No. 25-369

In the Supreme Court of the United States

UNITED NATURAL FOODS, INC., DBA
UNITED NATURAL FOODS, INC., AND SUPERVALU, INC.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

D. JOHN SAUER
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

WILLIAM B. COWEN
Acting General Counsel
STEPHANIE CAHN
Acting Deputy General Counsel
PETER SUNG OHR
Associate General Counsel
RUTH E. BURDICK
Deputy Associate General Counsel
MEREDITH JASON
Assistant General Counsel
ERIC WEITZ
Attorney
National Labor Relations Board
Washington, D.C. 20570

QUESTIONS PRESENTED

1. Whether *Loper Bright Enterprises* v. *Raimondo*, 603 U.S. 369 (2024), permits a court to (a) accept an agency's reasonable construction of a statute without exhausting all relevant tools to determine the best interpretation of the statute or (b) give precedential weight to earlier decisions that interpreted statutory text by affording deference to an agency interpretation under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

2. Whether the President may remove the General Counsel of the National Labor Relations Board at will.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) is reported at 138 F.4th 937. A prior opinion of the court of appeals (Pet. App. 33a-76a) is reported at 66 F.4th 536. The order of the National Labor Relations Board (Pet. App. 77a-79a) is reported at 370 NLRB No. 127.

JURISDICTION

The judgment of the court of appeals was entered on May 28, 2025. On August 18, 2025, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including September 25, 2025, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The National Labor Relations Act (Act), ch. 372, 49 Stat. 449 (29 U.S.C. 151 *et seq.*), regulates labor

relations and forbids unfair labor practices by employers and unions. The Act establishes the National Labor Relations Board (Board or NLRB) to enforce its provisions. See 29 U.S.C. 153. The Board consists of five members appointed by the President with the advice and consent of the Senate for five-year terms. See 29 U.S.C. 153(a). The Act provides that the President may remove a member of the Board for "neglect of duty or malfeasance in office, but for no other cause." *Ibid.*

The General Counsel has "final authority, on behalf of the Board," over "the investigation of [unfair-labor-practice] charges," the "issuance of complaints under [Section 10 of the Act, 29 U.S.C.] 160," and "the prosecution of such complaints before the Board." 29 U.S.C. 153(d). The General Counsel is appointed by the President with the advice and consent of the Senate for a four-year term. *Ibid.* The Act does not expressly address the General Counsel's removal. See *ibid.*

b. A person who believes that an employer or union has committed an unfair labor practice may file a charge with the agency. 29 C.F.R. 101.2. A regional director, exercising authority delegated by the General Counsel, then investigates the charge. 29 C.F.R. 101.4-101.6. If "the charge appears to have merit," the regional director issues "a complaint and notice of hearing." 29 C.F.R. 101.8.

A party may file a pre-hearing motion for dismissal or for summary judgment with the Board, which must be filed "no later than 28 days prior to [a] scheduled hearing." 29 C.F.R. 102.24(a) and (b). The Board may either "deny the motion" or "issue a Notice to Show Cause why the motion may not be granted." 29 C.F.R. 102.24(b). "If a Notice to Show Cause is issued, the hearing, if scheduled, will normally be postponed indef-

initely"; an "opposing party may file a response," *ibid.*; and the Board will order the matter transferred to itself or a member of the Board for decision, see 29 C.F.R. 102.24(a), 102.50; see also Pet. App. 78a n.2. Other "pre-hearing motions" are assigned to an administrative law judge (ALJ) for decision. 29 C.F.R. 102.25.

An ALJ is separately designated to conduct the hearing itself. 29 C.F.R. 101.10. That ALJ is generally responsible for "rul[ing] on all motions after opening of the hearing," 29 C.F.R. 102.25, and, after "the conclusion of the hearing," must issue a recommended decision, 29 C.F.R. 101.11, which is subject to review by the Board, 29 C.F.R. 101.12.

The regional director, however, may withdraw the complaint "before the hearing." 29 C.F.R. 102.18. The regional director may exercise that authority, *inter alia*, "after issuance of [the] complaint but before opening of the hearing," 29 C.F.R. 101.9(c)(1), by approving an informal settlement providing for "the withdrawal of the complaint," 29 C.F.R. 101.9(b)(2). A charging party may appeal the regional director's withdrawal of the complaint to the General Counsel. 29 C.F.R. 102.19(a); see 29 C.F.R. 101.9(c)(3).

