No. 25-1110

In the Supreme Court of the United States

CATHY A. HARRIS, PETITIONER

v.

SCOTT BESSENT, SECRETARY OF THE TREASURY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE D.C. CIRCUIT

BRIEF FOR THE RESPONDENTS

D. JOHN SAUER
Solicitor General
Counsel of Record
BRETT A. SHUMATE
Assistant Attorney General
DANIEL AGUILAR
LAURA E. MYRON
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the statutory removal protections for members of the Merit Systems Protection Board violate the separation of powers.

2. If so, whether the appropriate remedy for the constitutional violation is to disregard the statutory removal protections.

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OPINIONS BELOW

The court of appeals' opinion (Pet. App. 1a-90a) is reported at 160 F.4th 1235. The en banc court of appeals' order denying a stay (Pet. Ap. 258a-278a) is available at 2025 WL 1021435. The court of appeals panel's order granting a stay pending appeal (Pet. App. 136a-257a) is available at 2025 WL 980278. The district court's memorandum opinion granting summary judgment (Pet. App. 93a-135a) is reported at 775 F. Supp. 3d 164.

JURISDICTION

The judgment of the court of appeals was entered on entered on December 5, 2025. A petition for rehearing was denied on January 9, 2026 (Pet. App. 279a-280a, 281a-282a). The petition for a writ of certiorari was filed

on March 17, 2026. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress established the Merit Systems Protection Board (MSPB) in the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111. The MSPB consists of three members appointed by the President with the advice and consent of the Senate. 5 U.S.C. 1201. No more than two members may belong to the same political party. *Ibid.* Members serve seven-year terms and, according to the statute, "may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office." 5 U.S.C. 1202(d); see 5 U.S.C. 1202(a).

The MSPB "manages disputes between federal employees and their employing agencies." Pet. App. 12a. For example, employees may "appeal" to the MSPB when their employing agencies take certain disciplinary actions against them. 5 U.S.C. 7513(d). Employees also may seek "corrective action" from the MSPB for "prohibited personnel practice[s]," such as unlawful discrimination. 5 U.S.C. 1221(a); see Pet. App. 12a. And the MSPB resolves employment disputes involving administrative law judges. See 5 U.S.C. 7521.

The MSPB's authority extends beyond conducting adjudications. For instance, the MSPB possesses "rulemaking authority," including the power to issue substantive rules that regulate the "primary conduct" of other federal agencies with respect to their employees. Pet. App. 14a, 33a. The MSPB also possesses "its own litigating authority" in the lower courts. *Id.* at 13a.

2. In 2022, President Biden, with the advice and consent of the Senate, appointed petitioner Cathy Harris to the MSPB, for a term expiring on March 1, 2028. Pet. App. 97a. On February 10, 2025, the Deputy Director

of the White House Office of Presidential Personnel sent petitioner an email stating: "On behalf of President Donald J. Trump, I am writing to inform you that your position on the Merit Systems Protection Board is terminated, effective immediately. Thank you for your service." *Ibid.* (citation omitted).

The next day, petitioner filed this suit in the U.S. District Court for the District of Columbia, claiming that her removal violated her statutory tenure protection and seeking immediate judicial relief restoring her to office. Pet. App. 98a. The court granted summary judgment to her, rejecting the government's argument that the MSPB's statutory removal protections violate the separation of powers. *Id.* at 93a-135a. The court issued a declaration that petitioner "remains a member" of the MSPB and an injunction prohibiting the defendants (other than the President) from "in any way treating her as having been removed without cause." *Id.* at 91a-92a.

A motions panel of the D.C. Circuit stayed the district court's judgment pending appeal, but the en banc court vacated the stay. Pet. App. 15a. This Court then stayed the district court's judgment pending appeal and certiorari. 145 S. Ct. 1415. In doing so, the Court found it likely that the MSPB exercises "considerable executive power." *Id.* at 1416.

