettle jittery markets. This moment calls for orderly process and sober deliberation—not a destabilizing rush to judgment.

The government's alternative argument (that the district court lacked authority to enforce the removal restriction) is no less risky, as it would render the Judiciary powerless to prevent the unlawful removal of members of the Federal Reserve and other critical agencies. And that argument, like the government's merits argument, is likewise foreclosed by precedent. Since Blackstone and *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 173 (1803), courts have exercised their authority to reverse the wrongful termination of government officials through mandamus. And following the merger of law and equity, courts have also provided equivalent relief in the form of an injunction. In any event, the government has affirmatively waived any challenge to the issuance of a declaratory judgment. So, at a minimum, Ms. Wilcox is entitled to that form of relief, which stems from the Judiciary's authority to "say what the law is." *Id.* at 177.

Nor should this Court accept the government's extraordinary suggestion to grant certiorari before the D.C. Circuit has even finished its expedited review. Further ventilation is necessary. No court has fully evaluated the impact of the NLRB's unique bifurcated structure, a reform adopted in 1947, that imposes an internal "separation of powers within the agency." *NLRB 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 noted, it "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).

No court of appeals has addressed these agency-specific features of the NLRB's history and structure on the merits. Nor has any court addressed whether—even assuming that certain NLRB functions might raise separation-of-powers concerns—the proper remedy would be to sever any problematic provisions rather than compromising the independence of neutral adjudicators by invalidating the entire removal scheme.

Even setting aside this need for ventilation, it would be particularly ill advised to grant certiorari and try to cram this case into the end of the current Term. And there is no need for that drastic step. The D.C. Circuit imposed a "highly expedited schedule," under which this appeal is already fully briefed and set for argument on May 16. App. 3a. The court will almost certainly issue its decision this summer, allowing this Court to evaluate that decision along with other potential vehicles making their way through the courts.

For ninety years, this Court has allowed this law 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 months. The Court should therefore deny the government's motion in all respects. But, at a minimum, if the Court is inclined to grant certiorari before judgment, it should set the case for argument at the start of the new Term, not in May, to allow for adversarial presentation and careful deliberation commensurate with the gravity of the issues.

STATEMENT

I. Legal 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." App. 145a. "In the latter part of the nineteenth century and the early decades of the present 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 "in the public interest," *Amalgamated Util. Workers v. Consol. Edison Co. of N.Y.*, 309 U.S. 261, 265 (1940), with 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." App. 150a–151a. "[M]uch like many other multimember entities, the Board was designed to be an independent panel of experts that could impartially adjudicate disputes." App. 147a; *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

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

Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 Cornell L. Rev. 769, 825 (2013).[2] President Franklin D. Roosevelt signed 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 (also known as the Wagner Act) "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 later 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. The House version of the bill would have created a separate agency responsible for prosecuting unfair labor practice complaints while retaining the Board to adjudicate disputes. *Id.* Although the final bill "did not go so far as to create a new agency," it did "determine that the General Counsel of the Board should be independent of the Board's

[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 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).

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." App. 146a. "The two sides operate independently," with the General Counsel "independent of the Board's control." *Id.*; *see United Food & Com. 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. App. 146a. 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.* The independence of Board members, Congress concluded, 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 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.

The Board's 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 limited 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. "From its inception in 1935," however, "the Board has exhibited a 'negative attitude' toward setting down principles in rulemaking, rather than adjudication." *Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947, 949 (D.C. Cir. 2013); *see* Jeffrey S. Lubbers, *The Potential of Rulemaking by the NLRB*, 5 FIU L. Rev. 411, 413 (2010) (noting that the Board has "maintained [a] resistance to rulemaking"). Almost all its rules "concern rules of practice before the Board and other procedural and housekeeping measures." Lubbers, *The Potential of Rulemaking by the NLRB*, 5 FIU L. Rev. at 413 n.19.

The Board's "first venture" into "substantive rulemaking" didn't come until 1989, when it issued a rule specifying the bargaining units in healthcare facilities. *Collective-Bargaining Units in the Health Care Industry*, 54 Fed. Reg. 16336-01 (Apr. 21, 1989). This Court upheld that rule in *American Hospital Association v. NLRB*, noting that

it was the "first time" in its history that "the Board has promulgated a substantive rule." 499 U.S. 606, 608 (1991). Since then, 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 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

[3] Other than the 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.

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) at 162.

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.

[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).

