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 District of Columbia Circuit

## BRIEF OF *AMICUS CURIAE* AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS IN SUPPORT OF RESPONDENT

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## INTEREST OF *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a federation of 64 national and international labor organizations that represent 15 million working people.[1] Federal laws protect those employees' labor rights, along with the rights of unorganized employees. The three most significant agencies that administer those laws—the National Labor Relations Board (NLRB or Labor Board), Federal Labor Relations Authority (FLRA or Authority), and National Mediation Board (NMB or Mediation Board)—each have multimember boards whose members, by law, enjoy statutory protections against Presidential removal except for specified causes. Unions and their members depend on the independence these statutory protections provide to ensure that these multimember labor boards act as impartial factfinders, adjudicators, and mediators, as Congress—exercising its constitutional power to create and regulate offices—envisioned.[2]

## SUMMARY OF ARGUMENT

**I.** Regardless of how this Court might have resolved *Humphrey's Executor v. United States*, 295

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

[2] The AFL-CIO's interest is not merely theoretical. In the last year, the President has removed tenure-protected members from each agency. *See Trump v. Wilcox*, 145 S. Ct. 1415 (2025) (NLRB member); *Grundmann v. Trump*, 770 F. Supp.3d 166 (D.D.C 2025) (FLRA member); Frank N. Wilner, *Another POTUS 47 Firing—NMB This Time*, Railway Age (Oct. 16, 2025), https://www.railwayage.com/regulatory/another-potus-47-firing-nmb-this-time/ (NMB member).

U.S. 602 (1935), in the first instance, it should adhere to that precedent now as a matter of *stare decisis*.

Congress, employers, employees, and unions have all relied on *Humphrey's Executor*. When this Court handed down *Humphrey's Executor* in May 1935, the House and Senate were conferring over how to structure the NLRB. Expressly relying on *Humphrey's Executor*, Congress decided to make the NLRB an independent agency, not housed within the Department of Labor, and to protect its members during their staggered, fixed terms from removal without specified cause. Doing so, Congress believed, was important to assure covered employers and the public of the impartiality of the new labor tribunal whose members would perform quasi-judicial duties. A decade later, Congress amended the NLRA to separate the agency's prosecutorial functions (now, held exclusively by a removable General Counsel) from its adjudicatory ones (now, held exclusively by tenure-protected Labor Board members). These amendments redoubled Congress's reliance on *Humphrey's Executor*, which sustained Congress's authority to legislate tenure protections for officers who adjudicate.

Decades later, Congress enacted the Civil Service Reform Act of 1978, Title VII of which regulates federal-sector labor relations. Congress replaced the Presidentially controlled predecessor council with an independent FLRA, expressly modeled on the NLRB (as structured following the 1947 amendments) and, thus, reliant on *Humphrey's Executor*. Congress did so to ensure employees and unions have confidence in impartial adjudication before the Authority, rather than biased adjudication before an adjudicator interested in the dispute.

*Humphrey's Executor* was also well grounded in precedent. Although some have questioned *Humphrey's Executor*'s distinction between quasi-judicial and executive duties, when this Court issued *Humphrey's Executor* it had, by then, relied on that distinction for nearly a century across many, varied areas of law, and has continued to do so since 1935.

**II.** Unlike tenure protections for sole directors of enforcement agencies, such protections for officers serving on multimember bodies do not raise serious separation of powers concerns. Multimember structures limit the power any officer can wield alone. The President's ability to appoint Federal Trade Commission (FTC) commissioners and labor agency board members provides him significant influence over those agencies' direction. And the staggered terms held by these agencies' multimember officers, moreover, provides the President the practical ability to appoint a majority of each agency's multimember officials during a single Presidential term. Together, these structural features combine to allow each branch of government to exercise its constitutional powers, without encroaching on any other branch's domain.

**III.** If the Court nonetheless narrows or overrules *Humphrey's Executor*, it should avoid casting doubt on the tenure protections of officers who do not themselves wield potent enforcement powers but, instead, perform adjudicative, factfinding, or mediatory responsibilities in agencies where other, removable officers enforce statutory obligations (or, in the NMB's case, where the agency as a whole entirely lacks enforcement powers).

The removal-protected board members in the three main federal labor agencies have no authority to launch investigations, prosecute statutory violations, or impose civil (or other) penalties. They wield none of

the enforcement powers that supported Presidential removal authority in this Court's recent precedents.

Respecting Congress's institutional design in these areas promotes public confidence in impartial adjudication, avoids adjudication by interested adjudicators, and allows mediators to bring opposed parties to agreement in explosive situations. Congress has the constitutional authority to foster these interests where it avoids endowing tenure-protected officers with potent enforcement powers. The Court should maintain the agency- and officer-specific analysis in its recent cases and not paint with an overly broad brush.

## ARGUMENT

### I. The Court should adhere to *Humphrey's Executor*.

The AFL-CIO agrees with respondent's showing that the Court correctly decided *Humphrey's Executor* and federal courts have authority to reinstate unlawfully removed officers. Regardless, the Court should adhere to *Humphrey's Executor* as a matter of *stare decisis*. Because the history of labor regulation provides particular insights into two *stare decisis* factors—reliance and grounding in prior precedent—we focus on those factors here.

#### A. Congress, employers, employees, and their unions all rely on *Humphrey's Executor*.

"Adherence to precedent is a foundation stone of the rule of law" that "promotes evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the

actual and perceived integrity of the judicial process." *Kisor v. Wilkie*, 588 U.S. 558, 586–87 (2019) (cleaned up). Where, as here, a precedent undergirds significant aspects of the "corpus of administrative law," reliance on that precedent heavily favors *stare decisis*. *Id.* at 587. Indeed, "[*s*]*tare decisis* has added force when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision," and overruling it would "require an extensive legislative response." *Hilton v. S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991). *Accord United States v. Maine*, 420 U.S. 515, 527 (1975) (*stare decisis* has especial force where "a great deal of public and private business," as well as "major legislation enacted by Congress," rely on a challenged precedent).

