No. 24A966

In the

Supreme Court of the United States

SCOTT BESSENT, IN HIS OFFICIAL CAPACITY
AS SECRETARY OF TREASURY, ET AL., APPLICANTS

v.

CATHY A. HARRIS, IN HER PERSONAL CAPACITY AND IN HER OFFICIAL CAPACITY AS MEMBER OF THE MERIT SYSTEMS PROTECTION BOARD, RESPONDENT.

CATHY A. HARRIS'S OPPOSITION TO APPLICATION FOR A STAY PENDING APPEAL AND FOR AN ADMINISTRATIVE STAY

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Scott Bessent, Trent Morse, Sergio Gor, Henry Kerner, Donald J. Trump, and Russell T. Vought are Applicants in this Court, and are Defendant-Appellants below.

Cathy A. Harris is Respondent in this Court, and is Plaintiff-Appellee below.

RELATED PROCEEDINGS

This case was before the District Court in *Harris* v. *Bessent*, No. 25-cv-412 (D.D.C.), and is before the Court of Appeals in *Harris* v. *Bessent*, Nos. 25-5037, 25-5055 (D.C. Cir.).

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TO THE HONORABLE JOHN G. ROBERTS, CHIEF JUSTICE OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE D.C. CIRCUIT:

The government asks this Court to overturn a century of practice and precedent—and invalidate the structure of numerous agencies—"on a short fuse without benefit of full briefing and oral argument." *Does* v. *Mills*, 142 S. Ct. 17, 18 (2021) (Barrett, J., concurring). Doing so would have immediate consequences for foundational institutions—from the Federal Reserve to the National Transportation Safety Board. Even if this Court wishes to revisit settled precedent, a *blitzkrieg*-to-judgment is not the way to go about it. The Court should deny the application; preserve the status quo that has existed for a century; allow the D.C. Circuit to hold expedited oral argument on May 16; and consider the case in due course.

The time courts have had to consider the new Administration's major structural constitutional challenge is inversely proportional to how long this Court's precedents have decided it. It was just two months ago, on February 10, that the President—without even trying to show cause—purported to remove Cathy Harris from her position as a member of the Merit Systems Protection Board, an "adjudicatory body" that hears employment appeals regarding civil servants. *Wiener* v. *United States*, 357 U.S. 349, 356 (1958). Under a law that has existed for half-century without challenge from chief executives such as Reagan and Bush, the President may terminate members of the Board "only for inefficiency, neglect of duty, or malfeasance in office." 5 U.S.C. § 1202(d).

The government insists that Article II of the Constitution provides the President unchecked authority to remove Board members at will. That is not the law.

Under *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935), Congress may enact standards of removal for "multimember board[s]," *Seila Law LLC* v. *CFPB*, 591 U.S. 197, 207 (2020), particularly "predominantly quasi judicial," *Humphrey's Executor*, 295 U.S. at 624, "adjudicatory bod[ies]," *Wiener*, 357 U.S. at 356.

Humphrey's Executor reflects "deeply rooted historical practice" on which the political branches have long relied. *PHH Corp.* v. *CFPB*, 881 F.3d 75, 174 (D.C. Cir. 2018) (Kavanaugh, J., dissenting). In *Seila Law* and *Collins*, this Court recently invalidated removal protections for novel agencies led "by a single individual" that lacked a foothold in history. *Seila Law*, 591 U.S. at 213*; see Collins* v. *Yellen*, 594 U.S. 220, 251 (2021). This Court did not "revisit *Humphrey's Executor* or any other precedent," and the Chief Justice's decision repeatedly contrasted single-director-led agencies with traditional multimember boards or commissions. *Seila Law*, 591 U.S. at 228. Since then, at the United States's urging, this Court has denied requests to overturn *Humphrey's Executor*,[1] and the Courts of Appeals have uniformly rejected the strained reading of *Seila Law* and *Collins* the Solicitor General now embraces.[2]

The government now asks this Court to rush to junk that settled precedent in the guise of a stay pending appeal. As even the government acknowledges (at 14), it must show a "likelihood of success" "*under existing law*" to receive a stay. *NetChoice,*

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[1] *See Leachco, Inc.* v. *CPSC*, No. 24-156 (cert denied Jan. 13, 2025); *Consumers' Rsch.* v. *CPSC*, No. 23-1323 (cert denied Oct. 21, 2024).

[2] *See Magnetsafety.org* v. *CPSC*, 129 F.4th 1253, 1266 (10th Cir. 2025); *Leachco, Inc.* v. *CPSC*, 103 F.4th 748, 763 (10th Cir. 2024); *Consumers' Rsch.* v. *CPSC*, 91 F.4th 342, 351-352 (5th Cir. 2024) (Willett, J.); *Illumina, Inc.* v. *FTC*, 88 F.4th 1036, 1047 (5th Cir. 2023); *Meta Platforms, Inc.* v. *FTC*, No. 24-5054, 2024 WL 1549732, at *2 (D.C. Cir. Mar. 29, 2024) (per curiam).

LLC v. *Paxton*, 142 S. Ct. 1715, 1716 (2022) (Alito, J., dissenting) (quotation marks omitted) (emphasis added). But the best the government could say in the D.C. Circuit was that there was "a lack of clarity in the law"—well short of the demanding standard needed to receive a stay pending appeal. App.3a.

To be clear: There is no "lack of clarity." *Humphrey's Executor* has not been narrowed into nonexistence, such that it applies only "if the agency in question is the identical twin of the 1935" Federal Trade Commission (FTC). App.54a (Walker, J., concurring). Quite the opposite. This Court took pains not to disturb the *Humphrey's Executor* framework for traditional multimember boards and commissions. The Merit Systems Protection Board exercises far less significant authority than the FTC, and falls within the heartland of this Court's precedent. As the government agreed, the Board is "predominantly an adjudicatory body." App.94a (Millett, J., dissenting) (quoting oral argument). It does not launch investigations, set policy, fill up vague statutes, or regulate "the economy at large." *Collins*, 594 U.S. at 253. The Board merely hears discrete cases regarding civil servants, and neutrally applies laws Congress passed prohibiting arbitrary dismissal, discrimination, and retaliation.

The Board is the easy case. If the Board's structure is not constitutional under *Humphrey's Executor*, nothing is. Not the Federal Reserve, which sets monetary policy and regulates banks. Not the National Transportation Safety Board, which determines the causes of air accidents. The list goes on. Granting the stay application in this case would invalidate agencies in every case.[3]

[3] The D.C. Circuit should be permitted to decide both *Wilcox* v. *Trump*, 25-5057 (D.C.

The government separately argues that Article III courts are powerless to issue a meaningful remedy when the President violates a for-cause removal statute. The Court should reject the suggestion that one-weird-trick allows the government to sidestep *Humphrey's Executor*. Courts may issue equitable relief. *See Sampson* v. *Murray*, 415 U.S. 61, 71 (1974); *Service* v. *Dulles*, 354 U.S. 363, 370, 389 (1957); *Vitarelli* v. *Seaton*, 359 U.S. 535, 537, 546 (1959); *Severino* v. *Biden*, 71 F.4th 1038, 1042-1043 (D.C. Cir. 2023); *Swan* v. *Clinton*, 100 F.3d 973, 980 (D.C. Cir. 1996). There is an extremely long Anglo-American history and tradition of courts issuing the same relief in the form of mandamus to provide "full and effectual remedy" "for wrongful removal." 3 William Blackstone, Commentaries *264; *see Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 173 (1803) (wrongful divestment of Senate-confirmed position presented "a plain case for a mandamus"). And the government agreed below that the District Court could declare "that the removal was unlawful," and it is bound by that concession before this Court. *See* Gov. D.C. Cir. Br. at 40 n.7.

At minimum, the government cannot make the necessary "strong showing" of success on the merits, *Nken* v. *Holder*, 556 U.S. 418, 426 (2009) (quotation marks omitted), under "existing precedent." *NetChoice, LLC*, 142 S. Ct. at 1716 (Alito, J., dissenting) (quotation marks omitted). But the point is more basic: In our constitutional system, courts "say what the law is," and the executive branch complies with the judiciary's judgments. *Marbury*, 5 U.S. at 177. To hold that the judiciary

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Cir.), and this case, and examine the different issues each Board presents. But if this Court were to grant review in *Wilcox*, it should grant this case as well, so the differences in each Board can be ventilated and provide guidance to the lower courts.

cannot provide meaningful relief in this case would overturn *Humphrey's Executor* by creating a remedial blackhole in which lawful statutes Congress passed are completely unenforceable. The Court should be particularly careful of going down this path, because it would prevent the Court from ever preserving any subset of removal statutes, and risks undermining the foundations of judicial review in cases involving the executive.