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. App. 109a–110a (Millett, J., dissenting). The following year, Congress gave the President "no removal authority" over members of the Bank of the United States. *Id.* at 110a.

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 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]

[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).

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).

II. Factual and procedural background

The Senate confirmed Ms. Wilcox as a member of the Board in September 2023, for a second term of five years. App. 87a. 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—effectively 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). App. 145a. Indeed, the government has never attempted to argue otherwise. App. 27a. 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. App. 144a. 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." App. 150a.

Accordingly, the district court granted Ms. Wilcox's motion for summary judgment and awarded her both declaratory judgment and injunctive relief. App. 177a–178a. The government appealed and sought a stay pending appeal. A D.C. Circuit motions panel agreed and issued a stay over a dissent, setting out its reasoning in three fractured opinions. App. 23a–82a. 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 2a. 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 is scheduled for May 16, 2025.

ARGUMENT

I. This Court should deny a stay pending review.

Parties seeking emergency relief in this Court after the court of appeals has already "denied a motion for a stay"—as the en banc D.C. Circuit did here—bear "an especially heavy burden." *Edwards v. Hope Med. Grp. for Women*, 512 U.S. 1301, 1302 (1994) (Scalia, J., in chambers); *accord Little v. Reclaim Idaho*, 140 S. Ct. 2616, 2618 (2020) (Roberts, C.J., with Alito, Gorsuch, Kavanaugh, JJ., concurring in the grant of stay). "When a matter is pending before a court of appeals," this Court will "grant stay applications only upon the weightiest considerations." *Packwood v. Senate Select Comm. on Ethics*, 510 U.S. 1319, 1320 (1994) (Rehnquist, C.J., in chambers). The applicant must show "(1) whether the

applicant is likely to succeed on the merits, (2) whether it will suffer irreparable injury without a stay, (3) whether the stay will substantially injure the other parties interested in the proceedings, and (4) where the public interest lies." *Ohio v. EPA*, 603 U.S. 279, 291 (2024). In addition, an applicant must establish "a reasonable probability" that this Court will eventually grant certiorari. *Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 572 U.S. 1301, 1301 (2014) (Roberts, C.J., in chambers). The government falls short at each step.

A. The government cannot make the required strong showing that it is likely to prevail under current precedent.

To make the required "strong showing" that the government is likely to succeed on the merits, "[i]t is not enough that the chance of success" is "better than negligible." *Nken v. Holder*, 556 U.S. 418, 434 (2009). The likelihood must be "substantial." *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). As the government acknowledges (at 14), the determination "must be made under 'existing law.'" *Netchoice v. Paxton*, 142 S. Ct. 1715, 1716 (2022) (Alito, J., dissenting).

1. *The Merits.* Far from showing a substantial likelihood of success under existing law, the "President's interpretation of the scope of his constitutional power … is flat wrong" under this Court's binding precedent. App. 145a. And although the government disagrees, even it has repeatedly "acknowledged a lack of clarity in the law." App. 3a; *see* Oral Arg. Tr. at 84, *Wilcox v. Trump*, No. 25-5057 (D.C. Cir. Mar. 18, 2025) (explaining that "reasonable minds can differ"); *id.* at 88 (noting "uncertainty" in the law); *see also* App. 73a (Henderson, J., concurring) (concluding that the government's likelihood of success "remain[s] murky" and is a "close[] call"). That is a virtual admission that the government cannot make a strong showing of likely success under existing precedent.

In fact, existing law plainly rejects the government's position. Beginning with this Court's unanimous decision in *Humphrey's Executor*, this Court has consistently "held that Congress can, under certain circumstances, create independent agencies run by principal officers appointed by the President, whom the President may not remove at will but only for good cause." *Free Enter. Fund v. Public Acct. Oversight Bd.*, 561 U.S. 477, 483 (2010). In the ninety years since *Humphrey's Executor* was decided, the Court has repeatedly applied it to uphold for-cause removal limits on a range of "traditional" "multimember board[s] or commission[s]," *Seila Law*, 591 U.S. at 207, that exercise "predominantly quasi judicial and quasi legislative" functions, *Humphrey's Executor*, 295 U.S. at 624. The NLRB "is a paradigmatic example of a multimember group of experts who lead an independent federal office." App. 150a–151a. "[M]uch like many other multimember entities, the Board was designed to be an independent panel of experts that could impartially adjudicate disputes." *Id.* at 147a; *see* 29 U.S.C. § 153(a); Datla & Revesz, *Deconstructing Independent Agencies*, 98 Cornell L. Rev. at 770-71. Thus, "*Humphrey's Executor* and its progeny control the outcome of this case and require that plaintiff be permitted to continue her role as Board member." App. 176a.

