

No. 26-5

In the Supreme Court of the United States

GWYNNE A. WILCOX, PETITIONER

v.

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

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT*

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the statutory removal protections for members of the National Labor Relations Board violate the separation of powers.
2. If so, whether the appropriate remedy for the constitutional violation is to disregard the statutory removal protections.

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OPINIONS BELOW

The court of appeals' opinion (Pet. App. 1a-86a) is reported at 160 F.4th 1235. The en banc court of appeals' order denying a stay (Pet. App. 90a-109a) is available at 2025 WL 1021435. The court of appeals panel's order granting a stay pending appeal (Pet. App. 110a-216a) is available at 2025 WL 980278. The district court's memorandum opinion granting summary judgment (Pet. App. 220a-261a) is reported at 775 F. Supp. 3d 215.

JURISDICTION

The judgment of the court of appeals (Pet. App. 87a-89a) was entered on December 5, 2025. A petition for rehearing was denied on January 28, 2026 (Pet. App. 266a-267a). On April 23, 2026, the Chief Justice extended the time within which to file a petition for a writ

of certiorari to and including June 27, 2026, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress established the National Labor Relations Board (NLRB) in the National Labor Relations Act (Act), ch. 372, 49 Stat. 449 (29 U.S.C. 151 *et seq.*). The NLRB consists of five members appointed by the President with the advice and consent of the Senate. See 29 U.S.C. 153(a). Members serve five-year terms and, under the Act, “may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.” *Ibid.* The NLRB possesses broad power to execute the Act’s provisions, including by conducting adjudications concerning unfair labor practices and union representation, see 29 U.S.C. 153(d), 159, 160; issuing regulations to implement the Act, see 29 U.S.C. 156; and initiating enforcement proceedings in court, see 29 U.S.C. 160(e) and (j).

In 2025, President Trump removed petitioner as a member of the NLRB without specifying one of the statutorily enumerated causes for removal. See Pet. App. 228a-229a. Petitioner filed this suit in the United States District Court for the District of Columbia, claiming that her removal violated the Act and seeking judicial relief restoring her to office. *Id.* at 229a.

The district court granted summary judgment to petitioner. Pet. App. 220a-261a. Relying on *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935), the court rejected the government’s contention that the NLRB’s statutory tenure protection violates Article II of the Constitution. Pet. App. 231a-261a. This Court later stayed that judgment pending appeal and certiorari. 145 S. Ct. 1415.

2. The D.C. Circuit consolidated the government’s appeal in this case with its appeal in *Harris v. Bessent*, 775 F. Supp. 3d 164 (D.D.C. 2025), where a district court had upheld the statute granting tenure protection to members of the Merit Systems Protection Board (MSPB). Pet. App. 1a. The D.C. Circuit reversed in both cases. *Id.* at 1a-86a.

The court of appeals held that the NLRB’s and MSPB’s statutory removal protections violate Article II. Pet. App. 9a. The court explained that, as a “general rule,” Article II empowers the President to remove executive officers at will. *Id.* at 20a. It then concluded the NLRB and MSPB fall outside “any exception based on” *Humphrey’s Executor* because their executive powers “substantially exceed” those considered in that case. *Id.* at 21a, 25a.

Turning to the appropriate remedy, the court of appeals rejected proposals to “solve the constitutional problem by stripping away agency powers” from the NLRB and MSPB. Pet. App. 36a. It observed that, when this Court has held a removal restriction invalid, “it has typically responded by disregarding the removal restriction” rather than by “blue-pencil[ing]” agency powers. *Id.* at 36a-37a.

Judge Pan dissented. Pet. App. 39a-86a. In her view, *Humphrey’s Executor* “control[led] this case.” *Id.* at 54a. She also concluded that the “constitutional text, structure, and original intent” did not support the “abolition of independent agencies.” *Id.* at 77a-78a.

3. The court of appeals denied rehearing en banc. Pet. App. 266a-267a. Then, this Court overruled *Humphrey’s Executor* in *Trump v. Slaughter*, 146 S. Ct. 2283 (2026), and denied the petition for a writ of certiorari in *Harris v. Bessent*, No. 25-1110 (June 30, 2026).

ARGUMENT

Petitioner contends (Pet. 15-19) that the NLRB’s statutory removal protections comply with Article II and that, if they do not, the appropriate remedy is to invalidate some of the agency’s powers. This Court’s intervening decision in *Trump v. Slaughter*, 146 S. Ct. 2283 (2026), makes clear that petitioner’s contentions are meritless. The Court should thus deny the petition for a writ of certiorari, or, in the alternative, grant the petition and summarily affirm.

1. *Slaughter* held that “[s]ubordinates who exercise the President’s power are subject to removal by him” “at will.” 146 S. Ct. at 2297, 2310. Applying that rule, the Court determined that Congress could not restrict the President’s authority to remove members of the Federal Trade Commission (FTC). See *id.* at 2304-2305. The Court explained that the FTC “enforces and administers” federal statutes by conducting “in-house adjudications,” “promulgat[ing] substantive rules,” and “fil[ing] civil suits on behalf of the United States.” *Ibid.* Because the FTC “unquestionably exercises executive power,” the Court held that the President is “entitled to cut [its members’] tenure short.” *Id.* at 2305.