That is precisely the case here. Congress relied directly on *Humphrey's Executor* in establishing the NLRB and FLRA and providing their members tenure protections. The NMB's independence relies indirectly, but still critically, on *Humphrey's Executor*. Now that those agencies exist, employees, unions, and employers have long relied on the independence of their multimember bodies for the impartial adjudication and mediation they perform.

**1. NLRB.** Congress enacted the National Labor Relations Act (NLRA), and established the NLRB, in 1935, just as its predecessor—the National Industrial Recovery Act (NIRA), Pub. L. No. 73–67, 48 Stat. 195 (1933)—was about to sunset by its own terms. *Id.*, § 2(c).

NIRA had created labor rights similar to those later protected by the NLRA. *Compare id.*, § 7(a) *with* 29 U.S.C. § 157. But NIRA's lack of a coherent administrative scheme made those paper rights a policy failure. Two problems bedeviled NIRA.

First, it lacked a centralized tribunal capable of uniformly interpreting § 7(a)'s substantive rights. Instead, NIRA left it to the President to establish agencies to carry out NIRA's purposes, NIRA, § 2, and President Roosevelt established the National Labor Board, which operated through regional boards without appellate review by the national board. S. Rep. No. 573, 74th Cong., 1st Sess. 4–6 (1935); H.R. Rep. No. 1147, 74th Cong., 1st Sess. 3–6 (1935); 79 Cong. Rec. 2371 (1935) (statement of Sen. Wagner). As a result, the meaning of § 7(a) differed across industries and regions.

Second, NIRA's National Labor Board depended on other agencies—the National Recovery Administration (NRA) and Department of Justice (DOJ)—to enforce its decisions. S. Rep. No. 1184, 73rd Cong., 2d Sess. 3–4 (1934); S. Rep. No. 573, 74th Cong., 1st Sess. 4–6 (1935); H.R. Rep. No. 1147, 74th Cong., 1st Sess. 3–6 (1935); 78 Cong. Rec. 3443–44 (1934) (statement of Sen. Wagner); 79 Cong. Rec. 2371 (1935) (statement of Sen. Wagner). This dependence led to ineffective enforcement as the NRA, which mediated labor disputes, was wary of holding employers legally accountable, and DOJ was loathe to bring criminal charges in labor disputes. Ineffective enforcement, in turn, led to significant disruption of interstate commerce by widespread, turbulent, and often violent strikes. S. Rep. No. 1184, 73rd Cong., 2d Sess. 10–11 (1934); 79 Cong. Rec. 2369, 2371 (1935) (statement of Sen. Wagner, recounting the "bloody and costly strikes" resulting from the "break-down of [NIRA's] section 7(a)"); S. Rep. No. 573, 74th Cong., 1st Sess. 1–3 (1935) (summarizing the numbers of strikes, jobs and working days lost, and billion-dollar cost to the economy from then-recent strikes); Michael L. Wachter, *The Striking Success of the National Labor*

*Relations Act, in* Research Handbook on the Economics of Labor and Employment Law 427 (Cynthia L. Estlund & Michael L. Wachter, eds.) (2012) (describing prevalence of strikes—often violent and disruptive—during this period).

Congress addressed both problems by creating a new administrative procedure that reinforced the NLRA's substantive rights. Following the FTC's procedures, Congress authorized the NLRB, after receipt of an unfair-labor-practice charge and issuance of an administrative complaint, to hold a hearing, find facts, render opinions regarding whether the charged violation occurred, and issue remedial orders, which the NLRB itself could seek to enforce in federal circuit court. S. Rep. No. 573, 74th Cong, 1st Sess. 14–15, 18 (1935); H.R. Rep. No. 1147, 74th Cong., 1st Sess. 4, 6–8 (1935); 79 Cong. Rec. 1313 (1935) (statement of Sen. Wagner). By establishing "a specific and specially constituted tribunal," with primary responsibility to interpret and apply the Act's obligations, Congress ensured that the NLRB would uniformly interpret the Act's labor rights, while avoiding the NLRB's dependence on other agencies for their enforcement. *Garner v. Teamsters*, 346 U.S. 485, 490 (1953); 29 U.S.C. § 160(a). Under the NLRA, the NLRB depends on courts alone to enforce its orders. 29 U.S.C. § 160(e).

Meanwhile, Congress recognized that, to succeed, such a centralized tribunal needed the confidence of regulated employers and the public in its "independence and impartiality" in rendering "quasi-judicial" decisions. H.R. Rep. No. 969, 74th Cong., 1st Sess. 9 (1935); H.R. Rep. No. 972, 74th Cong., 1st Sess. (1935).[3]

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[3] Congress avoided relying on federal courts, in the first instance, to enforce the NLRA's statutory rights because of the need to be perceived as an impartial adjudicator. For decades

In May 1935, the House and Senate debated whether locating the NLRB within the Department of Labor or making it a freestanding agency would best serve those ends. Either way, both chambers agreed the NLRB's independence and impartiality were essential to its mission. H.R. Rep. No. 969, 74th Cong., 1st Sess. 9 (1935); H.R. Rep. No. 972, 74th Cong., 1st Sess. (1935).

Just a week after the House issued its report framing the debate over where to locate the NLRB, this Court handed down *Humphrey's Executor* on May 27, 1935. The two chambers conferred in the following weeks and agreed to make the NLRB a freestanding agency whose members would be protected from removal except for "neglect of duty or malfeasance in office . . . ." H.R. Rep. No. 1147, 74th Cong., 1st Sess. 2 (1935). Congress added these statutory protections in light of "the recent *Humphreys* case," which it aimed to "embod[y] in this statute so as not to leave the matter open to further litigation." H.R. Rep. No. 1147, 74th Cong., 1st Sess. 14 (1935). Congress believed that this "quasi-judicial body," like the FTC, "would stand a better chance of favorable treatment" through independence. *Id.*

President Roosevelt concurred, emphasizing that the NLRB "will be an independent quasi-judicial body." 79 Cong. Reg. 10720 (1935) (statement of Pres. Roosevelt).

