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, ET AL.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF FOR THE PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

The corporate disclosure statement in the petition for a writ of certiorari remains accurate.

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REPLY BRIEF FOR THE PETITIONERS

The government's brief in opposition fails to counter the two independent reasons to grant certiorari in this case. Both questions presented by the petition warrant the Court's review.

First, the Fifth Circuit majority failed to give proper effect to *Loper Bright Enterprises* v. *Raimondo*, 603 U.S. 369 (2024). This Court granted petitioner's prior petition for certiorari, vacated the Fifth Circuit's application of *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and remanded for reconsideration in light of *Loper Bright*. But the majority did not appreciate *Loper Bright*'s instruction to apply all relevant tools of interpretation to ascertain the single, best meaning of the statute at issue. The majority did not even recite that part of its obligation under *Loper Bright*. So, to defend the majority's opinion, the government tries to pretend the opinion said something more than what it said. But as Judge Oldham noted in his dissent, the majority's second opinion is nearly indistinguishable from its first. The majority changed a few words but otherwise left its earlier reasoning intact. Beyond Judge Oldham, judges in several other circuits have similarly objected to recent failures to apply *Loper Bright*'s principles to the full. The Court should grant certiorari to nip this concerning trend in the bud.

Second, the Fifth Circuit erroneously held that the mandatory language in the National Labor Relations Act (NLRA) that the General Counsel "*shall* be appointed * * * for a term of four years," 29 U.S.C. 153(d), permits the President to remove the General Counsel without cause before the end of that term.

The government does not dispute that the effect of such tenure-fixing provisions is an oft-recurring issue that affects many federal officers beyond the General Counsel of the National Labor Relations Board (NLRB). Nor does the government rebut petitioner's observation that at least some of this Court's decisions treat the fixing of a definite term of office as precluding without-cause removal before the end of that term. Rather, the government cites off-point cases that it says (at 18) "effectively abrogated" the Supreme Court precedent on which petitioner relies. But none of those cases involved mandatory term-of-years provisions nor did they purport to overrule the cases that contradict petitioner's contentions here. The decision below cannot be squared with existing precedent of this Court, and certiorari is warranted for this reason too.

A. The Court should review the Fifth Circuit's misapplication of *Loper Bright*.

Loper Bright is not yet eighteen months old. Yet court of appeals judges are already sounding the alarm that this Court's instructions in that landmark case are not being followed. As Judge Oldham described below, the Fifth Circuit majority reinstated its *Chevron*-based original decision with surface-level changes, "recycling the same reasons it provided two years ago to justify deferring to the Board." Pet. App. 29a (dissenting opinion).

The government tries to defend the majority's application of *Loper Bright*. It argues (at 10) that the majority "concluded that the Board's position was correct (not just reasonable)." True, the majority's new, post-*Loper* decision swapped the word "correctly" into

the sentence in the earlier, *Chevron*-based decision that said "permissibly." Compare Pet. App. 28a ("[T]he Board correctly determined that Acting General Counsel Ohr had discretion to withdraw the complaint[.]"), with *id.* at 55a-56a ("[T]he Board permissibly determined that Acting General Counsel Ohr had discretion to withdraw the complaint[.]"). Petitioner admitted that much. Pet. 1-2. But simply paying lip service to this Court's directions cannot be "what *Loper Bright* envisioned." Pet. App. 32a (Oldham, J., dissenting). Otherwise, *Chevron*-style deference could easily be resurrected under *Loper Bright* through careful wordsmithing. See *ibid.*

And truth be told, the majority here did not even recite the right words. Yes, it disavowed "deference" and assertedly applied "independent judgment." Pet. App. 13a (citations omitted); see Br. in Opp. 11. But the majority never acknowledged its duty to ascertain the "best reading" of the statute. *Loper Bright*, 603 U.S. at 400. Nor did it acknowledge that this duty requires finding the interpretation that "the court, after applying all relevant interpretive tools, concludes is best." *Ibid.* *Loper Bright* was emphatic in requiring courts to "use every tool at their disposal to determine the best reading of the statute." *Ibid.* "[S]tatutes, no matter how impenetrable, do—in fact, must—have a single, best meaning." *Ibid.* That is, after all, "the whole point of having written statutes." *Ibid.*

The government does not dispute that the majority failed to discuss its duty to find the single best interpretation of the National Labor Relations Act. On the contrary, the government is forced to append those words to what the Fifth Circuit actually wrote below

and to claim support from the Fifth Circuit's *other* decisions. The government states, for example, that "[i]n this case *and others*, the Fifth Circuit has made clear" that it must "'exercise [its] independent judgment' to decide the *best interpretation* of the relevant statute." Br. in Opp. 11 (emphases added) (quoting Pet. App. 13a). But "best interpretation" are the government's words—they appear nowhere in the decision below. Only the dissent mentioned *Loper Bright*'s instruction to find the "single, best meaning" of the statute. Pet. App. 30a.