Despite having numerous opportunities over the decades since they were decided, this Court has "repeatedly stated that it was not overturning the precedent established in *Humphrey's Executor* and *Wiener* for multimember adjudicatory bodies." App. 2a. Instead, the Court has consistently, and mostly unanimously, reaffirmed that precedent. *See Seila Law*, 591 U.S. at 204 ("[W]e need not and do not revisit our prior decisions allowing certain limitations on the President's removal power."); *see also, e.g.*, *Wiener*,

357 U.S. 349 (recognizing that *Humphrey's Executor* remains good law); *Free Enter. Fund*, 561 U.S. at 483 (declining to "reexamine" *Humphrey's Executor*). Given this unbroken line of authority, this Court cannot find the district court's decision erroneous under existing law. *See Wisc. Legislature v. Wisc. Elections Comm'n*, 595 U.S. 398, 406 (2022) (Sotomayor, J., dissenting) (summary relief should be disfavored where an applicant is not likely to succeed under existing precedent). A party with no right to relief under existing law is not likely to succeed on the merits and therefore not entitled to a stay pending appeal.

Nor, at this late date, is there any sound basis for overruling *Humphrey's Executor*. Setting aside an established precedent requires that the decision be "not just wrong, but grievously or egregiously wrong." *Ramos v. Louisiana*, 590 U.S. 83, 121–22 (2020) (Kavanaugh, J., concurring in part). *Stare decisis*, and indeed, the "rule of law" itself, requires a "compelling justification" to overturn precedent, *Hilton v. S.C. Pub. Railways Comm'n*, 502 U.S. 197, 202 (1991)—especially precedent as venerable as *Humphrey's Executor*. And the demands of *stare decisis* are "at their acme ... where reliance interests are involved." *Payne v. Tennessee,* 501 U.S. 808, 828 (1991). For nearly a century, Congress has repeatedly and expressly relied on *Humphrey's Executor* to structure independent agencies responsible for a broad range of important functions. Where, as here, "the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision, … overruling the decision would dislodge settled rights and expectations or require an extensive legislative response." *Hilton,* 502 U.S. at 202. This Court has warned about the particular need to "be cautious before adopting changes that disrupt … settled expectations." *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.,*

535 U.S. 722, 739 (2002). To instead conclude—on the emergency docket no less—that this Court is *likely* to reverse a century of precedent would stand the rule on its head.

In response, the government devotes most of its brief to arguing that *Humphrey's Executor* was wrongly decided. But an argument that this Court "got something wrong—even a good argument to that effect—cannot by itself justify scrapping settled precedent." *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 455–56 (2015) ("[I]t is not alone sufficient that we would decide a case differently now than we did then."). For "precedent to mean anything, [*stare decisis*] must give way only to a rationale that goes beyond whether the [prior] case was decided correctly." *June Med. Servs. LLC v. Russe*, 591 U.S. 299, 346 (2020) (Roberts, C.J., concurring in the judgment). Indeed, the doctrine "has consequence only to the extent it sustains incorrect decisions; correct judgments have no need for that principle to prop them up." *Kimble*, 576 U.S. at 455.

Like the doctrine of *stare decisis*, requiring a stay applicant to demonstrate a likelihood of success under existing law "reduces incentives for challenging settled precedents, saving parties and courts the expense of endless relitigation." *Id.* And, what's more, it saves courts from the need to confront novel challenges to settled law in an emergency posture, without the benefit of full briefing, argument, and adequate time to deliberate. *See Does 1-3 v. Mills*, 142 S. Ct. 17, 18 (2021) (Barrett, J., concurring) (noting that emergency motions are disfavored for consideration of difficult merits questions because they require decision on a "short fuse without benefit of full briefing and oral argument"). The government is of course entitled to make its argument for overruling *Humphrey's Executor*, and will have the chance to do so soon enough. But there's no rush

to reconsider a precedent that has gone unchallenged for ninety years. Because "[t]he District Court here did everything right under the law existing today," the government is not entitled to a stay pending its effort to overrule precedent. *Merrill v. Milligan*, 142 S. Ct. 879, 883 (2022) (Kagan, J., dissenting); *see also*, *e.g.*, *id.* (Roberts, C.J., dissenting).[6]