2. Petitioner is a nationwide food distributor that entered into collective-bargaining agreements with respondents International Brotherhood of Teamsters Locals 117 and 313 (Unions), which represented employees at petitioner's distribution facility in Tacoma, Washington. Gov't C.A. Br. 2, 4; see Pet. 7. After petitioner announced plans to close its Tacoma facility and laid off most of its employees there, the Unions filed a grievance alleging that the collective-bargaining agreements required petitioner to allow the employees to transfer to a different facility without a reduction in wages or

benefits. Gov't C.A. Br. 4; see Pet. 7. An arbitrator ruled in favor of the Unions. Pet. 8.

a. In October 2019, petitioner filed an unfair-labor-practice charge with the Board, alleging that the Unions' attempts to enforce the collective-bargaining agreement violated the Act. See Pet. App. 2a-3a. The Unions also filed an unfair-labor-practice charge against petitioner. *Id.* at 3a. A regional director, on behalf of then-General Counsel Peter B. Robb, issued a consolidated complaint alleging that both petitioner and the Unions had violated various provisions of the Act. *Ibid.*

In January 2021, the President removed General Counsel Robb and designated a new Acting General Counsel. Pet. App. 3a. The Unions asked the Acting General Counsel to reconsider the complaint. *Id.* at 3a-4a. Thereafter, petitioner moved the Board to sever the claim against petitioner and then to transfer the case against the Unions to the Board and grant summary judgment to petitioner. *Id.* at 4a.

Before the Board acted on petitioner's motion, the regional director issued an order severing the claim against petitioner (as petitioner had requested) and withdrawing the remaining complaint against the Unions. Pet. App. 4a. The regional director explained that, after reexamining the case, the Acting General Counsel had decided to exercise his prosecutorial discretion to dismiss the charges against the Unions. *Ibid.**

b. The Board denied petitioner's request for permission to appeal the regional director's withdrawal order. Pet. App. 77a-79a. The Board explained that the regional director may exercise enforcement "discretion to withdraw a complaint sua sponte at any time before the

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* Petitioner separately settled the severed unfair-labor-practice claim against it, which was then dismissed. Pet. App. 4a n.2.

hearing" and that such an exercise of enforcement discretion, though appealable to the General Counsel, is not subject to review by the Board. *Id.* at 78a. The Board rejected petitioner's argument that the service of petitioner's motion for summary judgment precluded the regional director from withdrawing the complaint, noting that the Board had not issued a notice to show cause or taken any other action on petitioner's motion before the complaint had been withdrawn. *Id.* at 78a-79a & n.2. Having determined that the withdrawal order was unreviewable, the Board declined to resolve petitioner's contention that the order was invalid because the President had lacked the power to remove General Counsel Robb. *Id.* at 79a.

3. The Fifth Circuit denied petitioner's petition for review, Pet. App. 33a-56a, before this Court had decided *Loper Bright Enterprises* v. *Raimondo*, 603 U.S. 369 (2024), and overruled the *Chevron* doctrine, *id.* at 377-378, 412.

The court of appeals first rejected petitioner's contention that the regional director lacked the power to withdraw the unfair-labor-practice complaint because petitioner had filed a motion for summary judgment. Pet. App. 43a-54a. The court concluded that the Board's categorization of the withdrawal here as prosecutorial was a "permissible interpretation of the [Act]" and thus entitled to *Chevron* deference. *Id.* at 48a-49a; see *id.* at 44a.

Relying on prior circuit precedent holding that the President could remove the General Counsel at will, the court of appeals also rejected petitioner's contention that the regional director lacked the authority to withdraw the complaint on the theory that the previous General Counsel had not been validly removed. Pet. App.

55a (citing *Exela Enter. Solutions, Inc.* v. *NLRB*, 32 F.4th 436 (5th Cir. 2022)).

Judge Oldham dissented in part. Pet. App. 57a-76a. He concluded that Section 10(b) of the Act, 29 U.S.C. 160(b), and Rule 41 of the Federal Rules of Civil Procedure precluded the regional director from unilaterally withdrawing the complaint after petitioner filed a motion for summary judgment. Pet. App. 59a-62a.

4. This Court subsequently overruled the *Chevron* doctrine in *Loper Bright*. The Court then granted certiorari in this case, vacated the court of appeals' judgment, and remanded for further consideration in light of *Loper Bright*. 144 S. Ct. 2708.

