No. 25-332

IN THE

Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL.

Petitioners,

v.

REBECCA KELLY SLAUGHTER, ET AL.,

Respondents.

On Writ of Certiorari Before Judgment to the United States Court of Appeals for the D.C. Circuit

BRIEF FOR *AMICUS CURIAE* CATHY HARRIS IN SUPPORT OF NEITHER PARTY

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INTERESTS OF *AMICUS CURIAE*[1]

Like Petitioner Rebecca Slaughter, *amicus* Cathy Harris was unlawfully removed by the President without cause. But Slaughter is a member of the Federal Trade Commission, an independent agency that engages in investigations and policymaking. In contrast, Harris is a member of a purely "adjudicatory body," the Merit Systems Protection Board. *Wiener* v. *United States*, 357 U.S. 349, 356 (1958).

The Merit Systems Protection Board hears appeals by civil servants regarding the laws that Congress passed to ensure a merit-based civil service, free from partisan discrimination and whistleblower retaliation. Unlike the Federal Trade Commission and similar independent agencies, the Board can truly be characterized as a "quasi judicial" entity. *Humphrey's Executor* v. *United States*, 295 U.S. 602, 629 (1935). The Board does not launch investigations, promulgate rules or regulations, fill up vague statutes, or otherwise engage in policymaking. Instead, the Board is a quintessential "legislative court[]," *Ex parte Bakelite Corp.*, 279 U.S. 438, 449 (1929), that decides discrete matters brought before it, applying law to fact in each given case.

Neither Petitioner nor Respondent has an interest in defending the constitutionality of purely adjudicatory entities like the Merit Systems Protection Board. Slaughter is a member of the modern Federal Trade Commission, which has the authority to launch

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[1] No counsel for a party authored the brief in whole or in part, and no person or entity, other than the *amicus curiae* and her counsel, made a monetary contribution to the preparation or submission of the brief.

investigations and make policy. Meanwhile, the Government has taken the maximalist position that *all* for-cause removal statutes are unconstitutional, including for purely adjudicatory bodies, with the possible exception of the Federal Reserve Board and the D.C. courts system. *See* U.S. Br. 23, 29.

This brief provides the Court with an important middle-ground perspective. Even if the Court were to trim back *Humphrey's Executor* for the Federal Trade Commission and other policymaking agencies that perform functions other than adjudication, the Court should preserve for-cause removal statutes for legislative courts, which stand on a unique and separate constitutional footing dating back to the Founding.

INTRODUCTION

For nearly a century and a half, Congress has established independent "agencies led by a group of principal officers removable by the President only for good cause." *Seila L. LLC* v. *CFPB*, 591 U.S. 197, 204 (2020) (emphasis omitted). In its recent decisions, the Court contrasted that established model for independent agencies with "novel" agency frameworks that lack "a foundation in historical practice" and "clash[] with constitutional structure." *Id*. In *Seila Law*, this Court even explained that Congress could lawfully preserve the independence of the Consumer Financial Protection Bureau—which engages in widescale policymaking and enforcement activities—by "converting" it "into a multimember agency." *Id*. at 237.

The Court should not rush to invalidate the many multimember boards and commissions that Congress, in reliance on the Court's longstanding precedent, has established throughout the federal government. To be sure, in light of past statements by members of the

Court and the Court's decision to grant review in this case, *amicus* recognizes that the Court may revisit *Humphrey's Executor*. *Amicus* also acknowledges the constitutional concerns presented by independent agencies engaging in regulatory and enforcement activities.

But whatever this Court decides with respect to the Federal Trade Commission and other policymaking independent agencies, the Court should not invalidate purely "adjudicatory bod[ies]" that Congress has chosen to house within the executive branch and whose members are protected from arbitrary removal. *Wiener*, 357 U.S. at 356. Often referred to as "legislative courts," *Ex parte Bakelite*, 279 U.S. at 449, these tribunals do not "bring civil enforcement suits against private parties," "promulgate binding rules," or "investigate potential violations of the law," U.S. Br. 10. Instead, legislative courts perform "intrinsic judicial" functions—deciding discrete cases brought before them by applying law to facts. *Wiener*, 357 U.S. at 355.

There is a long history of legislative courts adjudicating three categories of disputes: (i) matters in the territories; (ii) offenses committed by service members; and (iii) public rights. Well-known examples of such courts include the Tax Court and the Court of Claims. Legislative courts are "quasi judicial," *Humphrey's Executor*, 295 U.S. at 629, in that they perform "judicial determination[s]" just like a court does, but Congress may exercise its Article I authority to house them in the executive branch. *Ex parte Bakelite*, 279 U.S. at 451.

The statutes protecting members of legislative courts from arbitrary removal thus reflect a unique historical tradition, dating to the Founding, and the

stare decisis values for these tribunals are particularly acute. On several occasions prior to *Humphrey's Executor*, the Court has recognized that Congress may lawfully define the tenures of the members that serve on such bodies. *See Williams* v. *United States*, 289 U.S. 553, 562 (1933); *Ex parte Bakelite*, 279 U.S. at 449; *McAllister* v. *United States*, 141 U.S. 174, 186 (1891). In *Myers* v. *United States*—the Court's most expansive exposition of the President's removal power—the Court acknowledged that at least some legislative courts pose a distinct constitutional circumstance from the mine-run removal case. 272 U.S. 52, 158 (1926). And before this Court, even the government now implicitly acknowledges the unique status of legislative courts. *See* U.S. Br. 23.