The government's application flunks the remaining stay factors. History disproves the government's assertion that the President will be irreparably harmed if he cannot remove Harris. No other President in our lifetimes has *ever* attempted to violate for-cause removal statutes in this manner. The current chief executive is not being held to a different standard. He is being asked to follow binding precedent unless and until the Court overturns it, just like his predecessors for nearly a century. If that is an incursion on executive power, it is only one due to his idiosyncratic view of what that power is—one that rejects Congress' and this Court's longstanding view of the issue, as well as the practice of every past President. *See NLRB* v. *Noel Canning*, 573 U.S. 513, 525 (2014).

On the other side of the ledger, there are high costs to granting a stay. A stay will subject Harris to arbitrary removal, the very thing that Congress did not want. As a result of the Court's administrative stay, the Merit Systems Protection Board immediately lost a quorum, and the Board will be divested of a quorum until the end of the case should the Court issue a stay. Meanwhile, the Court's decision would send a clear signal that the President can arbitrarily remove members of every

independent agency, from the Federal Reserve Board on down. That way lies chaos.

Finally, the Court should reject the government's request to take the extremely unusual step of granting certiorari before judgment. The Courts of Appeal are in agreement, and the Court previously denied review in cases asking it to overturn *Humphrey's Executor*. At this unique juncture, a rush-to-judgment that would call into question the longstanding balance-of-power could be particularly destabilizing. And there is no need to do so. The D.C. Circuit has already set an expedited briefing schedule and will hear oral argument on May 16, 2025. There are important issues that the lower court should consider, such as: the precise functions of the Board; its unique history; and the effect of a decision invalidating the Board on other critical independent adjudicators who sit within the executive branch.

One example demonstrates the last point. It is telling that nowhere in its 39-page application did the Solicitor General say a word about what overturning *Humphrey's Executor*—or narrowing it into oblivion—would mean for the Federal Reserve Board, despite this moment of considerable economic turmoil. Not one. If the Court is to consider overturning landmark precedent, it should at least do so with the benefit of the Court of Appeals' reasoned analysis on that and other important issues. The Court should deny the application.

BACKGROUND

A. The Merit Systems Protection Board

This case involves a quintessential adjudicatory body—the Merit Systems Protection Board—that reflects a centuries-long effort to combat patronage in federal

employment. *See infra* pp. 18-19. At the President's urging, Congress provided that the Board's members "may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office." 5 U.S.C. § 1202(d). The Board's three members serve staggered seven-year terms, and no more than two are of the same political party. *Id.* §§ 1201, 1202(a)-(c).

The Board adjudicates federal employee appeals, including claims of political discrimination and whistleblower retaliation. *Id.* §§ 2302(b)(1), (b)(8). Its jurisdiction is circumscribed to avoid encroaching on core Presidential prerogatives. It may not hear appeals by political appointees, *id.* § 7511, has limited authority as to senior executive managers, *id.* § 3592(a), and cannot wade into national security issues, *Kaplan v. Conyers*, 733 F.3d 1148, 1166 (Fed. Cir. 2013) (en banc).

B. Procedural History

1. Cathy Harris was nominated and confirmed as a member in 2022. Her term expires March 1, 2028. On February 10, 2025, Harris received an email claiming the President terminated her, without any reason. She filed this action the next day.

In the proceedings below, the government did not contest: (i) that the Board does not "dictate or enforce policies regarding the federal workforce"; (ii) that the "Board does not initiate disciplinary actions"; and (iii) that "over 95% of the decisions" of the Board are "unanimous." D. Ct. Dkt. 22-2 at 7-9.

2. The District Court concluded that Board members' "removal protections are constitutional under *Humphrey's Executor*." App.186a. As the District Court explained, *Seila Law* and *Collins* took pains to preserve "the constitutionality of for-

cause removal provisions for multimember bodies of experts heading an independent agency." App.189a-190a. In *Seila Law*, this "Court even opined that Congress could fix" the agency in question by " 'converting' " the agency " 'into a multimember' " body. App.191a (quoting *Seila Law*, 591 U.S. at 237). The court found the Board to be a quintessential multimember body with " 'quasi judicial' " "duties" that "conducts preliminary adjudications of federal employees' claims." App.192a.

The District Court granted injunctive and declaratory relief for Harris. But the court also made clear that, were "equitable injunctive relief unavailable," it would issue "a writ of mandamus as an alternative remedy." App.214a.

3. The government appealed and sought a stay pending appeal. At oral argument on the stay, the government characterized the Merit Systems Protection Board as "predominantly an adjudicatory body." Supp.App.5a.

The panel granted the stay pending appeal. There was no majority opinion. In a concurrence, Judge Walker narrowed *Humphrey's Executor* into non-existence, calling it a "benched quarterback" that applies only "if the agency in question is the identical twin of the 1935 FTC." App.53a-54a (Walker, J., concurring). Under his view of *Seila Law* and *Collins*, nothing is left of *Humphrey's Executor* and *Wiener*, and no independent agency is constitutional, including the Federal Reserve.

Judge Henderson voted to grant the stay. But she acknowledged that the Board's "powers are relatively more circumscribed" than other agencies, and deemed "the merits as a slightly closer call." App.73a, 76a (Henderson, J., concurring).

Judge Millett dissented, emphasizing that the panel's decision conflicted with

"controlling Supreme Court precedent" and conflicted with every Court of Appeals to have considered the question. App.83a (Millett, J., dissenting). The panel's order, she explained, called "into question the constitutionality of dozens" of agencies "from the Federal Reserve Board and the Nuclear Regulatory Commission to the National Transportation Safety Board and the Court of Appeals for Veterans Claims." *Id.*

4. The en banc Court vacated the stay in a 7-4 vote. The D.C. Circuit explained that 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. The appeal is proceeding on a "highly expedited schedule." App.3a. The merits have been fully briefed and oral argument is scheduled on May 16, 2025.

ARGUMENT

I. The Government Cannot Show A Likelihood Of Success Under Existing Law.

A stay pending appeal is an "extraordinary" remedy. *Williams* v. *Zbaraz*, 442 U.S. 1309, 1311 (1979) (Stevens, J., in chambers). To prevail, the government must prove a "substantial likelihood of success on the merits," *Alabama Ass'n. of Realtors* v. *Dep't of Health and Hum. Servs.*, 594 U.S. 758, 761 (2021) (per curiam), "*under* '*existing law.*' " *NetChoice*, 142 S. Ct. at 1716 (Alito, J., dissenting) (emphasis added) (quoting *Merrill* v. *Milligan*, 142 S. Ct. 879 (2022) (Roberts, C .J., dissenting)). The government does not come close. *Seila Law* and *Collins* did not invalidate the rule for traditional multimember bodies, and the Board falls squarely within the heartland of *Humphrey's Executor*. Even the government agreed below that it is "predominantly an adjudicatory body." Supp.App.12. Finally, the District Court's

order rests on centuries of Anglo-American remedies precedent.

A. Ruling For The Government Requires Overturning The *Humphrey's Executor* Framework.

1. The Board Falls Within The Heartland Of *Humphrey's Executor*.

a. Under *Humphrey's Executor*, Congress may afford a measure of removal protection to "multimember board[s] or commission[s]," *Seila Law*, 591 U.S. at 207, which exercise "predominantly quasi judicial" functions, *Humphrey's Executor*, 295 U.S. at 624, and serve as "adjudicatory bod[ies]," *Wiener*, 357 U.S. at 356.

The quintessential example is the War Claims Commission, a three-member group of experts housed within the executive branch that " 'adjudicate[d]' " claims " 'according to law' " and issued final decisions unreviewable "by any other official of the United States or by any court." *Wiener*, 357 U.S. at 355. *Wiener* rejected the "naked[]" "claim that the President could remove a member of an adjudicatory body like the War Claims Commission merely because he wanted his own appointees." *Id.* at 356. "[N]o such power is given to the President directly by the Constitution." *Id.* The Court explained that modest removal protections further critical due process values by ensuring the "attitude of independence" needed to decide cases without fear or favor. *Id.* at 353 (quoting *Humphrey's Executor*, 295 U.S. at 629). The adjudicatory powers in *Wiener* far eclipsed those of the Board here—from the subject matter (payment of claims) to how decisions were reviewed (zero review in *Wiener*).

In the years since *Humphrey's Executor* and *Wiener*, this Court has not once invalidated a "traditional independent agency headed by a multimember board or commission." *Seila Law*, 591 U.S. at 207. Quite the opposite. "[R]emoval

restrictions" "have been generally regarded as lawful" for entities ranging from the "Consumer Product Safety Commission" to "Article I courts." *Morrison* v. *Olson*, 487 U.S. 654, 724-725 (1988) (Scalia, J., dissenting); *see Mistretta* v. *United States*, 488 U.S. 361, 411 (1989). The Court has squarely rejected the argument, which the government now embraces (at 12), that "the language of Article II vesting the executive power of the United States in the President requires that every officer of the United States exercising any part of that power must serve at the pleasure of the President." *Morrison*, 487 U.S. at 690 n.29.

b. In *Selia Law* and *Collins*, this Court held that *Humphrey's Executor* does not extend to "novel" agencies headed by a single director that wield considerable "rulemaking and enforcement powers" and are exempt from the traditional appropriations process. *Collins*, 594 U.S. at 251; *Seila Law*, 591 U.S. at 207; *see Free Enter. Fund* v. *PCAOB*, 561 U.S. 477, 496 (2010). But in *Seila Law*, the Court went out of its way not to disturb "*Humphrey's Executor* or any other precedent," *Seila Law*, 591 U.S. at 228, and repeatedly contrasted the novel agencies at issue in those cases with permissible multimember boards, *see id.* at 207, 216, 218, 237. Meanwhile, *Collins* represented a "straightforward application of" *Seila Law* to another "agency led by a single Director." *Collins*, 594 U.S. at 251.

