No. 25-1110

# In the Supreme Court of the United States

CATHY A. HARRIS,

Petitioner,

*v.*

SCOTT BESSENT, SECRETARY OF THE TREASURY, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

## BRIEF OF UNITED STATES SENATORS CHRIS VAN HOLLEN, ANGELA ALSOBROOKS, MARK WARNER, TIM KAINE, RICHARD BLUMENTHAL, AND GARY PETERS AS AMICI CURIAE IN SUPPORT OF PETITIONER

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## INTEREST OF AMICI CURIAE[1]

Amici are United States Senators Chris Van Hollen and Angela Alsobrooks of Maryland, Mark Warner and Tim Kaine of Virginia, Richard Blumenthal of Connecticut, and Gary Peters of Michigan. As lawmakers, amici are familiar with the critical work done by non-Article III tribunals such as the Merit Systems Protection Board (MSPB) and the necessity of removal protections to ensure that those tribunals are able to discharge their adjudicatory functions impartially. Amici submit this brief to explain why the D.C. Circuit's errant decision jeopardizes the independence of virtually all non-Article III tribunals and why invalidating the MSPB's removal protections would gut an essential feature of the Civil Service Reform Act (CSRA).

## INTRODUCTION AND SUMMARY OF ARGUMENT

Since the Founding, Congress has vested adjudicatory power in non-Article III tribunals. Some—like the territorial courts established by the First Congress and the Court of Claims—were classified as "legislative" or "Article I courts." Others—like the Board of General Appraisers and the Board of Tax Appeals—were established as executive agencies. But in each instance, Congress provided tenure protections, reflecting the same basic judgment: that officials charged with adjudicating disputes must be insulated

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amici or their counsel made a monetary contribution to this brief. All parties have received timely notification of the filing of this brief.

from political pressure if they are to discharge their duties impartially.

This Court has repeatedly blessed such protections, and relying on both practice and precedent, Congress and the Executive have worked in tandem to create bodies like the Court of Federal Claims (COFC), the United States Court of Appeals for the Armed Forces (CAAF), the Tax Court, the United States Court of Appeals for Veterans Claims (CAVC), the Occupational Safety and Health Review Commission (OSHRC), and the Federal Mine Safety and Health Review Commission (FMSHRC)—all of whose adjudicators enjoy protection from at-will removal.

The MSPB sits comfortably within this tradition. It does not promulgate substantive regulations or bring enforcement actions. Like these other tribunals, it waits passively for claimants to file appeals and resolves those disputes in the manner of any judicial body: by applying law to facts. Even so, the majority held that the MSPB exercised "significant executive powers" and concluded that its removal restrictions were incompatible with Article II.

The majority's reasoning is not merely flawed—it puts the removal restrictions of every Article I court and every independent adjudicative agency on the chopping block. All the aforementioned tribunals exercise "significant executive powers" as that term is defined by the majority. Indeed, the majority struggled to identify any feature that sets the MSPB apart. It objected to the MSPB's power to promulgate its own rules of procedure and issue final orders. All non-Article III tribunals, however, possess those powers. It took issue with the fact that the MSPB interprets a "host" of federal statutes, but the COFC interprets far

more. It faulted the MSPB for using a 12-factor test, but the Tax Court uses an equally unwieldy test with 13 factors. And it suggested that the MSPB's ability to be named respondent negates its status as purely adjudicatory. But, for decades, district court judges were named respondents in mandamus proceedings; and even today, the Tax Court, OSHRC, FMSHRC are named parties and forced to defend some of their decisions on appeal.

There is, in short, no principled way to cabin the majority's reasoning to the MSPB. If the majority is correct, then Congress has been violating separation of powers since the Founding. Worse still, under the majority's reasoning, Congress is largely powerless to prevent the President from wielding the removal power to bend these tribunals' adjudicatory processes to his will.

In any event, if this Court were to conclude that the MSPB exercised some quantum of excess executive power, the proper remedy would be to sever that excess power—not invalidate the MSPB's removal restrictions. As the CSRA's structure and legislative history make clear, the MSPB's independence is central to the proper functioning of the civil service system.

Congress enacted the CSRA amid a growing consensus that the existing regime had become politically corrupted and inefficient. Congress's answer to political meddling in the civil service was to create an independent MSPB to adjudicate federal employee claims. And once assured of its independence, Congress addressed the inefficiency problem by largely divesting district courts of jurisdiction over federal employment claims and channeling them into the MSPB.