In 1935, for better or worse, *Humphrey's Executor* analogized the Federal Trade Commission to "the legislative Court of Claims." 295 U.S. at 629. Since then, critics of *Humphrey's Executor* have stressed that the modern Federal Trade Commission's powers in fact mimic the core functions of executive branch agencies, including policymaking and regulatory functions. Regardless of how this Court resolves the question of the continued validity of *Humphrey's Executor* as applied to the Federal Trade Commission, the Court should not invalidate the few true legislative courts existing within the executive branch that perform purely adjudicatory functions. Traditional case-by-case adjudication, as opposed to a sweeping decision of this Court that strays beyond the facts, is particularly prudent in this unique area of the law.

The Merit Systems Protection Board—of which *amicus* is a member—is one of the entities that falls on the permissible side of the line: a legislative court that Congress may permissibly house within the

executive branch, and whose members may receive a modest degree of removal protection. The Board does not launch investigations, make policy, or enforce its own orders. Instead, the Board hears discrete cases brought before it, applying the laws that Congress passed regulating discrimination and retaliation in matters of public employment to the facts of each case. Today, other legislative courts whose members are similarly protected from arbitrary removal include the Tax Court, the Court of Appeals for Veteran Claims, the Court of Appeals for the Armed Forces, the District Courts for the U.S. Virgin Islands, the Northern Mariana Islands, and Guam, and the Court of Federal Claims. *Amicus* urges the Court—however it rules—to preserve these tribunals and not adopt a holding so broad as to encompass them, at least not without full merits briefing and argument.

It is important to highlight what is at stake should the Court invalidate removal protections for these adjudicators simply because they sit within the executive branch. The President could fire members of the Tax Court—for example—in retaliation for decisions ruling in favor of political adversaries. That is deeply concerning—which is precisely why Congress has chosen to ensure that those who sit on legislative tribunals where the risk of partisan political interference in the judicial process is most acute may receive protection from arbitrary removal.

These concerns are not abstract. The President has already removed *amicus* from her position on the Merit Systems Protection Board. The government has recently terminated hundreds of civil servants in ways that facially violate the civil service laws. And in a remarkable development, the Office of Legal Counsel recently issued an opinion directing the

Board how to rule in cases challenging those terminations. *See The Merit Systems Protection Board's Authority to Adjudicate Constitutional Questions within an Administrative Proceeding*, 49 Op. O.L.C. (Sept. 26, 2025) (slip op.). This is an astonishing assault on the ability of the Board's members to apply the law without fear or favor. Whatever it decides with respect to the Federal Trade Commission, the Court should avoid any decision that reaches out to decide the independence of the Board and the handful of purely adjudicatory tribunals within the federal government.

STATEMENT

A. The Merit Systems Protection Board

1. Cathy Harris is a member of an adjudicatory body—the Merit Systems Protection Board—that reflects a centuries-long effort to combat patronage in federal employment.

At the Founding, George Washington embraced principles of merit-based service. Patricia Wallace Ingraham, *The Foundation of Merit: Public Service in American Democracy* 17 (1995). But Thomas Jefferson took the position that "party service was a valid criterion for appointment to," and removal from, public service. *Id*. at 18. By the Civil War, a spoils system had taken hold. The effects were "tragic," undermining "the effectiveness of the Union army and" "federal government" during the war. *Id*. at 22.

President Grant "ran on a reform platform," but his administration faced "pressure from members of Congress looking for patronage appointments." *Id*. at 24. In 1871, Congress authorized a short-lived Civil Service Commission that shuttered two years later. *Id*. After President Garfield's assassination by a

would-be office-seeker, however, Congress passed the Pendleton Act in 1883, which established a Civil Service Commission of three members removable by the President at will. *Id.* at 26-27; ch. 27, 22 Stat. 403, 403.

The civil service initially encompassed only a portion of the federal workforce, Ingraham, *supra*, at 27, and Presidents continued to use "patronage removals and appointments" into the Twentieth Century, *id.* at 33; *see id.* at 46. Meanwhile, the "Civil Service Commission itself" soon became "a problem" because it served inherently conflicting roles of "administer[ing] and protect[ing] the merit system" while simultaneously "advis[ing] and assist[ing] the president in patronage matters." *Id.* at 74.

Abuses in the Watergate Era brought matters to a head. Contemporary investigations uncovered "flagrant violations" of merit principles for partisan "political interests," creating employment processes that "approximate[d] a patronage system." Subcomm. on Manpower & Civil Serv., H. Comm. on Post Office and Civil Serv., 94th Cong., *Documents Relating to Political Influence in Personnel Actions at the Small Business Administration* 11, 13 (Comm. Print 94-4, July 1975).

The corruption extended to the Civil Service Commission itself. "[T]op Commission officials," "including Commissioners," improperly sought to place individuals in positions of employment; "Commission officials" succumbed to "high-level pressure" to engage in patronage; and the Commission "failed to respond effectively" to "political interference in the operation of the Federal merit system." H. Comm. on Post Office and Civil Serv., 94th Cong., *A Self-Inquiry into Merit Staffing: Rep. of the Merit Staffing Rev. Team, U.S.*

Civil Service Comm'n 39, 46, 65 (Comm. Print 94-14, June 1976).

2. President Jimmy Carter made civil service reform a component of his election campaign and spearheaded the passage of the Civil Service Reform Act. Central to reform was creating a "strong and independent" Merit Systems Protection Board free of the pressures that had plagued the old Commission. S. Rep. No. 95-969, at *6-7 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 2723, 2728-29.

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

The Board is a legislative court within the executive branch that adjudicates federal employee appeals, including claims of political discrimination and whistleblower retaliation. *Id.* §§ 2302(b)(1)(E), (b)(8). Its jurisdiction is circumscribed to avoid encroaching on the President's core prerogatives. The Board may not hear appeals by political appointees, *id.* § 7511(b), has limited authority regarding senior executive managers, *id.* § 3592(a), and cannot wade into national security issues, *Kaplan* v. *Conyers*, 733 F.3d 1148, 1166 (Fed. Cir. 2013) (en banc). In addition, the President may exempt positions from the Board's jurisdiction if he determines a position is of a "policy-determining, policy-making or policy-advocating character." 5 U.S.C. § 7511(b)(2).