Finally, if there were any question about the validity of traditional multimember bodies after *Seila Law* and *Collins*, seven Justices in *Seila Law* dispelled that doubt when they invited Congress to repair the constitutional flaw by reconstituting the agency as a multimember body. *Seila Law*, 591 U.S. at 237

(Roberts, C.J., joined by Alito and Kavanaugh, JJ.); *id.* at 298 (Kagan, J., joined by Ginsburg, Breyer, and Sotomayor, JJ.). As the government argued to this Court just a few short months ago, litigants "cannot plausibly maintain that" this Court "invited Congress to adopt a structure that the preceding pages of the same opinion had just declared unconstitutional." U.S. Brief in Opp., *Leachco, Inc.* v. *CPSC* at 15, No. 24-156 (U.S. Nov. 14, 2024). In short, *Seila Law* and *Collins* mean what they said, and *Humphrey's Executor* dictates the rule for traditional multimember bodies.

c. The Merit Systems Protection Board falls squarely within the heartland of the *Humphrey's Executor* framework in both form and function, and the government cannot make the strong showing of success under existing law needed to receive a stay. By contrast, if this Board is not constitutional, nothing is left of *Humphrey's Executor*, and *Seila Law*'s repeated admonitions that it did not disturb precedent would have been "a disingenuous bait-and-switch." App.105a (Millett, J., dissenting).

Start with function. Even the government agrees the Board is "predominantly an adjudicatory body." App.94a (Millett, J., dissenting) (quotation marks omitted). The Board does not fill up vague statutes, establish policy, or "regulate the conduct of private parties." App. 192a. It hears a narrow range of appeals regarding civil servants—including claims of "discrimination, loyalty oaths, coercion to engage in political activity, and retaliation against whistleblowers"—applying the laws Congress passed to the facts of each discrete case. App.193a. Just like an Article III court, the Board "cannot initiate its own personnel cases, but must instead passively wait for them to be brought." App.192a-193a (quotation marks omitted).

There is no way to rule for the government without overturning *Wiener*. Just as with the War Claims Commission, Congress could have "given jurisdiction over" civil service disputes "to the District Courts or to the Court of Claims." *Weiner*, 357 U.S. at 355. That fact only underscores the "intrinsic judicial character of the task with which the" Board is "charged." *Id.* If anything, the Board exercises *less* power than the Commission in *Wiener*, whose decisions were completely unreviewable "by any other official of the United States or by any court." *Id.* (quotation marks omitted). By contrast, the Board's decisions are reviewable in Article III courts.

The Board's history confirms its adjudicatory nature. In 1883, Congress established the Civil Service Commission, which handled both personnel management and adjudications. In 1978, Congress split the Commission into multiple entities, including: (1) the Office of Personnel Management, to manage the federal workforce; and (2) the Board, as an adjudicatory authority. Pub. L. No. 95-545, 92 Stat. 1111, 1122 (1978). In 1989, Congress cleaved off the Office of Special Counsel—a single-director led entity that investigates and prosecutes violations of civil service rules—into a separate executive branch agency. Pub. L. No. 101-12, 103 Stat. 16 (1989). The result is a fully "adjudicatory" Board. *Wiener*, 357 U.S. at 356.

The Board's multimember structure is also straight out of *Humphrey's Executor*. The Board's three members must be "drawn from both sides of the aisle," and serve "staggered terms," ensuring the accrual of "significant expertise." *Seila Law*, 591 U.S. at 218; *accord Humphrey's Executor*, 295 U.S. at 624. By law, members must be experts whose "ability, background, training, or experience" make

them "especially qualified" to serve on the Board. 5 U.S.C. § 1201. Meanwhile, the President may designate the Board's chairman, affording him a measure of control over the Board. *See Seila Law*, 591 U.S. at 225; *PHH Corp.*, 881 F.3d at 189 (Kavanaugh, J., dissenting). And the Board lacks the unique permanent funding features that insulated agencies in *Seila Law* and *Collins* from the constitutional "appropriations process," and further "aggravate[d] the * * * threat to Presidential control." *Seila Law*, 591 U.S. at 226.

d. Any one of *Humphrey's Executor*, *Wiener*, *Seila Law* and *Collins* would be enough to deny a stay. But it bears emphasis: The Board reflects "deeply rooted historical practice," which carries great weight in the "separation of powers analysis." *PHH Corp.*, 881 F.3d at 174, 179 (Kavanaugh, J., dissenting); *see Seila Law*, 591 U.S. at 222; *Free Enter. Fund*, 561 U.S. at 505. This history underscores why the Court should deny the application and leave the existing legal framework in place.

As *Humphrey's Executor* recognized, Congress has long enacted measures to protect the "independence" of adjudicators who sit within the executive branch. 295 U.S. at 630. In the first years of the new nation, Congress allowed territorial judges to hold their commissions "during good behavior."[4] Shortly before the Civil War, Congress created the Court of Claims, a "legislative [c]ourt" whose judges were protected from arbitrary removal. *Humphrey's Executor*, 295 U.S. at 629.[5] In 1890,

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[4] *See, e.g.*, An Act to Provide for the Government of the Territory North-West of the River Ohio, ch. 8, 1 Stat. 50, 51 (1789); Act of Apr. 7, 1798, ch. 28, § 3, 1 Stat. 549, 550 (1798). Territorial courts were not Article III courts. *McAllister* v. *United States*, 141 U.S. 174, 184, 187 (1891).

[5] *See* Act of Feb. 24, 1855, ch. 122, § 1-1, 33 Stat. 612 (1855). The Court of Claims

Congress afforded removal protection to the Board of General Appraisers;[6] in 1924, to the members of the Board of Tax Appeals; and in 1946, to administrative law judges.[7] Today, judges on the Tax Court, 26 U.S.C. § 7443(f), the Court of Appeal for Veterans Claims, 38 U.S.C. § 7253(f), and the Court of Appeals for the Armed Forces, 10 U.S.C. § 942(c), are all adjudicators who sit within the executive branch and are protected from arbitrary dismissal through for-cause removal provisions.

There is an equally established tradition of multimember bodies with removal protection. Congress created the multimember Sinking Fund Commission in 1790; the First Bank of the United States a year later; and the Second Bank in 1816. App.109a-110a (Millett, J., dissenting). To pick a few more, Congress established the Interstate Commerce Commission in 1887; the Federal Reserve Board in 1913; the Federal Trade Commission in 1914; the National Mediation Board in 1934; the National Labor Relations Board in 1935; the Atomic Energy Commission in 1946; the Federal Energy Regulatory Commission in 1977; and the Merit Systems Protection Board in 1978.[8] And there are many other agencies, such as the National

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was a "legislative court." *Williams* v. *United States*, 289 U.S. 553, 571, 581 (1933); *accord Humphrey's Executor*, 295 U.S. at 629.

[6] Act of June 10, 1890, ch. 407, § 12, 51 Stat. 136-138 (1890).

[7] Revenue Act of 1924, ch. 243, 43 Stat. 253, 337 (1924); Administrative Procedure Act, ch. 324, § 11, 237, 244 (1946).

[8] *See* Interstate Commerce Act, Pub. L. No. 49-104, 24 Stat. 379, 383 (1887); Federal Reserve Act, Pub. L. No. 63-48, 38 Stat. 251, 260 (1913); Federal Trade Commission Act, Pub. L. No. 63-203, 38 Stat. 717, 718 (1914); An Act to Amend the Railway Labor Act, Pub. L. No. 442, 48 Stat. 1185, 1193 (1934); National Labor Relations Act, Pub. L. No. 198, 49 Stat. 449, 451 (1935); Atomic Energy Act of 1946, Pub. L. No. 585, 60 Stat. 755, 756-757 (1946); Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 565, 582 (1977).

Transportation Safety Board. The Solicitor General's Vesting Clause and Take Care Clause arguments would imperil all of them, on a highly expedited timeline.

