No. 23-558

In the Supreme Court of the United States

UNITED NATURAL FOODS, INC., DBA UNITED NATURAL FOODS, INC. AND SUPERVALU, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the President may remove the General Counsel of the National Labor Relations Board at will.

2. Whether the General Counsel was permitted, in the circumstances of this case, to withdraw an unfair-labor-practice complaint after the party that filed the unfair-labor-practice charge served a motion for summary judgment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-44a) is reported at 66 F.4th 536. The order of the National Labor Relations Board (Pet. App. 45a-47a) is reported at 370 N.L.R.B. No. 127.

JURISDICTION

The judgment of the court of appeals was entered on April 24, 2023. A petition for rehearing was denied on August 21, 2023 (Pet. App. 48a-49a). The petition for a writ of certiorari was filed on November 20, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The National Labor Relations Act (Act), ch. 372, 49 Stat. 449 (29 U.S.C. 151 *et seq.*), regulates labor rela-

tions and forbids unfair labor practices by employers and unions. The Act establishes the National Labor Relations Board (Board) to enforce its provisions. See 29 U.S.C. 153. The Board consists of five members appointed by the President with the advice and consent of the Senate for five-year terms. See 29 U.S.C. 153(a). The President may remove a member for "neglect of duty or malfeasance in office, but for no other cause." *Ibid.*

The General Counsel is responsible for investigating unfair-labor-practice charges, issuing complaints, and prosecuting the complaints before the Board. See 29 U.S.C. 153(d). The General Counsel is appointed by the President with the advice and consent of the Senate for a four-year term. See *ibid.* The Act does not expressly address her removal. See *ibid.*

A person who believes that an employer or union has committed an unfair labor practice may file a charge with the agency. See 29 C.F.R. 101.2. A regional director, exercising authority delegated by the General Counsel, investigates the charge. See 29 C.F.R. 101.5, 101.6. If "the charge appears to have merit," the regional director issues a complaint. 29 C.F.R. 101.8. An administrative law judge (ALJ) then holds a hearing and issues a recommended decision, which the Board may review. See 29 C.F.R. 101.10-101.12. But the regional director may withdraw a complaint at any time before the hearing. See 29 C.F.R. 102.18.

2. Petitioner is a nationwide food distributor. See Gov't C.A. Br. 4. Respondents International Brotherhood of Teamsters Locals 117 and 313 (together Local 117) represented employees at a facility in Tacoma, Washington. See *id.* at 2, 4. After petitioner announced plans to close the Tacoma facility, Local 117 filed a

grievance alleging that the collective-bargaining agreement required petitioner to allow the employees to transfer to a different facility without a reduction in wages or benefits. See *id.* at 4. An arbitrator ruled in favor of Local 117. See *ibid.*

In October 2020, petitioner filed an unfair-labor-practice charge with the Board, alleging that Local 117's attempts to enforce the collective-bargaining agreement violated the Act. See Pet. App. 2a-3a. A regional director, on behalf of then-General Counsel Peter B. Robb, issued a complaint. See *id.* at 3a.

In January 2021, the President removed General Counsel Robb and designated a new Acting General Counsel. See Pet. App. 3a. Local 117 asked the Acting General Counsel to reconsider the complaint. See *ibid.* After it did so, petitioner moved for the Board to transfer the case from the ALJ to the Board and then to grant summary judgment. See *ibid.*

Before the Board ruled on the motion for transfer and for summary judgment, the regional director issued an order withdrawing the complaint. Pet. App. 3a-4a. The regional director explained that, after re-examining the case, the Acting General Counsel had decided to exercise his "prosecutorial discretion" to dismiss the charges. *Id.* at 4a.

The Board denied petitioner's request for permission to appeal the regional director's withdrawal order. See Pet. App. 45a-47a. The Board explained that the regional director may withdraw a complaint at any time before the hearing and that the regional director's exercise of enforcement discretion is not subject to Board review. See *id.* at 46a. The Board rejected petitioner's argument that the service of a motion for summary judgment precluded the regional director from with-

drawing a complaint. See *id.* at 46a-47a. Having determined that the withdrawal order was not reviewable, the Board declined to consider petitioner's contention that the order was invalid because the President lacked the power to remove General Counsel Robb. See *id.* at 47a.