Congress took great pains to protect the MSPB's independence. It assigned Board members 7-year terms and mandated partisan balance in the Board's composition. Congress understood, however, that these protections were mere paper guarantees without removal restrictions. As recent history shows, a President with unfettered removal authority can reconstitute the Board's composition whenever he so desires, bring its proceedings to a halt by denying it a quorum, or dictate the outcome of its proceedings by forcing its members to conform their decision-making to his perceived preferences under pain of removal.

Separation-of-powers principles require courts to do the least damage possible to Congress's design when fashioning remedies. What the majority did instead was the equivalent of amputating a leg to cure a skin blemish. Its decision—which upends centuries of precedent and hampers Congress's ability to protect the impartiality of non-Article III tribunals—should not be allowed to stand.

## ARGUMENT

### I. Invalidating the MSPB's Removal Restrictions Would Upend Two Centuries of Practice and Imperil The Independence of All Non-Article III Tribunals

#### A. Congress's Authority to Establish Removal Protections for Non-Article III Adjudicators is Well Settled

Since the Founding, Congress has created non-Article III adjudicatory bodies—staffed by executive officers and nested within the executive branch—whose

adjudicators were shielded from at-will removal. *See* John M. Golden & Thomas H. Lee, *Congressional Power, Public Rights, and Non-Article III Adjudication*, 98 NOTRE DAME L. REV. 1113, 1129 (2023).

Congress's authority in this regard was recognized by James Madison himself. While Madison advanced a muscular vision of presidential removal authority in the lead up to the so-called "Decision of 1789," *see Free Enter. Fund* v. *Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 492 (2010), he took a markedly different view when the First Congress debated the Treasury Comptroller—the officer tasked with adjudicating appeals of auditor decisions to pay or reject Treasury claims. According to Madison, the President's ability to remove an officer depended on the "nature of [the] office." 1 Annals of Cong. 635 (1789) (Joseph Gales ed., 1834). Madison argued that the Comptroller's function partook "strongly of the judicial character" and that there were "strong reasons why an officer of this kind should not hold his office at the pleasure of the executive branch of the Government." *Id.* at 635-36. Responding to a colleague's contention that the President "had constitutionally a right to remove subordinate officers at pleasure," Madison stated: "I question very much whether [the President] can or ought to have any interference in the settling and adjusting of the legal claims of individuals against the United States." *Id.* at 638.

Although Madison ultimately withdrew his proposal to protect the Comptroller's tenure, the Founding generation plainly understood that Congress could limit the President's removal power over adjudicatory officers.

Thus, the First Congress created territorial courts whose judges were appointed by the President but held their commissions "during good behaviour." Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 51 & n. (a). Even though the statute spoke of "courts" and "judges," the historical record makes clear that Congress did not regard these tribunals as part of the Article III judiciary. The Judiciary Act of 1789 contained no mention of the territorial courts, *see* Act of Sept. 24, 1789, ch. 20, 1 Stat. 73, and the Salary Act of 1789 listed the three judges of the "western territory" as "Executive Officers." Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787-1801*, 115 YALE L.J. 1256, 1288 (2006). This Court later ratified that understanding in *Am. Ins. Co.* v. *Canter*, describing these tribunals as "legislative Courts." 26 U. S. (1 Pet.) 511, 546 (1828). And in *McAllister* v. *United States*, 141 U. S. 174 (1891), this Court confirmed that Congress had broad authority to prescribe tenure protections for legislative court judges, including by requiring the "consent of the Senate" before the President may remove them. *Id.* at 186.

In 1855, Congress created the Court of Claims—the COFC's predecessor—whose judges likewise held office "during good behavior." Act of Feb. 24, 1855, ch. 122, 10 Stat. 612. At first, the Court of Claims was "nothing more than an administrative or advisory body" entrusted with hearing private monetary claims against the United States and making recommendations to Congress. *Williams* v. *United States*, 289 U. S. 553, 565 (1933). Over time, however, the court accreted additional powers. Thus, in 1863, Congress granted the court the power to issue final orders, subject to a right of appeal to this Court. Act of March 3,

1863, ch. 92, § 5, 12 Stat. 765, 766. And in 1887, Congress enacted the Tucker Act which empowered the court to hear "[a]ll claims founded upon the Constitution." Act of Mar. 3, 1887, § 1 ch. 359, 24 Stat. 505. This Court, in turn, repeatedly affirmed Congress's authority to constitute the Court of Claims as a "legislative court"—thereby confirming that Congress may vest substantial adjudicatory authority in a non-Article III tribunal while simultaneously shielding its members from at-will removal by the President. *See*, *e.g.*, *Ex parte Bakelite Corp.*, 279 U. S. 438, 452 (1929); *Williams*, 289 U. S. at 565.

