No. 23-558

In the Supreme Court of the United States

UNITED NATURAL FOODS, INC., DOING BUSINESS AS UNITED NATURAL FOODS INC. & SUPERVALU, INC.

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

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 briefs in opposition try to dodge several of petitioner's main arguments for granting certiorari.

To start, neither brief in opposition confronts the incongruity between the government's position in this case and the government's position in *SEC* v. *Jarkesy*, No. 22-859 (argued Nov. 29, 2023). As the petition explained (at 1-3, 19-20), the government asks this Court to assume in *Jarkesy* that Commissioners of the Securities and Exchange Commission (SEC) *cannot* be removed unless cause exists. Yet here, the government insists (at 6) that the "traditional default rule" is that presidentially appointed officers *can* be removed, without cause, if the relevant statute "does not expressly address the [officer's] removal." Under that supposed rule, the SEC Commissioners would be just as removable as the Board's General Counsel. And then the Securities Exchange Act would not actually provide a second layer of protection for an administrative law judge (ALJ) at the SEC. Yet the Court is set to decide a constitutional question in *Jarkesy*, at the government's request, based on a premise that is completely inconsistent with the government's position here. This incongruity highlights the lack of clarity in the law on the scope of statutory removal protections and underscores the need for this Court's definitive resolution of the first question presented in the petition.

The briefs in opposition also ignore this Court's decision in *Allentown Mack Sales & Service, Inc.* v. *NLRB*, 522 U.S. 359, 373-377 (1998). There, this Court explained the Board's obligation to actually follow the well-known standards that the Board chooses

to import from normal civil litigation. As applied here, *Allentown Mack* means that the Board's decision to adopt a summary judgment procedure from civil litigation precludes the Board from arbitrarily applying that well-known procedure in a way that starkly differs from its normal application. In normal litigation, filing a motion for a summary judgment calls for an act of adjudication, and an opponent no longer gets to drop the case unilaterally once such motion is filed. Here, the Board took the opposite approach without justification, but the panel majority upheld that approach under *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Petitioner and the government agree that it makes sense to hold this petition at least until the Court rules on *Chevron*'s continuing viability in *Loper Bright Enterprises* v. *Raimondo*, No. 22-451 (argued Jan. 17, 2024), and *Relentless, Inc.* v. *Department of Commerce*, No. 22-1219 (argued Jan. 17, 2024). But even with *Chevron*, the decision below cannot be squared with this Court's precedent.[1]

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[1] There is no merit in the union respondents' argument (at 15-22) that this case is moot because of a federal district court ruling in *United Natural Foods, Inc.* v. *International Brotherhood of Teamsters Local 117*, 618 F. Supp. 3d 1107 (W.D. Wash. 2022). The NLRB has primary jurisdiction over alleged unfair labor practices, which the union respondents admit (at 16), and NLRB decisions are controlling over any contrary district court determinations. See, *e.g.*, *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 245 (1959) ("When an activity is arguably subject to § 7 or § 8 of the [National Labor Relations Act], * * * the federal courts must defer to the exclusive competence of the [NLRB.]"). So this case is not moot.

A. The government's unexplained refusal to take a position on SEC Commissioners undermines its arguments about the NLRB's General Counsel.

The petition explained (at 13-16) that this Court has interpreted term-of-years provisions, in circumstances like those presented here, as precluding the removal of federal officers without cause. Rather than engage with petitioners' discussion case-by-case, the government gleans a broad "general" rule from this Court's precedent, arguing that "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." NLRB Br. in Opp. 6. The government further argues that because 29 U.S.C. 153(d) "does not expressly address the General Counsel's removal," this "traditional default rule" purportedly allows the President to remove the General Counsel at will. NLRB Br. in Opp. 6. In short, the government reads this Court's cases as establishing a clear-statement rule that is not satisfied by a term-of-years provision.[2]

If so, the government's approach contradicts its position in *Jarkesy*. There, the government admitted that "no statutory provision expressly addresses the circumstances under which SEC Commissioners may

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[2] Although the government traces this rule to *Shurtleff* v. *United States*, 189 U.S. 311 (1903), this Court later clarified that the discussion in *Shurtleff* was addressing an office for which "no term of office was fixed by the act," such that removal protection would have created "life tenure." *Humphrey's Ex'r*, 295 U.S. 602, 622 (1935). The *Shurtleff* rule thus has no relevance to the legal import of a term-of-years provision.