3. The Fifth Circuit denied petitioner's petition for review. Pet. App. 1a-44a.

The court of appeals first rejected petitioner's contention that the regional director lacked the power to withdraw the unfair-labor-practice complaint because petitioner had filed a motion for summary judgment. See Pet. App. 11a-22a. The Act grants the General Counsel "final authority" over "investigation of charges," "issuance of complaints," and "prosecution of such complaints before the Board." 29 U.S.C. 153(d). Applying *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), this Court has deferred to the Board's understanding that the General Counsel's prosecutorial authority includes the power to withdraw complaints, at least before a hearing. See *NLRB* v. *United Food & Commercial Workers Union*, 484 U.S. 112, 123-128 (1987) (*Food Workers*). Petitioner sought to distinguish that decision on the ground that it did not involve withdrawal after the service of a motion for summary judgment, but the court of appeals rejected that distinction. See Pet. App. 14a-17a.

The court of appeals also rejected the dissent's theory that the withdrawal order violated Section 10(b) of the Act and Federal Rule of Civil Procedure 41. See Pet. App. 17a-22a. Section 10(b) states that an unfair-labor-practice proceeding "shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States un-

der the rules of civil procedure for the district courts of the United States." 29 U.S.C. 160(b). Rule 41 provides that a plaintiff "may dismiss an action without a court order by filing * * * a notice of dismissal before the opposing party serves * * * a motion for summary judgment." Fed. R. Civ. P. 41(a)(1)(A)(i).

The court of appeals explained that, because petitioner had not relied on Section 10(b), the principle of party presentation precluded it from considering the theory that the withdrawal of the complaint violated that provision. See Pet. App. 18a. The court added that applying Rule 41 to Board proceedings would in any event be "[im]practicable," 29 U.S.C. 160(b), because it would "undermine the [General Counsel's] ability to prosecute unfair labor charges," Pet. App. 20a. Finally, the court determined that Rule 41 would not have prevented the regional director's withdrawal of the complaint even if it applied. See *id.* at 20a-21a. The court explained that Rule 41 precludes unilateral dismissal only after the "opposing party" serves a motion for summary judgment, Fed. R. Civ. P. 41(a)(1)(A)(i), but that petitioner was "not an 'opposing party'" to the General Counsel, Pet. App. 20a.

The court of appeals next rejected petitioner's contention that the regional director lacked the authority to withdraw the complaint because the previous General Counsel had not been validly removed. See Pet. App. 23a-24a. The court observed that, in *Exela Enterprise Solutions, Inc.* v. *NLRB*, 32 F.4th 436 (5th Cir. 2022), it had held that the President has the power to remove the General Counsel at will. See Pet. App. 23a.

Judge Oldham dissented in part. See Pet. App. 25a-44a. He concluded that Section 10(b) and Rule 41 precluded the regional director from unilaterally with-

drawing the complaint after petitioner filed a motion for summary judgment. See *id.* at 27a-30a.

ARGUMENT

Petitioner argues (Pet. 12-23) that the President's removal of General Counsel Robb was invalid because the Act precludes the President from removing the General Counsel at will. Petitioner also argues (Pet. 24-29) that the Act precluded the regional director from withdrawing the unfair-labor-practice complaint after petitioner served a motion for summary judgment. The court of appeals correctly rejected those contentions, and its decision does not conflict with any decision of this Court or of any other court of appeals. No further review is warranted.

1. Petitioner's contention that the President may remove the General Counsel only for cause does not warrant further review.

a. In general, when a statute empowers the President to appoint an executive officer, the President may remove that officer at will unless the statute clearly provides otherwise. See *Collins* v. *Yellen*, 141 S. Ct. 1761, 1782 (2021); *Free Enterprise Fund* v. *Public Company Accounting Oversight Board*, 561 U.S. 477, 509 (2010); *Shurtleff* v. *United States*, 189 U.S. 311, 316 (1903). The Act empowers the President to appoint the General Counsel, but does not expressly address the General Counsel's removal. See 29 U.S.C. 153(d). Under the traditional default rule, the President may remove the General Counsel at will.

