No. 24A790

In the Supreme Court of the United States

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

v.

HAMPTON DELLINGER

REPLY IN SUPPORT OF APPLICATION TO VACATE THE ORDER ISSUED BY THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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TABLE OF CONTENTS

A. This Court has jurisdiction to vacate the district court's TRO 2

B. The government is likely to succeed on the merits................................. 9

C. The equities support relief 16

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When a district court crosses a constitutional red line and purports to bar the President from replacing an agency head he does not want to entrust with executive power—potentially for up to a month—this Court can and should intervene. Respondent agrees that at least *some* temporary restraining orders can be immediately appealed, and that this Court has previously vacated TROs. See Opp. 14-15 & n.4. So reviewing this TRO would not open new jurisdictional floodgates.

Indeed, respondent (Opp. 2) acknowledges the "special solicitude" that courts have accorded the President in hearing immediate appeals from decisions affecting core executive prerogatives. And this TRO functions like a preliminary injunction—the hallmark of appealability even for TROs involving private parties—and is independently mandamus-worthy. The TRO allows the district court, not the President, to decide who should run an agency that exercises prosecutorial and investigative powers. The TRO thus stops the President from shaping the agenda of an executive-branch agency in the new administration's critical first days. Even if the court of

appeals were later to reverse a subsequent preliminary injunction, the damage to the Presidency and the separation of powers would be irreversible and irremediable.

Respondent treats immediate judicial review as a problem, not a safeguard. But by cramping this Court's jurisdiction, respondent's position would invite inter-branch trench warfare whenever a new administration takes office. District judges could issue TROs barring all removals of agency-head holdovers from a prior administration, no matter how clear-cut the President's removal authority. TROs could prohibit presidential pardons from taking effect, bar recognition of foreign sovereigns, or stop military action. Yet, on respondent's telling, so long as district courts preserve the pre-inauguration status quo ante and limit TROs to the 28-day timeframe prescribed by Federal Rule of Civil Procedure 65(b), neither this Court nor any other appellate court can do anything about it.

Respondent invokes the specter of a flood of applications to this Court. But TROs have always been appealable in certain circumstances and grants or denials of mandamus are always reviewable, yet no flood of appeals has transpired. The deluge instead comes from district courts, which in the last few weeks alone have halted dozens of presidential actions (or even perceived actions). Just yesterday, a district judge issued a TRO forcing the reinstatement of a member of the Merit Systems Protection Board whom the President removed, preventing her removal until at least March 3. D. Ct. Doc. 9, *Harris* v. *Bessent*, No. 25-cv-412 (D.D.C. Feb. 18, 2025). This Court should make clear that immediate appellate review remains available to check TROs that usurp core Article II powers. TROs are not blank checks for district courts to stop any and all presidential actions for up to a month at a time.

A. This Court Has Jurisdiction To Vacate The District Court's TRO

Respondent principally contends (Opp. 1) that the district court's order "cannot

be appealed." That contention misapprehends multiple jurisdictional rules. This Court has both the authority to review this TRO and ample means to prevent respondent's hypothetical parade of TRO appeals.

1. Respondent focuses (Opp. 14-15) on *the court of appeals*' jurisdiction to review the district court's TRO. But what matters is *this Court's* jurisdiction. Respondent concedes (*id.* at 15 n.4) that this Court has previously reviewed and vacated TROs issued by district courts. See *Brewer* v. *Landrigan*, 562 U.S. 996 (2010); *Brunner* v. *Ohio*, 555 U.S. 5 (2008) (per curiam). There is no bright-line bar to review.

Respondent errs in arguing (Opp. 22-23) that this Court may vacate a TRO under the All Writs Act, 28 U.S.C. 1651, only if the court of appeals would have jurisdiction to review the TRO. The Court has held that the Act grants it "full power in its discretion to issue [a] writ" directly "to a federal District Court." *Ex parte Peru*, 318 U.S. 578, 584-585 (1943); see, *e.g.*, *id.* at 586-587 (invoking the Act to directly review a district court's interlocutory order denying a foreign state's sovereign-immunity defense); *Ex parte United States*, 287 U.S. 241, 248-249 (1932) (invoking the Act to review a district court's interlocutory order denying the government's petition for a bench warrant).

Of course, the All Writs Act does not independently grant jurisdiction, instead empowering courts to issue writs "in aid of their respective jurisdictions." 28 U.S.C. 1651; Opp. 22-23. But this Court and others can still issue appropriate orders in aid of future jurisdiction over an appeal from a final decision. See *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 25 (1943) (writ issued by court of appeals before district court's entry of final judgment); *FTC* v. *Dean Foods Co.*, 384 U.S. 597, 603-605 (1966) (order issued by court of appeals before final agency action). The district court's final order in this case will be reviewable in the court of appeals, then in this Court. Just

as this Court may grant stays of preliminary injunctions or other threshold relief, this Court may grant relief now "'in aid of this Court's jurisdiction' to review by certiorari a final disposition on the merits." *Coleman* v. *Paccar, Inc.*, 424 U.S. 1301, 1303 (1976) (Rehnquist, J., in chambers) (citation omitted).