3. A merits panel of the D.C. Circuit reversed the district court's judgment. Pet. App. 8a-40a.

The court of appeals explained that, as a general rule, Article II and this Court's precedents preclude Congress from restricting the President's authority to remove officers who exercise executive power on his behalf. Pet. App. 15a-16a. The court of appeals acknowledged that, in *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935), this Court had upheld a restriction

on the removal of members of the 1935 Federal Trade Commission (FTC). Pet. App. 16a-17a. But it observed that the Court has since "read *Humphrey's Executor* narrowly." *Id.* at 17a. The court of appeals understood *Seila Law LLC* v. *CFPB*, 591 U.S. 197 (2020), to establish that "the *Humphrey's Executor* exception" does not extend to agencies that wield "significant executive powers." Pet. App. 17a-18a.

The court of appeals then determined that the MSPB's executive powers "substantially exceed" the powers considered in *Humphrey's Executor*. Pet. App. 26a. It stated that the MSPB exercises "substantive rulemaking power" and "litigating authority," and that its "adjudicatory powers" "exceed what *Humphrey's Executor* deemed to be quasi-judicial." *Id.* at 33a, 37a.

The court of appeals accordingly concluded that "Congress may not restrict" the removal of MSPB members. Pet. App. 38a. It determined that the proper remedy for that constitutional violation is "to disregard the statutory removal restrictions." *Id.* at 39a. The court rejected petitioner's proposal to "solve the constitutional problem by stripping away agency powers," observing that, when this Court has held a removal restriction unconstitutionally, "it has typically responded by disregarding the removal restriction" rather than by "blue-pencil[ing]" the agency's powers. *Id.* at 38a-39a.

Judge Pan dissented. Pet. App. 41a-90a. Judge Pan concluded that, because the MSPB is "predominantly adjudicatory," it "wield[s] less executive power than did the 1935 FTC." *Id.* at 65a. Judge Pan also stated that the "abolition of independent agencies" is "unsupported by constitutional text, structure, and original intent." *Id.* at 81a.

The court of appeals denied petitioners' petition for rehearing. Pet. App. 279a-282a.

DISCUSSION

Petitioner contends (Pet. 17-33) that the MSPB's statutory removal protections comply with Article II and that, if they do not, the appropriate remedy is to sever and invalidate some of the agency's powers rather than to disregard the removal restriction. The court of appeals correctly rejected those contentions. This Court should hold the petition for a writ of certiorari pending the resolution of *Trump* v. *Slaughter*, No. 25-332 (argued Dec. 8, 2025), and then dispose of the petition as appropriate.

A. The MSPB's Statutory Removal Protections Violate The Separation Of Powers

The text of Article II, historical practice, and this Court's precedents establish that, as a "general rule," the President possesses the "unrestricted" authority to remove federal officers who "wield executive power on his behalf." *Seila Law LLC* v. *CFPB*, 591 U.S. 197, 204, 215 (2020). Though petitioner does not dispute that general rule, she contends (Pet. 17-29) that the MSPB falls outside the President's removal power because it is analogous to non-Article III courts such as the Tax Court and the Court of Appeals for the Armed Forces (CAAF). That argument is incorrect.

1. This Court need not decide, in *Slaughter* or here, whether the President's unrestricted removal power extends to non-Article III courts. The MSPB is nothing like any non-Article III court.

Non-Article III courts share several key features. First, Congress has expressly established such entities as courts rather than agencies. For instance, the CAAF is "a court of record" "established under article I." 10 U.S.C. 941. The Court of Federal Claims is a "court of record" and is "declared to be a court established under

article I." 28 U.S.C. 171(a). And the Tax Court is "a court of record," is established "under article I," and "is not an agency." 26 U.S.C. 7441.

Second, non-Article III courts do not "wield [the President's] executive power in his stead." *Seila Law*, 591 U.S. at 238. Many such entities either help Article III courts exercise the "judicial Power of the United States," U.S. Const. Art. III, § 1, or exercise a form of judicial power on their own. For instance, bankruptcy courts are adjuncts that help district courts exercise federal judicial power. See *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 80-81 (1982) (plurality opinion). District of Columbia courts exercise the judicial power of the District. See *Palmore* v. *United States*, 411 U.S. 389, 397-404 (1973); *Ortiz* v. *United States*, 585 U.S. 427, 475 (2018) (Alito, J., dissenting). Territorial courts exercise the judicial power of the relevant territory. See *The American Insurance Co.* v. *356 Bales of Cotton*, 1 Pet. 511, 545-546 (1828); *Ortiz*, 585 U.S. at 475 (Alito, J., dissenting).