The Board does not make policy or bring enforcement actions. The Board may conduct "studies"

relating to the civil service, *id.* § 1204(a)(3), in much the way the Judicial Conference issues annual reports to Congress with "recommendations for legislation," 28 U.S.C. § 331. But the Board lacks regulatory authority. Instead, the Board hears discrete cases involving civil servants, applying statutory law and precedent to the specific facts brought before it. The Board's discrete decisions are in turn reviewable by Article III courts, which is usually but not always the Federal Circuit. *See* 5 U.S.C. § 7703; *Perry* v. *MSPB*, 582 U.S. 420, 423 (2017). The Board lacks authority to enforce its own decisions.[2]

The Merit Systems Protection Board's history confirms its purely adjudicatory purpose. The Board's predecessor—the Civil Service Commission—handled both personnel management and adjudications. In 1978, Congress split the Commission into multiple entities, including: (1) the Office of Personnel Management, to manage the federal workforce as a true organ of executive power; and (2) the Merit Systems Protection Board, as an adjudicatory authority. Civil Service Reform Act, Pub. L. No. 95-454, 92 Stat. 1111, 1119, 1121 (1978).

In 1989, Congress further cleaved off the Office of Special Counsel—a single-director-led entity that investigates and prosecutes violations of civil service rules—into a separate executive branch agency.

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[2] When originally established, the Board could order the withholding of pay from federal employees who refused to comply with its decisions. 5 U.S.C. § 1204(e)(2)(A). But that mechanism required the involvement of the Comptroller General, who is a legislative officer. It became unconstitutional after *Bowsher* v. *Synar*, 478 U.S. 714, 733-734 (1986), leaving the modern Board without ability to enforce decisions unilaterally.

Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16. The result, today, is that the Board is a purely "adjudicatory body." *Wiener*, 357 U.S. at 356.

B. *Harris* v. *Bessent*

1. In 2022, Cathy Harris was nominated and confirmed as a member of the Merit Systems Protection Board. Her term expires March 1, 2028. On February 10, 2025, Harris received an email stating the President had terminated her. The next day, she filed a lawsuit, *Harris* v. *Bessent*, challenging her termination.

Before the district court, the government did not contest: (i) that the Merit Systems Protection Board "does not establish policy," and does not "dictate or enforce policies regarding the federal workforce"; (ii) that the Board "performs no investigations of external parties and does not prosecute cases"; (iii) that the "Board does not initiate disciplinary actions" and lacks "enforcement units"; (iv) that it "does not order other agencies to conduct investigations or to produce written reports"; and (v) that "over 95% of the decisions" of the Board are "unanimous." Dkt. No. 22-2, at 7-9, *Harris* v. *Bessent*, No. 1:25-cv-00412 (D.D.C. Feb. 23, 2025).

The district court ruled for Harris, finding that the Board is a "traditional independent agency headed by a multimember board." *Harris* v. *Bessent*, 775 F. Supp. 3d 164, 174 (D.D.C. 2025) (citation omitted). According to the court, the Board's "duties are 'quasi judicial,' in that it conducts preliminary adjudications of federal employees' claims, which may then be appealed to Article III courts." *Id.* at 176 (quoting *Humphrey's Executor*, 295 U.S. at 624). "The Board

does not regulate the conduct of private parties, nor does it possess its own rulemaking authority except in furtherance of its judicial functions." *Id.* "It cannot initiate its own personnel cases, but must instead passively wait for them to be brought." *Id.* (quotation marks and citation omitted).

The district court also explained that Congress has unique authority to establish the Merit Systems Protection Board, in particular, because Congress has the constitutional remit to "'limit, restrict, and regulate the removal'" of inferior officers and employees. *Id.* at 177 (quoting *United States* v. *Perkins*, 116 U.S. 483, 485 (1886)). Congress exercised that power when it enacted the Civil Service Reform Act—and the Board's "independence" is "structurally inseparable from the" Act itself. *Id.*

2. The government appealed and sought a stay pending appeal in the D.C. Circuit. At oral argument, the government characterized the Merit Systems Protection Board as "predominantly an adjudicatory body." *See* Oral Arg. Tr. 12, *Harris* v. *Bessent*, No. 25-5037 (D.C. Cir., Mar. 18, 2025).

The panel granted the stay pending appeal. *Harris* v. *Bessent*, No. 25-5037, 2025 WL 980278 (D.C. Cir. Mar. 28, 2025). There was no majority opinion. Judge Walker reasoned that the *Humphrey's Executor* framework applies "if the agency in question is the identical twin of the 1935" Federal Trade Commission. *Id.* at *13 (Walker, J., concurring).

Judge Henderson stated that the Merit Systems Protection Board's "powers are relatively more circumscribed" than other independent agencies. *Id.* at *23 (Henderson, J., concurring).

Judge Millett dissented. She emphasized that, in "the government's own words, the MSPB is 'predominantly an adjudicatory body.'" *Id.* at *30 (Millett, J., dissenting) (quoting oral argument transcript). The Board "has no investigatory or prosecutorial role," but is instead "passive and must wait for appeals to be initiated." *Id.* The Board "has no independent means of enforcing its orders," and does not make rules, except those "akin to the federal rules of procedure and local rules that courts adopt." *Id.* at *30-31.