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preceding the passage of the NLRA, federal courts were openly hostile to labor unions, regularly enjoining employees' collective action as antitrust violations. *See generally* Felix Frankfurter & Nathan Green, THE LABOR INJUNCTION (1930). *See also, e.g., Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921). To end this practice, three years before the NLRA, Congress enacted the Norris-LaGuardia Act, which withdrew federal court jurisdiction to issue injunctions in labor disputes, subject to narrow, strict exceptions. 29 U.S.C. §§ 101–15.

Two years later, this Court sustained the NLRA's "procedural provisions," which it found did "not offend against the constitutional requirements governing the creation and action of administrative bodies." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 47 (1937).

A decade later, Congress amended the NLRA through the Labor–Management Relations Act of 1947. Pub. L. 80-101, 61 Stat. 136 (1947). A major goal of that legislation was to divide the original NLRB's "prosecutorial and adjudicatory functions between two entities." *NLRB v. UFCW, Local 23*, 484 U.S. 112, 117 & n. 5 (1987). *See also* H.R. Rep. No. 245, 80th Cong., 1st Sess. 6 (1947) (amended NLRB would no longer "act as prosecutor, judge, and jury" because its "sole function will be to decide cases"); *id.*, at 39–40 (explaining the proposed scheme for "separating the Board's prosecuting functions and its deciding functions, and assigning the former" elsewhere). It did so by creating a new office, the General Counsel, appointed by the President and confirmed by the Senate, to exercise "final authority" to investigate unfair-labor-practice charges, issue complaints, and prosecute them before the Board. *UFCW*, 484 U.S. at 118 (citing 29 U.S.C. § 153(d)). The General Counsel is subject to Presidential removal at will. *Exela Enter. Solutions, Inc. v. NLRB*, 32 F.4th 436, 441 (5th Cir. 2022). Congress intended the General Counsel to be accountable to the President. H.R. Rep. No. 510, 80th Cong., 1st Sess. 37 (1947).

Since 1947, the General Counsel has held the agency's entire investigatory and prosecutorial authority and exercises it independently of Board members, while Board members are limited "to the performance of quasi-judicial functions." H.R. Rep. No. 510, 80th Cong., 1st Sess. 36–38, 53 (1947)

(Conference Report discussing elimination of Board's review division, and insulating administrative judges' decisions from pre-publication review). *See* 29 U.S.C. §§ 153(d), 154(a). General Counsels routinely use their authority to set the agency's enforcement priorities,[4] and to depart from their predecessors' priorities. *See UNFI v. NLRB*, 138 F.4th 937, 945–52 (5th Cir. 2025) (sustaining General Counsel's authority, before hearing, to withdraw complaint issued by prior General Counsel), cert. pending No. 25-369.

By limiting tenure-protected NLRB members to adjudicative duties, while making the agency's chief investigator and prosecutor removable at will, the 1947 Congress redoubled its reliance on *Humphrey's Executor's* distinction between officers who exercise executive functions (investigating and prosecuting statutory violations) and those who perform quasi-judicial functions (adjudicating those claims).

Congress's chosen structure "has been strikingly successful in achieving its explicit legislative goals." Wachter, *supra*, at 457. By channeling industrial disputes through independent adjudicators, the NLRA helped replace an era of violent labor disputes with one marked overwhelmingly by industrial peace. *Id.*

Employees, unions, and employers all rely on Board members' independence. They have no private right of

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[4] *See, e.g.,* Rescission of Certain General Counsel Memoranda, Mem. GC 25-5 (Feb. 14, 2025) (priorities of Acting General Counsel appointed by President Trump); Rescission of Certain General Counsel Memoranda, Mem. GC 21-02 (Feb. 1, 2021) (priorities of Acting General Counsel appointed by President Biden); Mandatory Submissions to Advice, Mem. GC 21-04 (Aug. 12, 2021) (priorities of General Counsel appointed by President Biden); Mandatory Submissions to Advice, Mem. GC 18-02 (Dec. 1, 2017) (priorities of General Counsel appointed by President Trump).

action; only the General Counsel can investigate and prosecute NLRA violations. *See, e.g., Utility Workers v. Consol. Edison Co.*, 309 U.S. 261, 267–70 (1940); *Nat'l Licorice Co. v. NLRB*, 309 U.S. 350, 362 (1940); *Machinists Lodge No. 35 v. NLRB*, 311 U.S. 72, 80 (1940); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 193 (1941); *Va. Elec. & Power Co. v. NLRB*, 319 U.S. 533, 543 (1943). And only the NLRB has authority, in the first instance, to adjudicate those claims. 29 U.S.C. § 160(a); *Garner*, 346 U.S. at 490; *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244 (1959) ("courts are not primary tribunals to adjudicate" labor rights because it is "essential to the administration of the Act that these determinations be left in the first instance" to the NLRB).

To get an impartial adjudication, those regulated parties depend now, as Congress did in 1935 and again in 1947, on *Humphrey's Executor*'s continuing vitality.

**2. FLRA.** In 1962, President Kennedy issued an executive order establishing the first comprehensive federal-sector labor relations policy. Exec. Order No. 10988, § 14 (1962).[5] The order recognized federal employees' rights to join unions and collectively bargain. Exec. Order No. 10988, §§ 1–8. Under the order, the Civil Service Commission and DOL administered these rights. *Id.*, §§ 12–13. President Nixon later established a Federal Labor Relations

[5] His order did not create federal-sector unions, which had existed for some time. By 1962, roughly a third of federal employees belonged to employee organizations, but the government had no formal policy regulating the respective rights and responsibilities of labor and management. *A Policy for Employee-Management Cooperation in the Federal Service*, *Report of the President's Task Force on Employee-Management Relations in the Federal Service*, 1185–86 (Nov. 30, 1961).