5. On remand, the Fifth Circuit again denied petitioner's petition for review. Pet. App. 1a-28a.

a. The court of appeals observed that although its initial opinion had applied *Chevron* deference, "we no longer accord such deference" in light of *Loper Bright* and instead must "'exercise [our] independent judgment in deciding whether [NLRB] has acted within its statutory authority.'" Pet. App. 13a-14a (quoting *Loper Bright*, 603 U.S. at 412) (brackets in original). "Exercising [its] independent judgment as directed by *Loper Bright*," the court concluded that the Board "correctly determined that [the] Acting General Counsel * * * had discretion to withdraw the complaint" which was not subject to review by the Board itself. *Id.* at 17a, 28a; see *id.* at 17a-27a.

The court of appeals observed that this Court's decision in *NLRB* v. *United Food & Commercial Workers Union*, 484 U.S. 112 (1987) (*Food Workers*), had applied "the 'traditional tools of statutory construction'" in concluding that the Act's "'words, structure, and history'" clearly "'differentiate between the General Counsel's

and the Board's final authority along a prosecutorial versus adjudicatory line.'" Pet. App. 18a (quoting *Food Workers*, 484 U.S. at 123-124). The court stated that "[t]he remaining question then is whether the specific agency decision at issue—here, the Acting General Counsel's dismissal of the complaint—falls on the prosecutorial side or the adjudicatory side of that line." *Id.* at 19a. And "[b]ecause *Loper Bright* eliminated *Chevron* deference," the court reiterated that its "task now is 'judicially to categorize [that] agency determination'" as prosecutorial or adjudicatory. *Id.* at 19a n.9. (citation omitted).

The court of appeals concluded that the General Counsel's withdrawal of the complaint was a prosecutorial function. Pet. App. 18a-21a. It explained that "the text [of Section 3(d) of the Act, 29 U.S.C. 153(d),] and [the] history of the [Act] uniformly confirm that the General Counsel holds authority over the issuance and prosecution of complaints," demonstrating that the General Counsel's "decision-making authority regarding which matters to prosecute * * * does not end with the issuance of a complaint." Pet. App. 18a-19a. The court also explained that, under the Act, "the Board discharges its separate adjudicatory responsibility by conducting an evidentiary hearing and, thereafter, issuing findings of fact and an appropriate order." *Id.* at 19a-20a (citing 29 U.S.C. 160(a)-(c)). The court reasoned that "[t]his statutory division of responsibilities supports the conclusion that the General Counsel retains the prosecutorial authority to dismiss a complaint prior to the scheduled hearing, when the Board is set to begin adjudication." *Id.* at 20a. The court emphasized that the Board "had taken no action prior to the Acting General Counsel's dismissal of the complaint." *Ibid.* And

the court determined that petitioner's contention that its summary-judgment motion converted "the General Counsel's prosecutorial function" into an "adjudicatory function" of the Board was inconsistent with "the statutory text's delineation of prosecutorial and adjudicatory authority." *Id.* at 20a-21a.

The court of appeals observed that although petitioner had "never argued in its initial briefing" that Section 160(b) required that the NLRB "follow Rule 41" of the Federal Rules of Civil Procedure, petitioner had on remand from this Court adopted that view from Judge Oldham's dissenting opinion. Pet. App. 21a-22a. The court of appeals rejected that position. *Id.* at 21a-25a. The court observed that Section 160(b) provides that Board proceedings "shall, *so far as practicable*, be conducted in accordance with the rules of evidence applicable in the district court[s] of the United States under the rules of civil procedure for the district courts." *Id.* at 21a (quoting 29 U.S.C. 160(b)). The court explained that Section 160(b) thus does not "incorporate[] the entire Federal Rules of Civil Procedure into Board proceedings"; that the Board's regulations adopted "some but not all of the requirements" of the federal rules, and that those regulations did not "adopt the requirements of Rule 41(a)(1)(A)(i)," which petitioner sought to invoke. *Id.* at 22a-23a. The court also determined that the application of Rule 41 as petitioner advocated would not be "'practicable' within the meaning of [Section] 160(b)" and would "undermine NLRB's ability to prosecute unfair labor practices charges." *Id.* at 24a.

