No. 24A

In the Supreme Court of the United States

SCOTT BESSENT, SECRETARY OF THE TREASURY, ET AL., APPLICANTS

v.

HAMPTON DELLINGER

APPLICATION TO VACATE THE ORDER ISSUED BY THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA AND REQUEST FOR AN IMMEDIATE ADMINISTRATIVE STAY

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PARTIES TO THE PROCEEDING

Applicants (defendants-appellants below) are Scott Bessent, Secretary of the Treasury; Sergio Gor, Director of the White House Presidential Personnel Office; Karen Gorman, Principal Deputy Special Counsel; Karl Kammann, Chief Operating Officer, Office of Special Counsel; Donald J. Trump, President of the United States of America; and Russell T. Vought, Director of the Office of Management and Budget.

Respondent (plaintiff-appellee below) is Hampton Dellinger.

RELATED PROCEEDINGS

United States District Court (D.D.C.):

Dellinger v. *Bessent*, No. 25-cv-385 (Feb. 13, 2025)

United States Court of Appeals (D.C. Cir.):

Dellinger v. *Bessent*, No. 25-5025 (Feb. 12, 2025)

Dellinger v. *Bessent*, No. 25-5028 (Feb. 15, 2025)

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Pursuant to Rule 23 of the Rules of this Court and the All Writs Act, 28 U.S.C. 1651, the Acting Solicitor General—on behalf of applicants Scott Bessent, Secretary of the Treasury, et al.—respectfully files this application to vacate the temporary restraining order issued by the U.S. District Court for the District of Columbia (App., *infra*, 4a-30a). In addition, the Acting Solicitor General respectfully requests an immediate administrative stay of the district court's order pending the Court's consideration of this application.

This case involves an unprecedented assault on the separation of powers that warrants immediate relief. As this Court observed just last Term, "Congress cannot act on, and courts cannot examine, the President's actions on subjects within his 'conclusive and preclusive' constitutional authority"—including "the President's 'unrestricted power of removal' with respect to 'executive officers of the United States whom [the President] has appointed.'" *Trump* v. *United States*, 603 U.S. 593, 609 (2024) (citation omitted). As to such principal officers—"the most important of his

subordinates"—"[t]he President's 'management of the Executive Branch' requires him to have 'unrestricted power to remove' them 'in their most important duties.'" *Id.* at 621 (citation omitted). Enjoining the President and preventing him from exercising these powers thus inflicts the gravest of injuries on the Executive Branch and the separation of powers.

In the last five years, this Court has twice held that restrictions on the President's authority to remove principal officers who serve as the sole heads of executive agencies violate Article II—in those cases, the single heads of the Consumer Financial Protection Bureau and the Federal Housing Finance Agency. See *Seila Law LLC* v. *CFPB*, 591 U.S. 197 (2020); *Collins* v. *Yellen*, 594 U.S. 220 (2021). Whatever the agency, for the President to discharge his constitutional duty to supervise those who exercise executive power on his behalf, the President can "remove the head of an agency with a single top officer" at will. *Collins*, 594 U.S. at 256. On that basis, President Biden in 2021 fired the single head of the Social Security Administration without cause.

Thus, when President Trump, on February 7, 2025, removed respondent Hampton Dellinger as the single head of the Office of Special Counsel, he engaged in an uncontroversial exercise of his Article II powers. Since the Carter Administration, the Executive Branch has repeatedly expressed the view that tenure protections for the head of the Office of Special Counsel in 5 U.S.C. 1211(b) violate the Constitution. That is because this agency presents a particularly clear-cut case. "Investigative and prosecutorial decisionmaking is 'the special province of the Executive Branch,' and the Constitution vests the entirety of the executive power in the President." *Trump*, 603 U.S. at 620 (citation omitted). The Office of Special Counsel operates as a self-described "investigative and prosecutorial agency." https://osc.gov/Agency. The Of-

fice enforces federal laws governing federal employment and federal whistleblowers, issues subpoenas and rules, and can in some circumstances require other agency heads to "conduct an investigation and submit a written report." 5 U.S.C. 1212(a)(2), (b)(2), (e), (h)(1); 5 U.S.C. 1213(a), (c)(2); 5 U.S.C. 1216(a). The President's removal of respondent accordingly implicated two preclusive presidential powers: the power to remove and the power to control investigative and prosecutorial decisionmaking.

Yet, within hours of respondent filing suit and before the government had the opportunity to respond, the district court issued an 8:35 p.m. order on February 10, 2025, labeled an "administrative stay." That order restored respondent to the office from which the President had removed him, enjoined any efforts to impede his "access to the resources or materials of that office," and barred the President from installing "any other person as Special Counsel." On February 12, the district court then issued a 27-page opinion granting a "temporary restraining order" enjoining the President and other senior Executive Branch officials and restoring respondent to office. See App., *infra*, 4a-30a. The court set that TRO to last a full 14 days and specified that a hearing on an "appealable" order would not be held until February 26. *Id.* at 30a.

Until now, as far as we are aware, no court in American history has wielded an injunction to force the President to retain an agency head whom the President believes should not be entrusted with executive power and to prevent the President from relying on his preferred replacement. Yet the district court remarkably found no irreparable harm to the President if he is judicially barred from exercising exclusive and preclusive powers of the Presidency for at least 16 days, and perhaps for a month. See Federal Rule of Civil Procedure 65(b)(2) (authorizing courts to extend TROs so that they last up to 28 days). And, when the United States sought a stay or, alternatively, mandamus, the D.C. Circuit issued a 27-page decision denying relief

late on Saturday night, over Judge Katsas's dissent. App., *infra*, 33a-59a.

The United States now seeks this Court's intervention because these judicial rulings irreparably harm the Presidency by curtailing the President's ability to manage the Executive Branch in the earliest days of his Administration. As Judge Katsas observed, the TRO—which operates as an injunction against the President and requires him to reinstate an agency head whom he removed—is "virtually unheard of," *id.* at 54a, and "usurped a core Article II power of the President," *id.* at 53a. "[C]ourts may not enjoin the President regarding the performance of his official acts, regarding removal or otherwise." *Id.* at 54a. Even when courts do not enjoin the President himself, this Court has long held that a court "will not, by injunction, restrain an executive officer from making a wrongful removal of a subordinate appointee, nor restrain the appointment of another." *White* v. *Berry*, 171 U.S. 366, 377 (1898). Thus, challenges to removals have historically been litigated through suits for back pay, not reinstatement. *E.g.*, *Humphrey's Executor* v. *United States*, 295 U.S. 602, 618 (1935); *Myers* v. *United States*, 272 U.S. 52, 106 (1926).

This Court should not allow lower courts to seize executive power by dictating to the President how long he must continue employing an agency head against his will. "Where a lower court allegedly impinges on the President's core Article II powers, immediate appellate review should be generally available." App., *infra*, at 52a (Katsas, J., dissenting). Yet the D.C. Circuit majority described "[w]aiting two weeks" to exercise the executive power vested by Article II as "not so prejudicial." *Id.* at 41a. If that reasoning is allowed to stand, it is hard to conceive of any TRO that would trigger appellate review. Such a ruling risks further emboldening district courts to issue TROs enjoining the President from undertaking myriad other actions implicating executive powers.