In contrast to the government's current position, the executive branch has long accepted this deeply rooted tradition. Neither the Office of Legal Counsel "nor any President in a signing statement has called into doubt *Humphrey's Executor* or *Wiener*." App.117a n.6 (Millett, J., dissenting). The opposite. When Congress created the Board, the Department of Justice agreed it is "a *quasi-judicial body* whose officials *may be legitimately exempted from removal* at the pleasure of the President." 2 O.L.C. 120, 121 (1978) (emphasis added); *see* 3 O.L.C. 357, 358-359 (1979) (similar). The *Humphrey's Executor* framework is at the constitutional apogee—representing the legal consensus of all three branches: For nearly a century, Congress and the President have created independent agencies in reliance on this Court's precedent.

This long history highlights the extraordinary stare decisis values at stake, which stand to be upended should the Court grant a stay. If the design of the Merit Systems Protection Board is not constitutional, nothing is. Not the Federal Reserve Board, which sets monetary policy and regulates banks. Not the National Transportation Safety Board, which investigates air accidents. Not any legislative court. This Court should not usher in such upheaval on its emergency docket.

e. In attempt to assuage concerns about eliminating the independence of the Federal Reserve, the government below has suggested, in wishy-washy language, that the Federal Reserve's " 'unique historical background' " "may illuminate the constitutional analysis," pointing to "the First and Second Banks of the United

States." Gov. D.C. Cir. Merits Reply Br. 14 (quoting *CFPB* v. *Cmty. Fin. Servs. Ass'n of Am., Ltd.*, 601 U.S. 416, 467 n.16 (2024) (Alito, J., dissenting)).

That does not hold up. There is no coherent way to create a special "Federal Reserve exception" that cabins the destructive effects of the government's theory. For one thing, the Federal Reserve exercises *far more* executive power than the Merit Systems Protection Board. It sets money policy and regulates banks. It is incoherent to argue that the Constitution provides the President unfettered authority to terminate everyone who exercises the smallest amount of executive power—but then blow a massive hole in that constitutional theory for the Federal Reserve. No matter how the Court couches a stay order, granting a stay in this case will empower the President to undermine the Federal Reserve tomorrow—which is precisely why the Court should deny the application. For another, the fact that directors of the First and Second Banks were not removable by the President does not mean there should be a special historical exception for the Federal Reserve. *See* App.110a (Millett, J., dissenting). It shows that the government's theory of executive power is wrong. The Framers did *not think* every member of a multimember board needed to be removable by the President at will.[9]

[9] Notably, the Solicitor General's brief before this Court says not one word about the Federal Reserve. But his claim that all executive power is vested in the President would obviously undo the Federal Reserve. And the historical exception argument the government floated below (but not in this Court) would not prevent the President from firing the Reserve's members without cause anyway. The President could point to the language "may," and then insist, as he does in this Court, that the federal courts are powerless to provide relief. Under the Solicitor General's remarkable view, therefore, all that stands between the firing of Jerome Powell and the Constitution is a cashier's check that would have to be cut for his backpay. That can hardly be the

Regardless, even under this half-baked historical exception test, the Merit Systems Protection Board has a "unique historical background." *Cmty. Fin. Servs.*, 601 U.S. at 467 n.16 (Alito, J., dissenting). Consider the highlights. Since the Founding, there has been a tug-of-war between merit-based service and patronage. Patricia Wallace Ingraham, *The Foundation of Merit: Public Service in American Democracy* 17-18 (1995). By the Civil War, the partisan spoils system had taken hold. The effects were "tragic," undermining "the effectiveness of the Union army and" "federal government." *Id.* at 22. Only after President Garfield was assassinated by an office-seeker did Congress pass the Pendleton Act in 1883, which established a Civil Service Commission, with three members removable by the President at will. *Id.* at 27. But even then, patronage persisted. The "Commission itself" emerged as "a problem" because it served inherently conflicting roles, "protect[ing] the merit system" while "assist[ing] the president in patronage matters." *Id.*

Abuses in the Watergate Era brought matters to a head. Investigations revealed that "top Commission officials," "including Commissioners," succumbed to "high-level pressures" to engage in patronage and "failed to respond effectively" to "political interference in the operation of the Federal merit system." U.S. Civ. Serv. Comm., *A Self-Inquiry into Merit Staffing* 39, 46, 65 (1976). President Jimmy Carter campaigned on and spearheaded the passage of the Civil Service Reform Act. Ingraham, *supra*, at 75-77. That legislation split the Commission's personnel management and adjudicatory functions, *see supra* p.13, and created a "strong and

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meaning of our constitutional structure.

independent" Board free of the defects that had plagued the old Commission. S. Rep. No. 95-969, at 7 (1978). The Board's unique history—and untouched for-cause removal provisions for a half century—strongly counsel against upsetting the centuries-long, bipartisan effort to ensure a professional, merit-based civil service.

f. Finally, the government's own admissions before the D.C. Circuit confirm it cannot make a strong showing of success *based on existing precedent*. Before that court, the government said there is "a lack of clarity in the law." App.3a. We disagree, as does every Court of Appeals to have considered the question, *see* supra p.2 n.2. But those admissions doom a stay here. If the law is unclear, the government does not deserve extraordinary relief based on existing precedent.

2. The Government's Contrary Arguments Are Wrong.

a. In this Court, the government argues (at 13-15) that *Seila Law* and *Collins* narrowed the *Humphrey's Executor* framework into oblivion, rendering it applicable *only* to "the identical twin of the 1935 FTC" "as *Humphrey's* understood the 1935 FTC." App.54a (Walker, J., concurring). That is not the best, let alone a fair, reading of this Court's decisions. This Court did not effectively overturn the *Humphrey's Executor* framework while disclaiming that very result.

The blast radius of the government's theory reaches far and wide. If everyone who sits within Article II must be removable at will under the Vesting and Take Care Clauses, *see* Application at 13, then *every* independent agency and neutral adjudicator lives underneath "the Damocles' sword of removal," *Wiener*, 357 U.S. at 356. According to the government, the President could fire the members of the

National Transportation Security Board if they refuse to cover up the cause of an accident. The President could remove Tax Court judges who decline to give tax breaks to political allies. And so on. The threat of removal will undermine both actual impartiality and the appearance of it that are critical for the public to have faith in these foundational institutions. There is a reason no President has attempted to exert this kind of naked authority: The corrosive effects are vast and disturbing.

The government's theory would mean that "a century-plus of politically independent monetary policy" is no more. App.134a (Millett, J., dissenting). Meanwhile, the merit based civil service is on the chopping block. The government pays lip service (at 13) to decisions permitting Congress to "limit and restrict the power of removal" with respect to inferior officers and employees. *United States* v. *Perkins*, 116 U.S. 483, 485 (1886). But that precedent is impossible to square with the Administration's limitless theory of removal under which anyone who exercises any executive power must be removable at will by the President. Even if members of this Court wish to revisit *Humphrey's Executor* in some manner, it would be particularly dangerous to do so in a stay with such limited briefing, given the potentially far-reaching consequences.

b. The government (at 17-18) claims the Merit Systems Protection Board exercises "substantial executive power." But it told the court below that the Board is "predominantly an adjudicatory body," App.94a (Millett, J., dissenting) (quoting stay oral argument), and even Judge Henderson agreed the Board's "powers are relatively" "circumscribed," App.76a (Henderson, J., concurring). There is no way to invalidate

the Board based on the nature of the powers it exercises without effectively overturning *Humphrey's Executor* and *Wiener*.

First, the fact that the Board exercises "adjudicatory power," "reviews * * * appeals" brought by employees, and "reviews proceedings brought by the Office of Special Counsel" does not render the Board unconstitutional. Application at 17 (quotation marks omitted). On the contrary. A multimember board hearing cases is the *ne plus ultra* of a permissible "adjudicatory body." *Wiener*, 357 U.S. at 356. Adjudicating cases does not render the Board unconstitutional; it underscores the reverse. *See Freytag v. Comm'r*, 501 U.S. 868, 891 (1991) (explaining "the Tax Court * * * is * * * an adjudicative body * * * [that] does not make political decisions.").

Contra the government (at 20), the Board exercises even *less* authority than the War Claims Commission in *Wiener*. The Commission issued completely non-reviewable decisions from its perch within the executive branch. *Id.* at 354-355. The Board's decisions are reviewable in Article III courts. The government also attempts (at 20) to distinguish the Board from the War Claims Commission on the basis that the Commission was only "temporary." But the government "nowhere explains why the length of an agency's mandate matters." App.102a (Millett, J., dissenting).

Second, the government argues (at 19) that the Board exercises substantial executive power because it hears matters involving "the hiring and firing of" federal "employees." But the Board no more interferes with the President's management of the executive branch than an Article III court interferes with educational institutions' admissions when it enforces foundational civil rights laws. *See Students for Fair*

Admissions v. *Harvard*, 600 U.S. 181 (2023). If anything, the Board stands on firm footing precisely because Congress has constitutional authority to "limit, restrict, and regulate the removal" of federal employees and inferior officers, and the Board is an integral part of the statutory scheme Congress has enacted. *Perkins*, 116 U.S. at 485.