Alternatively, the court of appeals held that even if Rule 41 applied generally, it would not apply in the circumstances here. Pet. App. 24a-25a. The court explained that Rule 41 provides that a plaintiff may dis-

miss an action until "'the *opposing party* serves . . . a motion for summary judgment,'" but that petitioner "is not an 'opposing party' to [the General Counsel] in [this] case" because petitioner "filed [the] charge" that forms the basis for the General Counsel's complaint. *Ibid.* (quoting Fed. R. Civ. P. 41(a)(1)(A)(i)).

b. The court of appeals affirmed its prior holding that petitioner's challenge to the removal of former General Counsel Robb was foreclosed by circuit precedent. Pet. App. 27a. That court stated that its "analysis of that issue remains unchanged" because the issue was "unaffected by *Loper Bright*." *Id.* at 12a.

c. Judge Oldham again dissented. Pet. App. 29a-32a. He reiterated his view that the Board's order was contrary to Section 160, *id.* at 29a, and stated that the "result" reached by the majority "conflict[s] with *Loper Bright*" and this Court's "GVR order," *id.* at 30a.

ARGUMENT

Certiorari is unwarranted. Petitioner contends (Pet. 12-19) that the court of appeals failed to properly apply *Loper Bright Enterprises* v. *Raimondo*, 603 U.S. 369 (2024), because the court purportedly "restat[ed] with minimal changes the analysis of its prior decision" that applied *Chevron* deference and "relied on *Chevron*-era holdings involving materially different agency actions," Pet. 12-13. The court of appeals, however, correctly applied *Loper Bright* by adopting what it concluded was the correct construction of the Act without affording *Chevron* deference to the Board's interpretation. That decision does not conflict with any decision of this Court or any other court of appeals.

Petitioner separately contends (Pet. 22-30) that the President's removal of General Counsel Robb in January 2021 was invalid because the Act precludes the

President from removing the General Counsel at will. This Court's recent decision in *Kennedy* v. *Braidwood Management, Inc.*, 606 U.S. 748 (2025), squarely forecloses that contention and confirms that where, as here, a statute lacks an "explicit[]" removal restriction, none exists. *Id.* at 770-771. The court of appeals' correct conclusion that the General Counsel is removable at will also does not conflict with any decision of this Court or of any other court of appeals.

I. THE *LOPER BRIGHT* QUESTION DOES NOT WARRANT REVIEW

The court of appeals correctly applied *Loper Bright* in determining that the Act authorizes the General Counsel to withdraw the complaint here as a matter of prosecutorial discretion after petitioner filed a prehearing summary-judgment motion with the Board but before the Board took any action on that motion. Petitioner contends (Pet. 1-3, 13-19) that the court ran afoul of *Loper Bright* by (a) adopting the Board's interpretation of the Act as "reasonable" without independently determining the "best interpretation" and (b) affording "precedential weight" to decisions that deferred to the Board's reading of the Act under the *Chevron* doctrine. Petitioner, however, misreads the court of appeals' decision, which concluded that the Board's position was correct (not just reasonable) and did not afford precedential weight to *Chevron*-based decisions.

a. Petitioner attempts (Pet. 13-15) to present the question whether *Loper Bright* "permits a court to * * * accept an agency's reasonable construction of a statute without exhausting all relevant tools to find the single, best meaning," Pet i. But there is no dispute that, under *Loper Bright*, courts "confront[ing] statutory ambiguities" must "use every tool at their disposal to determine

the best reading of the statute," which is why *Loper Bright* rejected the *Chevron* doctrine's requirement of judicial deference to an agency's reasonable interpretation of a statute. *Loper Bright*, 603 U.S. at 400, see *id.* at 412-413. "In the business of statutory interpretation, if [an interpretation] is not the best, it is not permissible." *Id.* at 400.

Since *Loper Bright*, the Fifth Circuit has resolved its cases accordingly. In this case and others, the Fifth Circuit has made clear that it "no longer accord[s]" "deference to [an agency's] 'reasonable interpretations of ambiguous [statutory] provisions'" and "must instead 'exercise [its] independent judgment'" to decide the best interpretation of the relevant statute. Pet. App. 13a (citations omitted); see, *e.g.*, *Texas* v. *United States Envtl. Prot. Agency*, 137 F.4th 353, 365 (5th Cir. 2025) (emphasizing that the court must "'exercise independent judgment in construing statutes administered by agencies,'" which "requires the use of '"all relevant interpretive tools" to determine the "best" reading of a statute'") (quoting *Loper Bright*, 603 U.S. at 400, 406, and Fifth Circuit precedent); *Mayfield* v. *United States Dep't of Labor*, 117 F.4th 611, 617 (5th Cir. 2024) (similar).