That is no mere hypothetical. The district court's order exemplifies a broader, weeks-long trend in which plaintiffs challenging President Trump's initiatives have persuaded district courts to issue TROs that intrude upon a host of the President's Article II powers. A district court in New York issued an *ex parte* TRO requiring that access to certain Treasury Department data be limited to "civil servants" and be denied to "political appointees." *New York* v. *Trump*, No. 25-cv-1144, 2025 WL 435411, at *1 (S.D.N.Y. Feb. 8, 2025). A district court in the District of Columbia issued a worldwide TRO that prohibited the government from "suspending, pausing, or otherwise preventing the obligation or disbursement" of any "federal foreign assistance award that was in existence as of January 19, 2025." *AIDS Vaccine Advocacy Coalition* v. *United States Department of State*, No. 25-cv-402, 2025 WL 485324, at *7 (D.D.C. 2025). Many other district courts have issued universal TROs that sweep far beyond the parties to those cases and effectively enjoin the President's Executive Orders even before agencies have decided how to implement them.[1]

The United States thus respectfully requests that this Court vacate the district court's order and end the practice whereby courts seize Article II powers for two weeks, yet disclaim the availability of any appellate review in the meantime. This Court should not allow the judiciary to govern by temporary restraining order and supplant the political accountability the Constitution ordains.

STATEMENT

1. Congress established the Office of Special Counsel in the Civil Service

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[1] See, *e.g.*, *Doctors for America* v. *OPM*, No. 25-cv-322, 2025 WL 452707, at *10 (D.D.C. Feb. 11, 2025); D. Ct. Doc. 8, at 1, *Association of American Medical Colleges* v. *NIH*, No. 25-cv-10340 (D. Mass. Feb. 10, 2025); *Doe* v. *McHenry*, No. 25-cv-286, 2025 WL 388218, at *1 (D.D.C. Feb. 4, 2025); *National Council of Nonprofits* v. *OMB*, No. 25-cv-239, 2025 WL 3688852, at *14 (D.D.C. Feb. 3, 2025); *New York* v. *Trump*, No. 25-cv-39, 2025 WL 357368, at *5 (D.R.I. Jan. 31, 2025); *Washington* v. *Trump*, No. 25-cv-127, 2025 WL 272198, at *2 (W.D. Wash. Jan. 23, 2025).

Reform Act of 1978, Pub. L. No. 95-495, 92 Stat. 1111. The Office began as "the investigative and prosecutorial arm of the Merit Systems Protection Board" (MSPB). *U.S. Office of Special Counsel Annual Report for Fiscal Year 2023*, at 9 (*OSC Annual Report*).[2] Congress made the Office a freestanding agency in 1989. See Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16.

The Office of Special Counsel remains an "investigative and prosecutorial agency." https://osc.gov/Agency. The Office executes certain provisions of four federal statutes governing the federal workforce: the Civil Service Reform Act, which regulates the civil-service system; the Whistleblower Protection Act, which forbids reprisals against federal whistleblowers; the Hatch Act of 1939, Pub. L. No. 76-252, 53 Stat. 1147, which restricts political activity by federal employees; and the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), Pub. L. No. 103-353, 108 Stat. 3149, which forbids employment discrimination against service members and veterans. The Office promulgates regulations, receives and investigates allegations of wrongdoing, and brings disciplinary actions. 5 U.S.C. 1212-1216. When a "meritorious case cannot be resolved through negotiation with the agency involved," the Office's Investigation and Prosecution Division "may bring an enforcement action before the MSPB." *OSC Annual Report* 11. Similarly, its Hatch Act Unit "seek[s] disciplinary actions before the MSPB," *id.* at 12, and its USERRA Unit "enforces" USERRA, including by "litigating complaints referred from the U.S. Department of Labor," *ibid.* The Office can even, in certain circumstances, "require an agency head to conduct an investigation and submit a written report." 5 U.S.C. 1213(a), (c)(2).

In Fiscal Year 2023, the Office of Special Counsel had approximately 129 full-

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[2] https://osc.gov/Documents/Resources/Congressional_Matters/Annual_Reports_to_Congress/FY_2023_Annual_Report_to_Congress.pdf

time-equivalent employees and $31.9 million in appropriated funding. *OSC Annual Report* 13. The office received 4,611 new cases that year. *Ibid.* That is "below the average of 5,900 cases received in the five years immediately preceding the [COVID-19] pandemic"; the Office "expects a return to pre-pandemic caseload levels in future fiscal years." *Ibid.*

The Office of Special Counsel is "headed by the Special Counsel." 5 U.S.C. 1211(a). The Special Counsel is appointed by the President, with the advice and consent of the Senate, for a term of five years. See 5 U.S.C. 1211(b). The Special Counsel has the statutory authority to appoint subordinate agency personnel, see 5 U.S.C. 1212(d), and the constitutional authority to supervise those officials' exercise of executive power, see *United States* v. *Arthrex*, 594 U.S. 1, 13 (2021).

The Civil Service Reform Act provides that the Special Counsel "may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office." 5 U.S.C. 1211(b). Since 1978, however, the Executive Branch has repeatedly raised constitutional objections to that restriction on the President's removal power. See *Seila Law LLC* v. *CFPB*, 591 U.S. 197, 221 (2020). For instance, in the Carter Administration, the Department of Justice's Office of Legal Counsel explained that, "[b]ecause the Special Counsel [would] be performing largely executive functions, the Congress [could] not restrict the President's power to remove him." 2 Op. O.L.C. 120, 121 (1978). President Reagan pocket-vetoed a bill "on constitutional grounds" because the bill would have vested the Office of Special Counsel with additional powers. *Seila Law*, 591 U.S. at 221. And the government filed a brief in this Court in 2020 explaining that "the President must have the power to remove at will the single hea[d] of the * * * Office of Special Counsel." Gov't Reply & Response Br. at 26, *Collins* v. *Yellen*, 594 U.S. 220 (No. 19-422).

2. In March 2024, President Biden, with the advice and consent of the Senate, appointed respondent Hampton Dellinger to serve as Special Counsel. See Compl. ¶ 1. On Friday, February 7, 2025, the Director of the White House Presidential Personnel Office informed respondent that President Trump had removed him from office effective immediately. *Id.* ¶ 2.

On February 10, the following Monday, respondent brought this suit in the U.S. District Court for the District of Columbia to challenge his removal. App., *infra*, 9a. Respondent moved for a temporary restraining order reinstating him as Special Counsel. See D. Ct. Doc. 2. Before the government could respond to the motion, the court held a near-immediate hearing. Hours later, the court entered what it described as a "brief administrative stay" that would last until midnight on February 13. D. Ct. 2/10/25 Minute Order. That order restored respondent to the post of Special Counsel and enjoined applicants from "deny[ing] him access to the resources or materials of that office or recogniz[ing] the authority of any other person as Special Counsel." *Ibid.* The next day, the President designated Secretary of Veterans Affairs Doug Collins as Acting Special Counsel, but the court's order prevented the Executive Branch from giving effect to that designation. See D. Ct. Doc. 13, at 1 (Feb. 12, 2025).[3]

The government appealed the administrative stay to the D.C. Circuit, sought

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[3] The district court stated that the President's designation of an Acting Special Counsel "may have been contrary to" the court's order, App., *infra*, 29a n.8, but it was not. The order prohibited the government from "recogniz[ing] the authority of any other person as Special Counsel." D. Ct. 2/10/25 Minute Order. The Executive Branch complied with that order, recognizing that, as long as it remains in effect, only respondent may exercise "authority" "as Special Counsel." *Ibid.* The President's designation merely identifies the person who would take over the agency if and when the court's order is lifted, the removal takes effect, and the official who had been appointed with the Senate's advice and consent is therefore "unable to perform the functions and duties of the office." 5 U.S.C. 3345(a). The Executive Branch takes seriously its constitutional duty to comply with the orders of Article III courts, and it has fulfilled that duty here.

a writ of mandamus, and sought a stay of the district court's order. See App., *infra*, 1a. The court of appeals dismissed the appeal for lack of jurisdiction, denied mandamus, and dismissed the motion for a stay. See *id.* at 1a-2a. In a concurring opinion, Judge Katsas indicated that the district court's administrative stay was not immediately appealable, but he emphasized that he "express[ed] no view on the appealability or merits of any later order granting interim relief to [respondent]." *Id.* at 3a.