Council to implement federal labor rights. Exec. Order No. 11491, §§ 4, 7–22 (1969). Council members were removable at the President's pleasure. *Id.*, § 4.

In the wake of President Nixon's misuse of governmental power to "harass and intimidate opponents," Robert Vaughn, *Civil Service Reform and the Rule of Law*, 8 Fed. Circuit B.J. 1, 2 (1999), in 1978, President Carter proposed civil service reform. 124 Cong. Rec. 5498–5500 (1978) (letter from Pres. Carter). That reform included improving labor-management relations by abolishing the Federal Labor Relations Council and replacing it with a newly established "Federal Labor Relations Authority"—with the aim of making "Executive Branch labor relations more comparable to those of private business, while recognizing the special requirements of the Federal government and the paramount public interest in the effective conduct of the public's business." *Id.* at 5500.

Congress then considered President Carter's proposal. The House was concerned that under the then-existing system, the "President, by Executive order, ha[d] complete authority to establish the labor-management program," leading to biased dispute resolution. H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 5 (1978). It sought to establish a "statutory basis for labor-management relations in the Federal service," and "for the first time enact into law the rights and obligations of the parties to this relationship . . . ." *Id.* at 41. To enforce this new regime, the House sought to establish the FLRA as an "independent establishment," including by providing its members removal protections to ensure their independence and thus guarantee impartial adjudication. *Id.* at 41–42. The FLRA's General Counsel, by contrast, would be "removable by the President at will." *Id.* at 42.

Independence was crucial because under the earlier regime, "the Federal labor management program [was] administered by the part-time, management-oriented Federal Labor Relations Council whose decisions and actions [were] not subject to review." *Id.* at 378 (supplemental views of Clay, et al.).

Congress modeled the FLRA squarely on the NLRB. S. Rep. No. 95-969, 95th Cong., 2nd Sess. 102 (1978). Congress thus relied on *Humphrey's Executor* in structuring the FLRA, just as it had with the NLRB.

Like in the private sector, federal employees, employers, and unions cannot privately enforce rights under Title VII; only the General Counsel, after charge and investigation, can issue complaints and prosecute violations before the Authority. 5 U.S.C. § 7118(a)(1)–(5); *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 95 (1983). The FLRA is the principal body Congress charged with adjudicating those claims. 5 U.S.C. § 7118(a)(7). To get a fair hearing before that body, the federal workforce and employers again rely on Authority members' independence secured by *Humphrey's Executor*.

**3. NMB.** Congress enacted the Railway Labor Act (RLA) in 1926, creating a Board of Mediation, and amended the statute in 1934, replacing that board with the NMB. RLA, Pub. L. 69-257, 44 Stat. 577 (1926); An Act to amend the RLA, Pub. L No. 73-422, 48 Stat. 1185 (1934).[6] Both the original and amended

[6] The RLA was the result of Congress's efforts, over a half century through seven prior statutes, to regulate railroad labor relations. *See Gen. Comm. of Adjustment of Bhd. of Locomotive Eng'rs v. MKT R. Co.*, 320 U.S. 323, 328–29 & n. 3 (1943). Earlier legislation used purely voluntary methods of dispute resolution, like negotiation, mediation, and voluntary arbitration. *Id.* Those efforts failed because they lacked judicially enforceable legal

RLA made the mediation board (first the Board of Mediation and later the NMB) an "independent agency" whose members the President could remove only for "inefficiency, neglect of duty, malfeasance in office, or ineligibility, but for no other cause." RLA, Pub. L. 69-257, § 4, First, 44 Stat. 577, 579 (1926); An Act to amend the RLA, Pub. L No. 73-422, § 4, First, 48 Stat. 1185, 1193–94 (1934).

This Court first encountered the RLA in *Clerks* (*supra*, note 5) in 1930, during the period between *Myers v. United States*, 272 U.S. 52 (1926), and *Humphrey's Executor*. In *Clerks*, the Court unanimously sustained the RLA against constitutional challenge, even as it noted that the statute established the Board of Mediation "as an independent agency in the executive branch of the government." *Clerks*, 281 U.S. at 565. While mediation board members' removal protections were not at issue in *Clerks*, not a single Justice wrote separately to query how those protections squared with *Myers*, handed down just four years earlier. The Court likely anticipated *Humphrey's Executor*'s holding that *Myers* applied only to statutes that protected, by requiring Senate consent for removal, the tenure of officers with clearly executive duties, not those that protected the tenure of officers with adjudicative or factfinding duties by providing fixed terms unless the officer engages in specified misconduct warranting earlier removal.

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obligations. *Id.* at 329. The RLA, especially since the 1934 amendments, relies on a mix of voluntary and legally binding dispute-resolution mechanisms (enforceable by federal courts) that safeguard employees' rights while making "their appropriate collective action an instrument of peace rather than of strife." *Tex. & New Orleans R. Co. v. Bhd. Ry. & S.S. Clerks*, 281 U.S. 548, 570 (1930).

Congress has amended the RLA ten times since *Humphrey's Executor*.[7] Not once did it revisit the office-holding protections Congress provided NMB members—now, for nearly a century.

Today, airlines,[8] railroads, their employees, and their unions all depend on the impartiality of the NMB's mediators, who assist in negotiating new labor contracts and determine when the parties have reached impasse, freeing employees to strike their employers and picket secondary employers. *See, e.g.*, *Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 377–93 (1969); *Burlington N. R.R. Co. v. BMWE*, 481 U.S. 429, 444–53 (1987). *Humphrey's Executor* protects that impartiality by ensuring the mediators can do their work without fear of removal.

### B. *Humphrey's Executor* is grounded in prior precedent.

Another important *stare decisis* factor is the extent to which the challenged precedent is itself grounded in prior precedent. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 219 (2022).