In 1890, Congress created the Board of General Appraisers—a body nested within the Treasury and tasked with adjudicating disputes over import duties. Customs Administrative Act of 1890, ch. 407, 26 Stat. 131, 136-37. At its inception, the Board was classified as an "executive agency," not a legislative court. *Ex parte Bakelite*, 279 U.S. at 458; *see also* Aditya Bamzai, *Taft, Frankfurter, and the First Presidential For-Cause Removal*, 52 U. RICH. L. REV. 691, 717 (2018) (summarizing legislative history showing Congress considered appraisers to be "executive branch officers, not judges").[2] Even so, this Court assumed that Congress could confine presidential removal to cases of "inefficiency, neglect of duty, or malfeasance in office." *Shurtleff* v. *United States*, 189 U. S. 311, 313-14 (1903).

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[2] In 1926, the Board of General Appraisers was renamed the United States Customs Court, and made an Article I court. Act of May 28, 1926, ch. 411, 44 Stat. 669. That change, however, was purely cosmetic. *See Ex parte Bakelite*, 279 U. S. at 457. Thirty years later, it was given Article III status. Act of July 14, 1956, ch. 589, § 1, 70 Stat. 532.

To be sure, *Shurtleff* ultimately concluded that the President could remove a Board of General Appraisers member without cause, but only because the statute was not drafted to make "inefficiency, neglect of duty, or malfeasance in office" the exclusive grounds for removal. 189 U.S. at 316. Congress's response to *Shurtleff*, however, speaks volumes: It amended the statute to provide that the President could remove a Board member only on those three grounds "and no other." Act of May 27, 1908, sec. 3, § 31, 35 Stat. 403, 406.

Nearly two decades later, Congress used a similar formulation when it enacted the Board of Tax Appeals—the predecessor to today's Tax Court. Revenue Act of 1924, § 900(b), 43 Stat. 253, 337 (providing that any Board member "may be removed by the President for inefficiency, neglect of duty, or malfeasance in office, but for no other reason").[3]

Then, in 1948, Congress established the War Claims Commission to adjudicate claims by former prisoners of war, civilian internees, and certain religious organizations. War Claims Act of 1948, 62 Stat. 1240. Ten years later, in *Wiener* v. *United States*, 357 U. S. 349 (1958), this Court invalidated President Eisenhower's attempt to remove a member of that Commission without cause, notwithstanding the absence of any express statutory removal restriction. Looking

[3] Congress expressly classified the Board as "an independent agency in the executive branch of the Government," *id.* § 900(a), (k), 43 Stat. at 338. In 1942, Congress renamed the Board the "Tax Court of the United States," without otherwise changing its classification. *See Battat* v. *Commissioner*, 148 T. C. 32, 35 (2017). Only in 1969 did Congress recharacterize the board as an Article I Court. Tax Reform Act of 1969, 83 Stat. 487.

to the "nature of the function that Congress vested in" the Commission, this Court concluded that Congress had created "an adjudicating body," and that it could therefore "be inferred that Congress did not wish to have hang over the Commission the Damocles' sword of removal by the President for no reason other than that he preferred to have on that Commission men of his own choosing." *Id.* at 353-54, 356. The fact that Congress lodged this authority within an Executive Branch body was of no moment: that choice, the Court explained, "did not alter the intrinsic judicial character of the task with which the Commission was charged." *Id.* at 355.

Relying on these precedents, Congress continued to establish independent, non-Article III tribunals throughout the second half of the twentieth century. Thus, in 1950, it created the CAAF's predecessor, the Court of Military Appeals, to review certain sentences imposed by courts-martial. Act of May 5, 1950, 64 Stat. 107; *see* 10 U.S.C. § 942(c) (permitting removal for neglect of duty, misconduct, or mental or physical disability, but not "for any other cause").

In 1970, Congress created the OSHRC to adjudicate challenges to OSHA enforcement actions. Occupational Safety and Health Act of 1970, § 12(a), 84 Stat. 1590, 1601. As originally conceived, the Act would have concentrated rulemaking, enforcement, and adjudicatory authority in the Secretary of Labor. *See* S. 2193, 91st Cong., 1st Sess. § 6 (1969). But after employers objected that such an arrangement risked biased enforcement, Congress opted for a bifurcated structure. It left rulemaking and enforcement to the Secretary, but vested adjudicatory authority in the OSHRC—an "autonomous, independent and quasi-

judicial body" whose members were protected against at-will removal. *Dole* v. *Occupational Safety & Health Review Comm'n*, 891 F. 2d 1495, 1498 (10th Cir. 1989), *rev'd on other grounds sub nom. Martin* v. *Occupational Safety and Health Review Comm'n*, 499 U. S. 144 (1991); 29 U. S. C. § 661(b).