Petitioner acknowledges (Pet. 14-15) that the court of appeals both repeatedly stated that it had applied its "independent judgment" to interpret the statute, Pet. App. 13a-14a, 17a, and ultimately concluded that the government's interpretation was "correct[]," *id.* at 28a. Petitioner nevertheless asserts (Pet. 14) that the court of appeals "reverted" to "*Chevron*'s reasonableness standard." The court of appeals did no such thing. The court observed that, in light of this Court's earlier decision in *NLRB* v. *United Food & Commercial Workers*

Union, 484 U.S. 112 (1987), the government's position in this case was "at least a reasonable interpretation of the [Act]." Pet. App. 14a. But in the very next sentence, the court emphasized that "whereas previously [it] could defer to NLRB's reasonable interpretation," it must now "instead, following *Loper Bright*, 'exercise [its] independent judgment in deciding'" the statutory question. *Ibid.* (quoting *Loper Bright*, 603 U.S. at 412). And "[e]xercising [its] independent judgment as directed by *Loper Bright*," the court held that the Board's statutory interpretation was "correct[]." *Id.* at 17a, 28a.

To support its contention that the panel resurrected *Chevron* and disregarded *Loper Bright*, petitioner asserts that the court of appeals both failed expressly to "acknowledge its duty to ascertain the 'single, best meaning' of the statute" and "denied petitioner's request to use all relevant interpretive tools to identify where the General Counsel's unilateral authority ends." Pet. 14 (quoting *Loper Bright*, 603 U.S. at 400). The court, however, analyzed the "'words, structure, and history'" of the Act as "'traditional tools of statutory construction'" (which this Court had previously examined in *Food Workers*) and determined that the Act's "text and history"—as well as its structure dividing the "responsibilities [of the Board and General Counsel]"—supported the court's conclusion that "the General Counsel retains the prosecutorial authority to dismiss a complaint prior to the scheduled hearing, when the Board is set to begin adjudication." Pet. App. 18a-20a (quoting *Food Workers*, 484 U.S. at 123-124); see pp. 6-7, *supra*. Nothing suggests that the court viewed its interpretation as anything but the best interpretation of the Act. Notably, petitioner does not even develop any argument that the court's statutory interpretation is wrong.

Moreover, petitioner identifies (Pet. 14) only one "tool[]" that the court of appeals purportedly left in the interpretive toolbox: A consideration of "how summary judgment motions are normally understood in the civil sphere to cut off the ability to dismiss a complaint unilaterally." Petitioner is plainly incorrect. The court of appeals specifically analyzed whether Section 160(b)'s instruction that Board proceedings "shall so far as practicable, be conducted in accordance with * * * the rules of civil procedure for the district courts," 29 U.S.C. 160(b), required the Board to apply Rule 41's provisions governing dismissal of a complaint, concluding that it did not. Pet. App. 21a-24a; see p. 8, *supra*. Moreover, the court determined that even assuming *arguendo* that Rule 41's provision permitting a plaintiff to dismiss an action until "'the opposing party serves * * * a motion for summary judgment," Fed. R. Civ. P. 41(a)(1)(A)(i), "does apply" to Board proceedings, the rule would not prevent the General Counsel from dismissing the complaint here. Pet. App. 24a-25a. That is because Rule 41 limits a plaintiff's ability to dismiss its complaint only after "'the *opposing party*'" has served a motion for summary judgment and because petitioner—whose charge formed the basis for the General Counsel's complaint against the Unions—was "not an 'opposing party'" to the General Counsel. *Ibid.* (citation omitted); see pp. 8-9, *supra*. Petitioner's lack of argument that the court of appeals incorrectly construed Rule 41 in this context underscores that no further review is warranted.

b. Petitioner next attempts (Pet. 3, 15-19) to present the question whether *Loper Bright* "permits a court to * * * give precedential weight to decisions affording deference under *Chevron*" when evaluating a "different agency action," Pet. i. Petitioner contends (Pet. 3, 16-

17) that the court of appeals erroneously gave such weight to this Court's decision in *Food Workers*, *supra*, and to *International Brotherhood of Boilermakers* v. *NLRB*, 872 F.2d 331 (9th Cir. 1989) (*Boilermakers*). But again, the court did no such thing.