Some members of this Court have questioned whether *Humphrey's Executor*'s distinction between "quasi-judicial" and executive duties is mere handwaving, ungrounded in precedent. *See, e.g.*,

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[7] Pub. L. 74-487, 49 Stat. 1189 (1936); Pub. L. 81-914, 64 Stat. 1238 (1951); Pub. L. 88-542, 78 Stat. 748 (1964); Pub. L. 89-456, 80 Stat. 208 (1966); Pub. L. 91-234, 84 Stat. 199 (1970); Pub. L. 91-452, 84 Stat. 922 (1970); Pub. L. 97-35, 95 Stat. 357 (1981); Pub. L. 104-88, 109 Stat. 804 (1995); Pub. L. 104-264, 110 Stat. 3213 (1996); Pub. L. 112-095, 126 Stat. 146 (2012).

[8] Since 1936, the RLA has also covered airlines and their employees. 45 U.S.C. §§ 181–82.

*Bowsher v. Synar*, 478 U.S. 714, 761 n.3 (1986) (White, J., dissenting); *Seila Law LLC v. CFPB*, 591 U.S. 197, 246–48 (2020) (Thomas, J., concurring).

That concern is misplaced. This Court has consistently relied on the concept of "quasi-judicial" duties for nearly two centuries. Quasi-judicial duties, in this Court's jurisprudence, are those duties which Congress has, by law, entrusted to an officer with discretion to exercise judgment. *See, e.g.*, *Wilkes v. Dinsman*, 48 U.S. (7 How.) 89, 129 (1849). The Court has used the concept to refer to offices—usually within a specialized tribunal—Congress has created outside of Article III and directed by statute to find facts, apply a legal standard to those facts, and formulate remedies. *See, e.g.*, *ICC v. United States ex rel. Campbell*, 289 U.S. 385, 388 (1933).

As of 1935, when *Humphrey's Executor* issued, the Court had used the concept this way across a wide variety of institutional arrangements. *See, e.g.*, *Butte, Anaconda & Pac. Ry. Co. v. United States*, 290 U.S. 127, 132–36, 141 (1933) (ICC's certification that railway was entitled to money); *Ex parte Bakelite Corp.*, 279 U.S. 438, 458 (1929) (Court of Customs Appeals adjudication of unfair-trade-practice appeals); *Goldsmith v. U.S. Bd. of Tax Appeals*, 270 U.S. 117, 121 (1926) (Board of Tax Appeals appeals from Commissioner of Internal Revenue determinations of tax assessments); *Campbell v. Wadsworth*, 248 U.S. 169, 173–74 (1918) (Commission to the Five Civilized Tribes, which settled disputes over Indian tribal membership, land, and property); *Baer Bros. Mercantile Co. v. Denver & R. G. R. Co.*, 233 U.S. 479, 483 (1914) (ICC, insofar as it awarded reparation for injuries by private shipper); *Plested v. Abbey*, 228 U.S. 42, 52 (1913) (Land Department, which disposed of public

land); *Chin Bak Kan v. United States*, 186 U.S. 193, 200 (1902) (commissioner charged with determining facts on which citizenship depends); *United States ex rel. Bernardin v. Duell*, 172 U.S. 576, 581–89 (1899) (patent commissioners); *Earnshaw v. United States*, 146 U.S. 60, 67 (1892) (board of appraisers, valuing merchandise for import and export); *Clinkenbeard v. United States*, 88 U.S. 65 (1874) (board of assessors, who assessed and collected taxes); *Greely v. Thompson*, 51 U.S. (10 How.) 225, 240 (1850) (merchant appraiser). *See also Murray's Lessee v. Hoboken Land Co.*, 59 U.S. (18 How.) 272, 280 (1855) (describing auditing of public moneys and "all those administrative duties" whose performance "involves an inquiry into the existence of facts and the application to them of rules of law" as "judicial" in an "enlarged sense").[9]

Since *Humphrey's Executor*, the Court has continued to use the concept to refer to administrative adjudication. *See, e.g.*, *CFTC v. Schor*, 478 U.S. 833, 855 (1986) (administrative adjudication of Commodity Exchange Act claims and related state-law counterclaims); *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 248, 254–63 (2004) (Commission for European Communities, within the meaning of federal statute authorizing federal-court discovery for use in foreign tribunals).

When *Humphrey's Executor* distinguished officers with quasi judicial duties from others, it drew on a long line of precedent to hold that Congress could constitutionally enact laws providing tenure

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[9] The Court "explicitly 'disapproved'" any suggestion "supporting the President's inherent constitutional power to remove members of quasi-judicial bodies." *Wiener v. United States*, 357 U.S. 349, 352 (1958) (citing *Humphrey's Executor*, 295 U.S. at 628).

protections to officers who perform primarily adjudicative functions.

## II. The statutory tenure protections Congress provides members of multimember agencies, like the FTC and labor agencies, do not raise serious separation-of-powers concerns.

The FTC and main labor agencies are multimember bodies populated by officers appointed by the President and confirmed by the Senate to serve staggered terms. Those structural features distinguish these bodies from the single-headed agencies whose directors this Court recently found unconstitutionally insulated from removal. And they significantly reduce the separation-of-powers concerns of protecting the tenure of multimember officials through a fixed term absent disqualifying misconduct.

1. Unlike single-headed agencies, multimember agencies "divide and disperse power across multiple . . . board members[,]" which "reduces the risk of arbitrary decisionmaking and abuse of power, and helps protect individual liberty." *PHH Corp. v. CFPB*, 881 F.3d 75, 165 (D.C. Cir. 2018) (Kavanaugh, J., dissenting), *majority abrogated by Seila Law*, 591 U.S. 197. Singular directors of enforcement agencies, however, wield "significant governmental power in the hands of a single individual accountable to no one." *Seila Law*, 591 U.S. at 224. Where such officers are insulated from removal, they can act "unilaterally," without needing to persuade "colleagues," to "dictate and enforce policy for a vital segment of the economy affecting millions of Americans." *Id.* at 225 (emphasis omitted).