Congress followed the same blueprint when it created the FMSHRC in 1977. *See* Federal Mine Safety and Health Amendments Act of 1977, 91 Stat. 1290. It vested the Secretary with authority to promulgate mine-safety standards, conduct inspections, and issue citations for violations, *see* 30 U.S.C. §§ 811, 813, 814, but assigned adjudication of enforcement challenges to a separate, independent commission. *Id*. §§ 815(d), 823(b); *see also Prairie State Generating Co. LLC* v. *Sec'y of Labor*, 792 F. 3d 82, 85-86 (D.C. Cir. 2015) (observing that "[t]he Mine Act's split-function approach contrasts with the more typical administrative structure, in which rulemaking and adjudication are performed within a single agency").

More recently still, Congress created the CAVC to review decisions of the Board of Veterans' Appeals. Veterans' Judicial Review Act of 1988, 102 Stat. 4105. Its members likewise enjoy for-cause removal protections. 38 U. S. C. § 7253(f).

### B. A Rule Invalidating MSPB Removal Protections Would Put All Non-Article III Tribunals' Independence at Risk

The MSPB fits comfortably within this longstanding tradition of independent non-Article III tribunals. As it did with the Occupational Safety and Health Act and the Federal Mine Safety and Health Amendments Act, Congress built an internal separation of powers into the civil service system. Thus, it vested the power to "execut[e], administer[], and enforce[] … civil service rules and regulations" and the power to investigate and prosecute certain forms of agency misconduct in the Office of Personnel Management (OPM) and the Office of Special Counsel (OSC), respectively. 5 U.S.C. §§ 1103(a)(5)(A), 1212. And it vested adjudicatory power in the MSPB.

The upshot of this arrangement is that the MSPB does "not perform any quintessentially executive functions." Pet. App. 64a (Pan, J., dissenting). The MSPB does not make policy, promulgate substantive rules, investigate wrongdoing, or prosecute claims. It waits for others to invoke its jurisdiction and then, like other non-Article III tribunals, simply "appl[ies] law to facts." *Ibid.*

The majority nonetheless concluded that the MSPB wielded "significant executive power that cannot be characterized as quasi-legislative or quasi-judicial." Pet. App. 38a. In reaching this conclusion, the majority committed a foundational error: It reflexively classified any authority not given to the FTC at the time of *Humphrey's Executor* as "executive." Pet. App. 33a–38a. But this Court has never held that the 1935 version of the FTC defines the outermost bounds of

*adjudicatory* power that can be vested in an agency before its members must be removable at will. And if the majority's reasoning is correct, then no Article I court or independent adjudicatory agency is safe, since all of them possess some—if not all—of the same powers that the majority relied on in striking down the MSPB's removal restrictions.

### i. "Rulemaking" Authority

The majority classified the MSPB's authority to "promulgate regulations 'for the performance of its functions'" as an executive power. Pet. App. 33a (quoting 5 U.S.C. § 1204(h)). But almost every independent, non-Article III tribunal contains a similar grant of authority. *See*, *e.g.*, 26 U. S. C. § 7453 (Tax Court); 38 U. S. C. § 7264(a) (CAVC); 28 U. S. C. § 2503(b) (COFC); 10 U. S. C. § 944 (CAAF); 30 U. S. C. § 823(d)(2) (FMSHRC); 29 U. S. C. § 661(g) (OSHRC).

Nor is there anything "executive" about this authority. Section 1204(h) merely empowers the MSPB to promulgate its own rules of procedure—an authority that is a hallmark of "judicial power." *Ortiz* v. *United States*, 585 U. S. 427, 460 (2018) (Thomas, J., concurring). Indeed, none of the rules that have been promulgated under this provision can plausibly be described as "substantive." *See*, *e.g.*, 5 C. F. R. §§ 1201.14 (electronic filing procedures), 1201.21 (contents of notice of appeal), 1201.23 (computation of time for deadlines), 1201.26 (service of pleadings), 1201.27 (class appeals), 1201.34 (intervenors and amicus curiae); 1201.73 (discovery procedures); 1201.115 (criteria for granting petition).