The Act's silence on the General Counsel's removal is especially conspicuous because the Act expressly makes the members of the Board removable only for "neglect of duty or malfeasance in office." 29 U.S.C. 153(a). The fact that the Act expressly grants tenure

protection to Board members, but not to the General Counsel, confirms that the General Counsel lacks such protection. See *Collins*, 141 S. Ct. at 1781-1782.

The canon of constitutional avoidance reinforces that conclusion. See *FBI* v. *Fazaga*, 595 U.S. 344, 355-356 (2022). In general, Article II of the Constitution grants the President the unrestricted power to remove executive officers whom he appoints with the advice and consent of the Senate. See *Seila Law LLC* v. *CFPB*, 140 S. Ct. 2183, 2197-2198 (2020). This Court has recognized an exception to that general rule for certain multimember bodies, see *Humphrey's Executor* v. *United States*, 295 U.S. 602, 626-632 (1935), and has approved removal restrictions for certain inferior officers appointed by heads of departments or courts of law, see *Morrison* v. *Olson*, 487 U.S. 654, 685-693 (1988); *United States* v. *Perkins*, 116 U.S. 483, 484-485 (1886). But the General Counsel does not fit within either exception; she is not a member of a multimember body, and she is appointed by the President with the advice and consent of the Senate. Interpreting the Act to grant the General Counsel tenure protection would accordingly raise serious constitutional doubts.

b. Petitioner's contrary arguments lack merit. Petitioner errs in arguing (Pet. 13) that the Act precludes the President from removing the General Counsel at will because it provides that the General Counsel serves "for a term of four years." 29 U.S.C. 153(d). In general, a statutory provision setting a term of office for an executive officer simply prescribes the maximum duration of the officer's service; it does not prevent removal before the end of that term. See *Parsons* v. *United States*, 167 U.S. 324, 328-344 (1897). In addition, the Act prescribes both a definite term and tenure protection for

Board members, but only a definite term for the General Counsel. See 29 U.S.C. 153(a) and (d). That structure underscores the distinction between definite terms and tenure protection, and it confirms that the Act does not grant the General Counsel tenure protection.

Petitioner also errs in asserting (Pet. 13-15) that the decision below conflicts with this Court's decisions in *Humphrey's Executor*, *Wiener* v. *United States*, 357 U.S. 349 (1958), and *Marbury* v. *Madison*, 1 Cranch 137 (1803). In *Humphrey's Executor*, this Court applied a statute that *explicitly* made members of the Federal Trade Commission removable for "inefficiency, neglect of duty, or malfeasance in office." 295 U.S. at 619. No statute explicitly grants tenure protection to the General Counsel.

In *Wiener*, this Court determined that Congress had implicitly granted tenure protection to members of a multimember commission that performed purely adjudicatory functions. See 357 U.S. at 355-356; see also *Collins*, 141 S. Ct. at 1783 n.18 (explaining that *Wiener* concerns adjudicatory entities). The General Counsel performs enforcement functions rather than adjudicatory functions.

Finally, in *Marbury*, this Court stated in dictum that justices of the peace in the District of Columbia were not removable at will, even though no statute expressly granted them such protection. See 1 Cranch at 139. But the Court has since disavowed that dictum and has explained that it may have concerned judicial rather than executive officers and may have rested on the special status of the District of Columbia. See *Myers* v. *United States*, 272 U.S. 52, 158 (1926).

c. The Fifth Circuit's decision, following its prior decision in *Exela Enterprise Solutions, Inc.* v. *NLRB*, 32

F.4th 436 (2022), that upheld the President's removal of the Board's General Counsel, does not conflict with the decision of any other court of appeals. The only other court of appeals to address the question presented, the Ninth Circuit, has likewise concluded that the President may remove the General Counsel at will. See *NLRB* v. *Aakash, Inc.*, 58 F.4th 1099, 1103-1106 (2023).

Petitioner argues (Pet. 20-21) that this Court should grant review so that it can clarify whether members of various multimember bodies, ranging from the Commodity Futures Trading Commission to the International Trade Commission, are removable at will or only for cause. But petitioner does not allege any circuit conflict with respect to any of those agencies either. This case, in any event, concerns only the meaning of the National Labor Relations Act, not the meaning of the distinct statutes that establish the multimember bodies that petitioner lists.