be removed." Pet. at 20, *SEC* v. *Jarkesy*, No. 22-859, 2023 WL 2478988 (Mar. 8, 2023). The government thus described 15 U.S.C. 78d(a) in precisely the same way that it describes 29 U.S.C. 153(d) here. Yet, in contrast to its position here, the government stated in *Jarkesy* that it was taking "no position" on the President's power to remove SEC Commissioners, and asked this Court to decide that case "with the understanding that the Commissioners are removable only for cause." *Ibid.* (citation and brackets omitted). That "understanding" in *Jarkesy* is incompatible with the government's position here. Both 29 U.S.C. 153(d) (for the NLRB General Counsel) and 15 U.S.C. 78d(a) (for SEC Commissioners) give the officers a fixed term of years, but neither statutory provision—according to the government's own descriptions—"expressly address[es]" removal. NLRB Br. in Opp. 2; *Jarkesy* Pet. 20. The government never explains why indistinguishable language triggers the supposed traditional default rule in one case but calls for a different outcome (or agnosticism) in the other.

Reading between the lines, the government's brief in opposition might suggest that the broader statutory context of 29 U.S.C. 153 differentiates the General Counsel from the SEC Commissioners. The government maintains (at 6-7) that contrasting language for NLRB's Members—authorizing removal "for neglect of duty or malfeasance in office, but for no other cause"—implies a lack of any removal protection for the NLRB's General Counsel. But the government never responds to petitioner's argument about this contrast—that 29 U.S.C. 153(a) eliminates inefficiency, the traditional third type of cause for removal, as a potential ground for removing Board Members.

Pet. 22-23. So, as petitioner explained (at 23), courts can give effect to the different language in Section 153(a) and 153(d) without concluding that Section 153(d) permits routine removal of the General Counsel without any cause at all. This contrast therefore cannot justify treating SEC Commissioners differently than the NLRB General Counsel.

Petitioner does not mean to suggest that the government is barred from taking inconsistent positions in two cases before this Court at the same time. And there may be good reasons to read materially indistinguishable language as providing different protections for different officers. Petitioner's point about the government's unexplained inconsistency is merely that the statutory question is clearly not as simple as the briefs in opposition suggest. Cases like *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. 137 (1803), have interpreted language comparable to the language in 15 U.S.C. 78d(a) and 29 U.S.C. 153(d) as providing tenure protections, without any recognition of the supposed "traditional default rule" that the government articulates here.[3]

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[3] Respondents ignore petitioner's point (at 13-14) that the removal protections recognized for the Federal Trade Commission in *Humphrey's Executor* are based on inference, not explicit, affirmative restrictions. The relevant language actually *authorizes* removal for cause. 15 U.S.C. 41 ("Any Commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office."). It was only through the negative implication of that authorization, particularly in light of the term of years and functions of the officers, that the Court inferred removal protection. *Humphrey's Ex'r*, 295 U.S. at 626 ("[T]o hold that * * * the members of the commission continue in office at the mere will

The Court should definitively resolve—once and for all—whether a provision granting an agency officer a fixed term of years is an express indication from Congress that the President may not remove the officer without cause. That question could be extremely important to the Court's resolution of the Article II issue in *Jarkesy*. Were the Court to accept the government's "traditional default rule," it would have no basis to treat 15 U.S.C. 78d(a) as creating removal protection for the SEC Commissioners and thus no reason to treat such removal protection as reason to strike down the *express* removal protection for the SEC ALJs. The government acknowledges principles of constitutional avoidance (at 7) but never addresses the petition's argument (at 19-20) that such principles favor resolving this broader statutory question before the constitutional question teed up in *Jarkesy*. And, as the petition explained (at 20-21), this statutory question is vitally important to many agencies, not just the NLRB and SEC.[4]

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of the President, might be to thwart, in large measure, the very ends which Congress sought to realize by definitely fixing the term of office."). And in *Wiener*, the Court inferred removal protections from total statutory silence: "nothing was said in the [War Claims] Act about removal." 357 U.S. at 352; Pet. 14-15.

[4] The respondent unions argue (at 9-11) that petitioner has failed to show that the General Counsel is tantamount to a Member of the Board. But petitioner has not made that argument. Its argument in the petition (at 21-22) and in much greater detail below is that having an independent General Counsel is vitally important to the independent functioning of the Board itself. Just as one example: the General Counsel has the power to decide whether to defend and enforce the Board's decisions before the federal courts. Politicization of the General Counsel's role would necessarily compromise the Board's independence.