3. At Harris's request, the en banc D.C. Circuit vacated the panel's order and denied the government's motion for a stay. *See Harris* v. *Bessent*, No. 25-5037, 2025 WL 1021435 (D.C. Cir. Apr. 7, 2025) (en banc). The D.C. Circuit merits panel heard oral argument on May 16, 2025, but has not yet issued a decision.

After the D.C. Circuit denied a stay, the government filed an application for a stay in this Court. *See* Application, *Trump* v. *Wilcox*, 24A966 (U.S. Apr. 9. 2025). The government also asked the Court to construe its application as a request for certiorari before judgment and hear the case in a special sitting in May 2025. *Id.* at 36-38.

Harris opposed a stay and certiorari before judgment. She explained that the D.C. Circuit had expedited proceedings and that waiting for the D.C. Circuit would allow that court to explain "the effect of ruling for the government on the Federal Reserve and adjudicators like Tax Court judges." Harris Response at 39, *Trump* v. *Wilcox*, 24A966 (U.S. Apr. 15, 2025).

This Court granted the government's stay pending appeal but denied certiorari before judgment. According to the Court, "the Government faces greater risk of harm from an order allowing a removed officer to

continue exercising the executive power than a wrongfully removed officer faces from being unable to perform her statutory duty." *Trump* v. *Wilcox*, 145 S. Ct. 1415, 1415 (2025) (per curiam).

The Court did not opine on whether the Government was likely to succeed on the merits. The Court instead stated that the President "may remove without cause executive officers who exercise" "power on his behalf, subject to narrow exceptions recognized by" "precedent[]." *Id.* But the Court determined that whether the Merit Systems Protection Board "falls within such a recognized exception" is a question "better left for resolution after full briefing and argument." *Id.*

Justice Kagan dissented, joined by Justices Sotomayor and Jackson. *Id.* at 1416 (Kagan, J., dissenting).

4. On September 4, 2025, the Government filed an application requesting a stay and seeking certiorari before judgment in this case, *Trump* v. *Slaughter*, involving a member of the Federal Trade Commission whom the President purported to remove without cause. In response, Harris filed a conditional petition for certiorari before judgment, *Harris* v. *Bessent*, No. 25-312 (U.S.), asking the Court to grant review in her case if it granted *Slaughter*.

The Court granted certiorari before judgment in *Slaughter* and denied it in *Harris*. This *amicus* brief in support of neither party follows.

SUMMARY OF ARGUMENT

I. *Amicus* recognizes that the Court may revisit *Humphrey's Executor* and reexamine the significance of the Federal Trade Commission and similar modern-day multimember bodies that engage in core executive

functions, such as initiating enforcement actions and regulating private parties. *Amicus* stands by her view that Court should not overturn the longstanding framework that allows Congress to structure multi-member independent agencies.

Importantly, however, neither party before the Court has an incentive to defend purely adjudicatory bodies—such as the Merit Systems Protection Board and the Tax Court—that reflect the venerable tradition of legislative courts. As a result, *amicus* urges the Court—however it rules in this case—not to paint with an overbroad brush and hold that *every* principal officer outside of Article III must be removable at will.

Instead, the Court should preserve the constitutionality of purely adjudicatory bodies within the executive branch. These stand-alone tribunals rest on unique constitutional footing and do not pose the conceptual challenges presented by the modern Federal Trade Commission and similar policymaking agencies that promulgate rules and launch investigations. Meanwhile, drawing the constitutional line at "adjudicatory bod[ies]," *Wiener*, 357 U.S. at 356, would reflect the original logic of *Humphrey's Executor*, and would provide this Court a principled, bright-line rule that distinguishes between constitutionally defective agencies and the constitutionally permissible adjudicatory tribunals that Congress has chosen to house within the executive branch.

II. The Merit Systems Protection Board is an example of a purely adjudicatory body that should remain constitutional—even if the Court holds that the President must be able to remove Federal Trade Commissioners at will. The Board hears discrete appeals brought by civil servants. It does not make policy, regulate parties, or launch investigations. Indeed,

invalidating the Board would mean invalidating legislative courts—past, present, and future—within the executive branch. This Court should not take that drastic step in a case that does not at all present that issue.

ARGUMENT

However the Court addresses the government's challenge to the current structure of the Federal Trade Commission, the Court should uphold the constitutionality of purely adjudicatory bodies within the executive branch, such as the Merit Systems Protection Board. There is a "historical precedent" dating to the Founding, *Free Enter. Fund* v. *PCAOB*, 561 U.S. 477, 505 (2010) (citation omitted), of Congress establishing non-Article III "legislative Courts," *Am. Ins. Co.* v. *356 Bales of Cotton*, 26 U.S. 511, 546 (1828) (*Canter*). Under a "time-honored reading of the Constitution," these "legislative tribunals," *Freytag* v. *Comm'r*, 501 U.S. 868, 889 (1991), may hear matters arising in the territories, *id.*, offenses committed by servicemembers, *Ortiz* v. *United States*, 585 U.S. 427, 437 (2018), and disputes regarding "public rights," *SEC* v. *Jarkesy*, 603 U.S. 109, 130 (2024); *see N. Pipeline Const. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 64-70 (1982). And as this Court has explained, members of these "legislative courts" may be protected from removal at will, and may "hold [office] for such term as Congress prescribes." *Ex parte Bakelite*, 279 U.S. at 449.

I. THE COURT SHOULD NOT INVALIDATE REMOVAL PROTECTIONS FOR MEMBERS OF ADJUDICATORY BODIES.

A. There is "a serious and unbroken historical pedigree" of legislative courts whose members are not

removable at will by the President. *Jarkesy*, 603 U.S. at 153 (Gorsuch, J., concurring).