Third, non-Article III courts operate in fields where there is a longstanding tradition of decision-making by judicial rather than executive bodies. The Tax Court, for example, follows in the tradition of England's Court of Exchequer, which resolved disputes between the Crown and taxpayers. See 3 William Blackstone, *Commentaries on the Laws of England*, 43-46 (1768). And the CAAF follows in the tradition of courts-martial, which are "older than the Constitution." *Ortiz*, 585 U.S. at 439 (citation omitted).

Fourth, non-Article III courts function as courts. They resolve "'cases' as that term is generally understood," "in strict accordance with a body of federal law," within the confines of a "judicial system." *Ortiz*, 585 U.S. at 437-438, 442. Unlike agencies, they do not issue

substantive regulations, conduct litigation, or formulate policy through adjudication.

Finally, non-Article III courts are treated as courts for purposes of other constitutional provisions. For instance, Article III permits this Court to exercise appellate jurisdiction over cases appealed from such entities, though not necessarily over "cases from other adjudicative bodies in the Executive Branch." *Ortiz*, 585 U.S. at 448. Such entities also are "Courts of Law" rather than "Departments" for purposes of the Appointments Clause. U.S. Const. Art. II, § 2, Cl. 2; see *Freytag* v. *Commissioner*, 501 U.S. 868, 884-892 (1991).

This Court need not decide which of those features is dispositive, for the MSPB lacks all those features and plainly exercises executive power. Congress has not established the MSPB as a court of record; to the contrary, it has classified the MSPB as an executive agency. See 5 U.S.C. 104(1), 105. The MSPB does not exercise (or help an Article III court exercise) judicial power; instead, it exercises "considerable executive power," 145 S. Ct. 1415, 1416, by formulating policy, issuing rules, conducting litigation, and overseeing executive personnel decisions, see pp. 10-11, *infra*. The MSPB lacks the historical pedigree of non-Article III courts; it was created in 1978, and its predecessor, the Civil Service Commission, was an executive agency whose members had been removable at will since the agency's creation in 1883. See Pet. App. 231a-234a (Millett, J., dissenting). The MSPB also does not function like a court; rather, it performs many of the functions associated with executive agencies, including making policy, issuing regulations, and engaging in litigation. See pp. 10-11, *infra*. Finally, no one claims that Article III would allow this Court to hear appeals directly from the MSPB or that the MSPB is a court of law for pur-

poses of the Appointments Clause. The MSPB thus does not fall within an exception to the President's removal power.

2. Petitioner proposes (Pet. 2) a broad exception to the President's removal power for "adjudicatory bodies." That suggested exception is flawed in principle and contrary to precedent.

"Under our Constitution, the 'executive Power'—all of it—is 'vested in a President.'" *Seila Law*, 591 U.S. at 203 (citation omitted). Even though administrative adjudications take "'judicial' forms," "they are exercises of—indeed, under our constitutional structure they *must be* exercises of—the 'executive Power.'" *Id.* at 216 n.2 (citation omitted); see *City of Arlington* v. *FCC*, 569 U.S. 290, 304 n.4 (2013). The officers who conduct such adjudications, like other "agents who wield executive power in [the President's] stead," are generally subject to at-will removal. *Seila Law*, 591 U.S. at 238.

Consistent with the constitutional text, this Court has repeatedly recognized that adjudicators within the Executive Branch, no less than other executive officers, must remain subject to the President's oversight. In *Myers* v. *United States*, 272 U.S. 52 (1926), the Court explained that the President "may consider the decision" of an "executive tribuna[l]" "as a reason for removing the officer." *Id.* at 135. In *Seila Law*, the Court invalidated a statutory restriction on the removal of the Director of the Consumer Financial Protection Bureau because the Director exercises "substantial executive power" by, among other things, "issu[ing] final decisions awarding legal and equitable relief in administrative adjudications." *Id.* at 218-219. And in *United States* v. *Arthrex, Inc.*, 594 U.S. 1 (2021), it explained that, "[w]hile the duties of [administrative patent judges] 'partake of a Judiciary quality as well as Exec-

utive,'" such officers "are still exercising executive power and must remain 'dependent upon the President.'" *Id.* at 17 (citation omitted). The logic of those precedents forecloses a broad exception to the removal power for adjudicatory bodies.