2. Petitioner's contention (Pet. 24-28) that the regional director lacked the power to withdraw the unfair-labor-practice complaint after petitioner sought summary judgment also does not warrant further review.

a. The Act grants the General Counsel "final authority" over the "investigation" of unfair-labor-practice charges, the "issuance of complaints," and "the prosecution of such complaints before the Board." 29 U.S.C. 153(d). In *NLRB* v. *United Food & Commercial Workers*, 484 U.S. 112 (1987), this Court determined that the Act empowers the General Counsel to withdraw a complaint, at least before a hearing occurs. See *id.* at 123-128. The Court explained that the Act "divid[es] the final authority of the General Counsel and the Board along a prosecutorial and adjudicatory line." *Id.* at 125. Applying *Chevron U.S.A. Inc.* v. *Natural Resources De-*

fense Council, Inc., 467 U.S. 837 (1984), the Court deferred to the agency's understanding that, at least "until the hearing begins," "dismissal determinations are prosecutorial." *Food Workers*, 484 U.S. at 126. The Court "fail[ed] to see why the General Counsel should have the concededly unreviewable discretion to file a complaint, but not the same discretion to withdraw the complaint before hearing if further investigation discloses that the case is too weak to prosecute." *Ibid.*

Petitioner's argument (Pet. 24) that the "filing of a summary judgment motion" cuts off the "authority to withdraw the General Counsel's previously issued complaint" cannot be squared with *Food Workers*. The Court's decision states repeatedly that the General Counsel may withdraw a complaint until a hearing is commenced—not just until the filing of a motion for summary judgment. See, *e.g.*, *Food Workers*, 484 U.S. at 125 ("until a hearing is held"); *id.* at 126 ("until the hearing begins"); *ibid.* ("before hearing"); *ibid.* ("at least before a hearing begins").

Petitioner argues (Pet. 26) that "[a]ssessing the merits of a summary judgment motion is a quintessentially adjudicative function" committed to the Board, not a prosecutorial function committed to the General Counsel. But the agency did not adjudicate petitioner's motion for summary judgment on the merits. The regional director simply withdrew the complaint before the hearing began. Under *Food Workers*, such a withdrawal falls within the General Counsel's authority.

Petitioner also argues (Pet. 24, 27) that the regional director's withdrawal of the complaint violated Section 10(b) of the Act, which, it contends, required the Board to follow Federal Rule of Civil Procedure 41. The court of appeals correctly rejected petitioner's argument

based on Section 10(b). First, petitioner forfeited that theory by failing to raise it before the Board. See Pet. App. 18a; see also 29 U.S.C. 160(e) ("No objection that has not been urged before the Board * * * shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."). And although petitioner relied in its brief to the Fifth Circuit on Rule 41's application in ordinary civil litigation, see Pet. App. 40a-41a & n.2 (Oldham, J., dissenting in part), petitioner did not rely on Section 10(b) of the Act to argue that the Act itself required a similar course in this case. Section 10(b) was instead raised for the first time in Judge Oldham's dissent. See *id.* at 27a-30a.

Second, Section 10(b) requires the Board, "*so far as practicable*," to conduct unfair-labor-practice proceedings "in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States." 29 U.S.C. 160(b) (emphasis added). Applying Rule 41 would not be "practicable," *ibid.*, because it would undermine the General Counsel's authority to prosecute and settle unfair-labor practice charges. See Pet. App. 20a. On petitioner's theory, "a party who suspects that the [General Counsel] intended to informally settle a complaint could defeat the settlement * * * by racing to file a summary judgment motion." *Ibid.* Petitioner states (Pet. 27) that the Board "has not argued" that applying Rule 41 would be impracticable within the meaning of Section 10(b). But because petitioner did not rely on Section 10(b) before the Board or in the court of appeals, the Board had no occasion to address that provision earlier in this litigation.