The court of appeals appropriately considered this Court's decision in *Food Workers* and followed the portion of that decision that was rooted in this Court's own interpretation of the Act, not in any deference to the Board. *Food Workers* reasoned that "[t]he words, structure, and history" of the Act "clearly reveal that Congress intended to differentiate between the General Counsel's and the Board's 'final authority' along a prosecutorial versus adjudicatory line." 484 U.S. at 124. Indeed, the Court found it "easy to discern" that "general congressional framework," adding that "[s]ome agency decisions can be said with certainty to fall on one side or the other" of the "prosecutorial and adjudicatory line." *Id.* at 125. "[D]ecisions whether to file a complaint," for instance, "are prosecutorial," whereas "the resolution of contested unfair labor practices is adjudicatory." *Ibid.* The court of appeals correctly followed that statutory analysis. Pet. App. 18a-19a.

After identifying those clear statutory guideposts, the Court in *Food Workers* observed that agency actions "between the[] extremes * * * might fairly be said to fall on either side" of the line. 484 U.S. at 125. Only for one such action did the Court view its task "under * * * *Chevron*" as "to decide whether the agency's regulatory placement is permissible" and, finding the agency position reasonable, concluded that, "until [a] hearing begins," "settlement or dismissal determinations are prosecutorial." *Id.* at 125-126.

The court of appeals here, however, did not treat that aspect of *Food Workers* as binding here. The court instead singled out this portion of *Food Workers* as "[r]elying on *Chevron*" to "'decide whether the agency's regulatory placement is permissible.'" Pet. App. 19a n.9 (citation omitted). And "[b]ecause *Loper Bright* eliminated *Chevron* deference," the court explained, it could not defer to the Board, but instead had to resolve whether "the Acting General Counsel's dismissal of the complaint" in this case "falls on the prosecutorial side or adjudicatory side of th[e] line" by "'judicially * * * categoriz[ing] [the relevant] agency determination.'" *Id.* at 19a & n.9 (citation omitted).

Petitioner's suggestion (Pet 15-16) that the court of appeals gave "precedential weight" to the Ninth Circuit's extra-circuit decision in *Boilermakers* is even further afield. After interpreting the statute for itself, Pet. App. 18a-25a, the court of appeals "observ[ed]" that the result it reached "is consistent with the only circuit case identified by the parties that addresses a similar question," *i.e.*, *Boilermakers*. *Id.* at 25a. Observing that the decision below created no circuit split is a far cry from giving "precedential weight" to an out-of-circuit decision that could itself never be deemed binding precedent in the Fifth Circuit.

Petitioner suggests (Pet. 19-22) that a division of authority exists over the "statutory *stare decisis*" effect of prior decisions that rest on *Chevron* deference. But petitioner has not shown any clear conflict of authority among other courts of appeals that might warrant review: According to petitioner, it relies on one decision that "sidestepped th[e] question," Pet. 19; another that declined to apply a prior *Chevron* decision because the agency's interpretation had "flip-flopped" repeatedly,

Pet. 20; and a third that adhered to circuit precedent upholding an agency interpretation, Pet. 20-21. Regardless, this case would not implicate any such conflict because the court of appeals in this case did not (as petitioner suggests) give precedential weight to the *Chevron*-based analysis in *Food Workers* or *Boilermakers*.

II. THE PRESIDENT'S REMOVAL OF THE GENERAL COUNSEL DOES NOT WARRANT REVIEW

Petitioner's separate contention (Pet. 22-30) that the Act's specification of a four-year term for the General Counsel, 29 U.S.C. 153(d), itself prohibits the President as a statutory matter from removing the General Counsel during that term is also incorrect and warrants no further review.

a. When a statute empowers the President to appoint an executive officer, the President may remove that officer at will unless the statute clearly provides otherwise. See *Collins* v. *Yellen*, 594 U.S. 220, 248 (2021); *Free Enter. Fund* v. *Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 509 (2010); *Shurtleff* v. *United States*, 189 U.S. 311, 316 (1903). That is because "the 'power of removal of executive officers' is 'incident to the power of appointment.'" *Braidwood*, 606 U.S. at 763 (quoting *Myers* v. *United States*, 272 U.S. 52, 119 (1926)). And as this Court recently confirmed in *Braidwood*, "Congress must use 'very clear and explicit language'" to "'take away' the power of at-will removal from an appointing officer." *Id.* at 771 (quoting *Shurtleff*, 189 U.S. at 315). Courts therefore may not "read a for-cause removal restriction into a statute" unless its text "explicitly provide[s] for one." *Id.* at 770; see *id.* at 771 ("'Mere inference or implication' does not suffice.") (citation and brackets omitted).