Such an exception also makes little sense. Under the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, rulemaking and adjudication are the two basic mechanisms through which agencies implement federal statutes and make policy. "[T]he choice made between proceeding by general rule or by individual, *ad hoc* [adjudication] is one that lies primarily in the informed discretion of the administrative agency." *SEC* v. *Chenery Corp.*, 332 U.S. 194, 203 (1947); see *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 292-294 (1974). Petitioner provides no good reason to conclude that the President's ability to oversee an agency turns on whether that agency uses rulemaking or adjudication to execute the law.

Petitioner cites (Pet. 22) *Wiener* v. *United States*, 357 U.S. 349 (1958), a case where this Court held that the President could not remove, at will, a member of the War Claims Commission, even though the applicable statute lacked an express removal restriction. But this Court has effectively abrogated *Wiener* by holding that "Congress must use 'very clear and explicit language'" "to 'take away' the power of at-will removal from an appointing officer." *Kennedy* v. *Braidwood Management, Inc.*, 606 U.S. 748, 771 (2025) (citation omitted). *Wiener*, moreover, represents an "appli[cation]" of *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935). *Seila Law*, 591 U.S. at 216; see *Wiener*, 357 U.S. at 356 (relying on the "philosophy of *Humphrey's Executor*"). This Court is currently considering whether to overrule *Humphrey's Executor* in *Slaughter*.

Regardless, *Wiener* does not support a broad exception to the removal power for adjudicatory bodies. The Court's holding is limited to "an adjudicatory body *like the War Claims Commission*"—*i.e.*, a temporary entity that is not "part of the Executive establishment" and that performs "intrinsic[ally] judicial" tasks. *Wiener*, 357 U.S. at 353, 355-356 (emphasis added). The MSPB does not satisfy those criteria because it is a permanent part of the Executive Branch, exercises the core executive power of overseeing executive personnel decisions, and functions as an agency rather than a court. See pp. 7-8, *supra*.

3. In all events, petitioner's argument fails on its own terms. The MSPB is not a "purely adjudicatory bod[y]." Pet. 18.

To begin, the MSPB possesses the power to make rules. See Pet. App. 14a. In addition to making "such regulations as may be necessary for the performance of its functions," 5 U.S.C. 1204(h), and "regulations to carry out" administrative appeals, 5 U.S.C. 7701(k), the MSPB may make "regulations" "[f]or the purpose of" a statutory provision concerning disciplinary actions against administrative law judges, 5 U.S.C. 1305. The Federal Circuit has held that those provisions authorize the MSPB to issue "substantive rule[s]" determining, for example, when an employing agency's actions amount to the constructive removal of an administrative law judge. *Tunik* v. *MSPB*, 407 F.3d 1326, 1345 (2005). In other words, the rulemaking provisions "permit the MSPB to define by regulation what primary conduct [the statute] prohibits, not simply to prescribe rules for the adjudication of disputes." Pet. App. 33a.

The MSPB also possesses the power to veto rules. See Pet. App. 14a. The agency may, *sua sponte*, review rules issued by the Office of Personnel Management.

See 5 U.S.C. 1204(f)(1). It may invalidate such rules if it concludes that they purport to require prohibited personnel practices, see 5 U.S.C. 1204(f)(2), and it may "require any agency" to "cease compliance" with such rules, 5 U.S.C. 1204(f)(4)(A).

Further, the MSPB possesses litigating authority. See Pet. App. 37a. The MSPB may appear "in any civil action brought in connection with any function carried out by the Board." 5 U.S.C. 1204(i). The MSPB also "sometimes is the proper respondent when its orders are challenged in a court of appeals." Pet. App. 37a. "That too cuts against [petitioner's] position here. Purely adjudicatory agencies * * * are generally not proper parties to defend their decisions on review, just as district judges are generally not proper parties to defend their decisions on appeal." *Id.* at 38a.