The majority also pointed to the MSPB's ability to prescribe regulations "'for the purpose of section

7521,'" which governs the removal, suspension, and reduction of pay for ALJs. Pet. App. 33a (quoting 5 U. S.C. § 1305). But that grant is vanishingly narrow. Section 7521 excludes actions taken for national-security reasons, reductions in force, and disciplinary complaints. 5 U. S. C. § 7521(b)(1)(A)–(C). The majority itself acknowledged that it was "unclear" what rulemaking authority this provision actually confers, Pet. App. 33a—an admission that, under constitutional avoidance principles, required the majority to assume that the authority was insignificant. What's more, if that ill-defined residue is enough to make the MSPB's powers "executive," then the same must be true of the Tax Court, the CAVC, and the COFC—all of which are directed by statute to prescribe rules governing the filing and investigation of complaints against their judges. *See* 26 U. S. C. § 7466; 38 U. S. C. § 7253(g); 28 U. S. C. § 363.[4]

### ii. Adjudicatory Powers

Next, the majority concluded that the MSPB's adjudicatory powers were executive because they exceeded those exercised by the FTC in *Humphrey's Executor* in three respects: "finality, breadth of jurisdiction, and breadth of remedial authority." Pet. App. 34a. But if those features suffice to render the MSPB's powers "executive," then every independent, non-Article III tribunal exercises a constitutionally impermissible amount of executive power as well.

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[4] These courts' rules are far more developed than the regulations promulgated under 5 U. S. C. § 1305—all of which are procedural in nature. Cf., *e.g.*, 5 C. F. R. §§ 1201.137-1201.142, *with* Rules for Jud. Conduct & Disability Proc. for the U.S. Tax Ct., https://ustaxcourt.gov/files/documents/jcd_rules.pdf.

*Finality*. The majority took issue with the fact that the MSPB's decisions were final and enforceable unless set aside by a court of appeals. *Ibid.* But the same is true for essentially all non-Article III tribunals. *See*, *e.g.*, 26 U. S. C. §§ 7481, 7482 (Tax Court); 28 U. S. C. §§ 1295(a)(3), 2519 (COFC); 38 U. S. C. § 7292 (CAVC); 29 U. S. C. §§ 659(c), 660(a)-(b) (OSHRC); 30 U. S. C. § 823(d)(1) (FMSHRC). Indeed, this Court held that the War Claims Commission had an "intrinsic judicial character" even though its decisions were not subject to further review "by any other official of the United States or by any court by mandamus or otherwise." *Wiener*, 357 U.S. at 355 (internal quotation marks omitted).

*Breadth of Jurisdiction*. The majority's conclusion that the MSPB's jurisdictional breadth qualified as an "executive power" is equally mistaken. To start, the MSPB is hardly the "jack-of-all-trades" the majority made it out to be. Pet. App. 34a. The MSPB operates only in the "specialized realm of employment law," Pet. App. 67a (Pan, J., dissenting), and even there its jurisdiction is sharply confined. It may only adjudicate certain claims brought by a qualifying "employee"—a term that excludes, among others, political appointees and civil servants serving in "probationary" or "trial period[s]" of employment. 5 U. S. C. § 7511(a)(1); *see also Roche* v. *MSPB*, 596 F. 3d 1375, 1383 (Fed. Cir. 2010).

The majority bolstered its conclusion by reciting a list of employment-law statutes the MSPB may apply in resolving claims. Pet. App. 34a-35a. But that proves nothing: Article III courts possess the broadest jurisdiction of any federal adjudicatory body—but that breadth of jurisdiction has never been thought to

make their power any less judicial. Nor is the majority's analysis susceptible to any limiting principle that would enable future courts to determine how many statutes an adjudicatory body may apply before its members must be subject to at-will removal. On the majority's logic, the removal protections of the CAVC would be constitutionally suspect because that court applies the Honoring Our PACT Act of 2022, 136 Stat. 1759, the Agent Orange Act of 1991, 105 Stat. 11, the Post-9/11 Veterans Educational Assistance Act of 2008, 122 Stat. 2357, the Veterans' Pension Act of 1959, 73 Stat. 432, and the Servicemembers' Group Life Insurance Enhancement Act of 2005, 119 Stat. 2045. *See generally* 38 C.F.R. § 20.104(a)–(b). The same is true for the COFC, which has jurisdiction over "*any* claim against the United States founded either upon the Constitution, or *any* Act of Congress or *any* regulation of an executive department, or upon *any* express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U. S. C. § 1491(a)(1) (emphasis added).[5]

The majority also concluded that the MSPB's adjudication of disciplinary claims "cannot plausibly be described as 'quasi-judicial'" because it involves the "application of a non-exclusive, twelve factor balancing test." Pet. App. 35a. But Article I courts deploy

