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 D.C. Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

The Government's Brief in Opposition confirms that this matter deserves this Court's review. The Government does not dispute that whether the President may remove members of adjudicatory tribunals is a once-in-a-generation issue meriting this Court's attention. The Government likewise does not dispute that the D.C. Circuit invalidated removal protections for the Merit Systems Protection Board (MSPB)—a purely adjudicatory body—based on arguments that the Government never advanced below. And the Government does not dispute the enormous ramifications of the D.C. Circuit's ruling. After firing Petitioner, the executive branch began ordering the MSPB to rule its way in specific cases—the very thing Congress intended to prevent when it established the MSPB. *See* Pet. 32. This latest development is as disturbing as it is unprecedented. The executive branch's actions pose an existential threat to the integrity of the civil service system and all Article I courts.

Instead, the Government doubles down on its strategy of saying as little as possible—the Brief in Opposition is just fourteen pages—to undersell the consequences of this case. But what the Government does say confirms this Court should grant the Petition. The Government now argues (at 9) that this Court already "effectively abrogated" *Wiener* v. *United States*, 357 U.S. 349 (1958), last Term. That is the first time that the Government has ever made that argument in this case. The monumental question of whether to overturn *Wiener*—which sounds in a unique historical tradition, *see* Pet. 18-22—deserves to be the subject of merits briefing, not a drive-by assassination at the certiorari stage.

The Government attempts to—but cannot—limit the blast-radius of the D.C. Circuit's decision. The logic of that decision will invariably invalidate other "Article I courts" "such as the Tax Court, the Court of Appeals for the Armed Forces, and the Court of Appeals for Veterans Claims." Pet. App. 71a (Pan, J., dissenting). The Government hopes to obfuscate those ramifications by leaning into the panel's characterization of the MSPB as a policymaking agency. The Petition explained why that is wrong—although the Government declines to engage with our arguments. The MSPB is an Article I court that "hear[s]" and "adjudicate[s]" the "matters within" its "jurisdiction" by applying law to fact in discrete cases. 5 U.S.C. § 1204(a)(1). If this branch is to invalidate Congress's handiwork, it should do so based on an accurate assessment of what the MSPB really is—an "adjudicating body with all the paraphernalia by which legal claims are put to the test of proof"—and with a true appreciation for what the result here will do to Article I courts. *Wiener*, 357 U.S. at 354.

The Government also invents a four-part doctrinal framework, which—for the first time—it claims distinguishes the MSPB (and perhaps other adjudicatory tribunals) from other Article I courts. That novel test appears nowhere in the decision below. Even more importantly, the Government's new argument blows a hole in its constitutional theory. The Government now asserts that Article I courts—which are housed within the executive branch—"do not wield the President's executive power in his stead." BIO at 6 (quotation marks, citation, and brackets omitted). But that is impossible to square with the Government's central theory—reiterated just two pages later—that *anyone* housed in the executive branch must *by definition*

exercise the President's Article II power and is therefore removable at will. *See* BIO at 8.

The Government cannot have it both ways. Either judges on legislative courts like the MSPB can be protected from at will removal because, although they are housed within Article II, there are exceptions to the Government's formalistic approach. Or Congress is powerless to protect legislative courts—whether the Tax Court or the MSPB—because there are no exceptions. That the Government cannot offer a coherent constitutional theory, and feels the need to backfill the D.C. Circuit's analysis at this late hour, demonstrates why this Court should decide this important issue as only it can.

Finally, the Government's arguments on the second question presented confirm review is warranted. The Government (at 12) mischaracterizes Petitioner as asking the Court "to reconfigure" the MSPB's organic statute. Not true. Petitioner is asking for the same narrow remedy the Court applied in *United States* v. *Arthrex, Inc.*, 594 U.S. 1 (2021), which the Chief Justice suggested at oral argument in *Slaughter*, Pet. 29-30, and which is most consistent with principles of judicial modesty. The tail should not wag the dog. If some vestigial part of the MSPB's statute prevents this important tribunal from fulfilling its role as an Article I court as Congress intended, this Court can and should preclude the MSPB from exercising that virtually never-used function—not eviscerate the judicial independence of this critical adjudicatory institution.