2. *Remedy.* The government's argument that the district court lacked authority to order relief is likewise foreclosed by precedent. The government relies (at 25) on this Court's 1898 decision in *White v. Berry* and other outdated cases for the proposition that "a court may not enjoin the removal of an executive officer." 171 U.S. 366 (1898). But, although the cases on which the government relies recognize a limitation on relief for wrongful removal in *equity*, they also acknowledge the availability of functionally equivalent remedies at *law*. *See, e.g.*, *White*, 171 U.S. 377 ("The jurisdiction to determine the title to a public office belongs exclusively to the courts of law, and is exercised either by certiorari, error, or appeal, or by mandamus, prohibition, quo warranto or information in the nature of a writ of quo warranto."). In particular, "overwhelming" authority established that public officials had recourse to mandamus as a remedy for violations of for-cause removal protections. *Kalbfus v. Siddons*, 42 App. D.C. 310, 319 (D.C. Cir. 1914); *see, e.g., Marbury*, 5 U.S. (1 Cranch) at 173. The government argues (at 30) that Ms. Wilcox's right to relief is

[6] The government likewise fails to show a "reasonable probability" that this Court will grant certiorari. *Teva Pharms.*, 572 U.S. at 1301 (Roberts, C.J., in chambers). The Court, as noted, has repeatedly reaffirmed *Humphrey's Executor*. And, twice in the past year, the Court has denied petitions asking it to overrule the decision. *See Leachco Inc. v. CPSC*, 103 F.4th 748, 763 (10th Cir. 2024) (upholding removal protections for the Consumer Product Safety Commission), *cert. denied*, 2025 WL 76435 (Jan. 13, 2025); *Consumers' Rsch. v. CPSC*, 91 F.4th 342, 351–52 (5th Cir. 2024) (same), *cert. denied*, 145 S. Ct. 414 (2024).

too "unclear" to support mandamus. But district courts grant mandamus under *existing* law, which the district court found, under *Humphrey's Executor*, supports a "clear right to relief" here. App. 173a n.22.[7]

Moreover, as this Court has explained, "[m]uch water has flowed over the dam" since *White v. Berry* was decided in 1898. *Sampson v. Murray*, 415 U.S. 61, 71, 92 n.68 (1974). Since the merger of law and equity, "cases such as *Service v. Dulles*," 354 U.S. 363, 370, 389 (1957), "establish that federal courts do have authority" to grant injunctive relief to a wrongfully terminated federal employee. *Sampson*, 415 U.S. at 71–72; *see also Vitarelli v. Seaton*, 359 U.S. 535 (1959); *Severino v. Biden*, 71 F.4th 1038, 1042–43 (D.C. Cir. 2023); *Swan v. Clinton*, 100 F.3d 973, 980 (D.C. Cir. 1996).

The government nevertheless insists (at 24) that the scope of a court's equitable powers must be limited to "traditional principles of equity jurisdiction," as understood at the founding. (citing *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 319 (1999)). But *Grupo Mexicano*, on which the government relies, did not hold that equity is frozen in its 18th-century form. *See* 527 U.S. at 322 ("We do not question the proposition that equity is flexible."). All it held was that the specific relief ordered by the

[7] The government also suggests for the first time that Ms. Wilcox should have sought relief in the form of a writ of quo warranto. This is a category error. Below, the government correctly acknowledged that quo warranto is inapposite because it serves "only [to] oust an unlawful office holder and does not reinstate a removed plaintiff." Govt. Br. at 45, *Wilcox v. Trump*, No. 25-5057 (D.C. Cir. Mar. 27, 2025). As the government's own case establishes, quo warranto is "an action of ejectment," used to dispute an official's claimed entitlement to office. *Andrade v. Lauer*, 729 F.2d 1475, 1498 (D.C. Cir. 1984); *accord* 3 William Blackstone, *Commentaries* 262 ("A writ of *quo warranto* is … against him who claims or usurps any office … to inquire by what authority he supports his claims, in order to determine the right."). Because Wilcox doesn't seek "to turn out [a] party who usurped" her position, quo warranto is the wrong remedy.

district court—an injunction prohibiting the "defendant[s] from transferring assets in which no lien or equitable interest is claimed"—had "never been available before" and was "specifically disclaimed by longstanding judicial precedent." *Id.* at 310, 322. Unlike the creditors in *Grupo Mexicano*, Ms. Wilcox seeks to protect an established legal right—statutory removal protection. And this Court has "long held" that plaintiffs may seek injunctive relief "with respect to violations of federal law by federal officials." *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015); *accord Am. Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 110 (1902) (granting an injunction against Postmaster General to enforce a "legal right, under the general acts of Congress").