3. On February 12, the district court issued what it described as a temporary restraining order. See App., *infra*, 4a-30a. The order stated that, "until the [district court] rules on the entry of a preliminary injunction," respondent "shall continue to serve as the Special Counsel" and applicants "may not deny him access to the resources or materials of that office or recognize the authority of any other person as Special Counsel." *Id.* at 29a.

In issuing that order, the district court found that respondent was likely to succeed on the merits. See App., *infra*, 11a-19a. The court acknowledged this Court's decisions recognizing "the President's broad authority to remove officials * * * at will," but concluded that "the reasoning underlying the decisions * * * does not extend to the unique office and official involved in this case." *Id.* at 12a. The court stated that the Office of Special Counsel "has no authority over private actors," "does not have broad rulemaking authority or wield substantial enforcement authority," and does not affect "a broad swath of the American public or economy." *Id.* at 18a.

Turning to the equities, the district court accepted respondent's contention that he faced irreparable harm because he was deprived of his "statutory entitlement to serve as the lawful agency head" of the Office. App., *infra*, 19a (citation omitted). And it held that the balance of hardships and the public interest favored respondent because the government "proferr[ed] no circumstances that required the President's

hasty, unexplained action, or that would justify the immediate ejection of [respondent] while the legal issue is subject to calm and thorough deliberation." *Id.* at 28a.

3. The same day, the government again appealed to the D.C. Circuit and sought a writ of mandamus. See App., *infra*, 32a. The next day, the district court denied the government's motion for a stay pending appeal, emphasizing that its order was one of "limited duration." *Ibid.*; see *id.* at 31a-32a. The court later issued an order consolidating the upcoming preliminary-injunction hearing with its consideration of the merits. See D. Ct. 2/15/25 Minute Order.

In a lengthy opinion issued late at night on Saturday, February 15, the court of appeals once more dismissed the appeal for lack of jurisdiction, denied mandamus, and dismissed the motion for a stay. See App., *infra*, 33a-59a. The court reasoned that "[p]reliminary injunctions are appealable, but TROs generally are not." App., *infra*, 38a. The court acknowledged that a TRO may be treated as an injunction when it has "irreparable consequences that warrant immediate relief," but it determined that the harm to the Executive Branch here does not qualify. *Id.* at 38a-39a. The court observed that the district court plans to hold a preliminary-injunction hearing on February 26 and stated that "[w]aiting two weeks" to exercise "the Executive's Article II prerogatives" is "not so prejudicial to the government's interests that [the court] must rush to issue a ruling." *Id.* at 41a.

Judge Katsas dissented. See App., *infra*, 48a-59a. He first explained that, although TROs "generally are not" appealable, "*this* TRO—which orders the President to recognize the authority of an agency head whom he has formally removed—qualifies for immediate review." *Id.* at 50a. "When it comes to judicial review," he noted, "courts have long recognized the 'special status of the President.'" *Id.* at 51a (citation omitted). For instance, he cited opinions permitting immediate review of

orders compelling the President to produce subpoenaed documents, see *United States* v. *Nixon*, 418 U.S. 683 (1974); discovery orders against the Vice President, see *Cheney* v. *United States District Court*, 542 U.S. 367 (2007); and interlocutory orders rejecting as-applied Article II defenses to criminal prosecutions, see *Trump* v. *United States*, 603 U.S. 593, 654 (Barrett, J., concurring). App., *infra*, 51a-52a. Judge Katsas concluded that the district court's TRO "is immediately reviewable under these principles" because it "usurped a core Article II power of the President." *Id.* at 53a.

ARGUMENT

Under Rule 23 of the Rules of this Court and the All Writs Act, 28 U.S.C. 1651, the Court may vacate a temporary restraining order entered by a federal district court. See *Brewer* v. *Landrigan*, 562 U.S. 996 (2010); *Brunner* v. *Ohio Republican Party*, 555 U.S. 5, 6 (2008) (per curiam). To obtain such relief, an applicant must show a likelihood of success on the merits, a reasonable probability of obtaining certiorari, and a likelihood of irreparable harm. See *Hollingsworth* v. *Perry*, 558 U.S. 183, 190 (2010) (per curiam). In "close cases," "the Court will balance the equities and weigh the relative harms." *Ibid.* Those factors overwhelmingly support vacatur here.[4]

A. The Government Is Likely To Succeed On The Merits

An applicant's likelihood of success on the merits is the most important determinant for emergency relief—and here, that likelihood is very high. See *Ohio* v. *EPA*, 603 U.S. 279, 292 (2024); *Labrador* v. *Poe*, 144 S. Ct. 921, 929 (2024) (Ka-

[4] The government has applied to "vacate" rather than "stay" a district court's order when, given the order's duration, a stay pending review in this Court would effectively foreclose all applications of the order. See, *e.g.*, Appl. to Vacate Injunction at 15 n.3, *Garland* v. *Blackhawk Manufacturing Group, Inc.*, 144 S. Ct. 338 (No. 23A302). Regardless of the label, the practical effect of the relief is the same, and the traditional stay standard should govern. See *ibid.*; see also *Brunner*, 555 U.S. at 5-6 ("vaca[ting]" a TRO even though the applicant had asked the Court to "stay" it).

vanaugh, J., concurring). First, this Court's precedents are pellucid that Article II empowers the President to remove, at will, the single head of an agency, such as the Special Counsel. See App., *infra*, 55a-56a (Katsas, J., dissenting). Second, this Court's precedents are clear that district courts lack equitable power to reinstate principal officers. See *id.* at 54a-55a. By transgressing both of those lines of precedent, the district court erred in ways that threaten the separation of powers.

1. Article II empowers the President to remove the Special Counsel at will

a. Time and again, this Court has held that the President has unrestricted removal authority over principal officers such as respondent. Article II vests the "executive Power" in the President and directs him to "take Care that the Laws be faithfully executed." U.S. Const. Art. II, § 1, Cl. 1; *id.* § 3. The executive power "generally includes the ability to remove executive officials." *Seila Law LLC* v. *CFPB*, 591 U.S. 197, 213 (2020). Otherwise, "the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else." *Id.* at 204 (citation omitted). The President's power to remove those who exercise his executive power on his behalf "follows from the text of Article II," "was settled by the First Congress," and has been "confirmed" by this Court many times. *Ibid.*; *Collins* v. *Yellen*, 594 U.S. 220, 250-256 (2021); *Seila Law*, 591 U.S. at 213-232; *Free Enterprise Fund* v. *PCAOB*, 561 U.S. 477, 492-510 (2010); *Myers* v. *United States*, 272 U.S. 52, 108-176 (1926). Thus, "the President's power to remove 'executive officers of the United States whom he has appointed' may not be regulated by Congress or reviewed by the courts." *Trump* v. *United States*, 603 U.S. 593, 620 (2024) (citation omitted).

Applying that general rule, this Court has repeatedly held in recent years that the President must be able to remove at will sole agency heads. See *Seila Law*, 591

U.S. at 220-222. As a general matter, the Constitution "scrupulously avoids concentrating power in the hands of any single individual" save for the President, who is "the most democratic and politically accountable official in Government." *Id.* at 223-224. Single agency heads thus must be accountable to the President through at-will removal. There are only four single agency heads upon whom Congress has sought to confer tenure protection: the Directors of the Consumer Financial Protection Bureau (CFPB) and Federal Housing Finance Agency (FHFA), the Commissioner of Social Security, and the Special Counsel here. The former three are undisputedly subject to at-will removal under Article II. This Court's precedents foreclose any special exception for the Special Counsel.