[5] The COFC applies, *inter alia*: the Tucker Act, 28 U.S.C. § 1491; the Contract Disputes Act of 1978, 41 U.S.C. §§ 7101 *et seq.*; the National Childhood Vaccine Injury Act of 1986, 42 U.S.C. §§ 300aa-1 *et seq.*; patent and copyright infringement claims under 28 U.S.C. § 1498; the Indian Tucker Act, 28 U.S.C. § 1505; the Back Pay Act of 1966, 5 U.S.C. § 5596; and the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201 *et seq.*

similarly complex multi-factor tests. The Tax Court, for example, uses a 13-factor test when distinguishing debt from equity, *Recklitis* v. *Commissioner*, 91 T. C. 874, 901 (1988), and a 9-factor test when determining the availability of a deduction. *Dreicer* v. *Commissioner*, 78 T. C. 642, 645 (1982); *see also Pullins* v. *Commissioner*, 136 T. C. 432, 448 (2011) (applying a nonexclusive 6-factor test to determine spousal tax liability). Bankruptcy courts use an 11-factor test when assessing whether a Chapter 13 repayment plan was proposed in good faith. *In re Estus*, 695 F. 2d 311, 317 (8th Cir. 1982). And when considering a mandamus petition based on unreasonable agency delay, the CAVC uses a 6-factor test which, in the words of the court that first formulated it, is "'hardly ironclad'" and "suffers from vagueness.'" *Martin* v. *O'Rourke*, 891 F. 3d 1338, 1345 (Fed. Cir. 2018) (quoting *Telecomms. Research & Action Ctr.* v. *FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984)).

*Breadth of remedial authority*. The majority concluded that any authority beyond the power to "simply order the offending agency to cease and desist" was executive in nature. Pet. App. 35a. But virtually every independent, non-Article III tribunal exercises remedial authority that extends well beyond bare issuance of cease-and-desist orders. The COFC, for example, has the power to order back pay, liquidated damages, and interest, *Astor* v. *United States*, 79 Fed. Cl. 303, 319-20 (2007), award consequential damages in breach of contract cases, *Ind. Mich. Power Co.* v. *United States*, 422 F. 3d 1369, 1373 (Fed. Cir. 2005), reimburse expert witness fees, *Gatto* v. *Sec'y of HHS*, 2025 U.S. Claims LEXIS 1044, at *1 (Fed. Cl. Mar. 31, 2025), reinstate an employee or place them in the

appropriate duty or retirement status, 28 U.S.C. § 1491(a), and grant injunctive relief in bid protest claims. *Id.* § 1491(b)(2). The Tax Court may order the IRS to refund overpayments plus interest, 26 U.S.C. § 6512(b)(2); and it may award "reasonable litigation costs," including attorney's fees, expert-witness expenses, and the cost of necessary studies or analyses. *Id.* § 7430(a), (c)(1), (d)(2). The CAVC can effectively order the Department of Veterans Affairs to pay out a benefit by reversing an adverse decision. 38 U.S.C. §§ 7252(a), 7261(a); *see also Speigner* v. *Wilkie*, 31 Vet. App. 41, 44 (2019) (awarding attorney's fees). And both the OSHRC and FMSHRC have broad authority to affirm, modify, or terminate the Secretary's citation or proposed penalty. 29 U.S.C. § 659(c), 30 U.S.C. §§ 815, 823(b)(1).

The majority appeared particularly troubled by the fact that the MSPB could award relief "on a wholesale basis." Pet. App. 36a (citing Harris's reinstatement of 6,000 laid-off employees pending further administrative proceedings). But both the COFC and CAVC have the ability to award similarly expansive relief via class action. *See*, *e.g.*, *Barnes* v. *United States*, 68 Fed. Cl. 492, 495 (2005) (certifying class consisting of thousands of navy employees alleging systematic failure to pay premium pay for short leaves); *Godsey* v. *Wilkie*, 31 Vet. App. 207, 213 (2019) (certifying mandamus proceeding by class of veterans alleging unreasonable delay in processing of benefits claims).

The majority's conclusion that the MSPB wields significant executive power by virtue of its ability to appear in district court and be named respondent, Pet. App. 37a-38a, is equally misguided. The majority anchored on 5 U.S.C. § 1204(i), which allows the MSPB

to appear in district court litigation brought against or by the Board. But there are only a handful of instances in which the MSPB would be in district court in the first place. *See*, *e.g.*, 5 U. S. C. § 1204(c) (subpoena enforcement); *Ocasio* v. *Merit Sys. Prot. Bd.*, 244 F. Supp. 3d 12, 14 (D.D.C. 2017) (defending against FOIA request). And the MSPB is only a respondent in disputes that "solely" involve its "procedure or jurisdiction." *Spruill* v. *MSPB*, 978 F. 2d 679, 684 (Fed. Cir. 1992) (emphasis added). Where an employee "seeks review of a final order or decision on the merits of the underlying personnel action" the named respondent is the agency. 5 U. S. C. § 7703(a)(2).