Even assuming that district courts lack inherent equitable power to enjoin illegal removal of public officials—despite the extensive precedent saying otherwise—Congress gave federal courts an equivalent statutory power in the Declaratory Judgment Act. *See* 28 U.S.C. § 2202. Section 2202 provides that "necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment." This includes "relief in the form of damages or an injunction." *Horn & Hardart Co. v. Nat'l Rail Passenger Corp.*, 843 F.2d 546, 549 (D.C. Cir. 1988); *accord Powell v. McCormack*, 395 U.S. 486, 499 (1969) ("A declaratory judgment can then be used as a predicate to further relief, including an injunction."). Although the government challenges the award of declaratory relief here, it admits that it did "not contest[]" it below. Govt. Br. at 40 n.7, *Wilcox v. Trump*, No. 25-5057 (D.C. Cir. Mar. 27, 2025) (conceding that the district court could declare "that

the removal was unlawful"). Under section 2202, Ms. Wilcox is therefore entitled to both declaratory and injunctive relief.

B. The district court's judgment causes the President no real-world injury.

One of the "most critical" stay factors is "whether the applicant will be irreparably injured absent a stay." *Nken*, 556 U.S. at 434. "The authority to grant stays has historically been justified by the perceived need to prevent irreparable injury to the parties or to the public pending review." *Id.* at 432. Accordingly, irreparable injury must be demonstrated by an applicant for a stay; "simply showing some 'possibility of irreparable injury'" is not enough. *Id.* at 434–35; *see also Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). But unlike other recent cases in which the government has sought emergency relief, there is no immediate urgency here. *See, e.g.*, *Noem v. Abrego Garcia*, No. 24A949, 2025 WL 1077101 (Apr. 10, 2025); *Trump v. J.G.G.*, No. 24A904, 2025 WL 1024097 (Apr. 7, 2025).[8]

To demonstrate irreparable injury, the government vaguely asserts (at 4) that the injunction harms "the President" and our " system of separated powers." All the district court's decision does, however, is restore the NLRB to the norms established by ninety

[8] This case is also unlike *Bessent v. Dellinger*, No. 24A790, 145 S. Ct. 515 (Feb. 21, 2025), in which the government recently sought to vacate a temporary restraining order requiring the Special Counsel to remain in office until the court ruled on the preliminary injunction. Because the Office of Special Counsel is a rare single-head agency, the district court did not rely on *Humphrey's Executor* to sustain the removal limit at issue there. *Dellinger v. Bessent*, 2025 WL 665041, at *18 n.16 (D.D.C. Mar. 1, 2025), *vacated as moot*, 2025 WL 935211 (D.C. Cir. Mar. 27, 2025). Moreover, unlike *Dellinger*, the President has not appointed a replacement to fill Ms. Wilcox's position. And the district court's injunction in this case, unlike the TRO in *Dellinger*, does not "direct[] the President to recognize and work with an agency head whom he has already removed." *Dellinger v. Bessent*, No. 25-5028, 2025 WL 559669, at *12 (D.C. Cir. Feb. 15, 2025) (Katsas, J., dissenting). The President has no more legitimate need to "work with" independent NLRB adjudicators than he has with Article III judges.

years of precedent and historical practice. The President cannot claim to be irreparably injured by his inability to violate a statute whose constitutionality is "dictated by binding precedent." App. 175a; *see League of Women Voters of United States v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016) ("There is generally no public interest in the perpetuation of unlawful agency action."). There is no "emergency" requiring that this Court upend decades of tradition to allow the President to remove an NLRB member for the first time now—before this Court has even had the opportunity to reconsider its longstanding precedent.