Multimember boards cannot act that way. As the FTC and labor agencies show, no single member of

these boards can adjudicate disputes alone. Indeed, multimember agencies typically have quorum requirements to ensure agency decisions involve more than one official. 17 C.F.R. § 2000.41 (FTC); 29 U.S.C. § 153(b) (NLRB); 45 U.S.C. § 154, First (NMB).[10] And power is disbursed even further at the NLRB and FLRA where the boards' adjudicative authority does not even begin until after the removable General Counsel decides to prosecute.

2. The President himself appoints the heads of the FTC and labor agencies. 15 U.S.C. § 41; 29 U.S.C. § 153(a); 5 U.S.C. § 7104(b) 45 U.S.C. § 154, First. Unlike some agencies recently considered by this Court, with FTC and labor board members, the President does not depend on appointments by other, officials who are themselves insulated from removal. *Cf.*, *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 484 (2010). The President therefore has far greater authority over the direction of the FTC and labor agencies than over agencies whose heads are appointed by other removal-insulated officials. The President can ensure these officials' priorities align with his own.

3. The President's appointment authority is particularly significant when coupled with staggered terms, which apply to the FTC and labor boards. 15 U.S.C. § 41; 29 U.S.C. § 153(a); 5 U.S.C § 7104(c); 45 U.S.C. § 154, First. Staggered terms ensure a President

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[10] The NMB can designate a single member to mediate a dispute, 45 U.S.C. § 154, Second, but mediation provides no power to resolve the bargaining dispute or bind the parties. And while the FLRA does not have a formal quorum requirement, as a three-member, bipartisan body, 5 U.S.C. § 7104(a), the Authority would ordinarily deadlock on any controversial decision without its full complement of three members. *Grundmann*, 770 F. Supp. 3d at 173.

will have the opportunity, by the end of his term, to appoint a majority of each agency's board members. This arrangement sharply contrasts with single-headed agencies because "some Presidents may not have any opportunity to shape its leadership and thereby influence its activities." *Seila Law*, 591 U.S. at 225. That practical obstacle to guaranteed Presidential appointments could mean "an unlucky President" could "find herself saddled with a holdover Director from a competing political party who is dead set against" the President's agenda. *Id*.

That situation cannot occur with multimember agencies, like the FTC and labor agencies. Staggered terms guarantee the President opportunities to shape these agencies' leadership. The President even has the authority to designate the chair of the FTC, NLRB, and the FLRA. 15 U.S.C. § 41; 29 U.S.C. § 153(a); 5 U.S.C. § 7104(b). This gives the sitting President a degree of control, through the chair, over "the day-to-day administration of the agency, agency personnel, and the agency's agenda." Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 Cornell L. Rev. 769, 796 (2013). *Cf. Seila Law*, 591 U.S. at 225 (single-director agency could not be influenced by Presidential selection of chair).

Taken together, the structures of the FTC and labor agencies mean that no single member can wield authority of any kind, let alone accomplish anything significant. The President has the authority to appoint a majority of each agency during a single, four-year Presidential term, and the President can designate the chair of three of the agencies at any time. These features grant the President significant authority to set each agency's direction. In these structures, tenure protections primarily insulate officials' deliberations—

freeing them from fear of retaliation for ruling for one party or another—without insulating the multimember body entirely from Presidential preferences.

These structural features thus significantly mitigate separation-of-powers concerns.

## III. If the Court narrows or overrules *Humphrey's Executor*, it should avoid casting doubt on the removal protections of officers with only adjudication, factfinding, or mediation authority but no enforcement powers.

The Court's recent removal cases have held that the President has authority to remove officers at will despite statutory removal protections when the officer alone exercises "potent enforcement powers" to launch investigations, prosecute statutory violations, and seek massive civil penalties. *See Seila Law*, 591 U.S. at 204, 206 (officer singlehandedly empowered to investigate, adjudicate, prosecute in federal court, and seek civil penalties up to $1 million per day); *Collins v. Yellen*, 594 U.S. 220, 230–31 (2021) (officer singlehandedly empowered to investigate, adjudicate, prosecute in federal court, and seek penalties of up to $2 million per day). That line of precedent calls for an agency-specific inquiry into the powers wielded by particular officers situated in specific institutional arrangements. If the Court overrules *Humphrey's Executor*, it should maintain this officer- and agency-specific approach.

### A. NLRB

1. The NLRB members' principal function is adjudication. Only after a charge is timely filed, the General Counsel issues a complaint, and typically an

administrative law judge holds a hearing, *UFCW*, 484 U.S. at 118–19, is the Board authorized to "state its findings of fact," render its "opinion" regarding whether the "person named in the complaint has engaged in or is engaging in [the charged] unfair labor practice," and, if so, order the charged party to "cease and desist" from the practice and to take "affirmative action including reinstatement with or without back pay, as will effectuate the policies" of the NLRA. 29 U.S.C. § 160(c). This Court has long found comparable statutory language to prescribe "quasi judicial action," *Chicago Junction Case*, 264 U.S. 258, 265 (1924), or, in modern terms, administrative adjudication.

Unlike the truly judicial action conducted by Article III judges, Board members' orders do not, of their own force, bind parties via enforceable judgments. *Jones & Laughlin*, 301 U.S. at 47 ("only when sustained by the court may the order be enforced"); *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 48 (1938) ("No power to enforce an order is conferred upon the Board."). "To secure enforcement, the Board must apply to a Circuit Court of Appeals for its affirmance." *Myers*, 303 U.S. at 48. *See* 29 U.S.C. §160(e).

Board members have no authority to launch investigations or to prosecute such violations on their own accord. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 138 (1975). And private parties can't bring their disputes directly to the Board. The Board can act only after the removable General Counsel issues a complaint on a timely charge. *Id.*[11] Even then, members do not act alone but only through a quorum. 29 U.S.C. § 153(b).