In the first years of the new nation, Congress passed laws under which non-Article III territorial judges were removable by the President but also held their commissions during good behavior. *See* An Act to provide for the Government of the Territory North-West of the river Ohio, ch. 8, 1 Stat. 50, 51, 53 (1789); Act of Apr. 7, 1798, ch. 28, § 3, 1 Stat. 549, 550. In a landmark decision, Chief Justice Marshall explained that these tribunals were "legislative Courts," "not constitutional Courts" established under Article III. *Canter*, 26 U.S. at 546.

Prior to the Civil War, Congress created the Court of Claims, a "legislative [c]ourt" whose judges were likewise protected from arbitrary removal. *Humphrey's Executor*, 295 U.S. at 629; *see* Act of Feb. 24, 1855, ch. 122, § 1, 10 Stat. 612, 612. In 1890, Congress afforded removal protection to the Board of General Appraisers, a multimember body balanced along partisan lines that heard cases regarding imported goods and tariffs. *See* Act of June 10, 1890, ch. 407, § 12, 26 Stat. 131, 136. In 1906, Congress created a United States Court for China, transferring jurisdiction over judicial proceedings previously conducted "by United States consuls and ministers by law and by virtue of treaties between the United States and China." An Act Creating a United States court for China and Prescribing the jurisdiction thereof, Pub. L. No. 59-403, § 1, 34 Stat. 814, 814 (1906). The members of this non-Article III body served for "ten years, unless sooner removed by the President for cause." *Id.* § 7.

In 1924, Congress established the Board of Tax Appeals—a precursor to the modern Tax Court—the members of which could "be removed by the President

for inefficiency, neglect of duty, or malfeasance in office, but for no other reason." Revenue Act of 1924, Pub. L. No. 86-176, § 900(b), 43 Stat. 253, 337. Two years later, in 1926, Congress reconstituted the Board of General Appraisers as the United States Customs Court, providing the new court's officers the same "tenure of office" as the old Board. Act of May 28, 1926, Pub. L. No. 69-304, § 2, 44 Stat. 669, 669.

B. In the years leading up to *Humphrey's Executor*, this Court recognized that the Constitution allows Congress to protect the members of these adjudicatory bodies from arbitrary removal.

In its 1891 decision in *McAllister*, for example, the Court explained that Congress, "in the respective acts providing for the organization of" legislative "courts," may provide that its members will "hold their offices during good behavior" or for some other period. 141 U.S. at 186.

In *Ex parte Bakelite*, the Court, then led by Chief Justice Taft, unanimously confirmed that "legislative courts" "are prescribed by Congress independently of section 2 of article 3; and their judges hold for such term as Congress prescribes, *whether it be a fixed period of years or during good behavior*." 279 U.S. at 449 (emphasis added).

In *Myers*—the historical highwater mark for the President's removal power—Chief Justice Taft's opinion for the Court acknowledged its precedent regarding legislative courts, and noted that at minimum territorial courts are constitutionally distinct from other executive branch officials whom the Constitution required to be removable at will. 272 U.S. at 156-158; *see id.* 182 n.2 (McReynolds, J., dissenting) (noting that the majority opinion's holding that principal

officers must be removed at will carved out an exception for "nonconstitutional judicial officers").

Finally, just two years before *Humphrey's Executor*, this Court heard *Williams* v. *United States*, in which a judge on the Court of Claims sued after his salary had been reduced. 289 U.S. at 560. This Court upheld the reduction in the judge's salary because the Court of Claims was a legislative court, not an Article III court whose judges' salaries cannot be constitutionally "diminished during their Continuance in Office." U.S. Const. art. III, § 1. The Court explained that Congress has broad discretion to "confer upon an executive officer or administrative board, or an existing or specially constituted court, or retain for itself, the power to hear and determine controversies respecting claims against the United States." *Williams*, 289 U.S. at 580. When Congress chooses to establish a legislative court to hear such claims, as Congress did when it established the Court of Claims, Congress may determine "the tenure of" "offices" for its members. *Id*. at 562.[3]

C. Rightly or wrongly, when the Court decided *Humphrey's Executor* two years later, the Court viewed the Federal Trade Commission as an adjudicatory entity akin to the Court of Claims.

Amicus urges the Court not to revisit *Humphrey's Executor*. *Amicus* recognizes, however, that some

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[3] In 1953, Congress declared the Court of Claims an Article III court. *See* An Act to Amend Title 28, United States Code, Pub. L. No. 83-158, 67 Stat. 226, 226; *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 531-532 (1962). In 1982, Congress reversed course and designated the newly constituted Claims Court an Article I court. *See* Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 105, 96 Stat. 25, 27.

members of the Court have suggested that the Court in 1935 incorrectly classified the Commission as an adjudicatory entity, underappreciated its executive characteristics, and was motivated by its "bitter standoff" with "President Roosevelt." *Seila Law*, 591 U.S. at 246 (Thomas, J., concurring in part and dissenting in part).

But whatever the Court decides in this case with respect to the modern Federal Trade Commission, the first question presented does not require the Court to reach the far larger question of purely adjudicatory tribunals that do not make policy, are fairly characterized as performing "quasi judicial" functions, and follow in the unique historical tradition of legislative courts. *Humphrey's Executor*, 295 U.S. at 629.

Indeed, it would be faithful to the core logic of *Humphrey's Executor* for the Court to reaffirm Congress's historic ability to provide tenure protections for true adjudicators. In *Humphrey's Executor*, the Solicitor General argued that "the removability of members of the Federal Trade Commission necessitated" the same removability for the members of "the Court of Claims." *Id.* at 629. Citing its recent decision in *Williams*, the Court rejected that argument—*i.e.*, that members of a "legislative" court must "continue in office only at the pleasure of the President"—and then went on to uphold the structure of the Federal Trade Commission. *Id.* The Court could overturn *Humphrey's Executor*'s classification of the Federal Trade Commission as akin to the Court of Claims while simultaneously remaining faithful to the history of removal protection for members of purely adjudicatory bodies.