The government's claimed injury is especially dubious given that, as the district court observed, the President has ample opportunity to exercise executive authority over the NLRB. App. 161a. He has already appointed the Acting General Counsel, who controls the NLRB's investigatory and prosecutorial functions, and designated a new Chair of the Board. He could also easily establish a majority on the Board by appointing members to fill its two vacant positions. *See Seila Law*, 591 U.S. at 225 (noting that, where board members serve staggered terms, every president has the "opportunity to shape its leadership and thereby influence its activities"). The President's choice to instead *remove* Ms. Wilcox does not bring the Board closer in line with his preferred policies; it prevents the agency from carrying out its congressionally mandated duties at all. The Board cannot "continue to operate with only two members," so Ms. Wilcox's removal brings an immediate and indefinite halt to the NLRB's critical work of adjudicating labor-relations disputes. *New Process Steel, L.P. v. NLRB*, 560 U.S. 674, 680, 687 (2010) (explaining that the NLRA requires "three participating members at all times for the Board to act"). The President

does not, and cannot, claim any legitimate interest in disabling an agency created by Congress from fulfilling its congressionally mandated work.

The government's claimed injury—that the executive branch is somehow injured every day that a federal court has thwarted the President's at-will firing spree—is further belied by its conduct in *Grundmann v. Trump*, 2025 WL 782665, at *10 (D.D.C. Mar. 12, 2025). In that case, the district court enjoined the President's attempt to remove a member of the Federal Labor Relations Authority over a month ago. Yet, to this day, the President still has not appealed that decision or sought a stay. If the President can delay seeking any appellate relief in that comparable case, surely, he can wait a few months for this Court to consider the merits of this appeal in its usual process.

Regardless, as the D.C. Circuit recognized, the government's claim of irreparable harm collapses into its argument on the merits; its "claimed intrusion on presidential power only exists if *Humphrey's Executor* and *Wiener* are overturned." App. 3a; *see also* App. 129a (Millett, J., dissenting) (noting that the "asserted injury to the President is entirely bound up with the merits of the government's constitutional argument"). Irreparable harm, however, becomes relevant only after the court has already found that the plaintiff has "prevailed" on the merits. *Wilkinson v. Legal Servs. Corp.*, 27 F. Supp. 2d 32, 65 (D.D.C. 1998). Because, as shown, the President has no legal right to remove Ms. Wilcox from office, he cannot claim irreparable injury from his inability to do so. Otherwise, the irreparable harm requirement would be rendered meaningless.[9]

[9] The same is true of the government's argument below that, if it eventually prevails, future litigants could challenge Ms. Wilcox's participation in Board decisions. Govt. Br. at

C. The balance of equities also cuts against the government's requested relief.

The government does not even attempt to explain how a stay pending appeal would serve the public interest. Nor is there even an arguable public interest in preventing Ms. Wilcox from resuming her work, which consists mostly of issuing unanimous appellate decisions. On the other hand, there is a substantial public interest in requiring the executive branch to "abide by the federal laws that govern their existence and operations." *League of Women Voters*, 838 F.3d at 12. Moreover, by depriving the Board of the quorum it needs to carry out its appellate decision making, the President's illegal removal causes immediate harm to the workers, employers, and broader public who depend on it to ensure "the friendly adjustment of industrial disputes," 29 U.S.C. § 151, and impairs the NLRA's primary purpose: "to stop and to prevent unfair labor practices," *UAW v. Russell*, 356 U.S. 634, 643 (1958).

"Without a functioning NLRB," the district court explained, "unfair labor practices go unchallenged, union elections go unrecognized, and pending labor disputes go unreviewed." App. 174a. Last fiscal year, the Board adjudicated hundreds of cases. Board Decisions Issued, NLRB, https://perma.cc/A8TY-Y3XG. In recent months, for example, the Board decided unfair-labor-practice charges concerning employers who fired an employee for discussing her wages with co-workers, *RFO808*, 373 NLRB No. 60 (2024); who placed

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50, *Wilcox v. Trump*, No. 25-5057 (D.C. Cir. Mar. 27, 2025). That harm only materializes if the government is right on the merits. But for purposes of the other elements of the test, the Court must assume that it is not. In any case, the government is mistaken that Ms. Wilcox's participation is likely to change outcomes. Of the eighteen decisions in total that the Board issued in the window during which Ms. Wilcox was able to return to work—after the district court's decision and before the special panel granted the government's stay—each was *unanimous*.

manure near a union picket site, *Regional Ready Mix, LLC & Brand X, LLC*, 373 NLRB No. 56 (2024); and who assaulted an employee who requested unpaid wages, *East Freight Logistics, LLC*, 373 NLRB No. 7 (2023). The Board also recently addressed unfair-labor-practice charges brought by employers against unions. *See, e.g.*, *IAMAW, Dist. Lodge No. 160*, 373 NLRB No. 39 (2024); *N. Atl. States Reg'l Council of Carpenters*, 373 NLRB No. 27 (2024). Ms. Wilcox's firing undermines the Board's capacity to review even clear NLRA violations. That is "irrevocably disruptive of the Board's function and [Ms. Wilcox's] legal responsibility for carrying it out, all to the damage of the public interest." *Mackie v. Bush*, 809 F. Supp. 144, 146 (D.D.C. 1993).