In short, this case provides an ideal vehicle to address two extremely important and timely constitutional questions. The Petition should be granted. At

minimum, the Court should grant, vacate, and remand the Petition in light of *Slaughter*.[1]

I. THE MSPB IS PURELY ADJUDICATORY.

As the Petition explained, the MSPB does not make policy, fill up vague statutes, or issue rules. It decides discrete cases by applying law to fact. That is why this Court has no difficulty in describing the MSPB as established "*to adjudicate* federal employment disputes." *Harrow* v. *Dep't of Def.*, 601 U.S. 480, 482 (2024) (emphasis added).

The Government asserts otherwise—and then declines to engage with our Petition—in a transparent effort to suggest there is nothing to see here. The Government is wrong, as described below. But there is a more fundamental point: The Court need not pick between Petitioner's or Respondents' characterization of the MSPB at this stage. It simply needs to decide whether this case—in which a Court of Appeals declared an agency's structure unconstitutional, based on arguments the Government never advanced—warrants this Court's review. And this case does warrant review, as proven by the fact that the parties here—and the majority and dissenting opinions below, and at the stay stage in the D.C. Circuit—offer such diametrically opposed views of how to classify the MSPB within our constitutional order.

The Government provides just four reasons it now says the MSPB "is not a purely adjudicatory body."

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[1] The Government suggests (at 13) that, if the Court grants the Petition, it do so after deciding *Slaughter*, so the parties can "begin briefing" with the benefit of that decision. Petitioner would not oppose that approach. Alternatively, the Court could grant the Petition immediately and suspend the briefing schedule until after deciding *Slaughter*.

BIO at 10 (quotation marks, citation, and brackets omitted). None of its arguments hold any merit. Each confirms that the MSPB is adjudicatory and that the Court should hear this case to determine whether the President has unfettered power to remove the members of adjudicatory bodies.

First, the Government repeats (at 10) the D.C. Circuit majority's assertion—which the Government never advanced below—that the MSPB makes substantive rules. But the D.C. Circuit's opinion was based on a single outlier decision from the Federal Circuit in which the MSPB had promulgated internal rules of procedure, and the Federal Circuit mischaracterized those rules as substantive policymaking. *See* Pet. 25-26.

The *amicus* brief by former MSPB members makes this clear: The "Board's rulemaking" is confined to "internal procedures"—akin to the local rules adopted by federal courts. Former MSPB Members & General Counsel *Amicus* Br. 15. Indeed, if the MSPB really did promulgate substantive rules, the Government would be able to cite meaningful examples. The Government cannot and did not do so because the MSPB is not a policymaking agency.

Second, the Government complains (at 10-11) that the MSPB can review the legality of regulations issued by the Director of the Office of Personnel Management (OPM) to ensure they do not violate the civil service laws. *See* 5 U.S.C. § 1204(f). But that is a quintessential adjudicatory function. *See* Pet. App. 216a-217a (Millett, J., dissenting). The MSPB no more "veto[es] rules" promulgated by OPM than this Court does when it concludes an agency's rule violates a statute or the Constitution. BIO at 10. If this function is not permissible, all Article I courts are at risk.

The Government notes that the MSPB has the technical authority to initiate such review "on its own motion," in addition to a request by a party. 5 U.S.C. § 1204(f)(1)(A). As a factual matter, the MSPB does not *sua sponte* review the legality of rules. We could find one instance of *sua sponte* review—almost a half-century ago—and that proceeding upheld the regulation. *In re Exceptions from Competitive Merit Plans*, 9 M.S.P.R. 116 (1981). But if the MSPB ever initiated review *sua sponte* in the future, it would still be performing an adjudicatory function. And if this or some other never-used authority does tip the balance for any reason, the solution is to sever that vestigial function—not blow up the agency's structure. *See infra* pp. 10-11.