Nor does the government persuasively counter petitioner's argument that the majority left an important interpretive tool unused. Contrary to the government's contention (at 12), the petition did explain why the majority's reading—that a summary judgment motion on the merits of the case somehow does not call for "adjudication"—is worse than petitioner's reading. See Pet. 9. The majority refused to give a motion for summary judgment before the Board the significance it is understood to have in normal civil litigation. Pet. App. 15a-17a. On top of that, petitioner highlighted the Federal Rule of Civil Procedure that precludes a complainant's unilateral dismissal of an action once such a motion is filed; but the majority chose to "place greater weight on the Supreme Court's authoritative holding in *UFCW* that 'it is a reasonable construction of the NLRA to find that until the hearing begins, settlement or dismissal determinations are prosecutorial.'" *Id.* at 17a (citing *NLRB* v. *United*

Food & Commercial Workers Union, 484 U.S. 112, 125-126 (1987) (*UFCW*)).[1]

The government does not dispute petitioner's point that *UFCW* did not involve a motion for summary judgment. Pet. 17. And to make matters worse, *UFCW* explicitly applied *Chevron* deference in adopting the "reasonable construction" on which the majority placed such weight. See *UFCW*, 484 U.S. at 125-26. The government's attempts to explain away the majority's departure from *Loper Bright* are not persuasive.

Judge Oldham is hardly alone in his concerns that some courts are not adhering to *Loper Bright*. Judge Bumatay similarly objected that a panel of his court "skipped the need to determine whether the agency's interpretation was the best reading of the statute." *Lopez* v. *Bondi*, 151 F.4th 1196, 1202 (9th Cir. 2025) (opinion dissenting from the denial of rehearing en banc). And Judge Rao recently coined the phrase

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[1] The government misses the forest for the trees in repeating the majority's contention that Federal Rule of Civil Procedure 41(a)(1)(A)(i) does not fit NLRB proceedings well enough to require its direct application under 29 U.S.C. 160(b). Br. in Opp. 13. The broader point, familiar from any basic civil procedure class, is that summary judgment motions call for adjudication by the adjudicator. Rule 41(a)(1)(A)(i) only further underscores the correctness of petitioner's position in this case by providing that summary judgment motions cut off the complainant's ability to unilaterally dismiss a case without the adjudicator's permission. In addition, the government's theory (at 13) that the NLRB and petitioner were not opposing parties is a "head-scratch[er]." Pet. App. 75a (Oldham, J., dissenting). The Acting General Counsel's decision to reverse position on petitioner's charges clearly made the NLRB petitioner's opponent. *Ibid.* That is why petitioner and the NLRB are on opposite sides here.

"*Loper Bright* avoidance" as shorthand for a panel's failure to "use every tool at [its] disposal to determine the best reading of the statute." *Am. Gas Ass'n* v. *U.S. Dep't of Energy*, 157 F.4th 476, 506 (D.C. Cir. 2025) (dissenting opinion) (quoting *Loper Bright*, 603 U.S. at 400). If these early datapoints are a "harbinger of things to come," Pet. App. 30a (Oldham, J., dissenting), *Loper Bright* is destined to receive less than its full effect among the courts of appeals.

The government does not address these concerns at all. And, contrary to *Loper Bright*, the Executive Branch may favor having *Chevron* "live[] on in perpetuity" to the extent possible. *Tennessee* v. *Becerra*, 131 F.4th 350, 374 (6th Cir. 2025) (Kethledge, J., dissenting in part and concurring in the judgment in part), petition for cert. pending, No. 25-162 (filed Aug. 7, 2025).

But *Loper Bright* obligates courts to exhaust all interpretive tools to find the "best reading" of every statute, meaning "the reading the court would have reached if no agency were involved." 603 U.S. at 400 (citation and quotation marks omitted). The Court should emphasize that obligation here. It should grant certiorari and correct the Fifth Circuit's failure to give *Loper Bright* its due in this case.

B. The Court should review the Fifth Circuit's removal-protection holding.

The government's arguments against reviewing the second question also fail scrutiny. The petition detailed (at 22-25) two lines of this Court's precedent that send conflicting signals on whether a statutory term-of-years provision phrased in mandatory language—such as, here "*shall* be appointed * * * for a

term of four years," 29 U.S.C. 153(d)—restrict the ability to remove the officer without cause before the end of the prescribed term. The government's responses are unconvincing.

First, the government cites several cases (at 16) for the proposition that clear and explicit language is needed to limit an appointing authority's power of removal. That general proposition does not answer the specific question here, which is whether a prescribed term-of-years is sufficiently clear and explicit. That is the question on which this Court's cases have vacillated.