Start with the Director of the CFPB. In *Seila Law*, this Court held that Congress had violated Article II by granting tenure protection to that sole agency head. See 591 U.S. at 220-232. "The CFPB's single-Director structure contravene[d] [Article II's] carefully calibrated system by vesting significant governmental power in the hands of a single individual accountable to no one." *Id.* at 224. "The Director [wa]s neither elected by the people nor meaningfully controlled (through the threat of removal) by someone who is." *Id.* at 224-225. "With no colleagues to persuade, and no boss or electorate looking over her shoulder," the Director could "*unilaterally*" "dictate and enforce policy." *Id.* at 225.

This Court then extended the at-will-removal rule to the single head of the FHFA. See *Collins*, 594 U.S. at 226-228. The Court found *Seila Law* "all but dispositive," given that the FHFA was "an agency led by a single Director." *Id.* at 250-251. The Court rejected the contention that the FHFA should be treated differently because it exercised less executive power than the CFPB. See *id.* at 251-253. The Court explained that "the nature and breadth of an agency's authority is not dispositive";

that "[t]he President's removal power serves vital purposes even when the officer subject to removal is not the head of one of the largest and most powerful agencies"; and that "[c]ourts are not well-suited to weigh the relative importance of the regulatory and enforcement authorities of disparate agencies." *Id.* at 251-253. In short, Article II empowers the President "to remove the head of an agency with a single top officer." *Id.* at 256; see *id.* at 273 (Kagan, J., concurring in part and concurring in the judgment) ("Any 'agency led by a single Director,' no matter how much executive power it wields, now becomes subject to the requirement of at-will removal."); *id.* at 292 (Sotomayor, J., concurring in part and dissenting in part) ("After *Seila Law*, the Court reasons, all that matters is that 'the FHFA (like the CFPB) is an agency led by a single Director.'") (brackets and citation omitted).

Then came the single head of the Social Security Administration. After *Collins*, President Biden removed the Commissioner of Social Security without cause, contrary to a statute purporting to make that agency head removable only for "neglect of duty or malfeasance in office." 42 U.S.C. 902(a)(3). In supporting that decision, the Office of Legal Counsel explained that "the best reading of *Collins* and *Seila Law*" "means that the President need not heed the Commissioner's statutory tenure protection." *Constitutionality of the Commissioner of Social Security's Tenure Protection*, 2021 WL 2981542, at *1, *7 (July 8, 2021). The only courts of appeals to have considered the question, the Ninth and Eleventh Circuits, have both held that statutory restrictions on the removal of that single agency head violate Article II. See *Rodriguez* v. *SSA*, 118 F.4th 1302, 1313-1314 (11th Cir. 2024); *Kaufmann* v. *Kijakazi*, 32 F.4th 843, 848-849 (9th Cir. 2022).

b. Crafting a special exception to at-will removal for the Special Counsel would plainly contravene those precedents. "[T]he Special Counsel undoubtedly

wields executive power." App., *infra*, 56a (Katsas, J., dissenting). The Office of Special Counsel is an "investigative and prosecutorial agency" responsible for executing "four federal laws": "the Civil Service Reform Act, the Whistleblower Protection Act, the Hatch Act, and the Uniformed Services Employment & Reemployment Rights Act." https://osc.gov/Agency. The Special Counsel may, among other things, "investigate allegations of prohibited personnel actions," 5 U.S.C. 1212(a)(2); "investigat[e]" "any allegation" concerning "political activity," "activities prohibited by any civil service law," or "prohibited discrimination," 5 U.S.C. 1216(a); and "issue subpoenas" and "order the taking of depositions," 5 U.S.C. 1212(b)(2). The Special Counsel also enforces multiple statutes by bringing disciplinary actions and litigating complaints before the MSPB, see 5 U.S.C. 1215; intervening in proceedings before the MSPB, 5 U.S.C. 1212(c)(1); and litigating in federal court as an amicus curiae, 5 U.S.C. 1212(h)(1). Further, the Special Counsel may appoint other officials in his agency, see 5 U.S.C. 1212(d)(1), and issue regulations, see 5 U.S.C. 1212(e).

Those are executive functions—and significant ones at that. At the outset, the Department of Justice recognized that "the Special Counsel's functions are executive in character"; that his powers "are directed at the enforcement of the laws"; and that his "role in investigating and prosecuting prohibited practices is much the same as that of a U.S. Attorney or other Federal prosecutors." 2 Op. O.L.C. 120, 120 (1978). The D.C. Circuit, for its part, has noted that the Special Counsel is a "prosecutor * * * of merit system abuses" who pursues administrative enforcement actions that are "comparable to criminal prosecutions designed to vindicate the public interest." *Frazier* v. *MSPB*, 672 F.2d 150, 163 (1982) (emphasis omitted); see *Barnhart* v. *Devine*, 771 F.2d 1515, 1520 (D.C. Cir. 1985) (describing the Special Counsel as the MSPB's "prosecutorial arm"). The MSPB, too, has described the Special Counsel's relation-

ship to it as like "that of a prosecuting attorney to a court." *Layser* v. *USDA*, 8 M.S.P.B. 72, 73 (1981). Even the Office of Special Counsel agrees that it is an "investigatory and prosecutorial agency," https://osc.gov/Agency, that is located "within the executive branch," *OSC Annual Report* 9. But "[i]nvestigative and prosecutorial decisionmaking is 'the special province of the Executive Branch,' and the Constitution vests the entirety of the executive power in the President." *Trump*, 603 U.S. at 620 (citation omitted).

Thus, the unconstitutionality of the Special Counsel's tenure protection has long been apparent. The Executive Branch has repeatedly objected to that protection since the enactment of the Civil Service Reform Act in 1978. During the Carter Administration, the Department of Justice explained that, "[b]ecause the Special Counsel [would] be performing largely executive functions, the Congress [could] not restrict the President's power to remove him." 2 Op. O.L.C. at 121; see *Seila Law*, 591 U.S. at 221 (noting that the statutory tenure provision elicited a "contemporaneous constitutional objection"). In 1988, President Reagan pocket-vetoed a bill that would have vested the Office of Special Counsel with additional powers, explaining that the legislation "raised serious constitutional concerns" by, among other things, "purport[ing] to insulate the Office from presidential supervision and to limit the power of the President to remove his subordinates from office." Public Papers of the Presidents, Ronald Reagan, Vol. II, Oct. 26, 1988, at 1391-1392 (1991); see *Seila Law*, 591 U.S. at 221 (noting that President Reagan vetoed the bill "on constitutional grounds"). And during the first Trump Administration, the Acting Solicitor General filed a brief in this Court explaining that, on the government's reading of this Court's precedents, "the President must have the power to remove at will the single heads of the Social Security Administration and Office of Special Counsel." Gov't Reply & Response Br.

at 26, *Collins* v. *Yellen*, 594 U.S. 220 (No. 19-422). This is not a close call.

c. The district court's and court of appeals' contrary reasoning defies this Court's precedents.

The district court stated that "the reasoning underlying" *Seila Law* and *Collins* "does not extend to the unique office and official involved in this case" and that the Office of Special Counsel "cannot be compared to those involved when [this] Court found the removal for cause requirement to be an unconstitutional intrusion on Presidential power." App., *infra*, 12a, 19a. That analysis gets things backwards. This Court's precedents recognize a "general rule" of "unrestricted removal," subject to only "two exceptions." *Seila Law*, 591 U.S. at 215. First, in *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935), the Court concluded that Congress could provide tenure protection to "a multimember body of experts, balanced along partisan lines, that performed legislative and judicial functions and was said not to exercise any executive power." *Seila Law*, 591 U.S. at 216.[5] Second, the Court has concluded that Congress could provide tenure protection to "certain *inferior* officers with narrowly defined duties." *Id.* at 204 (citing *Morrison* v. *Olson*, 487 U.S. 654 (1988), and *United States* v. *Perkins*, 116 U.S. 483 (1886)). Those two exceptions represent "the outermost constitutional limits of permissible congressional restrictions on the President's removal power." *Id.* at 218 (citation omitted).