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[11] The General Counsel's decision to issue a complaint—or not—is not reviewable by the Board. *UFCW*, 484 U.S. at 119.

Where Board members have authority to act, they can order only equitable remedies designed to restore the status quo. 29 U.S.C. § 160(c); *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10 (1940); *Local 60, Carpenters v. NLRB*, 365 U.S. 651, 655 (1961); *NLRB v. Strong*, 393 U.S. 357, 359 (1969). They cannot impose penalties, unlike the officials in *Seila Law* and *Collins*.

2. Board members also answer questions of representation by certifying the results of secret-ballot elections held among a unit of employees appropriate for the purposes of collective bargaining. 29 U.S.C. § 159(b), (c). This certification "does not itself command action." *AFL v. NLRB*, 308 U.S. 401, 408 (1940). It merely announces a finding as to whether a majority of employees in the appropriate unit have, in fact, selected a particular union as their bargaining representative. S. Rep. No. 573, 74th Cong., 1st Sess. 5 (1935) (certification is "in reality merely a preliminary determination of fact"); H.R. Rep. No. 1147, 74th Cong., 1st Sess. 7 (1935) (same). When employers fail to bargain with certified representatives, on a timely charge and General Counsel complaint, the Board separately adjudicates whether the employer has violated its duty to bargain with its employees' representatives. *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 152–53 (1941); *Boire v. Greyhound Corp.*, 376 U.S. 473, 476–79, 481 (1964); *Magnesium Casting Co. v. NLRB*, 401 U.S. 137, 139 (1971).

As with other unfair-labor practices, when an employer refuses to bargain with the certified employee representative, Board members cannot launch investigations into failures to bargain, prosecute them on their own initiative, or impose punitive remedies. And the Board cannot act on private parties' initiative but depends on the General

Counsel finding sufficient merit in a charge to warrant prosecution before the Board.

3. Finally, the NLRA gives Board members rulemaking authority, but only to further the purposes of the Act. 29 U.S.C. § 156. The Board has primarily exercised that authority to promulgate "rules of practice before the Board and other procedural and housekeeping measures." Jeffrey S. Lubbers, *The Potential of Rulemaking by the NLRB*, 5 FIU L. Rev. 411, 413 n.19 (2010). Indeed, the only time the Board issued a rule requiring any regulated person to take any action, it was promptly vacated. *Chamber of Com. v. NLRB*, 721 F.3d 152 (4th Cir. 2013) (vacating rule requiring employers to post notice of NLRA rights). The few substantive rules the Board has issued merely guide its own decisionmaking. *See, e.g., Am. Hosp. Ass'n v. NLRB*, 499 U.S. 606 (1991) (affirming Board's authority to issue rule defining what groups of healthcare workers would constitute an appropriate bargaining unit); 85 Fed. Reg. 11235–36 (promulgating rule describing how Board will weigh evidence of control over employment conditions when adjudicating whether an employer jointly employs workers).

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Board members enjoy much more limited powers, and exercise very different duties, than do the single-headed agency directors considered in the Court's recent removal cases. And they exercise their limited powers within an agency where a Presidentially-removable General Counsel sets the enforcement agenda and acts as a gatekeeper in deciding which cases warrant adjudication before the Board. The Court should not create a categorical rule that treats Board members the same as the very different officers at issue in earlier cases.

### B. FLRA

Like NLRB members, FLRA members adjudicate unfair-labor-practice charges (once that agency's removable General Counsel issues a complaint on a timely charge),[12] certify the results of representation elections, and exercise limited rulemaking authority. 5 U.S.C. §§ 7105(2), 7118(a).

Like Labor Board members, Authority members can order reinstatement with limited backpay, 5 U.S.C. §§ 5596, 7118(a)(7), and other "remedial action," 5 U.S.C. § 7105(g)(3), but cannot impose penalties of any kind. 5 U.S.C. § 7105(g)(3); *Army v. FLRA*, 56 F.3d 273, 277–79 (D.C. Cir. 1995) (statute does not authorize money damages awards); *F.E. Warren AFB, Cheyenne, Wyo.*, 52 FLRA 149, 160 (1996) (Authority remedies may not be punitive). FLRA members' orders are not self-enforcing judgments; the Authority must petition courts to obtain enforceable orders. 5 U.S.C. § 7123(b); *U.S. Nuclear Regul. Comm'n v. FLRA*, 25 F.3d 229, 232 (4th Cir. 1994), as amended (June 21, 1994).

FLRA members thus wield far more limited enforcement powers than do sole directors of enforcement agencies. Two additional reasons underscore the need for an agency-specific analysis in respect to the FLRA.

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[12] Like the NLRB's General Counsel, the FLRA's General Counsel has sole authority, not reviewable by Authority members, to investigate and prosecute statutory violations. 5 U.S.C. §§ 7104(f)(1)–(2), 7118(a)(1); 5 C.F.R. § 2423.8; *Turgeon v. FLRA*, 677 F.2d 937, 938 n.4, 938–39 (D.C. Cir. 1982); *Rizzitelli v. FLRA*, 212 F.3d 710, 712 (2d Cir. 2000). Private parties may not bring their disputes to the FLRA without that agency's General Counsel deciding to do so.

First, because the President has an interest in the outcome of federal-sector labor disputes, it would raise constitutional concerns if he could handpick his preferred labor-relations adjudicators to affect the outcome of particular cases. Due process, after all, "requires a 'neutral and detached judge in the first instance'"—even when the legislature "delegates adjudicative functions" to someone other than an Article III judge. *Concrete Pipe & Prods. Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 617 (1993) (quoting *Ward v. Village of Monroeville*, 409 U.S. 57, 61–62 (1972)). *Accord In re Murchison*, 349 U.S. 133, 136 (1955) (due process requires a "fair trial in a fair tribunal," which precludes both "actual bias in the trial" and "even the probability of unfairness"); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 597, 598 n.7 (1953) (alien could not be deported solely on Attorney General's order because due process entitled person to an impartial hearing "at least before an executive or administrative tribunal").