Nor does the ability to be named a respondent negate a body's "purely adjudicatory" status, as the majority suggested. District court judges were once "frequently named as defendants when litigants [sought] writs of mandamus, prohibition, and the like." *In re Justices of Supreme Court*, 695 F. 2d 17, 23 (CA1 1982). And while that practice ended with the 1996 amendments to the Federal Rules of Appellate Procedure, the rules still allow a court of appeals to invite or order the trial-court judge to address a petition for mandamus. Fed. R. App. P. 21(b)(4). Nor is the MSPB the only non-Article III tribunal that can be named a respondent. *See*, *e.g.*, *Aka* v. *United States Tax Court*, 854 F. 3d 30 (D.C. Cir. 2017) (Tax Court named respondent in defending its attorney disbarment orders); *Jones Bros.* v. *Sec'y of Labor, Mine Safety & Health Admin.*, 68 F. 4th 289, 294 n. 2 (6th Cir. 2023) (Secretary of Labor and FMSHRC named as separate respondents and appeared with separate counsel); *see also MFA Enters.* v. *OSHRC*, 153 F. 4th 647, 649 (8th

Cir. 2025); *Dole*, 891 F. 2d 1495 (OSHRC listed as respondent in action brought by Secretary of Labor).

* * *

In short, there is no principled way to limit the majority's reasoning to the MSPB. The powers the majority branded "executive" have been exercised by independent non-Article III tribunals since the Founding. This Court should not endorse a rule that would overturn centuries of historical practice and imperil the independence of Article I courts and adjudicatory agencies.

## II. If the MSPB Possesses Any Impermissible Executive Powers, The Proper Remedy is To Sever Those Powers, not Invalidate Its Removal Protections

Assuming, *arguendo*, that the MSPB possesses some quantum of executive power that is incompatible with removal restrictions, the proper remedy is not to sever the removal restrictions, but to cleave off the excess executive power. *See United States* v. *Arthrex, Inc.*, 594 U. S. 1 (2021).

When deciding which portion of the MSPB to sever, the relevant question is which statutory "remainder" is most "consistent with Congress' basic objectives in enacting" the CSRA: one where the MSPB operates without independence or one where the MSPB is left with only its adjudicatory powers. *United States* v. *Booker*, 543 U. S. 220, 258-59 (2005) (internal quotation marks and citations omitted). The answer is obvious: The legislative history and structure of the CSRA make clear that MSPB independence was central to Congress's design, and that the statute could

not function as intended if the President could remove Board members at will.

By 1978, widespread reports of political manipulation within the civil service and retaliation against whistleblowers had produced mounting pressure for reform. *Developments in the Law—Public Employment*, 97 HARV. L. REV. 1611, 1631-32 (1984). President Carter and Congress traced the problem to a structural defect: a single entity—the Civil Service Commission (CSC), whose members were removable "at any time for any reason," 124 Cong. Rec. 27,536 (1978)—was entrusted with both enforcing civil service rules and adjudicating federal employee claims. As President Carter explained in his message proposing the CSRA, the CSC had been entrusted with "inherently conflicting responsibilities." Jimmy Carter, Federal Civil Service Reform: Message to the Congress (Mar. 2, 1978). It served as "manager, rulemaker, prosecutor and judge" and, as a result, was unable to do any of those jobs "effectively." *Ibid.*[6]

President Carter proposed abolishing the CSC and replacing it with three separate entities: OPM, which would act as the "center for personnel administration," a Special Counsel to "investigate and prosecute political abuses and merit system violations," and a board to act as an "adjudicatory arm" that would provide "*independent and impartial* protection to employees." *Ibid.* (emphasis added).

After an "exhaustive" five-month study of the federal workforce, Congress embraced and enacted President Carter's proposal—the "cornerstone" of which

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[6] *See also* H.R. No. 95-1403, at 6 (recognizing that the CSC was compromised by an "inherent conflict[]").

was a "strong and independent" MSPB. S. Rep. No. 95-969, at 1-2, 7 (1978). The legislative history confirms that Congress considered the MSPB's independence paramount. The CSRA co-sponsor explained that "much effort" was dedicated to ensuring that the new scheme "absolutely insure[d] against any form of destructive political manipulation" of the federal civil service. 124 Cong. Rec. 27566 (1978). And the Senate Committee Report explained that the MSPB was designed to function "independent of any Presidential directives" and to be "insulated from the kind of political pressures that [had] led to violations of merit principles in the past." S. Rep. No. 95-969, at 7.