The Act empowers the President to appoint the General Counsel for a four-year term, but does not explicitly address the General Counsel's removal. See 29 U.S.C. 153(d). The Act accordingly does not disturb the President's "power of at-will removal." *Braidwood*, 606 U.S. at 771; see *Parsons* v. *United States*, 167 U.S. 324, 328-344 (1897) (concluding that a statutory provision setting a term of office for an executive officer simply prescribes the maximum duration of the officer's service and does not prevent removal before the end of that term).

b. Petitioner's contrary arguments lack merit. Petitioner errs in arguing (Pet. 22) that the Act precludes the President from removing the General Counsel at will because it provides that the General Counsel serves "for a term of four years." 29 U.S.C. 153(d). Both *Braidwood* and *Parsons* foreclose that contention.

Petitioner also errs in asserting (Pet. 22-26) that the decision below conflicts with this Court's decisions in *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935); *Wiener* v. *United States*, 357 U.S. 349 (1958); and *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803). In *Humphrey's Executor*, this Court applied a statute that *explicitly* made members of the Federal Trade Commission removable for "inefficiency, neglect of duty, or malfeasance in office." 295 U.S. at 619. No statute explicitly grants tenure protection to the General Counsel.

In *Wiener*, this Court determined that Congress had implicitly granted tenure protection to members of the War Claims Commission, a temporary agency created solely to perform a purely adjudicatory function as part of Congress's distribution of "funds derived from foreign sources" to "internees, prisoners of war, and religious organizations" who claimed injury or property

damage "at the hands of the enemy" in connection with World War II. 357 U.S. at 349-350, 355. But *Wiener* rested on the erroneous premise that the agency at issue was not "part of the Executive establishment." *Id.* at 353. Its logic does not extend to positions like the General Counsel, who clearly exercises executive power in enforcing the Act. Moreover, this Court has already effectively abrogated *Wiener* by holding that Congress must use "explicit language" to restrict at-will removal. *Braidwood*, 606 U.S. at 771.

Finally, in *Marbury*, this Court stated in dictum that justices of the peace in the District of Columbia were not removable at will, even though no statute expressly granted them such protection. See 5 U.S. (1 Cranch) at 139. But the Court has since disavowed that dictum and has explained that it may have concerned judicial rather than executive officers and may have rested on the special status of the District of Columbia. See *Myers*, 272 U.S. at 158.

c. The Fifth Circuit's decision, following its prior decision in *Exela Enterprise Solutions, Inc.* v. *NLRB*, 32 F.4th 436 (2022), which upheld the President's removal of General Counsel Robb, does not conflict with the decision of any other court of appeals. The other courts of appeals to have addressed the question presented here have concluded that the President may remove the General Counsel at will, and this Court has recently denied certiorari to review that conclusion. See *Rieth-Riley Constr. Co., Inc.* v. *NLRB*, 114 F.4th 519, 529-531 (6th Cir. 2024), cert. denied, 145 S. Ct. 1429 (2025) (No. 24-767); *NLRB* v. *Aakash, Inc.*, 58 F.4th 1099, 1103-1106 (9th Cir. 2023). The same course is warranted here.

Petitioner nevertheless argues (Pet. 26-30) that this Court should grant review to clarify whether members

of various multimember bodies lacking "explicit" statutory removal restrictions, Pet. 26, ranging from the Commodity Futures Trading Commission to the International Trade Commission, are removable at will or only for cause. Again, *Braidwood* resolved that question, and petitioner identifies no circuit conflict with respect to any of those agencies either.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

D. JOHN SAUER
Solicitor General

WILLIAM B. COWEN
Acting General Counsel
STEPHANIE CAHN
Acting Deputy General Counsel
PETER SUNG OHR
Associate General Counsel
RUTH E. BURDICK
Deputy Associate General Counsel
MEREDITH JASON
Assistant General Counsel
ERIC WEITZ
Attorney
National Labor Relations Board

NOVEMBER 2025