Second, this Court has distinguished officers' exercise of prosecutorial power "inward" toward other governmental actors from the exercise of such power outward toward private parties. *Seila Law*, 591 U.S. at 219 (distinguishing *Morrison v. Olson*, 487 U.S. 654 (1988), which upheld statutory tenure protections for official who wielded core executive power but only with respect to other actors within the federal government). While outward exercises of power may be sufficiently significant to raise separation-of-powers concerns, this Court has explained that inward, proprietary uses of such power do not raise similar concerns. *Id.*[13]

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[13] This distinction between inward- and outward-facing exercises of state power runs throughout many areas of law. *See,*

When it comes to resolving labor disputes within the federal government itself, the resolution of that proprietary matter and due process's insistence on an impartial decisionmaker, along with Authority members' limited powers, all reinforce the need for an agency- and officer-specific analysis.

### C. NMB

Unlike the NLRB and FLRA, the NMB does not adjudicate claims that a party has violated the rights established by the RLA. Federal courts alone do that. *See Virginian Ry. Co. v. Sys. Fedn. No. 40*, 300 U.S. 515, 542–53 (1937) (federal courts adjudicate statutory bargaining obligation); *Detroit & Toledo Shore Line R. Co. v. United Transp. Union*, 396 U.S. 142, 148–53 (1969) (federal courts adjudicate statutory obligations to maintain status quo while negotiating successor agreements); *Chicago & N.W. Ry. Co. v. United Transp. Union*, 402 U.S. 570, 574–77 (1971) (same for obligation to make reasonable efforts to settle disputes and make agreements); *Trans World Airlines, Inc. v. Indep. Fedn. Flight Attendants*, 489 U.S. 426, 440–42 (1989) (federal courts, in some circumstances, adjudicate obligation to allow employees to organize without interference).

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*e.g.*, *Garcetti v. Ceballos*, 547 U.S. 410, 417–20 (2006) (speech restrictions); *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 592–93 (1997) (treatment of other states' citizens); *Bldg. & Constr. Trades Council of Metro. Dist. v. Associated Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218, 230 (1993) (labor law preemption); *Hawaii v. Standard Oil Co. Cal.*, 405 U.S. 251, 259–60 (1972) (antitrust standing); *Weber v. Bd. Harbor Comm'rs,* 85 (18 Wall.) 57, 67–68 (1873) (quiet title actions).

Instead, NMB members fulfill two main functions: certifying representatives and mediating disputes over new agreements.

This Court has long held that, like the NLRB's certification of representatives, the NMB's certification is a mere "finding of fact prerequisite to enforcement by the courts of the command of the statute." *Virginian Ry.*, 300 U.S. at 561–62. *Accord Switchmen's Union v. NMB*, 320 U.S. 297, 304 (1943); *MKT*, 320 U.S. at 330–31. Like the NLRB's, the NMB's certification function entails no exercise of enforcement powers whatsoever. It is a function whose success, this Court has recognized, depends entirely on NMB members being—and being seen as—"'neutral.'" *Switchmen's*, 320 U.S. at 303 (quoting H.R. Rep. 7650, 73d Cong., 2d Sess. 41 (1934)).

As for mediation, NMB members' duty is simply to assist the parties in settling their negotiations and, if unable to do so, to then "notify both parties in writing that its mediatory efforts have failed," 45 U.S.C. § 155, First, thereby releasing them to self-help after the statutory 30-day cooling off period. *Burlington Northern*, 481 U.S. at 444–45; *Shore Line*, 396 U.S. at 149 & n. 14. During mediation, NMB members use their best efforts to bring the parties to agreement amicably—a sensitive, non-coercive process largely immune from judicial review. *Teamsters v. NMB*, 888 F.2d 1428, 1435–73 (D.C. Cir. 1989).[14]

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[14] If NMB members were not independent, a President could remove NMB members who refused to release the union from mediation to strike as soon as mediation commenced, and another President could remove NMB members who refused to hold unions in mediation indefinitely. Neither approach would achieve the statutory aim of bringing parties to agreement.

The NMB's mediation and factfinding authorities are far milder than the potent enforcement powers singlehandedly wielded by the standalone directors considered in *Seila Law* and *Collins*.

* * *

Congress, with the assent of several Presidents, has chosen to protect the tenure of those officials who serve on several multimember labor agencies. Those labor officials wield a variety of powers—all short of the potent enforcement powers considered in this Court's recent removal cases. They do so in a variety of institutional settings that further constrain their powers, for example, by separating prosecutorial functions (held by separate, removable officials) from adjudicatory ones (held by tenure-protected officials) and by requiring judicial review before orders become enforceable. The political branches have made these choices for a variety of agency-specific reasons: to promote public confidence in impartial adjudication, to seek industry buy-in for labor regulation, to avoid biased adjudication of disputes internal to the government, and to enable fair-minded neutrals to perform the sensitive task of bringing opposed parties to agreement.

The Constitution expressly gives Congress the power to "make all laws which shall be necessary and proper for carrying into execution . . . all other [non-legislative] powers vested by this Constitution in the government of the United States, or in any department or officer thereof." Art. I, § 8, cl. 18. Even if the Court overturns *Humphrey's Executor*, any rule that it announces to replace that precedent should be sensitive to Congress's capacious power to regulate federal offices, with an eye to the particular powers they wield, the particular institutional environments

in which they wield them, and the particular purposes for which they wield them.

## CONCLUSION

For these reasons, the Court should affirm the judgment below. Should it nonetheless reverse, at a minimum, it should do so in a narrow opinion that does not treat all officials serving on independent, multimember agencies alike.

Respectfully submitted,

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