The district court should not have asked whether the cases applying that gen-

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[5] *Humphrey's Executor* appears to have misapprehended the powers of "the New Deal-era [Federal Trade Commission]" and misclassified those powers as primarily legislative and judicial. *Seila Law*, 591 U.S. at 218. The exception recognized in *Humphrey's Executor* thus does not apply to multimember agencies that exercise substantial executive power, for instance by promulgating binding rules or issuing final decisions in administrative adjudications. The Department of Justice has informed Congress that, to the extent *Humphrey's Executor* requires otherwise, it intends to urge this Court to overrule that decision. See https://www.justice.gov/oip/media/1389526/dl?inline.

eral rule, such as *Seila Law* and *Collins*, should be "extend[ed]" to the Special Counsel. App., *infra*, 12a. Rather, it should have recognized the rule that the President can remove principal officers at will and noted that this Court has foreclosed any possible exception for single agency heads. That should have ended the matter, especially since the only exceptions this Court has recognized to the President's unrestricted removal power are inapt. As the district court acknowledged, the Special Counsel "is not entirely analogous" to the "FTC panel members" in *Humphrey's Executor* or the "Independent Counsel" in *Morrison*. App., *infra*, 15a-16a.

Regardless, "the reasoning underlying" this Court's recent precedents does "extend" to this case. App., *infra*, 12a. Those precedents establish a bright-line rule: "[T]he Constitution prohibits even 'modest restrictions' on the President's power to remove the head of an agency with a single top officer." *Collins*, 594 U.S. at 256 (citation omitted). The district court dismissed *Seila Law* and *Collins* on the ground that the Special Counsel exercises "limited jurisdiction," deals with "a small subset" of federal employees, "does not have broad rulemaking authority or wield substantial enforcement authority," and does not "affec[t] a broad swath of the American public or its economy." App., *infra*, 18a. But *Collins* refutes that rationale, making clear that the President's power to remove sole agency heads does not "hing[e] on" "the relative importance of the regulatory and enforcement authority of disparate agencies." 594 U.S. at 253. Article II contains no exception for "limited" exercises of executive power that purportedly affect only "small" groups of people. App., *infra*, 18a; cf. *Morrison*, 487 U.S. at 718 (Scalia, J., dissenting) ("The Ambassador to Luxembourg is not anything less than a principal [executive] officer, simply because Luxembourg is small."). And the Special Counsel executes multiple federal laws by investigating allegations of wrongdoing, issuing subpoenas, bringing disciplinary actions, and par-

ticipating in proceedings before the Merit Systems Protection Board.

The district court emphasized that, in *Seila Law* and *Collins*, this Court did "not comment on the constitutionality of any removal restriction" applicable to other agencies that were not before the Court. App., *infra*, 17a (quoting *Collins*, 594 U.S. at 256 n.21). "But a court, by announcing that its decision is confined to the facts before it, does not decide in advance that logic will not drive it further when new facts arise." *Haddock* v. *Haddock*, 201 U.S. 562, 631 (1906) (Holmes, J., dissenting). The results in *Seila Law* and *Collins* may have concerned only the CFPB and FHFA, but the Court's reasoning "is all but dispositive" for any other "agency led by a single Director." *Collins*, 594 U.S. at 250-251.

The district court also analogized the Special Counsel to the Independent Counsel, whose removal protections were sustained in *Morrison*. App., *infra*, 14a. But *Morrison* concerned an *inferior* officer appointed by a court of law, not a principal officer appointed by the President with the advice and consent of the Senate to lead a freestanding executive department. Because the Special Counsel "is not an inferior officer," "[t]he logic of *Morrison* * * * does not apply." *Seila Law*, 591 U.S. at 219.

The district court noted that Presidents Carter and George H.W. Bush signed the bills that give the Office of Special Counsel its current structure. See App., *infra*, 16a n.3. But "it is not uncommon for Presidents to approve legislation containing parts which are objectionable on constitutional grounds." *INS* v. *Chadha*, 462 U.S. 919, 942 n.13 (1983). The court added that, when concluding that President Biden could fire the Commissioner of Social Security at will, the Office of Legal Counsel "d[id] not reach the validity of tenure protections conferred on the Special Counsel." 2021 WL 2981542, at *6 n.3; see App., *infra*, 18a n.4. But that 2021 legal opinion simply stated that the Office of Special Counsel would "implicate different consider-

ations," mentioning its "primarily investigatory function and 'limited jurisdiction.'" 2021 WL 2981542, at *15 (citation omitted). That opinion did not mention the prosecutorial functions, much less disavow the Office of Legal Counsel's prior determination that, "[b]ecause the Special Counsel [would] be performing largely executive functions, the Congress [could] not restrict the President's power to remove him." 2 Op. O.L.C. at 122. Regardless, one President cannot "bind his successors by diminishing their powers." *Free Enterprise Fund*, 561 U.S. at 497.

The district court's decision reasons that the needs of "the unique office and official involved in this case," App., *infra*, 12a, justify recognizing a new exception to the "general rule" of "unrestricted removal," *Seila Law*, 591 U.S. at 215. But this Court has held the opposite many times, has cabined the "two exceptions to the President's unrestricted removal power" as representing "'the outermost constitutional limits of permissible congressional restrictions'" on removal, and has warned against extending those exceptions to "novel context[s]." *Id.* at 204, 218 (citation omitted).

The court of appeals, for its part, did not explore the merits, but did invoke the presumption of constitutionality that ordinarily attaches to a "duly enacted statute." App., *infra*, 41a (citing *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981)). This Court has never invoked that presumption in inter-branch disputes concerning the removal power, "*because it does not apply*." *Morrison*, 487 U.S. at 704 (Scalia, J., dissenting) (emphasis in original). "[W]here the issue pertains to the separation of powers, and the political branches are (as here) in disagreement, neither can be presumed correct." *Id.* at 704-705. "The reason is stated concisely by Madison: 'The several departments being perfectly co-ordinate by the terms of their common commission, neither of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers.'" *Id.* at 705 (citation omitted). "The

playing field for the present case, in other words, is a level one. As one of the interested and coordinate parties to the underlying dispute, Congress, no more than the President, is entitled to the benefit of the doubt." *Ibid.*

d. Worse, the district court's order does not just enjoin the President from firing the Special Counsel. The court's order strips the President of even the authority under the statute to remove the Special Counsel "for inefficiency, neglect of duty, or malfeasance in office." 5 U.S.C. 1211(b). The court's order provides categorically that, "until the Court rules on the entry of a preliminary injunction, plaintiff Hampton Dellinger shall continue to serve as the Special Counsel." App., *infra*, 29a.

The district court's order thus raises the prospect that, even if the President wished to fire respondent for cause (*i.e.*, in conformity with the statute's restriction on his removal power), he would first need to ask the court to modify its order. The court of appeals appeared to view that prospect with equanimity, stating that the order is not "irreversible" and that "the district court can * * * allow the President to remove Dellinger, if the court so chooses." App., *infra*, 44a. But that demand for judicial preclearance represents a further and unprecedented intrusion on presidential oversight of the Executive Branch. The First Congress rejected the idea that the President would need to obtain the Senate's advice and consent to remove a principal executive officer. See *Myers*, 272 U.S. at 115. No one imagined that the President might need to obtain the advice and consent of a federal district court.