Third, the government complains (at 17) the Board "may send its own attorneys to" "lower federal courts" in complex procedural appeals, where the Board's attorneys have unique expertise, and in circumstances in which the Director of the Office of Personnel Management petitions a court to review a Board decision.

There are no constitutional concerns here. The Board's modest ability to represent itself when sued looks nothing like the litigation authority the executive branch wields through the Department of Justice, which launches investigations and prosecutes cases. Moreover, the ability to appear before courts is a typical feature of independent agencies, which only underscores the degree to which adopting the government's position here would require overturning *Humphrey's Executor*.[10] Nor is it a uniquely executive function. Federal courts retain attorneys on their behalf in mandamus cases, and Congress litigates in court.

Fourth, the government takes aim (at 17-18) at the fact that the Office of Special Counsel can request a single member of the Board to enter a temporary stay in personnel actions, which the full Board may "terminate[]" "at any time." 5 U.S.C.

[10] *See, e.g.*, 15 U.S.C. § 2061(a) (CPSC); 42 U.S.C. § 7171(i) (FERC); 5 U.S.C. § 7105(h) (FLRA); 46 U.S.C. § 41307(a), (d) (FMC); 12 U.S.C. § 248(p) (Federal Reserve); 15 U.S.C. § 53(b) (FTC); 29 U.S.C. § 154(a) (NRLB); 49 U.S.C. § 1301(c)(1) (STB); 39 U.S.C. § 409 (USPS).

§ 1214(b)(1)(D). But the ability of a single judge to grant a temporary stay is a typical feature of multimember adjudicatory bodies. *See, e.g.*, Sup. Ct. Rs. 22.5, 23.1. In this case, for example, the Chief Justice entered an administrative stay on his own authority, subject to the full Court's review. And a Board member's ability to enter a temporary stay, subject to the review of the full Board, looks *nothing* like the vast power wielded by single directors that troubled the Court in *Seila Law* and *Collins*.

The argument fails for another reason: only the Special Counsel (not Harris or any other Board official) may seek this kind of stay, 5 U.S.C. § 1214(b)(1)(A)(i), and the President has appointed his preferred acting Special Counsel. The D.C. Circuit recently held that the President could remove the Special Counsel because he was a single director head of a prosecutorial agency. *See Dellinger* v. *Bessent*, No. 25-5052, 2025 WL 887518 (D.C. Cir. Mar. 10, 2025) (per curiam). As a result, the President has installed an acting Special Counsel, who in turn completely controls the ability to request stays. If the government does not want more of these stays, the President's acting Special Counsel simply need not seek them. The government's theoretical concern is therefore solved by the President's existing powers, and there is certainly no need for emergency relief from this Court.

Fifth, the government argues (at 17) that the Board's structure is unconstitutional because the Board may *sua sponte* review Office of Personnel Management regulations to ensure compliance with laws Congress passed regulating prohibited practices, such as discrimination and retaliation. But this purely "negative power" *is also adjudicatory*. App.77a (Henderson, J., concurring). This

authority is effectively never employed. We could find one instance, almost a half-century ago, *upholding* a regulation. *In re Exceptions from Competitive Merit Plans*, 9 M.S.P.R. 116 (MSPB 1981). To top it off, the government may seek "judicial review" of the Board's decisions. App.99a (Millett, J., dissenting). Regardless, if the Court were truly worried about that vestigial function (or any similar one), the solution—consistent with principles of constitutional avoidance and judicial modesty—is not to blow up the century-plus structure of agencies, but to invalidate the particular exercise of that function should it ever be used. *See United States v. Arthrex, Inc.*, 594 U.S. 1, 24-26 (2021). At the least, a never exercised vestigial function is certainly not such a pressing concern that it requires emergency relief.

The bottom line: There is no way the government can succeed under existing law, and the Court should not upset longstanding precedent in a stay motion.

B. Article III Courts Are Not Powerless To Enforce The Law.

The District Court granted Harris an injunction and declaratory relief, and explained that it would award "mandamus as an alternative remedy" if necessary. App.214a. This relief is rooted in centuries of Anglo-American history and tradition.

1. Courts May Issue "Full And Complete" Relief In Removal Cases.

The District Court properly provided relief by enjoining subordinate executive officials from "denying or obstructing Harris's access" to "her office." App.214a. This type of injunction does not run against the President. Instead, the order requires *subordinate officials* to permit Harris " 'to exercise the privileges' " of her office. *Severino*, 71 F.4th at 1043 (quoting *Swan*, 100 F.3d at 980). This injunction neither

reinstates Harris to office, nor requires the President to exercise his appointments power. Rather, because the President's putative removal was "illegal and void" under *Humphrey's Executor*, "the office never became vacant," *Kalbfus* v. *Siddons*, 42 App. D.C. 310, 321 (D.C. Cir. 1914), and "Harris was never in fact removed." App.205a n.13. The order simply requires subordinate officials to honor that reality. As Judge Silberman has explained, this kind of injunction provides Harris "all the relief" she will "ever need" "without ever attempting to impose judicial power directly on the President of the United States." *Swan*, 100 F.3d at 989 (Silberman, J., concurring).

The law permitting injunctive relief in this context is so settled that the government agreed in the D.C. Circuit that the District Court could provide equitable relief "as a matter of circuit precedent." Supp.App.7a; *see Severino*, 71 F.4th at 1043; *Swan*, 100 F.3d at 980. Indeed, "[i]njunctions against subordinate executive officials to prevent illegal action by the Executive Branch are" commonplace. App.125a (Millett, J., dissenting); *see, e.g.*, *Hamdan* v. *Rumsfeld*, 548 U.S. 557, 567 (2006); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 583 (1952); *Franklin* v. *Massachusetts*, 505 U.S. 788, 828 (1992) (Scalia, J., concurring in part and concurring in judgment) ("Review of * * * Presidential action can ordinarily be obtained in a suit seeking to enjoin the officers who attempt to enforce the President's directive.").

This Court's precedent confirms such injunctions are available in removal cases. In *Sampson* v. *Murray*, the Court recognized that "in disputes over tenure of governmental employees," courts of law rather than courts of equity historically provided relief. 415 U.S. at 71. But then-Justice Rehnquist explained for the Court

that "[m]uch water has flowed over the dam," and that modern "federal courts do have authority to review the claim of a discharged governmental employee." *Id.*at 71.

Consider *Service* v. *Dulles*, on which *Sampson* relied. In that case, a foreign service officer had sought both injunctive and declaratory relief, *Service*, 354 U.S. at 389, and obtained that relief on remand after this Court held his termination unlawful, *Service*, B-134614 (Comp. Gen.), 1958 WL 1888 (Mar. 3, 1958). Similarly, in *Vitarelli* v. *Seaton*, a federal employee sought judgment declaring his dismissal unlawful and "an injunction requiring his reinstatement," and the Court held that he was "entitled to the reinstatement which he seeks." 359 U.S. at 537, 546; *see also Miller* v. *Clinton*, 687 F.3d 1332, 1360 n.7 (D.C. Cir. 2012) (Kavanaugh, J., dissenting) (noting public servants facing "unconstitutional discrimination" may obtain "an injunction"). In short, the District Court had authority power to issue an injunction.

b. There is a long tradition of courts issuing similar relief styled as mandamus. As the District Court detailed, to "the extent that English equity courts declined to issue injunctions," "a court of law" "would readily issue mandamus instead." App.204a (collecting precedent). After the merger of law and equity, an injunction "is essentially" "mandamus in this context"—meaning that history supports the District Court's authority to issue an injunction. *Swan*, 100 F.3d at 976 n.1. But the "broader point" is that the court possessed the authority to "provide Harris *some* form of effective relief," regardless of the precise label. App.206a.

There is "overwhelming" English authority that "mandamus" lies where a person removable only for "causes specified" "is wrongfully dispossessed." *Kalbfus*,

42 App. D.C. at 319 (quoting *R v. Blooer*, (1760) 97 Eng. Rep. 697; 2 Burr. 1043, 1045). "[M]andamus" provides a "full and effectual remedy." Blackstone, *supra*, *264; *see, e.g.*, *R v. Mayor, Bailiffs and Common Council of the Town of Liverpool*, (1759) 97 Eng. Rep. 533; 2 Burr. 730-732.[11] That English tradition of mandamus crossed the Atlantic and is etched into the cornerstone of judicial review. *Marbury* v. *Madison* involved a Senate-confirmed official whose commission was wrongfully withheld—a circumstance analogous to wrongful removal. According to Chief Justice Marshall, that scenario presented "a plain case for a mandamus." *Marbury*, 5 U.S. at 173. Numerous other cases abound.[12]

c. Finally, the District Court had the authority to enter declaratory relief. It is the basic duty of this Court to "say what the law is," *Marbury*, 5 U.S. at 177, and our system relies on "executive" "officials" abiding "by an authoritative interpretation" of the law, *Franklin*, 505 U.S. at 803 (plurality op.). Notably, although

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[11] *See* Oliver Field, *Civil Service Law*, ch. XI § V (1939) ("Mandamus to reinstate" is "commonly used remedy in civil service removal cases."); James L. High, *A Treatise on Extraordinary Remedies* 71 (2d ed. 1884) ("[C]ivil courts" may "restore one [to office] who has been wrongfully removed."); Samuel Slaughter Merril, *Law of Mandamus* 182 (1892) (Officer "will be restored" "by the writ of *mandamus*."); Thomas Tapping, *The Law and Practice of the High Prerogative Writ of Mandamus* 240 (1853) (Mandamus lies as a "remedy for a wrongful dispossession of an office."); John Shortt, *Informations (Criminal and Quo Warranto), Mandamus and Prohibition* 302 (1888) ("mandamus" is "true specific remedy" for person "wrongfully dispossessed" (quotation marks omitted)).