Slaughter controls this case. Like the FTC, the NLRB “enforces * * * statutes and rules through in-house adjudications.” *Slaughter*, 146 S. Ct. at 2305. For example, the NLRB’s General Counsel brings, and the NLRB adjudicates, actions claiming that employers or unions have engaged in unfair labor practices. See 29 U.S.C. 153(d), 160. In those proceedings, the NLRB may award “back pay,” “reinstatement,” and other remedies that “will effectuate the policies” of the Act. 29 U.S.C. 160(c). The NLRB also adjudicates proceedings relating to union representation. Among other things,

it identifies the appropriate bargaining unit, decides whether to hold elections to certify or decertify unions, and administers such elections. See 29 U.S.C. 159. The NLRB often uses agency adjudications as “vehicles for the formulation of agency policies” that govern the conduct of employers and unions. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974) (citation omitted). The power to conduct such adjudications “is executive.” *Slaughter*, 146 S. Ct. at 2305.

While that alone establishes that the President must be able to remove NLRB members at will, the NLRB also has “the power to promulgate substantive rules that carry the force of law.” *Slaughter*, 146 S. Ct. at 2304. The Act empowers the NLRB to make “rules and regulations” “to carry out [its] provisions,” 29 U.S.C. 156, and the NLRB has exercised that authority, for instance by promulgating rules governing collective bargaining in the health care industry, see 29 C.F.R. 103.30. The power to issue such rules “is executive through and through.” *Slaughter*, 146 S. Ct. at 2305.

If more were needed, the NLRB also possesses the power to file “civil suits on behalf of the United States in federal court.” *Slaughter*, 146 S. Ct. at 2305. The NLRB may authorize its General Counsel to file petitions in courts of appeals to enforce its orders, see 29 U.S.C. 160(e), as well as suits in district courts to enjoin unfair labor practices, see 29 U.S.C. 160(j). The “discretionary power to seek judicial relief” on behalf of the United States “lies at the very core of executive authority.” *Slaughter*, 146 S. Ct. at 2305 (citation omitted).

The NLRB thus exercises executive power—indeed, as this Court remarked when staying the district court’s judgment, “considerable executive power.” 145 S. Ct. 1415, 1416. The President therefore may remove its members at will. See *Slaughter*, 146 S. Ct. at 2305.

Petitioner contends (Pet. 17) that the NLRB is an “essentially adjudicatory” body and so falls outside the President’s at-will removal power. As an initial matter, that characterization is wrong. The NLRB’s executive powers go far beyond conducting adjudications. See p. 5, *supra*. More fundamentally, *Slaughter* explained that the power to “enforc[e] * * * statutes and rules through in-house adjudications” “is executive” and that exercises of that power “must therefore be controlled by the Chief Executive.” 146 S. Ct. at 2305. So even focusing solely on the agency’s adjudicatory powers, the NLRB’s members must be subject to at-will removal.

2. *Slaughter* also disposes of petitioner’s contention (Pet. 17) that the appropriate solution to the constitutional problem is to “sever” the NLRB’s non-adjudicatory powers. For one, *Slaughter* reaffirms that the appropriate remedy for a violation of the President’s removal power is “severing the invalid removal provision.” 146 S. Ct. at 2304 n.3; accord *Seila Law LLC v. CFPB*, 591 U.S. 197, 233-238 (2020) (opinion of Roberts, C.J.); *Free Enterprise Fund v. PCAOB*, 561 U.S. 477, 508 (2010). Courts generally lack the “editorial freedom” to “blue-pencil a sufficient number of [an agency’s] responsibilities” or to “restrict [its] enforcement powers.” *Free Enterprise Fund*, 561 U.S. at 509-510.

For another, severing the NLRB’s non-adjudicatory powers would not solve the constitutional problem. The power “to ‘unilaterally issue final decisions’ in ‘administrative adjudications’” is “executive,” *Slaughter*, 146 S. Ct. at 2305 (quoting *Seila Law*, 591 U.S. at 219), and “the Constitution ‘vests the whole executive power in the President’ alone,” *id.* at 2302 (quoting *Osborn v. Bank of United States*, 9 Wheat. 738, 819 (1824)).

3. Because petitioner’s claims clearly lack merit given *Slaughter*, this Court should deny the petition for

a writ of certiorari. The day after the Court issued its opinion in *Slaughter*, it denied the petition for a writ of certiorari in *Harris v. Bessent*, No. 25-1110 (June 30, 2026), the case concerning removal protections for the MSPB. The petitioner in *Harris* contended that Congress could grant tenure protection to MSPB members because the MSPB is a “purely adjudicatory bod[y],” Pet. at 18, *Harris, supra* (No. 25-1110), and that “the proper remedy” for any violation is to “invalidate” any “authority that tip[s] the balance,” *id.* at 29. If those contentions did not warrant this Court’s review, then petitioner’s materially similar contentions in this case do not do so either.

Alternatively, this Court should summarily affirm the decision below. See, e.g., *Moore v. Duckworth*, 443 U.S. 713, 715 (1979) (per curiam) (granting certiorari and summarily affirming). Summary disposition is appropriate, and plenary review is unnecessary, because *Slaughter* so clearly dictates the outcome of this case. At the same time, summary affirmance would address petitioner’s concern (Pet. 3, 19) that “leav[ing] [the NLRB’s] status under *Slaughter* unresolved would * * * depriv[e] the agency’s stakeholders, and the agency itself, of the certainty they urgently need,” and that “[o]nly this Court can provide” that certainty.

Contrary to petitioner’s suggestion (Pet. 3), there is no basis to grant certiorari, vacate the judgment, and remand the case (GVR). A GVR order is “potentially appropriate” only where “intervening developments” “reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration.” *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam). This case does not satisfy that criterion. Far from casting doubt on any aspect of the court of appeals’

decision, *Slaughter* reinforces it. At a minimum, “a GVR order is inappropriate” in this case because “the delay and further cost entailed in a remand are not justified by the potential benefits of further consideration.” *Id.* at 168.

CONCLUSION

This Court should deny the petition for a writ of certiorari. Alternatively, it should grant certiorari and summarily affirm the court of appeals’ judgment.

Respectfully submitted.

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