2. Respondent has no right to reinstatement

Having contravened this Court's removal precedents, the district court defied the Court's remedial precedents as well. Courts cannot enjoin the President—yet the district court's order here requires undoing the President's removal decision and bars the President from appointing anyone else. This Court recognized long ago that a

court "has no jurisdiction of a bill to enjoin the President in the performance of his official duties." *Mississippi* v. *Johnson*, 4 Wall. 475, 501 (1867); see *Franklin* v. *Massachusetts*, 505 U.S. 788, 826-828 (1992) (Scalia, J., concurring in part and concurring in the judgment). "An injunction preventing the President from firing an agency head—and thus controlling how he performs his official duties—is virtually unheard of." App., *infra*, at 54a (Katsas, J., dissenting). Yet the district court's order necessarily enjoins the President from removing the Special Counsel or from appointing someone else by directing that "Dellinger shall continue to serve as the Special Counsel" and that "Defendants may not * * * recognize the authority of any other person as Special Counsel." App., *infra*, 29a. The court of appeals sought to avoid that problem by interpreting the term "Defendants" to refer only to "the other defendants" but not to the President himself. *Id.* at 42a n.1. But that is no answer. "[T]he TRO necessarily targets the President—the only official with the statutory and constitutional authority to appoint, remove, and supervise the Special Counsel." *Id.* at 53a n.2 (Katsas, J., dissenting).

Whether the order is expressly directed at the President or not, this Court's precedents reinforce that courts lack power to issue any order reinstating a principal executive officer removed by the President. When executive officers have challenged their removal by the President, they have traditionally sought back pay, not reinstatement. See *Wiener* v. *United States*, 357 U.S. 349, 350 (1958) (suit "for recovery of his salary"); *Humphrey's Executor*, 295 U.S. at 612 (suit "to recover a sum of money alleged to be due * * * for salary"); *Myers*, 272 U.S. at 106 (suit "for his salary from the date of removal"); *Shurtleff* v. *United States*, 189 U.S. 311, 318 (1903) (suit "for salary"); *Parsons* v. *United States*, 167 U.S. 324, 326 (1896) (suit "for salary and fees").

That rule reflects the obvious Article II problems that arise if a court attempts

to reinstate a principal executive officer removed by the President. The President cannot be compelled to retain the services of a principal officer whom he no longer believes should be entrusted with the exercise of executive power. Indeed, many members of the First Congress argued against requiring the Senate's advice and consent for removals precisely because of the risk that such a procedure would require the President to retain someone he had sought to remove. As Representative Benson observed: "If the Senate, upon its meeting, were to acquit the officer, and replace him in his station, the President would then have a man forced on him whom he considered as unfaithful." *Myers*, 272 U.S. at 124 (citation omitted). Representative Boudinot argued: "But suppose [the Senate] shall decide in favor of the officer, what a situation is the President then in, surrounded by officers with whom, by his situation, he is compelled to act, but in whom he can have no confidence." *Id.* at 131-132 (citation omitted). And Representative Sedwick asked rhetorically: "Shall a man under these circumstances be saddled upon the President, who has been appointed for no other purpose but to aid the President in performing certain duties? Shall he be continued, I ask again, against the will of the President?" *Id.* at 132 (citation omitted). The district court's extraordinary remedy raises just that problem.

The district court's remedy also exceeded the scope of its equitable powers. A federal court may grant only those equitable remedies that were "traditionally accorded by courts of equity." *Grupo Mexicano de Desarrollo S.A.* v. *Alliance Bond Fund, Inc.*, 527 U.S. 308, 319 (1999). Reinstatement of a public official is not such a remedy. "[I]t is * * * well settled that a court of equity has no jurisdiction over the appointment and removal of public officers." *In re Sawyer*, 124 U.S. 200, 212 (1888). Instead, "[t]he jurisdiction to determine the title to a public office belongs exclusively to the courts of law," for instance through suits for back pay. *Ibid.* Thus, "the power

of a court of equity to restrain by injunction the removal of a [public] officer has been denied in many well-considered cases." *Ibid.*; see, *e.g.*, *Baker* v. *Carr*, 369 U.S. 186, 231 (1962) (decisions that "held that federal equity power could not be exercised to enjoin a state proceeding to remove a public officer" or that "withheld federal equity from staying removal of a *federal* officer" reflect "a traditional limit upon equity jurisdiction"); *Walton* v. *House of Representatives*, 265 U.S. 487, 490 (1924) ("A court of equity has no jurisdiction over the appointment and removal of public officers."); *Harkrader* v. *Wadley*, 172 U.S. 148, 165 (1898) ("[T]o sustain a bill in equity to restrain * * * the removal of public officers, is to invade the domain of the courts of common law, or of the executive and administrative department of the government."); *White* v. *Berry*, 171 U.S. 366, 377 (1898) ("[A] court of equity will not, by injunction, restrain an executive officer from making a wrongful removal of a subordinate appointee, nor restrain the appointment of another.").

To be sure, Congress has sometimes departed from that equitable tradition and has empowered courts to award reinstatement. For instance, Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(g), empowers courts to grant "reinstatement" as well as "back pay" as remedies for employment discrimination. *Ibid.* Respondent, however, cites no statute that authorizes a court to reinstate a Special Counsel who claims to have been wrongfully removed. A court accordingly may not grant such a remedy. The creation of new remedies is "a legislative endeavor," *Egbert* v. *Boule*, 596 U.S. 482, 491 (2022), and courts of equity lack "the power to create remedies previously unknown to equity jurisprudence," *Grupo Mexicano*, 527 U.S. at 332. Those principles apply even to "the removal of a municipal officer," *Sawyer*, 124 U.S. at 212, and apply all the more to the President's removal of principal executive officer.

"Perhaps the most telling indication of the severe constitutional problem with

the [district court's remedy] is the lack of historical precedent for [it]." *Free Enterprise Fund*, 561 U.S. at 505 (citation omitted). We are unaware of any previous case in which a court ordered the reinstatement of single agency head after removal by the President. At most, a district court in 1983 effectively reinstated removed members of the multimember U.S. Commission on Civil Rights because that court believed that the commission functioned as a "legislative agency" whose "'only purpose'" was "to find facts which [could] subsequently be used as a basis for legislative or executive action"—not to exercise any executive power in its own right. *Barry* v. *Reagan*, No. 83-cv-3182, 1983 WL 538, at *2 (D.D.C. Nov. 14, 1983). That is no support for the district court's unheard-of decision to seize control of an executive agency from the President and insist that an agency head whom the President has fired must keep exercising Article II powers.

B. The Other Factors Support Relief From The District Court's Order

In deciding whether to grant emergency relief, this Court also considers whether the underlying issues warrant its review, whether the applicant likely faces irreparable harm, and, in close cases, the balance of equities. See *Hollingsworth*, 558 U.S. at 190. Those factors overwhelmingly support relief here.

1. The issues raised by this case warrant this Court's review

Plainly, if the court of appeals holds that the President may not remove the Special Counsel at will or that the district court may order the reinstatement of the Special Counsel, that decision would warrant this Court's review. The Court has on several occasions granted certiorari to review the constitutionality of restrictions on the President's power to remove executive officials. See *Collins*, 594 U.S. at 236; *Seila Law*, 591 U.S. at 209; *Free Enterprise Fund*, 561 U.S. at 488. Rightly so. The Court has recognized "the importance of removal as a tool of supervision," identifying it as

"*the* key means" of preserving the Executive Branch's "'dependence on the people.'" *Free Enterprise Fund*, 561 U.S. at 501 (citation omitted). "[T]he expansion of [the federal] bureaucracy into new territories the Framers could scarcely have imagined only sharpens [the Court's] duty to ensure that the Executive Branch is overseen by a President accountable to the people." *Seila Law*, 591 U.S. at 231-232.