Third, the Government (at 11) characterizes the MSPB as serving as a super-manager within the executive branch because it "reviews an agency's imposition of discipline." This grossly mischaracterizes what the MSPB does. As the former MSPB officials explain, when the MSPB reviews personnel actions for compliance with civil service laws, "the MSPB must give the presiding agency considerable deference." Former MSPB Members & General Counsel *Amicus* Br. 10. "This deference is founded in the Board's role as an adjudicatory body exercising *none of the managerial authority* statutorily assigned to executive agencies." *Id*. (emphasis added).

The MSPB thus in no way exercises "policy discretion" in reviewing the legality of terminations or suspensions. BIO at 11. Instead, when the MSPB reviews penalties imposed by an agency, the MSPB applies the "the familiar arbitrary-and-capricious standard requiring agency consideration of the relevant factors and no clear error of judgment." Former MSPB

Members & General Counsel *Amicus* Br. 11 (quotation marks and citations omitted). The Petition explained all this. *See* Pet. 27-28. The Government declines to engage with our arguments because it cannot dispute them.

Fourth, the fact that the MSPB is sometimes a respondent in litigation raising complex procedural questions and has extremely modest litigating authority is in no way incompatible with the MSPB's adjudicatory function. For example, under the rules promulgated by this Court, Article III "trial-court judge[s]" may submit briefing in mandamus cases. Fed. R. App. P. 21(b)(4). That fact does not transform Article III judges into policymakers. The Petition addressed this too. The Government simply ignores what it cannot refute.

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That the Government can only muster these four picayune arguments underscores that the MSPB is not a policymaking agency. It looks nothing like the Federal Trade Commission, the National Labor Relations Board, or other agencies that fill up vague statutes and regulate broad swaths of the national economy. As a result, in invalidating the MSPB, the D.C. Circuit put at risk *all* non-Article III adjudicatory bodies, from the Tax Court on down. *See Wiener*, 357 U.S. at 354. This important case cries out for this Court's review.

II. THE GOVERNMENT'S NOVEL TEST FOR IDENTIFYING ARTICLE I COURTS UNDERSCORES THE NEED FOR REVIEW.

For the first time, the Government offers a novel four-factor test that, it says, distinguishes Article I courts from other non-Article III adjudicatory

tribunals within the executive branch—including the MSPB. This test appears nowhere in the decision below and demonstrates why that opinion should not stand as the final word in this matter. Cert-stage briefing is no place to remake constitutional law.

Regardless, the Government's latest arguments undermine its constitutional theory in this case. The Government now says Article I "courts do not wield the President's executive power." BIO at 6 (quotation marks, citation, and brackets omitted). This is an extraordinary development. Until now, the Government has embraced a rigid formalism under which *every* entity situated within the executive branch, including Article I courts, must by definition be exercising executive power and be subject to at-will removal. *See, e.g.*, BIO at 8. For the first time, however, the Government acknowledges there are exceptions to its categorical rule. For good reason. If the Government did not bend, its formalism would mean invalidating the Tax Court, the Court of Appeals for Veterans Claims, and other tribunals housed within the executive branch. But the Government's concession is fatal to its constitutional arguments about the MSPB. If those other Article I courts—which are housed within the executive branch, *see, e.g.*, 38 U.S.C. § 7253(f)(1)—can be said to "not wield the President's executive power," the same can be said of the MSPB, which is a purely adjudicatory body that hears discrete disputes just like a court. BIO at 6 (quotation marks, citation, and brackets omitted); *see* Nick Bednar, Victoria Nourse, & Lawyers Defending American Democracy *Amicus* Br. 12-14 (MSPB does not exercise executive power).

The Government's remaining arguments prove it cannot meaningfully distinguish the MSPB from

other Article I courts. The Government asserts (at 5) that it matters whether Congress calls the tribunal a "court" versus a "board." This is nonsense. Congress's constitutional authority does not wax or wane based on the *name* it picks for tribunals. The Government notes (at 7) that Article I courts have been found to qualify as courts for other constitutional purposes. For example, the Tax Court is an "Article I court[]" that qualifies as one of the "'Courts of Law' within the meaning of the Appointments Clause." *Freytag* v. *Comm'r*, 501 U.S. 868, 890 (1991). The Government then asserts—without any support—the same cannot be true of the MSPB. But why not? The Government cannot say.