[12] *Fuller v. Trs. of Acad. Sch. in Plainfield*, 6 Conn. 532, 547 (Conn. 1827) (mandamus proper where "no just cause is shewn"); *State ex rel. Gill v. Common Council of City of Watertown*, 9 Wis. 254, 258 (Wis. 1859) ("[A] mandamus is a proper remedy."); *Ransom v. Mayor of Boston*, 79 N.E. 823, 823 (Mass. 1907) (mandamus to "reinstate" plaintiff "unlawfully ousted"); *Truitt v. City of Philadelphia*, 70 A. 757, 761 (Pa. 1908) (mandamus "to reinstate" superintendent); *see also Macfarland v. United States ex rel. Russell*, 31 App. D.C. 321, 322 (D.C. Cir. 1908) (mandamus for police officer).

the government purports to now challenge declaratory relief, the government's merits brief below accepted the availability of that remedy. *See* Gov. D.C. Cir. Br. at 40 n.7.

2. The Government's Arguments Are Wrong.

The government's arguments are wrong, and at the very least the government falls short of the necessary " 'strong showing' " of success. *Nken*, 556 U.S. at 426.

First, the government argues (at 21-22) that courts may award only backpay because other remedies "violate[] Article II" by compelling the President to retain "someone he has fired." But that restates the merits question, *i.e.*, may the President remove Harris on a whim. Because Congress can protect against arbitrary removal, Harris remaining in office does not violate Article II.

The government's argument defies historical practice. Presidents have honored *Humphrey's Executor* for nearly a century. It cannot be that every other chief executive could have cut some checks for trivial sums to evade removal statutes Congress enacted. Let's be honest: A backpay-only rule would gut *Humphrey's Executor* by turning every removal statute into unenforceable dead letter. The Court should be cautious of ruling for the government on this basis because it would foreclose any ability for the Court to later preserve some of *Humphrey's Executor* by identifying a subset of removal statutes that remain lawful and enforceable.

Second, the government argues for a backpay-only rule on the theory that there is no "historical precedent" for issuing other relief to principal officers. Application at 23 (quotation marks omitted). But that is wrong. William Marbury "was nominated by the President, and confirmed by the Senate," App.127a (Millett J.,

dissenting), and Chief Justice Marshall dubbed Marbury's wrongful removal "a plain case for mandamus." *Marbury*, 5 U.S. at 173.[13]

Indeed, the government elsewhere acknowledges that Anglo-American courts *have* issued meaningful relief in the form of mandamus for centuries, including to Senate-confirmed officers. But the government then says (at 30) a court may only use "mandamus to try the title to judicial or local offices." The government, however, cannot cite any authority to support this arbitrary limitation. Our history and traditions matter. The government's remedies theory is not rooted in them. It is gerrymandered to fit this case. But to the extent that Harris's circumstances are unprecedented, that fact rebounds on the government. It underscores that no other President has attempted to gut independent agencies.

Third, to support a backpay only rule, the government (at 21) points to the fact that "removed executive officers (or their executors) have challenged their removal by seeking back pay." *See also* App. 12a (Rao, J., dissenting). But the plaintiffs in *Marbury* and *Wiener* sought to return to office by bringing suits at law, and there is a lengthy Anglo-American tradition of officials doing the same. *See supra* p.29 n.13.

The government's parenthetical, moreover, gives the game away. There was a reason William Humphrey's *executor* sued for backpay in the landmark case bearing his name. Humphrey had passed away at the time of the suit's filing, and Humphrey

[13] Similarly, in *Wiener*, the plaintiff originally brought a legal proceeding to recover his Senate confirmed position on the War Claims Commission, which became moot upon the Commission's abolition. *Wiener*, 357 U.S. at 351 n.*.

could not return to office.[14] Everyone knew the case was about much more than a right to backpay. "Humphrey's case was a cause *célèbre*" because it decided the broader rule that the President may not arbitrarily dismiss members of quasi-judicial and quasi-legislative bodies. *Wiener*, 357 U.S. at 353; *see* App.232a ("[T]hese cases represent far more than grievances over backpay and routine personnel issues.").

Fourth, the government argues (at 24-25) that injunctive and declaratory relief are unavailable because only courts of law provided relief historically. But the government conceded the availability of declaratory relief in its merits brief below, and cannot walk back that representation now. Meanwhile, in *Sampson*, 415 U.S. at 71, this Court acknowledged the historical limitation on courts of equity, but then explained "[m]uch water has flowed over the dam since."

Regardless, the government's own sources prove that meaningful relief was available via courts of law, which is more than enough to sustain the District Court's decision. *White* v. *Berry*, 171 U.S. 366, 377 (1898) and *In re Sawyer*, 124 U.S. 200, 212 (1888), expressly acknowledged the availability of mandamus. The government's preferred treatise quotes confirms that dispute over "title to office" are "cognizable" "by courts of law." 2 James L. High, Treatise on the Law of Injunctions § 1312, at 863 (2d ed. 1880). In short, courts are not powerless in this circumstance.

This case is therefore nothing like *Grupo Mexicano de Desarrollo S.A.* v. *All.*

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[14] Samuel F. Ratherburn Br., 1935 WL 32964, at *2, *Humphrey's Executor* v. *United States*, No. 667 (U.S. 1934) (lawsuit filed April 28, 1934, Humphrey died February 14, 1934). Similarly, in *Myers* v. *United States*, 272 U.S. 52, 52 (1926), the plaintiff sued three months before his term ended (and then died during litigation). It would have made no sense to seek return to office with such little time left on the clock.

Bond Fund, Inc., 527 U.S. 308 (1999). In *Grupo Mexicano*, a federal court had sought to order a specific type of "relief that ha[d] never been available before" and was "specifically disclaimed by longstanding judicial precedent." *Id.* at 322. By contrast, here, there is a long history of Anglo-American courts ordering meaningful relief in removal cases. After the merger of law and equity, the distinction of labeling that order a writ of mandamus or an injunction is immaterial. *Swan*, 100 F.3d at 976 n.1.

Fifth, the government attempts (at 30) to brush aside the history of mandamus relief in removal cases by arguing that Harris's "right to relief" is not sufficiently clear for mandamus to issue. *See also* App.14a-15a (Rao, J., dissenting). That is wrong. Harris has a clear right to relief. The removal statute is unambiguous. The Court's precedent is binding.

Moreover, a right to relief can be sufficiently clear for mandamus to issue even if courts must perform some legal analysis along the way. *See In re Cheney*, 406 F.3d 723, 729 (D.C. Cir. 2005) (explaining that "mandamus actions" are not "ruled out whenever the statute allegedly creating the duty is ambiguous"); *Swan*, 100 F.3d at 364 (explaining that a "nonremoval duty of sufficient clarity" exists, even if "the interpretation of the controlling statute is in doubt" (quotation marks omitted)). This fact highlights how granting the government a stay based on its remedies arguments, on such limited briefing, could accidentally upset other areas of law.