Further, this Court has been appropriately receptive to reviewing cases where, as here, "[t]he Executive Branch, at its highest level, is seeking the aid of the courts to protect its constitutional prerogatives." *Cheney* v. *United States District Court*, 542 U.S. 367, 385 (2004); see, *e.g.*, *Clinton* v. *Jones*, 520 U.S. 681, 689-690 (1997) ("The representations made on behalf of the Executive Branch as to the potential impact of the precedent established by the Court of Appeals merit our respectful and deliberate consideration."). The President has sought to remove an agency head, only to be thwarted by a district court.

2. The district court's reinstatement of the Special Counsel causes irreparable harm to the Executive Branch

a. The district court's order causes extraordinary and irreparable harm to the President, in whom the Constitution vests "all of" "the 'executive Power.'" *Seila Law*, 590 U.S. at 203 (quoting Art. II, § 1, Cl. 1). A single district judge is forcing the President to continue allowing a principal officer to exercise executive power when the President believes that the officer should be removed. That sort of harm—to the Executive Branch, to the separation of powers, and to our democratic system—is transparently irreparable. In the first few weeks of a new Administration, the President is being prevented from installing an agency head of the President's choosing to implement his agenda, and the President must instead retain an agency head against his will. Not only can the district-court-reinstated agency head exercise ex-

ecutive power without proper accountability to the President—without, for instance, the threat of removal for unwise enforcement or investigative decisions or rule-makings. Agency heads also control hiring and firing decisions for subordinates—here, an agency of over 100 people who perform important investigative and enforcement functions affecting the entire federal workforce. The President's lost ability to implement his agenda through a principal officer of his choosing is plainly irreparable harm, as is the affront to his Article II powers.

The district court faulted the government for failing to identify "circumstances that required the President's hasty, unexplained action, or that would justify the immediate ejection of the Senate-confirmed Special Counsel." App., *infra*, 28a. That reasoning just attacks the notion of removal *at will*. Presidents may remove executive officers for many reasons: to remove "those he finds 'negligent and inefficient,'" "those who exercise their discretion in a way that is not 'intelligent or wise,'" "those who have 'different views of policy," "those who come from a competing political party," and "those in whom he has * * * lost confidence." *Collins*, 594 U.S. at 256 (brackets and citation omitted). Presidents may remove executive officers simply because they want to appoint someone else. "[T]he President's power to remove 'executive officers of the United States' may not be regulated by Congress *or reviewed by the courts*." *Trump*, 603 U.S. at 621 (emphasis added; citation omitted). "[I]n cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that [his] acts are only politically examinable." *Marbury* v. *Madison*, 1 Cranch 137, 166 (1803).

The district court believed that the Executive Branch did not face significant harm because the Office of Special Counsel has a "narrow focus." App., *infra*, 28a. But the court understated the extent of the Special Counsel's powers. As noted, the

Special Counsel may appoint personnel, promulgate regulations, launch investigations, issue subpoenas, bring disciplinary actions, and represent the Executive in proceedings in court and before the Merit Systems Protection Board. Because of the court's order, the Special Counsel may now exercise all those powers "with no boss, peers, or voters to report to." *Seila Law*, 591 U.S. at 203. More fundamentally, "[i]t is not for [this Court] to determine, and [the Court has] never presumed to determine, how much of the purely executive powers of government must be within the full control of the President. The Constitution prescribes that they *all* are." *Morrison*, 487 U.S. at 709 (Scalia, J., dissenting).

Finally, the district court emphasized the "limited duration" of its order—which is set to expire on February 26, 2025—and stated that applicants "have not identified any harms to themselves or the public that could flow from the Special Counsel's continuing to perform his statutory duty" in the meantime. App., *infra*, 32a. The court of appeals similarly thought that "[w]aiting two weeks" to exercise "the Executive's Article II prerogative" is "not so prejudicial to the government's interests." *Id.* at 41a. That rationale ignores the direct harm that the court's order causes to the Constitution's means of ensuring democratic accountability. "[T]he President is elected for four years, with the mandate of the people to exercise his executive power under the Constitution." *Myers*, 272 U.S. at 123. Yet in this case, a court has barred the elected President from controlling an entire department of the Executive Branch and has turned over that department to a person who answers to no one and for whom no one voted. That action raises grave issues of democratic legitimacy and electoral accountability, issues not adequately answered by noting the order's "limited duration." App., *infra*, 32a. No one would seriously contend that a district court's temporary restraining order enjoining the President from issuing a

pardon, making a nomination, or recognizing a foreign sovereign was tolerable simply because the court stymied the President for only two weeks. So too here.

Indeed, history and precedent underscore the President's and the Nation's interest in the prompt execution of removals. "The Framers deemed an energetic executive essential to 'the protection of the community against foreign attacks,' 'the steady administration of the laws, 'the protection of property,' and 'the security of liberty.'" *Seila Law*, 591 U.S. at 223-224 (citation omitted). "Accordingly, they chose not to bog the Executive down with the 'habitual feebleness and dilatoriness' that comes with a 'diversity of views and opinions.'" *Id.* at 224 (citation omitted). "Instead, they gave the Executive the 'decision, activity, secrecy, and dispatch' that 'characterise the proceedings of one man.'" *Ibid.* (citation omitted).

Consistent with that history, this Court has recognized that "sudden removals" are sometimes "necessary." *United States* v. *Germaine*, 99 U.S. 508, 510 (1879). "The moment that [the President] loses confidence in the intelligence, ability, judgment or loyalty of any one of [his subordinates], he must have the power to remove him without delay." *Myers*, 272 U.S. at 134. In *Myers*, the Court cited the prospect of delay as one of the reasons for holding that Congress could not require the Senate's consent for a removal: "To require [the President] to file charges and submit them to the consideration of the Senate might make impossible that unity and co-ordination in executive administration essential to effective action." *Ibid.* The Court's precedents foreclose the district court's suggestion that limits on the removal power are made tolerable by their "limited duration." App., *infra*, 32a.

b. The district court's order also threatens irreparable harm to the Office of Special Counsel. In *Collins*, this Court recognized that private parties may be entitled to a remedy when an unconstitutional removal restriction "inflict[s] compensa-

ble harm." 594 U.S. at 259. For instance, if "the President had attempted to remove [an agency head] but was prevented from doing so by a lower court decision," the removal restriction "would clearly cause harm" to affected individuals. *Ibid.* By thwarting the President's removal of the Special Counsel, the district court has arguably exposed every action (or decision not to act) by the Office to legal challenge. The prospect of mass invalidation of everything done by the Office during respondent's court-ordered and insulated tenure provides a further reason to grant immediate relief. And that prospect vitiates the court's claim that its order is necessary to avoid "a gap in protections" provided by the Office. App., *infra*, 27a (citation omitted).

3. Granting relief would not prejudice respondent

Granting the government relief from the district court's order would not cause any irreparable harm to respondent. Although respondent's removal deprives him of his employment and salary, such consequences ordinarily do not amount to *irreparable* injury, "however severely they may affect a particular individual." *Sampson* v. *Murray*, 415 U.S. 61, 92 n.68 (1974). Thus, the traditional remedy for such claims has been an award of back pay at the end of the case, not interim reinstatement. See App., *infra*, 58a (Katsas, J., dissenting).

The district court determined that respondent's removal irreparably harms him by depriving him of "the ability to perform his statutory functions and fulfill his statutory obligations." App., *infra*, 27a. But this Court has rejected that reasoning too. Although a public official's "loss of salary" amounts to a judicially cognizable harm, his "loss of political power" does not. *Raines* v. *Byrd*, 521 U.S. 811, 820 (1997). The notion that public officials "have a separate private right, akin to a property interest, in the powers of their offices" is "alien to the concept of a republican form of government." *Barnes* v. *Kline*, 759 F.2d 21, 50 (D.C. Cir. 1984) (Bork, J., dissenting).