Congress took multiple steps to protect the MSPB's independence. It provided that MSPB members would serve 7-year terms, thus limiting the number of appointments any one President could make. 5 U. S. C. § 1202(a). It established that no more than two of its three members could belong to the same political party to protect against partisan tilt. *Id.* § 1201. And it ensured that the MSPB chair's appointment of personnel would "not be subject to the approval or supervision of the [OPM] or the Executive Office of the President." *Id.* § 1204(j).

Congress understood, however, that these protections would be mere formalities if the Board members could be removed at the President's whim. Without removal restrictions, the President could reconstitute the entire Board in one fell swoop. He could bring the MSPB proceedings to a halt by refusing to appoint replacements and denying it a quorum. *See generally* Nicholas Bednar & Todd Phillips, *Commission Quorums*, 78 STAN. L. REV. __ (forthcoming 2026). Congress likewise understood that the Board members

who operated under the "Damocles' sword of removal," *Wiener*, 357 U. S. at 356, would face tremendous pressure to align their decisions with the President's perceived preferences.

Congress also made a series of design choices that were premised on the assumption that aggrieved employees would have recourse to an impartial MSPB that operated above the political fray. As the Senate Committee Report explained, "absent such a mandate for independence for the merit board, it is unlikely that [it] would have granted [OPM] the power it has or the latitude to delegate personnel authority to the agencies." *Ibid.* (emphasis added). The House Committee Report expressed the same sentiment. H.R. No. 95-1403, at 106 (1978) ("The independence and authority of MSPB and its ability to protect the legitimate concerns of employees is the overriding factor on how much flexibility can be provided to managers" to discipline or remove personnel).

Congress's chosen method for streamlining the review process likewise hinged on an independent MSPB. One of the problems that Congress sought to solve with the CSRA was the "'wasteful and irrational'" "double layer of judicial review" that allowed federal employees to challenge agency actions in district courts across the country. *Elgin* v. *Department of the Treasury*, 567 U. S. 1, 13-14 (2012) (quoting *Fausto*, 484 U. S. at 455). That process had, in Congress's estimation, become "so lengthy and complicated that managers often avoid[ed] taking disciplinary action" against employees even when it was clearly warranted. S. Rep. No. 95-969, at 9.

Congress addressed this inefficiency by divesting district courts of jurisdiction over most federal work

force suits and channeling those claims through the MSPB, whose decisions would be subject to exclusive review by the Federal Circuit. *Elgin*, 567 U.S. at 5, 14. That decision, however, was "predicated on the existence of a functioning and independent MSPB." *Nat'l Ass'n of Immigr. Judges* v. *Owen*, 139 F. 4th 293, 302 (4th Cir. 2025). Tellingly, courts are now grappling with whether this channeling scheme can survive in a world where the MSPB's members are removable at will. *See, e.g.*, *id.* at 299-300 (remanding for fact-finding to determine if district courts now have jurisdiction over CSRA claims due to attacks on the MSPB's independence); *Elev8 Balt., Inc.* v. *Corp. for Nat'l & Cmty. Serv.*, 804 F. Supp. 3d 524, 556 (D. Md. 2025) (concluding that CSRA's implied preclusion is no longer operative because MSPB is not functioning as Congress intended); *see generally* Benjamin Stern & Hampton Dellinger, *When One Door Closes: What Federal Courts, and Congress, Owe Federal Workers as Independent Agencies Fall*, 15 REGUL. REV. IN DEPTH 11, 18 (2026).

Severability principles require courts to take a "tailored approach" that does the least damage to Congress's enactments. *Arthrex*, 594 U.S. at 25. That rule "reflects the confined role of the Judiciary in our system of separated powers" and "manifests the Judiciary's respect for Congress's legislative role." *Barr* v. *American Ass'n of Political Consultants, Inc.*, 591 U.S. 610, 626 (2020). Applied here, those principles require the Court to excise any marginal executive authority the MSPB may possess, not to dismantle a core structural protection on which the CSRA's edifice was built.

## CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted and the decision below reversed. In the alternative, this Court should hold this petition pending *Trump* v. *Slaughter*, No. 25-332, and grant, vacate, and remand this case in light of its decision.

Respectfully submitted,

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