Sixth, the government argues (at 24) that because Congress "has never enacted a Reinstatement Act under which principal executive officers may seek restoration to office," Congress did not want courts to provide such relief. But

Congress provided express statutory authorization for mandamus relief, *see* 28 U.S.C. § 1361, codifying the long history of courts issuing mandamus in this context. *See Taggart* v. *Lorenzen*, 587 U.S. 554, 560 (2019) (A "term" "transplanted" "brings the old soil with it.") (cleaned up). As the government acknowledges (at 29), Congress also enacted a statute permitting officers to bring a writ of *quo warranto* when two competing officers vie for the same position. D.C. Code §§ 16-3501. These statutes indicate Congress intended Courts to provide meaningful relief in removal cases.[15]

There is also a long backdrop of courts issuing equitable relief to remedy *ultra vires* executive action, which provides a default norm that equitable relief is available unless Congress displaces it. *See, e.g.*, *Youngstown*, 343 U.S. at 583. The Administrative Procedure Act authorizes the Court to "compel agency action unlawfully withheld," 5 U.S.C. § 706, and the Declaratory Judgment Act authorizes "[f]urther necessary or proper relief based on a declaratory judgment," 28 U.S.C. § 2202, providing additional statutory authority to grant relief. If there were any doubt, the removal statute itself indicates Congress intended courts to issue meaningful relief. Congress did not enact a removal statute to ensure that removed Board members received a few dollars in backpay. 5 U.S.C. § 1202(d). Congress sought to shield these adjudicators, and others like them, from "the Damocles' sword

[15] *Quo warranto* normally applied if there was another, competing office holder to sue. *Osgood v. Jones*, 60 N.H. 282, 288 (N.H. 1880); *Public Office*, 38 Harv. L. Rev. 693, 693 (1925). In addition to requesting mandamus, Harris asked the District Court for *quo warranto* if necessary. *See* D. Ct. Dkt. 38 at 25 n.10. The government is separately wrong (at 29) to suggest plaintiffs must make a futile gesture of applying to the Attorney General for permission to sue, which would effectively bar "access to court." *Andrade* v. *Lauer*, 729 F.2d 1475, 1498 (D.C. Cir. 1984).

of removal." *Wiener*, 357 U.S. at 356.

The government also reaches the wrong conclusion (at 24) from the fact that Congress has enacted statutes providing mechanisms for federal employees to seek certain remedies, including reinstatement. The statutes were necessary to outline the administrative processes federal employees must exhaust before heading to Court, such as appealing to the Merit Systems Protection Board. *See* 5 U.S.C. §7701. Members of the Board, by contrast, can't go to the Board. Congress did not require exhaustion because there is nowhere for them to turn before an Article III forum. Congress left the background rules in place for Board members, under which they proceed directly to court to stop *ultra vires* action.

Seventh, the government argues (at 27-28) that allowing courts to issue relief will cause "chaos," and warns that "courts may feel pressure to rush to final judgment." This is chutzpah. Any pressure in this case is due to the Administration's choices. Instead of creating circumstances conducive to orderly litigation, for example delaying the purported removal or holding it in abeyance pending the outcome of the case, the Administration has pressed forward at breakneck speed and asked for certiorari before judgment on an extremely expedited timeline.

Nor will issuing meaningful relief to Harris, and affirming the en banc D.C. Circuit, "risk damaging the public confidence that is vital to the functioning of the Judicial Branch." Application 28 (quotation marks omitted). Quite the opposite. It would undermine public confidence if the Court declares Congress' longstanding handiwork unconstitutional, overturns the *Humphrey's Executor* framework in an

emergency stay motion, and greenlights the President to remake everything from the Federal Reserve to the National Transportation Safety Board, when no other President has done anything like this. This is the wrong way, and the wrong moment, to revisit settled law regarding the separation of powers.

The government also suggests that suits for backpay create "time between the political resolution and the judicial review," reducing the appearance that the Court is meddling in politics. *Id.* (quotation marks omitted). This is misleading. The government is not suggesting that a lawsuit for backpay will test the legal question whether the President may fire Harris, after which the President will then abide by the Court's authoritative statement of the law. The government's position is that backpay is all Harris or anyone else can ever get—and the President can always defy the law, so long as the Treasury pays a trivial sum. Regardless, to the extent "time" insulates the Court from blowback that is only a further confirmation that issuing an extraordinary stay and granting certiorari before judgment are both bad ideas.

II. The Remaining Factors Weigh Against A Stay.

The remaining stay factors confirm a stay is unwarranted.

A. The government will not suffer irreparable harm in the few short months in which this case is decided in the D.C. Circuit. Denying a stay simply preserves a legal status quo that has endured for more than a century. The government's theory of injury (at 33) to the President's Article II prerogatives is, once more, bound up with its view of the merits. There is no meaningful harm to the Administration in following binding precedent, unless and until this Court overturns it. Application at

33 (quotation marks omitted). It is particularly telling that no other chief executive—including President Trump in his first term—has asserted the need to immediately remove members of independent boards and commissions in this manner.

Ordering the executive branch to follow the law will not harm "our democratic system." Application at 33. The Board is not a headless fourth branch of government obstructing President Trump. The Board does not set policy. The Board is a modest adjudicatory body like that in *Wiener*—subject to even greater degrees of Presidential control and judicial review than the War Claims Commission—which hears appeals regarding arbitrary dismissal, retaliation, and discrimination.

The government tries to paint as nefarious (at 34-35) the fact that Harris issued a temporary stay of removal. Because she is an adjudicator, Harris will let her decision speak for itself.[16] But note two things: First, the President has now installed his preferred acting Special Counsel, who in turn completely controls the ability to request stays. If the government does not want more stays, the acting Special Counsel can decide not to seek them. *See supra* pp. 23. Second, the government offers not a word about the substance of Harris's legal decision. It should go without saying, but we say it anyway: The job of an adjudicator, including those housed within Article II, is to apply law to facts, without fear or favor. Article II arbiters do not "thwart the elected President's agenda," Application at 35, if the law requires an outcome the President dislikes, any more than an Article III court does

[16] *See Special Couns. ex rel. John Doe* v. *Dep't of Agric.*, No CB-1208-25-20-U-1 (MSPB Mar. 5, 2025), https://tinyurl.com/4kdjsvyh.

when it strikes down an administration's preferred policy, *see, e.g.*, *Biden* v. *Nebraska*, 600 U.S. 477 (2023); *West Virginia* v. *EPA*, 597 U.S. 697 (2022).

B. Harris will suffer great harm from a stay. Harris took an oath of office to fulfill specific functions set out by Congress. If she is barred from performing her duties, no amount of money will repair that injury, or undo the violence to the statute Congress enacted. Nor is "back pay" a sufficient remedy—as the long history of mandamus shows—precisely because these injuries are not reparable by dollars and cents. Application at 38. Consider an analogy: No one would tell an Article III judge that backpay would suffice if the judge were improperly barred from chambers.

A stay would also irrevocably mar the independence that Congress deemed necessary for Harris and the other members of the Board to perform their adjudicatory functions without fear or favor. If the executive may illegally bar adjudicators from office and then receive a stay, that independence would be "effectively lost," *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985), and every adjudicator will live underneath the "Damocles' sword of removal." *Wiener*, 357 U.S. at 356.[17]

C. A stay is not in the "public interest." *Nken*, 556 U.S. at 436. It would greenlight chaos, including the potential destruction of the independent Federal Reserve on which the national economy relies. A stay pending appeal will divest the Board of a quorum (indeed, the administrative stay already has done just that). That result will trap "in legal limbo millions of" federal workers who "must go to" the Board

[17] Contra the government (at 35-36), *Raines* v. *Byrd*, 521 U.S. 811 (1997), "supports Harris's claim to injury." App.210a.

to resolve "employment disputes." App.84a. Amazingly, just last month, the Solicitor General urged this Court to vacate a district court decision reinstating fired federal employees *because employees needed to proceed through the Board process*. *See* Application, *OPM* v. *AFGE*, No. 24A904 (U.S. Mar. 24, 2025). Those employees may now find themselves in an intolerable Catch-22. The government's suggestion (at 36) that the Senate should confirm new members to the Board to restore a quorum is cold comfort to the millions of employees stuck in the meantime. And for comparison, the last time the Board lost a quorum, it resulted in a massive backlog of 3,800 cases that the Board has only just cleared. App.184a.

The government suggests (at 35) that federal employees might challenge Harris's participation in decisions during this litigation. This late-breaking argument, not made in the District Court, *see* Gov. Opp., D. Ct. Dkt. 33 at 20-21, is forfeited on appeal. It is also wrong. This Court's decisions remain binding law unless and until that Court overturns them, and any problems could also be resolved by the *de facto* officer doctrine. *Buckley*, 424 U.S. at 142. Moreover, if any employee does object to Harris hearing a case (to our knowledge, none have), the Board could choose to hold that particular matter in abeyance. This concern again is entirely of the government's own making because the Administration chose not to pause the purported removal until litigation was resolved. Finally, the countervailing here-and-now need for the Board to operate outweighs any such speculative harms.

D. A stay is also unwarranted because the Court may well deny review should the D.C. Circuit affirm the judgment. *Mills*, 142 S. Ct. at 18 (Barrett, J., concurring).

The Courts of Appeal have uniformly rejected the legal arguments now advanced by the government; this Court has declined to overturn *Humphrey's Executor*; and the government (until this case) urged this Court against upsetting settled precedent.