D. The Court's decision in *Wiener* two decades later further reinforces the conclusion that this Court

could draw a principled line at preserving for-cause removal provisions for legislative courts while holding that members of policymaking agencies must be removable at will by the President.

Wiener involved an effort to remove a member of the War Claims Commission, a purely "adjudicatory body" that was a legislative court like the modern-day Tax Court or the Merit Systems Protection Board. 357 U.S. at 356. The Commission decided "claims for compensating internees, prisoners of war, and religious organizations" "who suffered personal injury or property damage at the hands of the enemy in connection with World War II." *Id.* at 350.

In ruling for the removed official, the Court echoed its decisions regarding legislative courts. The Court explained that the Commission was "an adjudicating body with all the paraphernalia by which legal claims are put to the test of proof." *Id.* at 354. "Congress could" "have given jurisdiction over [the] claims to the District Courts or to the Court of Claims." *Id.* at 355. But instead, Congress "chose to establish a Commission to 'adjudicate according to law' the classes of claims defined in the statute." *Id.* That fact "did not alter the intrinsic judicial character of the task with which the Commission was charged." *Id.*

In this case, the Court could similarly hold that legislative courts remain constitutional, and that *Wiener* was correctly decided. In other words, when it comes to an adjudicatory body that does not make policy—such as the War Claims Commission or the Merit Systems Protection Board—Congress may house the tribunal within the executive branch and protect its members from arbitrary removal. At the same time, the Court would be free to conclude that the members of independent agencies that do launch investigations,

regulate parties, and make policy must be removable at will.

E. Drawing the constitutional line at adjudicatory bodies would have five jurisprudential benefits.

First, that line would be consistent with history and precedent—which even the government is forced to acknowledge in part. *See* U.S. Br. 23 (recognizing President cannot remove members of D.C. Court of Appeals). Preserving for-cause removal protections for purely adjudicatory bodies would harmonize *Humphrey's Executor* with that history and precedent, and would be fully consistent with *Wiener*—which the Court would not need to overturn. And it would spare the Court from the unintended ramifications of remaking its caselaw on legislative courts without any briefing.

It would also explain *Humphrey's Executor*'s description of a legislative court as exercising "quasi judicial" power. 295 U.S. at 629. As the unanimous Taft Court explained in *Ex parte Bakelite*, the power a legislative court exercises is "quasi judicial" in that it is directed to matters that "do not require judicial determination and yet are susceptible of it." 279 U.S. at 451, 458. This Court has at times even said that the "power exercised by" some "non-Article III tribunals *is* judicial power." *Freytag*, 501 U.S. at 889 (citing *Williams*, 289 U.S. at 565-566); *Ortiz*, 585 U.S. at 457, 463 (Thomas, J., concurring) (concluding that military tribunals within the executive branch exercise "judicial power").

In other words, the "fact that" Congress chooses "to establish a" legislative court "to 'adjudicate according to law'" certain "classes of claims" does "not alter the intrinsic judicial character of the task"—a task that

involves applying law to facts in individual cases, just as judges do. *Wiener*, 357 U.S. at 355. By contrast, an independent agency that launches investigations or sets policy by filling out vague statutes is simply not performing tasks of an "intrinsic judicial character." *Id.*

Second, drawing the line at truly adjudicatory bodies would resolve the government's stated concerns of a "headless Fourth Branch." U.S. Br. 4 (quoting *FCC* v. *Consumers' Rsch.*, 145 S. Ct. 2482, 2517 (2025) (Kavanaugh, J., concurring)). The Court would subject to direct presidential oversight policymaking agencies—such as the Federal Trade Commission, the Consumer Product Safety Commission, the Federal Communications Commission, and the Securities and Exchange Commission—that regulate private conduct and might be said to exercise "vast power" over people's lives. *Id.* at 20. At the same time, the Court would preserve tribunals—like the Tax Court and the Merit Systems Protection Board—that perform inherently judicial tasks and do not raise similar constitutional concerns.[4]

Third, a ruling that the heads of policymaking agencies must be removable at will—but not adjudicatory bodies—would harmonize *Humphrey's Executor* with the Court's three most recent decisions regarding the removal power.

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[4] To be sure, policymaking agencies may at times engage in adjudications. But unlike the Merit Systems Protection Board, these independent agencies are not purely or even predominantly adjudicatory. They instead perform a wide array of rulemaking and investigations, and even their adjudicatory functions in part make policy.

In *Free Enterprise Fund*, the Court exempted "administrative law judges" from its holding prohibiting dual layers of removal protection, 561 U.S. at 507 n.10. As the Court explained, "administrative law judges" "perform adjudicative rather than enforcement or policymaking functions." *Id.* If the Court adopted the approach outlined in this brief, the Court would draw the same line here, permitting modest removal protections for adjudicators but prohibiting them for policymakers.

Meanwhile, in *Seila Law*, the Court recently characterized the *Humphrey's Executor* exception as applying to "multimember expert agencies that do not wield *substantial executive power*." *Seila Law*, 591 U.S. at 218 (emphasis added). But in *Collins* v. *Yellen*, 594 U.S. 220 (2021), the Court explained that "Courts are not well-suited to weigh the relative importance of the regulatory and enforcement authority of disparate agencies," *id.* at 253. Some have suggested that there is a potential tension between *Seila Law* and *Collins*. The former could be read to require courts to determine whether executive power is substantial, but the latter could be read to forbid that inquiry. *See* U.S. Br. 34.