At bottom, respondent's claim to irreparable injury from being unable to continue to wield executive power is precisely the problem. Executive power belongs to the President, not to respondent, and wresting control of that power from the President is constitutionally intolerable.

C. No Jurisdictional Or Prudential Obstacle Prevents This Court From Granting Relief

1. Respondent argued below that the court of appeals lacked jurisdiction to hear the government's appeal and so lacked power to grant relief from the district court's order. See App., *infra*, 33a. That contention is meritless; in all events, there is no obstacle to this Court's granting this application.

First, whatever the scope of the court of appeals' jurisdiction, the All Writs Act empowers *this Court* to grant relief. That statute authorizes this Court to review a lower court's interlocutory orders. See, *e.g.*, *United States Alkali Export Ass'n* v. *United States*, 325 U.S. 196, 201-204 (1945). It also authorizes the Court to vacate or stay such orders. See *Coleman* v. *Paccar, Inc.*, 424 U.S. 1301, 1303 (1976) (Rehnquist, J., in chambers). Exercising that authority, the Court has previously entertained and granted applications to vacate or stay TROs. See *Brewer*, 562 U.S. at 996; *Brunner*, 555 U.S. at 5-6.

Second, the court of appeals had jurisdiction over the government's appeal from the district court's order. In 28 U.S.C. 1292(a)(1), Congress granted the courts of appeals jurisdiction over appeals from orders granting "injunctions." The district court, to be sure, labeled its order as a temporary restraining order rather than as an injunction, but "the label attached to an order is not dispositive." *Abbott* v. *Perez*, 585 U.S. 579, 594 (2018). "[W]here an order has the 'practical effect' of granting or denying an injunction, it should be treated as such for purposes of appellate jurisdiction."

Ibid. "This 'practical effect' rule serves a valuable purpose. If an interlocutory injunction is improperly granted or denied, much harm can occur before the final decision of the district court." *Ibid.* Accordingly, "Congress authorized interlocutory appellate review of such orders. But if the availability of interlocutory review depended on the district court's use of the term 'injunction' or some other particular language, Congress's scheme could be frustrated." *Ibid.*; see *Sampson*, 415 U.S. at 86-87 (explaining that a district court cannot "shield its orders from appellate review merely by designating them as temporary restraining orders").

The district court's order, although labeled a TRO, is the practical equivalent of a preliminary injunction. The court issued that order after having already issued an "administrative stay," which respondent has conceded was itself effectively a TRO. See No. 25-5025 Resp. C.A. Opp. 11, 13. The court received adversarial briefing before issuing the order—which was sufficiently extensive that the court invited the parties to "deem the motion in support of the temporary restraining order to be a memorandum in support of a motion for preliminary injunction, with the opposition and reply similarly designated." App., *infra*, 30a. And the court's order causes extraordinary harm to the President's authority to oversee the Executive Branch. See, *e.g.*, *Carson* v. *American Brands, Inc.*, 450 U.S. 79, 84 (1981) (an order may be more appropriately characterized as a preliminary injunction when it has "serious, perhaps irreparable, consequence[s]") (citation omitted).

This case, moreover, involves the President. The President—or, in some cases, the Vice President or a former President—is often able to obtain "immediate appellate review" that would be unavailable to ordinary litigants. App., *infra*, 51a (Katsas, J., dissenting); see, *e.g.*, *Trump*, 603 U.S. at 605 (reviewing ruling on presidential immunity from criminal prosecution); *Cheney*, 542 U.S. at 385 (reviewing discovery or-

der against Vice President); *Nixon* v. *Fitzgerald*, 457 U.S. 731, 741-743 (1982) (reviewing ruling on presidential immunity from civil prosecution). This Court's "precedent" thus recognizes that "interlocutory review" is sometimes "necessary to safeguard important constitutional interests—here, Executive Branch independence on matters that Article II assigns to the President's discretion." *Trump*, 603 U.S. at 651 (Barrett, J., concurring in part). Consistent with those principles, the Court should "view the order at issue here as a preliminary injunction." *Sampson*, 415 U.S. at 88; see App., *infra*, 51a-53a (Katsas, J., dissenting).

Finally, the government asked the court of appeals, in the alternative, for a writ of mandamus. See App., *infra*, 33a. The district court's extraordinary order readily satisfies the standard for that relief. See *Cheney*, 542 U.S. at 380-381. If it was proper to treat the district court's order as an unappealable TRO, the government would have "no other adequate means to attain the relief [it] desires." *Id.* at 380 (citation omitted). Given the clarity of the Constitution and this Court's precedents, the government's right to relief is also "clear and indisputable." *Id.* at 381 (citation omitted). And mandamus is "appropriate under the circumstances" because the district court's actions "threaten the separation of powers." *Ibid.*

2. The court of appeals also raised prudential concerns about setting a "precedent" that would encourage "many litigants subject to TROs * * * to appeal and to seek a stay," forcing courts to act "at breakneck pace" and "scrambling the normal appellate process." App., *infra*, 41a. We are mindful of those concerns, but they do not justify leaving the district court's order in place.

This case involves an order that runs against the President, and the President is not "many litigants." App., *infra*, 41a. Chief Justice Marshall long ago explained that "[i]n no case * * * would a court be required to proceed against the [P]resident

as against an ordinary individual." *United States* v. *Burr*, 25 F. Cas. 187, 192 (C.C. Va. 1807). Not only that, the order trenches on two of the President's "conclusive and preclusive" powers—the power to remove and the power to oversee investigations and prosecutions. *Trump*, 603 U.S. at 607 (citation omitted). Those powers lie at the core of the President's Article II prerogatives: "Congress cannot act on, and courts cannot examine, the President's actions within his 'conclusive and preclusive' constitutional authority." *Id.* at 609. Those distinctive circumstances—which will not be present in cases involving ordinary litigants—justify this Court's immediate intervention.

The government's response to the TROs issued so far in this Administration underscores the distinctiveness of this case. As noted above, in the weeks since the President's current term began, district courts have issued multiple TROs that block the President's policies throughout the Nation, sometimes even throughout the world. Although the government firmly believes that those TROs exceed district courts' lawful authorities, it has thus far sought the Court's intervention only in this case—because this TRO intrudes so deeply into the President's Article II powers.

The court of appeals also overlooked respondent's own litigation conduct. Instead of awaiting the district court's judgment on his back-pay claim, as many other removed officials have done before, he sought preliminary injunctive relief. Not only that, he obtained an administrative stay hours after he sued and a TRO two days later. Respondent was thus the one who created this emergency. And respondent cannot credibly claim that his interest in seizing the Office from the President is sufficiently urgent to justify immediate relief from the district court, but that the elected President's interest in taking that department back is insufficiently urgent to justify immediate relief from this Court.

If anything, it is the denial of this application that would "set a problematic

precedent." App., *infra*, 41a. For apparently the first time ever, a federal court has issued an injunction preventing the President from removing an agency head and putting someone else in his place. Leaving that order in place would suggest that district courts can, without appellate review, stymie any of the President's exclusive Article II powers for up to 28 days (the maximum duration of a TRO under Federal Rule of Civil Procedure 65(b)(2)).

Of course, federal courts have an institutional interest in "the orderly consideration of cases." App., *infra*, 34a. But the Executive Branch has institutional interests too—here, an interest in the President's exercise of his exclusive power to remove an agency head, so that the agency in question can implement the President's (rather than respondent's) policies. The district court has frustrated those interests in an order that manifestly violates the Constitution and defies this Court's precedents. The order should not be allowed to remain in place for one more day—much less for "two weeks." App., *infra*, 41a.

CONCLUSION

This Court should vacate the district court's February 12, 2025 order granting respondent's motion for a temporary restraining order. In addition, the Acting Solicitor General respectfully requests an immediate administrative stay of the district court's order pending the Court's consideration of this application.

Respectfully submitted.

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