Those effects are now playing out in real time, as evidenced by recent arguments by employers that the NLRB's lack of a quorum renders it unable to certify union election results, despite a majority of workers voting in favor of union representation. App. 174a. Absent an injunction, further defiance of the Board's authority is sure to follow. The longer Ms. Wilcox is wrongfully kept from her position, the worse the situation will become for workers, employers, and the broader public who depend on the agency's important work. This severe public harm strongly favors denying the government's requested emergency relief and allowing Ms. Wilcox to continue fulfilling her congressionally mandated responsibilities unless and until this Court decides to overrule its established precedent.

Granting the stay would also cast doubt on the tenure protections of every other multimember board, not to mention the legitimacy of Article I courts. Of particular concern, the independence of the Federal Reserve would become uncertain—a situation that would have dire repercussions for the market. *See* Daniel K. Tarullo, *The Federal Reserve and the*

Constitution, 97 S. Cal. L. Rev. 1, 45 (2024). As experts have warned, "doubts about the constitutional viability of the design and independence of the Federal Reserve … could undermine the Fed's credibility, creating a heightened risk of financial instability and persistently higher levels of inflation." Amicus Br. of Law Profs. at 13 (D.C. Cir. Mar. 10, 2025); *see also* Cristina Bodea & Raymond Hicks, *Price Stability and Central Bank Independence: Discipline, Credibility, and Democratic Institutions*, 69 Int'l Orgs. 35, 38 (2015) (noting the economic importance of the public's "belie[f] that the central bank is free from interference and that the law [governing the bank] is unlikely to change swiftly").

Such fears are not hypothetical. The President has publicly criticized Fed Chairman Jerome Powell for always being "late," instructing him to "CUT INTEREST RATES … AND STOP PLAYING POLITICS." Colby Smith, *Powell Says Trump's Tariffs Raise Risks of Faster Inflation and Slower Growth*, N.Y. Times, Apr. 4, 2025. And the President's top advisor recently called for an "end [to] the Fed." Shia Kapos, *Musk defends million-dollar giveaways in Wisconsin*, Politico, Mar. 30, 2025. These criticisms now carry a real threat of removal—a threat that rash action by this Court can only make more real. Any signal from this Court that casts doubt on the continuing validity of the precedents protecting the Fed's independence would further destabilize already jittery markets. This severe public harm strongly favors denying the government's requested relief until the Court carefully considers the merits of the government's argument—and all of its repercussions—after full briefing and argument.

II. This Court should deny the government's request for certiorari before judgment.

A. In addition to rejecting the government's request to stay the district court's order, this Court should also refuse the government's attempt to rush the Court's normal procedures for review. 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)). This case does not meet that "very demanding standard." *Mount Soledad Mem'l Ass'n v. Trunk*, 573 U.S. 954 (2014) (Alito, J., statement respecting the denial of certiorari before judgment).

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., Department of Commerce 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." *United States v. Trump*, No. 23-624, Br. in Opp. to Pet. 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.

B. The government (at 37) tries to manufacture an emergency requiring an expedited process because agencies "will operate under a cloud of legal uncertainty" until this issue is definitively resolved. But the same can be said of many cases on the Court's regular docket. *See, e.g.*, *CFPB v. Cmty. Fin. Servs. Assoc. of Am.*, 601 U.S. 416 (2024); *SEC v. Jarkesy*, 603 U.S. 109 (2024). Indeed, a "cloud of legal uncertainty" must have hung over the CFPB while the constitutional challenge to its removal limit worked its way through the courts in *Seila Law*. Yet, in each case, the Court relied on its usual, considered process.

Falling back, the government argues (at 37) that the normal process would have "little benefit" in this case because of all that has already been written on the topic of the president's removal power. Again, the existence of prior opinions and scholarship does not distinguish this case from other legal issues that this Court takes up through its usual process. It also ignores the complex second question presented concerning the appropriate and available remedy, on which much less has been written.