The Court could reconcile any apparent tension by holding that pure adjudication—*i.e.*, truly applying law to facts—is *per se* not the exercise of substantial executive power. That is because the task is of an "intrinsic judicial character," not an executive one. *Wiener*, 357 U.S. at 355; *see Free Enter. Fund* v. *PCAOB*, 537 F.3d 667, 699 n.8 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) (explaining that "adjudicatory functions" should "not be considered central to the functioning of the Executive Branch for purposes of the Article II

removal precedents" (quotation marks and citation omitted)).

Fourth, allowing Congress to provide modest removal protections for purely adjudicatory entities that do not make policy would further critical due process values. As this Court has explained, a "fair tribunal is a basic requirement of due process," and that rule "applies to administrative agencies which adjudicate as well as to courts." *Withrow* v. *Larkin*, 421 U.S. 35, 46 (1975) (quotation marks and citation omitted). In certain circumstances, Congress may reasonably determine that an adjudicator "who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will." *Wiener*, 357 U.S. at 353 (quoting *Humphrey's Executor*, 295 U.S. at 629).

This does not mean that the Constitution's guarantee of due process requires that all agency adjudicators be independent from at-will removal. Our argument is narrower: Congress may determine that in certain circumstances—for example, in disputes regarding partisan retaliation within the civil service—a measure of independence is necessary to ensure the appearance or reality of impartiality.

Fifth, preserving legislative courts would help protect interbranch comity.

Declaring "an Act of Congress unconstitutional" "is the gravest and most delicate duty that this Court is called on to perform." *Blodgett* v. *Holden*, 275 U.S. 142, 147-148 (1927) (Holmes, J., concurring). It involves the direct clash of one branch (the Judiciary) against another (Congress), here at the request of the third (the Executive). Should this Court invalidate the removal protections for independent agencies that

make policy, it would disrupt Congress's reasonable reliance on the Court's precedent. But at least for those policymaking agencies, Congress would have had little other choice but to house the agencies within the executive branch.

By contrast, for legislative courts, Congress had a choice: It could have assigned the same judicial functions to an Article III court. Invalidating the removal protections for legislative courts thus raises difficult severability questions about what Congress would have intended in the absence of *Humphrey's Executor*, *cf. Seila Law*, 591 U.S. at 234, and risks aggrandizing the executive branch's power in ways that Congress would never have wanted. And to do so in a case that does not present the question would be particularly imprudent.

The Merit Systems Protection Board demonstrates the problem. In the 1970s, the architects of civil service reform considered but declined to assign civil service claims to Article III courts in the first instance. They feared that Article III judges would "delay" resolving cases, would unduly trench on the executive branch, and would lack necessary "technical expertise." Pers. Mgmt. Project, 1 *Final Staff Report* 57 (1977). But reformers deemed it critical that the Board's members be removable "only for a cause, not for partisan political reasons." *Id.* at 54. Had Congress known the Board's members would be removable at will, there is every reason to think Congress may have chosen instead to assign the Board's judicial

functions to an Article III court rather than hand the President tools to remake a patronage system.[5]

F. The government implicitly recognizes the long tradition of legislative courts when it acknowledges that "the President's illimitable power of removal" does not extend "D.C. Court of Appeals judges." U.S. Br. 23 (quotation marks and citation omitted). But in a footnote, the government asks the Court to overturn *Wiener*, *id* at 30 n.1, and—without any analysis or briefing—invites the Court to invalidate the Merit Systems Protection Board too, *id.* at 3, 19. Meanwhile, the government conspicuously fails to offer any view on whether the President can fire members of other purely adjudicatory bodies, such as the Tax Court. And the government neither engages with the history undergirding legislative courts nor grapples with the fact that legislative courts do not engage in policymaking.

Instead, the government trains its fire on the Federal Trade Commission—and hopes the Court will gloss over the complexities posed by legislative courts. That obfuscation confirms that, whatever the Court decides about the Federal Trade Commission, the Court should at least reserve judgment for these adjudicatory bodies that do not make policy.

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[5] Indeed, if the President fires the Board's members and robs it of a quorum, he can disable the Board from hearing appeals altogether, leading cases to stall permanently in the administrative process. This can prevent important civil service disputes—such as the unlawful firing of federal workers—from *ever proceeding to judicial review*. There is no reason to think Congress would have given the President the power to eviscerate civil service protections in this manner.

To the extent the government gestures at a justification for invalidating purely adjudicatory bodies, it is skin-deep. The government suggests (at 24) that whenever adjudication occurs within the executive branch, the act is an exercise of executive power, and the adjudicator must be removable at will. But "questions implicating the separation of powers cannot be answered by arguing, in circular fashion, that whatever the Executive Branch does is necessarily an exercise of executive power," and the individual wielding that power must be removable at will. *Ortiz*, 585 U.S. at 457, 463 (Thomas, J., concurring). Instead, the history of Congress regulating adjudicators' removal demonstrates that these adjudicators perform a "task" of "intrinsic judicial character" and may be protected from arbitrary removal. *Wiener*, 357 U.S. at 355.

II. THE MERIT SYSTEMS PROTECTION BOARD IS A PURELY ADJUDICATORY BODY.

A. Despite inviting the Court to invalidate the Merit Systems Protection Board in a drive-by holding, the government never analyzes the Board's unique functions. Any fair analysis shows that the Board is a purely adjudicatory body whose members may permissibly receive a modest degree of removal protection under the Constitution.