Moreover, to the extent that critics of *Humphrey's Executor* worry that some independent agencies make policy without sufficient presidential oversight, other legal doctrines reduce the scope of agencies' authority, such as: the major questions doctrine, *Nebraska*, 600 U.S. at 504; the non-delegation doctrine, *Paul* v. *United States*, 140 S. Ct. 342, 205 (2019) (Kavanaugh, J., respecting the denial of certiorari); the jury trial right, *SEC* v. *Jarkesy*, 603 U.S. 109, 140 (2024); and the overruling of *Chevron* deference, *Loper Bright Enters.* v. *Raimondo*, 603 U.S. 369, 412 (2024). To be very clear, the Merit Systems Protection Board *does not set policy*. The government agrees the Board is "predominantly an adjudicatory body." Supp.App.5a. But if this Court is worried about other agencies, the Court has many avenues to ameliorate its concerns short of overturning *Humphrey's Executor*. And given the severe recency of decisions like *Nebraska, Jarkesy, and Loper Bright*, the issues here should percolate, and certainly should not be decided on a rushed basis.

The government argues the case is cert-worthy (at 31-32) now because it involves the separation of powers and remedies. This Court should be wary of accepting the suggestion these topics are certiorari cheat codes. Doing so would invite Presidents to defy precedent, seek stays, and force the Court to intervene. The government (at 32) suggests the Court should grant a stay to decide "the interim status of the removals." But that would undo Congress' handiwork, without full

briefing and argument. This Court can have the last word, in the ordinary process.

III. The Court Should Not Grant Certiorari Before Judgment.

The Court should reject the extraordinary request for certiorari before judgment. The law is settled, and there is no need for this Court to hear this case on a rushed timetable, especially at the end of the Term. The Solicitor General himself says "time between" "political" action and "judicial" resolution fosters legitimacy, Application at 28 (quotation marks omitted)—a point that strongly counsels against deviating from normal processes. In contrast, adopting extraordinary procedural measures in a fraught moment, to say nothing of overturning longstanding precedent in the blink of an eye, risks undermining faith in the judiciary. Indeed, a key purpose of certiorari jurisdiction is to enable the Court to choose what to decide when. Even if some members of this Court wish to revisit *Humphrey's Executor*, denying certiorari before judgment does not prevent the Court from doing so in the future, even in this very case. It just means the Court need not do so *right now*.

The appeal is also briefed before the D.C. Circuit, which will hear argument May 16. Even if the Court ultimately takes this case, waiting a few short months will permit the D.C. Circuit to consider important issues, including the effect of ruling for the government on the Federal Reserve and adjudicators like Tax Court judges, and the broader ramifications of the government's remedies theory.

Moving even faster than the highly expedited schedule set by the D.C. Circuit would sharply deviate from past practice in major structural challenges. In *Free Enterprise Fund*, this Court took 539 days from the petition for certiorari to decision,

and in *Seila Law*, it took 367 days. That was after exhaustive consideration in the lower courts. In *Free Enterprise Fund* there were 1602 days between the complaint's filing and judgment. In *Seila Law*, there were 1134 days. By contrast, the complaint here was filed on February 11, and the Solicitor General is seeking to truncate the process by tenfold, seeking a full-blown merits determination that calls into question decades of constitutional law in a *blitzkrieg* lasting four months, start-to-finish.

Rushing such important matters risks making mistakes and destabilizing other areas of the law. *Cf.* U.S. Opp. to Cert. Before Judgment, *Am. Inst. For Inter. Steel* v. *United States* at 14, No. 18-1317 (U.S. May 28, 2019) ("Even where a litigant seeks to challenge" "precedents" "the Court ordinarily awaits the completion of the appellate process."). One telling example: The Solicitor General's brief before this Court says *not one word* about the implications of its theory for the Federal Reserve. And none of the many briefs filed before the D.C. Circuit on an expedited basis made the point that the Government's remedy argument would give the President power to fire Federal Reserve Board officers *regardless of the merits*, simply by cutting a check for backpay. There's a reason why this Court takes time in cases of this magnitude. *Cf.* Donald Trump's Opp. to Cert. Before Judgment, *United States v. Trump* at 1, No. 23-624 (U.S. Dec. 20, 2023) (urging Court to employ "ordinary review procedures").

CONCLUSION

The government's application should be denied.

Respectfully submitted,

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April 2025

SUPPLEMENTAL APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CATHY A. HARRIS, in her personal capacity and in her official capacity as Member of the Merit Systems Protection Board, Appellee,	:	
v.	:	No. 25-5037 et al.
SCOTT BESSENT, in his official capacity as Secretary of the Treasury, et al., Appellant, and GWYNNE A. WILCOX, Appellee,	:	
v.	:	No. 25-5057
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, Appellants.	:	

Tuesday, March 18, 2025

Washington, D.C.

The above-entitled matter came on for oral argument pursuant to notice.

BEFORE:

CIRCUIT JUDGES HENDERSON, MILLETT, AND WALKER

APPEARANCES:

ON BEHALF OF APPELLEE CATHY A. HARRIS:

NATHANIEL A.G. ZELINSKY, ESQ.

ON BEHALF OF APPELLEE GWYNNE A. WILCOX:

DEEPAK GUPTA, ESQ.

ON BEHALF OF THE APPELLANTS:

ERIC D. MCARTHUR, ESQ.

C O N T E N T S

P R O C E E D I N G S

THE CLERK: Calling Case No. 25-5037 et al., Cathy A. Harris, in her personal capacity, in her official capacity as Member of the Merit Systems Protection Board, v. Scott Bessent, in his official capacity as Secretary of the Treasury, et al., appellant; and Case No. 25-5057, Gwynne A. Wilcox 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, appellants. Mr. McArthur for the appellants, Mr. Zelinsky for Appellee Harris, and Mr. Gupta for Appellee Wilcox.

JUDGE HENDERSON: All right. Mr. McArthur, good morning.

ORAL ARGUMENT OF ERIC D. MCARTHUR, ESQ.

ON BEHALF OF THE APPELLANTS

MR. MCARTHUR: Good morning, Your Honors, and may it please the Court. Eric McArthur for the defendants. The Court should stay the judgments below pending appeal because the government is likely to prevail on the merits and because the balance of harms and the public interest favor a stay.

On the merits, the government is likely to prevail for two independent reasons -- first, because Article II empowers the President to remove members of the NLRB and

was --

MR. MCARTHUR: Perhaps predominantly, but --

JUDGE MILLETT: -- in Humphrey's and Wiener. They are --

MR. MCARTHUR: -- but --

JUDGE MILLETT: -- they're predominantly -- the MSPB and NLRB are -- the Board, as it acts, is predominantly adjudicative. The MSPB, that's all it does.

MR. MCARTHUR: Well, that's not all it does, but I think --

JUDGE MILLETT: It makes some rules to govern its own proceedings --

MR. MCARTHUR: It --

JUDGE MILLETT: -- as do -- does this Court.

MR. MCARTHUR: It does some other things that are executive powers, but to go back to Your Honor's point about --

JUDGE MILLETT: But not predominantly.

MR. MCARTHUR: I agree with that. I think the MSPB is --

JUDGE MILLETT: I --

MR. MCARTHUR: -- predominantly an adjudicatory body, but the issue here is how you apply the Supreme Court's precedents when the holdings are left intact, but the rationale has been repudiated, and --

officials to treat the plaintiffs as de facto members of their boards -- de facto. The Court in both cases drew a very clear distinction between being de facto reinstated and actually being officially clothed with the authority of the office. The decisions below, both of them, take that next step here and say this isn't just de facto, this is -- we are ordering that these plaintiffs remain members of these boards and shall continue to serve as members unless and until they are removed for cause.

JUDGE MILLETT: So for your stay motion, you don't quibble with the de facto, I mean, put aside -- I know there are arguments on other prongs, but for this prong --

MR. MCARTHUR: I would say --

JUDGE MILLETT: -- de facto, we got circuit precedent binding -- if to the extent the court, the district court's decisions are read as de facto reinstatement and only operating upon other executive officers, you don't quibble and you don't quibble with the declaratory judgment saying that what happened here was unlawful, unlawful for both of them, then it's just the official status? The things that you're having is sort of de jure --

MR. MCARTHUR: I think de jure is a problem and one of the ways in which those -- this goes beyond Severino and Swan.

JUDGE MILLETT: Okay.

MR. MCARTHUR: I would say that we do accept --

JUDGE MILLETT: Yes.

MR. MCARTHUR: -- as a matter of circuit precedent, that the court would have power in appropriate circumstances to order that sort of partial relief that was contemplated, but whether the court has power to do it is a separate question from whether it's appropriate --

JUDGE MILLETT: Just hang on one second. I just want to make sure we didn't lose Judge Henderson here.

MR. MCARTHUR: Oh, no.

JUDGE MILLETT: Judge Henderson, are you still on?

JUDGE HENDERSON: Yes.

JUDGE MILLETT: Okay. Your picture has disappeared, so we wanted to make sure you were still here.

I'm sorry. Go ahead.

MR. MCARTHUR: But there are --

JUDGE HENDERSON: Okay.

MR. MCARTHUR: -- the two other points that I wanted to make with respect to the remedy. One is, the Court in Severino and Swan did not consider this separate line of authority, a long-standing limitation on the power of a court sitting in equity to interfere with the removal of a public officer. This is about public officers generally. It's not just about the President removing