And, regardless of what's been written generally on the subject "in this Court, in the lower courts, and in the academy," resolving this case will require a thorough and nuanced understanding of the unique history, structure, and authority of the Board. And the Board differs from other independent agencies in key ways. Although the NLRA as originally

enacted gave the Board "plenary authority over all aspects of unfair labor practice disputes," Congress in the Taft-Hartley Act created a unique internal "separation of powers within the agency," dividing its adjudicatory and prosecutorial functions 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. *United Food & Com. Workers Union*, 484 U.S. at 117–18 & n.5. Moreover, 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.). No court of appeals has yet examined at the merits stage what effect these and other limits on the Board's authority might have on the validity of its removal provisions.

Allowing the D.C. Circuit to nail down these specifics as well as the contours of the government's rule 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 government claims that the Board, a multimember adjudicative body, engages in "significant executive adjudication" and exercises both litigating and rulemaking authority. Govt. Br. at 27, *Wilcox v. Trump*, No. 25-5057 (D.C. Cir. Mar. 27, 2025). But it has yet to explain what "significant executive adjudication" means (and why it would not apply equally to an Article I court). Or to examine the NLRB's particular history and uniquely bifurcated structure. Or to address the question whether, if the government's only real complaint is the Board's limited and rarely used rulemaking powers, the correct course would be to sever such authority from the Board's principally adjudicative functions.

Getting these agency-specific nuances right is critical, not only for Ms. Wilcox and the millions of Americans who depend on the independent adjudicatory Board to resolve labor disputes impartially, but also for future courts considering the application of any rule this Court sets forth here. *See Seila Law*, 591 U.S. at 219 n.4 (relying on the Court's description of the 1935 FTC). Each agency, though created on the same model, has its own history, structure, and powers to consider. A rushed decision on faulty facts will necessarily affect how these other agencies are viewed.

Particularly when the D.C. Circuit has proceeded with all possible speed to resolve these important questions, there is no reason not to wait for its considered judgment on these issues. The case is fully briefed with argument set for May 16. At every turn, the D.C. Circuit has considered this case expeditiously and diligently. *See* Special Panel Decision on Mot. for Stay, App. 23a–136a (Mar. 28, 2025) (deciding emergency motion eighteen days after it was filed with full briefing and argument in the interim); En Banc Decision on Reh'g, App. 1a–18a (Apr. 7, 2025) (deciding en banc petition within a week of filing).

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 decide whether this case presents the best vehicle for deciding this issue. The Court has in the last year denied two petitions for certiorari raising the same issue. *See Leachco*, 103 F.4th at 763 (upholding removal protections for the Consumer Product Safety Commission), *cert. denied*, 2025 WL 76435 (Jan. 13, 2025); *Consumers' Rsch.*, 91 F.4th at 351–52, *cert. denied*, 145 S. Ct. 414 (2024) (same). And this case is not the only option for resolution in the near future. Already, two cases challenging similar no-cause firings are waiting in the wings—*Grundmann v.*

Trump, 2025 WL 782665 (D.D.C. Mar. 12, 2025), concerning the Federal Labor Relations Authority, and *Slaughter v. Trump*, No. 25-909 (D.D.C.), concerning the attempted removal of two Federal Trade Commissioners.

III. This Court should reject the government's rash suggestion to schedule oral argument in a special sitting next month.

Under no circumstances, however, should the Court accept the government's ill-conceived suggestion to cram briefing and argument in this complex case into a special sitting next month. The government has not actually proposed a briefing schedule along these lines, perhaps because it is hard to imagine how one would realistically work. Even if the Court were to grant certiorari today (and it should not), the usual briefing schedule would call for a brief on the merits by May 30, a response by June 30, and a reply by July 30, with sufficient time for amici curiae to weigh in. To accelerate all of that briefing so that argument is held *before* the opening brief would typically be due is to deprive these important questions of the measured consideration and full airing of views that they deserve, including consideration of newly developed historical research and briefing on agency-specific issues, among other things. As described above, there is no emergency warranting certiorari before judgment, let alone such an unworkably rushed schedule.

CONCLUSION

The application to stay the judgment of the district court and the request for certiorari before judgment should both be denied.

April 15, 2025

Respectfully submitted,

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**Practicing under the direct supervision of members of the D.C. Bar pursuant to Local Rule 49(c)(8) while application to the D.C. Bar is pending.*