The Board hears discrete employment appeals brought by civil servants. To evaluate those claims, the Board applies the laws that Congress passed regulating matters such as partisan discrimination and whistleblower retaliation. Just as with the War Claims Commission, "Congress could, of course, have given jurisdiction over these claims to the District Courts." *Wiener*, 357 U.S. at 355. That fact does not change "the intrinsic judicial character of the task

with which" the Board is "charged." *Id.* Indeed, the Board could just as easily have been named the Merit Systems Protection *Court*.

The purely adjudicatory Merit Systems Protection Board bears no relationship to the policymaking entities that motivate critics of *Humphrey's Executor*. As Judge Millett has explained, the Board "has no investigatory or prosecutorial role," but instead, like other courts, is "passive and must wait for appeals to be initiated." *Harris*, 2025 WL 980278 at *30 (Millett, J., dissenting). The Board does not make rules, except those "akin to the federal rules of procedure and local rules that courts adopt." *Id.* at *31. The Board lacks any "independent means of enforcing its orders." *Id.* at *30. Meanwhile, the vast majority of the Board's decisions—more than 95%—are unanimous.[6]

Indeed, the Board performs none of the non-adjudicatory functions that the government alleges render the Federal Trade Commission constitutionally suspect. Thus, for example, the Merit Systems Protection Board does not (i) "bring civil enforcement suits against private parties"; (ii) "promulgate binding rules"; (iii) "investigate potential violations"; or (iv) conduct "foreign relations." U.S. Br. 10, 28.

All of this is why, in *Harris* v. *Bessent*, the government *agreed* that the Merit Systems Protection Board was "predominantly an adjudicatory body." *See* Oral Arg. Tr. 12, *Harris* v. *Bessent*, No. 25-5037 (D.C. Cir., Mar. 18, 2025). And that is why the Board is a

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[6] The Board falls squarely within the public rights exception. It hears "claims against the United States," *Ex parte Bakelite*, 279 U.S. at 452, involving "the granting of" quintessential "public benefits," *i.e.*, public employment, *Jarkesy*, 603 U.S. at 130.

permissible legislative court whose members' tenure Congress may regulate.[7]

B. As the district court explained in *Harris* v. *Bessent*, the Merit Systems Protection Board also stands on unique constitutional footing for a second reason: Congress also has unique authority to establish the Board incident to its constitutional power to "'limit, restrict, and regulate the removal'" of inferior officers and employees. 775 F. Supp. 3d at 177 (quoting *Perkins*, 116 U.S. at 485).

As Chief Justice Taft explained in *Myers*, "in committing the appointment of" "inferior officers to the heads of departments," Congress "may prescribe incidental regulations controlling and restricting the latter in the exercise of the power of removal." 272 U.S. at 161. Congress exercised that power when it enacted the Civil Service Reform Act—and the Board's "independence" is "structurally inseparable from the" Act itself. *Harris*, 775 F. Supp. 3d at 177. This provides yet another reason the Court should decline the government's invitation to invalidate the Merit Systems Protection Board in a drive-by holding.

C. In addition to the Board, *amicus* has identified a handful of other tribunals whose members receive a modest degree of for removal protection, and who

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[7] To the extent the government may argue that the Board possesses a vestigial function incompatible with an adjudicatory body, the solution (consistent with principles of constitutional avoidance and judicial modesty) would be to invalidate a particular exercise of that function should it ever be used. *See United States* v. *Arthrex, Inc.*, 594 U.S. 1, 24-26 (2021). That narrow remedy may be less feasible for policymaking entities, for whom rulemaking or investigations are central to the agency's structure.

would be at risk if the Court accepts the government's sweeping and unnecessary conception of Article II removal.

Congress established the Tax Court "under article I of the Constitution of the United States" to hear disputes involving revenue collection. 26 U.S.C. § 7441; *see Freytag*, 501 U.S. at 888 (Tax Court is a "legislative court"). Its members serve 15-year terms and "may be removed by the President, after notice and opportunity for public hearing, for inefficiency, neglect of duty, or malfeasance in office, but for no other cause." 26 U.S.C. §§ 7443(e), 7443(f).

The Court of Appeals for Veteran Claims is comprised of up to seven members balanced along partisan lines. *See* 38 U.S.C. §§ 7253(a), 7253(b). Its judges may be removed by the President only "on grounds of misconduct, neglect of duty, engaging in the practice of law," or failing to abide by statutory residency requirements. *Id.* § 7253(f)(1).

The Court of Appeals for the Armed Forces is the top appellate body for the military. *See Ortiz*, 585 U.S. at 432. Its judges—all of whom must be civilians—may be removed only for "neglect of duty," "misconduct," or "mental or physical disability." 10 U.S.C. § 942(c).

Judges on the District Courts for the Virgin Islands, the Northern Mariana Islands, and Guam serve for 10-year terms, "unless sooner removed by the President for cause." 48 U.S.C §§ 1821(b)(1), 1614(a), 1424b(a). Finally, a decision ruling for the government could invalidate the structure of the Court of Federal Claims. That court is "established under article I of the Constitution." 28 U.S.C. § 171(a). Its judges serve 15-year terms and are

removable by a majority vote *of the Federal Circuit* only "for incompetency, misconduct, neglect of duty, engaging in the practice of law, or physical or mental disability." *Id.* §§ 172(a), 176(a).

* * *

However this Court decides the first question presented with respect to the Federal Trade Commission and other policymaking agencies, the Court should not invalidate modest removal protections for the members of legislative courts, at least not without full merits briefing and argument. These adjudicatory bodies perform a genuine judicial function, have a longstanding pedigree, and pose none of the constitutional problems presented by policymaking independent agencies.

CONCLUSION

Whatever it rules with respect to the Federal Trade Commission and policymaking agencies, the Court should not invalidate the structure of the Merit Systems Protection Board and other legislative courts.

Respectfully submitted,

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