The government tries to downplay this inconsistency. It contends (at 17), for example, that the statute in *Humphrey's Executor* v. *United States*, 295 U.S. 602, 619 (1935), "*explicitly* made members of the Federal Trade Commission" removable only for cause. But this contention ignores petitioner's point (at 23) that the statute's reference to the three types of good cause (inefficiency, neglect of duty, and malfeasance in office) was phrased in permissive terms: the statute authorized removal on those grounds but did not state that removal was permissible on those grounds alone. This Court therefore attached real significance to the statute's "fixing of a definite term" in addition to the mention of three types of cause. *Humphrey's Ex'r*, 295 U.S.at 623.

Moreover, the government cannot avoid the rationale of *Wiener* v. *United States*, 357 U.S. 349 (1958). There, the Court directly inferred removal protection from the fixed "tenure" of the commissioners and no other statutory language, because apart from the

fixed tenure "nothing was said in the Act about removal." *Id.* at 352; see Pet. 23-24. The government's only response is to dismiss this Court's holding in *Wiener* as "erroneous" and state it was "effectively abrogated" by this Court's decision last term in *Kennedy* v. *Braidwood Mgmt., Inc.*, 606 U.S. 748 (2025). Br. in Opp. 18 (citing *Braidwood, id.* at 771). *Braidwood* did nothing of the sort. The government's cited portion of that decision merely quotes language from cases that pre-dated *Wiener*, notably *Shurtleff* v. *United States*, 189 U.S. 311 (1903). Of course, decisions before *Wiener* cannot have abrogated *Wiener*. Nor did this Court do so in *Braidwood*, which did not even mention *Wiener*. Indeed, *Braidwood* is wholly off point for the question in this case. The claimed source of removal protection there, which the Court held insufficient, was the statute's use of the word "independent." 606 U.S. at 770. And the underlying statute in *Braidwood* did not prescribe a fixed term of years for the officers in question. See 42 U.S.C. 299b-4(a).[2] Nor did the statute in *Shurtleff*. See Pet. 23.

Finally, the government dismisses *Marbury* v. *Madison*, 5 U.S. 137, 157 (1803). Yet, the government does not claim that Chief Justice Marshall's reasoning there can be reconciled with the government's position here. It clearly cannot be. See Pet. 24. Rather, the

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[2] Petitioner's arguments here, like this Court's holding in *Wiener*, arise from a term-of years mandated *by statute*, which was not present in *Braidwood*. The background section of this Court's opinion in *Braidwood* notes that, currently, the inferior officers were appointed to "staggered 4-year terms" *by the Secretary of Health and Human Resources*. 606 U.S. at 755. Neither the Court's opinion nor the parties' briefs cite any statute that prescribed the length of the appointment.

government encourages the Court to ignore that reasoning as dicta ostensibly "disavowed" in *Myers* v. *United States*, 272 U.S. 52, 158 (1926). See Br. in Opp. 18. This dismissive response to *Marbury* proves too much. After all, in *Humphrey's Ex'r*, 295 U.S. at 626-627, much of *Myers*'s discussion was itself disavowed as dicta that went beyond the issue *Myers* actually decided. And as petitioner observed (at 25), the statutory question here was not before the Court in *Myers*.

Instead of denying review based on the government's expressed preference for one line of Supreme Court precedent which conflicts with another, this Court should provide a clear resolution and resolve these mixed messages as only this Court can. Indeed, in *Free Enterprise Fund* v. *PCAOB*, 561 U.S. 477, 487, 492-498 (2010), this Court declared a federal statute *unconstitutional* (which the government does not dispute) based on the "understanding" that commissioners of the Securities and Exchange Commission were protected from removal without cause, even though such removal protection could *only* have resulted from the statute's mandatory term-of-years provision. See Pet. 26-28 (citation omitted). This understanding was integral to the constitutional question in that case, and cannot be squared with the government's position in this one, which likewise involves a statutory term of years prescribed for the NLRB General Counsel.

Nor does the government deny that many additional statutes contain language like the General Counsel's term-of-years provision. Br. in Opp. 19; see Pet. 28-29. This question is unlikely to go away unless the Court answers it.

Finally, this Court has repeatedly indicated that lower courts must "leav[e] to this Court the prerogative of overruling its own decisions" (*Rodriguez de Quijas* v. *Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989)), and courts should not "conclude [that this Court's] more recent cases have, by implication, overruled an earlier precedent." *Agostini* v. *Felton*, 521 U.S. 203, 237 (1997). This is another reason the Court should reject the government's invitation to deny review on the basis that cases like *Wiener* were "erroneous" and "effectively abrogated" by a more recent decision that did not even discuss them. When, as here, this Court's prior cases cannot be fully harmonized, the Court should take up and resolve the issue itself. The Court should grant review here and answer whether a mandatory term-of-years provision suffices to prohibit mid-term removal without cause.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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