Third, even if Rule 41 applies, it would preclude unilateral dismissal only after "the *opposing* party serves * * * a motion for summary judgment." Fed. R. Civ. P. 41(a)(1)(A)(i) (emphasis added). Petitioner was not the General Counsel's "opposing" party in the unfair-labor-practice proceeding. Rather, the proceeding pitted the General Counsel against Local 117. See Pet. App. 20a-21a.

b. Contrary to petitioner's suggestion (Pet. 26-27), the decision below does not conflict with the decisions of the Second, Eighth, and Ninth Circuits. None of the decisions that petitioner cites (*ibid.*) involved Rule 41 or the withdrawal of an unfair-labor-practice complaint after the service of a summary-judgment motion. Each of those decisions instead simply stated that Section 10(b) requires the Board to follow the Federal Rules of Civil Procedure to the extent "practicable." 29 U.S.C. 160(b); see *NLRB* v. *Consolidated Bus Transit, Inc.*, 577 F.3d 467, 475 (2d Cir. 2009) (per curiam); *American Boiler Manufacturers Ass'n* v. *NLRB*, 366 F.2d 815, 821 (8th Cir. 1966); *Frito Co.* v. *NLRB*, 330 F.2d 458, 464-465 (9th Cir. 1964). The decision below does not conflict with those decisions; to the contrary, the court of appeals determined that applying Rule 41 in unfair-labor-practice proceedings is "not 'practicable.'" Pet. App. 20a.

This case would in any event be an unsuitable vehicle for resolving any circuit conflict. Petitioner did not argue in the court of appeals that Section 10(b) required the Board to follow Rule 41, and the court relied on that forfeiture as an alternative ground for its decision. See Pet. App. 18a. That alternative holding would prevent this Court from reaching the merits of petitioner's contention that the regional director's withdrawal of the

unfair-labor-practice complaint violated Section 10(b). See *United States* v. *Title Insurance & Trust Co.*, 265 U.S. 472, 486 (1924) ("[W]here there are two grounds, upon either of which an appellate court may rest its decision, and it adopts both, 'the ruling on neither is obiter, but each is the judgment of the court and of equal validity with the other.'") (citation and emphasis omitted).

3. The government does not object to petitioner's request to hold the petition for a writ of certiorari pending the resolution of *Loper Bright Enterprises* v. *Raimondo*, No. 22-451 (argued Jan. 17, 2024), and *Relentless, Inc.* v. *Department of Commerce*, No. 22-1219 (argued Jan. 17, 2024). Those cases present the question whether this Court should overrule or limit its holding in *Chevron* that courts owe deference to an agency's reasonable interpretation of an ambiguous statute that the agency administers. See Pet. at i-ii, *Loper Bright*, *supra* (No. 22-451); Pet. at i, *Relentless*, *supra* (No. 22-1219). Because the court of appeals relied on *Chevron* in holding that the General Counsel may withdraw a complaint after the service of a motion for summary judgment, see Pet. App. 12a, it would be appropriate to hold the petition in this case pending the Court's decisions in *Loper Bright* and *Relentless*.

Petitioner also requests (Pet. 29-30) that this Court hold the petition for a writ of certiorari pending the resolution of *SEC* v. *Jarkesy*, No. 22-859 (argued Nov. 29, 2023). *Jarkesy*, however, would not present an independent basis for holding the petition in this case. *Jarkesy* presents (among other issues) the question whether Congress may grant tenure protection to ALJs in the Securities and Exchange Commission (SEC). See Pet. at I, *Jarkesy*, *supra* (No. 22-859). Petitioner spec-

ulates (Pet. 29) that, although "the parties in *Jarkesy* are not asking this Court to * * * decide whether [applicable federal law] actually creates removal protection for the SEC Commissioners, the Court may nonetheless do so," and that "[i]f the Court takes that approach," its ruling could have "implications" for the General Counsel's removability. But even if the Court were to address that issue in *Jarkesy*, a decision interpreting the statute creating the SEC would have no bearing on the interpretation of the distinct statute establishing the General Counsel, who is not a member of a multimember body, but rather is an officer with prosecutorial and litigation responsibilities. Petitioner thus has not established a reasonable possibility that the Court's decision in *Jarkesy* could affect the outcome of this case.

CONCLUSION

This Court should hold the petition for a writ of certiorari pending the resolution of *Loper Bright Enterprises* v. *Raimondo*, No. 22-451 (argued Jan. 17, 2024), and *Relentless, Inc.* v. *Department of Commerce*, No. 22-1219 (argued Jan. 17, 2024), and should then dispose of the petition as appropriate.

Respectfully submitted.

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