B. Respondents fail to overcome the conflict between the decision below and decisions of this Court.

The petition explained (at 24-25) that the requirement of reasoned decisionmaking obligates the NLRB to give the normal effect to the "clearly understood legal standards" that the NLRB has chosen to embrace. *Allentown Mack*, 522 U.S. at 376. In *Allentown Mack*, the Board announced that it was applying a "[p]reponderance of the evidence" standard but, in effect, was demanding "clear and convincing evidence." *Ibid.* This Court held that the Board had to apply the preponderance standard unless it "forthrightly and explicitly" adopted, and justified, a more demanding standard. *Id.* at 378. The Board may not announce application of one standard without giving that standard its normal, well-understood effect. See *id.* at 376. Here, the normal effect of a summary judgment motion is a call for adjudication by the relevant adjudicator. And, under Rule 41(a)(1)(A)(i) of the Federal Rules of Civil Procedure, an opposing party may not unilaterally dismiss an action after a summary judgment motion is served. Because the Board chose to model its summary judgment procedures on the federal civil standard, *Allentown Mack*'s reasoning entails that filing a summary judgment motion in front of the Board should cut off the General Counsel's unilateral right of dismissal.

Without mentioning *Allentown Mack*, the government contends (at 10) that this argument is foreclosed by *NLRB* v. *United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 124 (1987) (*UFCW*). But the petition explained (at 25-26) why *UFCW* supports

petitioner. *UFCW* divides the General Counsel's authority and the Board's authority along a prosecution/adjudication line. Because petitioner's summary judgment motion put the merits of the entire case before the Board, it was at least as much on the adjudication side of the line as the commencement of the ALJ hearing that the Court discussed in *UFCW*. Respondents do not dispute petitioner's observations (at 7-8, 25) that a summary judgment motion seeks to establish the lack of need for a hearing and that no such motion was before this Court in *UFCW*. The *UFCW* Court's many references to a "hearing" simply dealt with the facts before it.

Respondents' argument that petitioner forfeited any reliance on Section 10(b), 29 U.S.C. 160(b), misses the mark. Petitioner's Fifth Circuit briefing indisputably preserved the argument that the Board needed to explain its deviation from the usual effect afforded to a summary judgment motion. See Pet. App. 30a, 41a n.2 (Oldham, J., dissenting). Section 10(b) merely provides another piece of support for that argument and therefore is properly before the Court. See Pet. 27 (citing *Kamen* v. *Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991)).

C. At a minimum, a hold is warranted.

The government agrees (at 13, 15) that it is appropriate to hold this petition until the Court resolves whether to retain *Chevron* deference in *Loper Bright Enterprises* v. *Raimondo*, No. 22-451 (argued Jan. 17, 2024), and *Relentless, Inc.* v. *Department of Commerce*, No. 22-1219 (argued Jan. 17, 2024). The majority decision explicitly relied on *Chevron*, and if this

Court overrules or narrows *Chevron* in its pending cases, vacatur and remand would be warranted.

Although the government disputes (at 13-14) petitioner's additional request for a hold pending a decision in *SEC* v. *Jarkesy*, No. 22-859 (argued Nov. 29, 2023), the government's reasoning is unpersuasive. If the Court addresses the statutory question in *Jarkesy* over whether SEC Commissioners have removal protection by virtue of their fixed term of years—and as petitioner has shown, constitutional avoidance supports the Court's doing so—a finding of removal protection would have direct implications here. The decisions finding no removal protection in 29 U.S.C. 153(d) have done so by rejecting arguments that a fixed term of years confers such protection. See *NLRB* v. *Aakash, Inc.*, 58 F.4th 1099, 1103-1104 (9th Cir. 2023); *Exela Enter. Sols., Inc.* v. *NLRB*, 32 F.4th 436, 442-443 (5th Cir. 2022). As the petition explained (at 16-19), the premise that the parties have asked the Court to uncritically accept in *Jarkesy* is incompatible with the reasoning in *Aakash* and *Exela*. The Court should therefore hold this petition for *Jarkesy*, too.

CONCLUSION

The Court should grant the petition for a writ of certiorari or, in the alternative, hold the petition pending the Court's decisions in *SEC* v. *Jarkesy*, No. 22-859, *Loper Bright Enterprises* v. *Raimondo*, No. 22-451, and *Relentless, Inc.* v. *Department of Commerce*, No. 22-1219, and then dispose of the petition as appropriate in light of those decisions.

Respectfully submitted,

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