Finally, even when the MSPB adjudicates individual cases, it exercises a measure of policy discretion—and thus is unlike a court that simply applies the law to the facts. For example, when the MSPB reviews an agency's imposition of discipline on an employee, see 5 U.S.C. 7513(d), it makes an "independent discretionary judgment" about the appropriate level of discipline. *Douglas* v. *Veterans Administration*, 5 M.S.P.B. 313, 326 (1981). The MSPB's review is "considerably broader" than a court's would be and involves "'the application of [the MSPB's] administrative judgment and discretion.'" *Id.* at 325, 327 (citation omitted). Such an adjudication "cannot fairly be characterized as involving 'no policy except the policy of the law.'" Pet. App. 35a (citation omitted); see 15 Op. O.L.C. 8, 14-15 (1991) (adjudications "determine, on a case-by-case basis, the policy of an executive branch agency" by "fill[ing] statutory and regulatory interstices comprehensively" with "policy judgments").

B. The Proper Remedy For The Constitutional Violation Is To Disregard The Removal Restriction

When this Court "encounters a statute that unconstitutionally insulates an executive officer from at-will removal," it usually "respond[s] by disregarding the removal restriction." Pet. App. 38a-39a; see *Seila Law*, 591 U.S. at 234; *Free Enterprise Fund* v. *PCAOB*, 561 U.S. 477, 508-509 (2010); *Myers*, 272 U.S. at 176. The court of appeals correctly followed that "well-worn path" in concluding that "the appropriate resolution here is to disregard the statutory removal restrictions for * * * MSPB members." Pet. App. 39a.

Petitioner argues (Pet. 29-31) that this Court should instead invalidate the MSPB's non-adjudicatory powers and convert the agency into a court. But courts lack the authority to "blue-pencil" an agency's powers, *Free Enterprise Fund*, 561 U.S. at 509, or to "conver[t]" an agency into a different type of entity, *Seila Law*, 591 U.S. at 237 (opinion of Roberts, C.J.). "[S]uch editorial freedom * * * belongs to the Legislature, not the Judiciary." *Free Enterprise Fund*, 561 U.S. at 510.

Petitioner's contrary approach would require this Court to "rewrite Congress's work." *Seila Law*, 591 U.S. at 238 (opinion of Roberts, C.J.). For example, the Court would need, at minimum, to reconfigure the provisions empowering the MSPB to issue rules, see 5 U.S.C. 1204(h), 1305, 7701(k); the provision authorizing it to veto rules, see 5 U.S.C. 1204(f); the provision authorizing it to litigate cases in court, see 5 U.S.C. 1204(i); and the provisions empowering it to make discretionary judgments in the course of adjudications, see, *e.g.*, 5 U.S.C. 7513(d). Such rewriting far exceeds the federal courts' "negative power to disregard an unconstitutional enactment." *Seila Law*, 591 U.S. at 237-

238 (citation omitted). Such rewriting also would be futile, as the MSPB's basic functions involve the exercise of the core executive power of overseeing executive personnel decisions.

C. This Court Should Hold The Petition For A Writ Of Certiorari Pending The Resolution Of *Slaughter*

In *Slaughter*, this Court is currently considering whether the Federal Trade Commission's statutory removal protections violate the separation of powers. See Gov't Br. at 12-37, *Slaughter*, *supra* (No. 25-332). The Court also is considering whether the appropriate remedy for such a violation is to disregard the removal restriction or instead to rewrite the agency's powers. See Gov't Reply Br. at 6, *Slaughter*, *supra* (No. 25-332). Because *Slaughter* could affect the resolution of the merits and remedial issues raised here, the Court should hold the petition for a writ of certiorari pending *Slaughter* and then dispose of the petition as appropriate.

This Court should reject petitioner's request (Pet. 34) to grant review now, while *Slaughter* is still pending. *Slaughter*'s reasoning may well fully resolve the issues raised by this case, making plenary review unnecessary. Further, even if this Court concludes that it should grant plenary review and resolve this case next Term, it would make little sense to begin briefing before the Court issues its decision in *Slaughter*.

CONCLUSION

This Court should hold the petition for a writ of certiorari pending the resolution of *Trump* v. *Slaughter*, No. 25-332 (argued Dec. 8, 2025), and then dispose of the petition as appropriate.

Respectfully submitted.

D. JOHN SAUER
Solicitor General
BRETT A. SHUMATE
Assistant Attorney General
DANIEL AGUILAR
LAURA E. MYRON
Attorneys

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