The Government gestures (at 6) toward developing a new special historical exception test for Article I courts in which—it seems—each court must trace its origin to an extremely specific historical precursor. Tellingly, the Government points to just two such precursors: the history of courts-martial prior to the enactment of the Constitution, and the English Court of Exchequer, which the Government's claims is the precedent for the Tax Court. This new theory does not survive first contact with history. Congress did not establish a Tax Court *until 1924*—meaning it in no way owes its origins to ancient England. Pet. 19. Regardless, the Government does not point to direct English precedent for the modern Court of Appeals for Veterans Claims or the other Article I courts Congress has established throughout our nation's history.[2]

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[2] To be clear: We agree that history matters. In this case, history proves that Congress has long created non-Article III courts to

Finally, the Government asserts (at 6-7) that Article I courts do not make policy through adjudication. We agree. But that proves why the MSPB is an Article I court. The MSPB does *not* make policy. Instead, the MSPB is a court that hears discrete cases brought before it by applying law to fact. *See supra* pp. 4-7.

III. THE D.C. CIRCUIT'S REMEDY CRIES OUT FOR REVIEW.

In *Arthrex*, the Court faced a choice between two competing remedies. 594 U.S. at 23. It could invalidate removal protections for administrative patent judges. *Id*. at 25-26. Or it could disregard a portion of the statute that otherwise cured the Appointments Clause defect in that case. *Id*. at 24-25. The Court adopted the latter approach, explaining that preserving the removal protections "better reflect[ed] the structure of" the statute and the adjudicatory "duties" administrative patent judges performed. *Id*. at 26.

As the Chief Justice noted in the *Slaughter* oral argument, adopting *Arthrex*'s modest remedy in cases such as this one means the Court could "sever out the smaller little tail on the dog and" "allow the judicial functions to go" on. Oral Arg. Tr. 21, *Trump* v. *Slaughter*, No. 25-332 (U.S. Dec. 8, 2025). That approach is particularly appropriate in this case. The Government has expressly agreed that the MSPB is "predominantly an adjudicatory body." Pet. App. 285a. As a result, the Court should not let the "little tail" wag the dog and doom this important tribunal.

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adjudicate certain categories of disputes, including the kind of public rights disputes that the MSPB adjudicates. *See* Pet. 18-22. That is why the MSPB is a permissible Article I court.

The Brief in Opposition does not engage with *Arthrex*—yet another example of the Government hoping to sweep any complicating factor under the rug. Instead, the Government mischaracterizes (at 12) Petitioner as seeking "to reconfigure" the MSPB's statute. That is wrong. Petitioner is asking the Court to do the same thing it did in *Arthrex*: If some vestigial authority Congress granted to the MSPB (but which the MSPB never employs) tips to balance, the Court should "disregard[] the problematic portions" of the statute "while leaving the remainder intact." *Arthrex*, 594 U.S. at 23 (quotation marks and citation omitted). This remedy does not require reconfiguring anything. Consider an example. Assume the Government is correct that the MSPB cannot constitutionally *sue sponte* review the legality of rules (something the MSPB never does, *see supra* p. 6). In that scenario, there would be an easy answer: The Court can disregard the "little tail" in 5 U.S.C § 1204(f)(1)(A)—the words "on its own motion"—and *leave everything else in the MSPB's statute intact*. This does not require reconfiguring anything.

The question of whether and when federal courts can adopt this tailored remedy will become hugely important if the Court overturns *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935), in *Slaughter*, and if the D.C. Circuit's decision invalidating adjudicatory bodies stands. In the absence of *Arthrex*'s alternative, narrow remedy, litigants will scour the United States Code to find any pretext (no matter how small) to destroy these adjudicatory bodies—much as the Government has in this case. That way lies chaos. This Court should take this case, now, to forestall it.

CONCLUSION

The Court should grant the Petition. In the alternative, the Court should hold the Petition pending Slaughter, and then grant it, vacate the judgment, and remand to the D.C. Circuit.

Respectfully submitted,

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