2. Even if this Court's jurisdiction depended on the lower court's jurisdiction, the D.C. Circuit had jurisdiction to review the TRO here. Respondent concedes that courts of appeals may review at least *some* TROs and that "a district court cannot 'shield' an injunction from appellate review merely by labelling it a temporary restraining order." Opp. 14 (citation omitted). The only question is whether "*this* TRO—which orders the President to recognize the authority of an agency head whom he has formally removed—qualifies for immediate review." Appl. App. 50a (Katsas, J., dissenting). The answer is yes.

This Court has held that an order is properly regarded as an appealable injunction if it has "'serious, perhaps irreparable consequences' that [a party] can 'effectually challenge' only by an immediate appeal." *Carson* v. *American Brands, Inc.*, 450 U.S. 79, 90 (1981). This Court has further recognized that, in determining appealability, courts of appeals owe "special solicitude" "to claims alleging a threatened breach of essential Presidential prerogatives under the separation of powers." *Nixon* v. *Fitzgerald*, 457 U.S. 731, 743 (1982). Under those precedents, the Executive Branch must be able to appeal orders that "enjoin the President in the performance of his official duties," *Mississippi* v. *Johnson*, 4 Wall. 475, 501 (1866), or that restrain the exercise of his "conclusive and preclusive" Article II powers, *Trump* v. *United States*, 603 U.S. 593, 607 (2024) (citation omitted). Thus, a TRO may be appealable when it "deeply intrude[s] into the core concerns of the executive branch," *OPM* v. *American Federation of Government Employees*, 473 U.S. 1301, 1305 (1985) (Burger,

C.J., in chambers) (citation omitted), as this one manifestly does.

Historically, TROs that transgress those constitutional principles have been rare. But when they occur, their appealability is essential to preserving the constitutional structure. The separation of powers requires that "each department" have the "constitutional means" "to resist encroachments of the others." *The Federalist* No. 51, at 349 (Jacob E. Cooke ed., 1961) (James Madison). The President can resist congressional encroachments by vetoing bills and declining to enforce unconstitutional statutes. But his defense against judicial encroachments is to appeal. If the appellate courts refuse to hear such appeals, district courts could whittle away Article II's vision of "an independent Executive" for a up to a month without any practical check. See *Trump*, 603 U.S. at 613 (citation omitted). The Framers envisioned an Executive Branch that would pursue "energetic, vigorous, decisive, and speedy execution of the laws" and "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.'" *Id.* at 610 (citation omitted). They certainly did not envision that district courts could replace energy with mandatory delay and stop the President from fulfilling his constitutional responsibilities during month-long stretches so long as they label their orders TROs.

As an independent basis for jurisdiction, the court of appeals or this Court can review the TRO through mandamus, as respondent concedes (Opp. 23). This case clears the high bar for that relief, especially given the separation-of-powers context. "Accepted mandamus standards are broad enough to allow a court of appeals to prevent a lower court from interfering with a coequal branch's ability to discharge its constitutional responsibilities." *Cheney* v. *United States District Court*, 542 U.S. 367, 382 (2004); see Appl. 33.

3. Respondent instead views (Opp. 1, 17) immediate judicial review as the greater threat to the republic. In respondent's view, permitting appeals of TROs like this one would promote "high-stakes emergency litigation," undermine "orderly administration and sound deliberation," cause "premature escalation of politically fraught disputes," and force courts to act "on an accelerated timeframe, without full briefing and argument." But it is respondent who insisted that this case warranted five-alarm relief. He sought a TRO the same day he filed suit on the ground that this case was "urgent," D. Ct. Doc. 2-1, at 1 (Feb. 10, 2025), and that he needed immediate relief lest he be deprived of his office "for weeks," 2/10/25 D. Ct. Tr. 16. The district court obliged, first by granting him an "administrative stay" within hours after he sued (before the government had even a chance to respond), and then by granting the TRO at issue. See Appl. 8-9.

Having gotten a President-stopping TRO in record time, respondent can hardly complain about the pace of ensuing proceedings. If respondent wanted orderly decision-making, he had only to wait for the district court to issue final judgment on his claim for back pay, as other removed officers have done throughout American history. See Appl. 22. Or he could have awaited a ruling on a motion for a preliminary injunction. Having proclaimed an emergency to get a precedent-breaking TRO, respondent is in no position to insist that this Court await "sound deliberation" before addressing "complex questions of constitutional law." Opp. 1. This Court should accord at least as much solicitude to the elected President's interest in managing the Executive Branch as the district court (wrongly) accorded to a fired Special Counsel's interest in continuing to run an executive agency.

Respondent emphasizes (Opp. 19) that a "directly applicable" statute provides that the President may remove the Special Counsel only for cause. But brandishing

a statute does not make the merits close when that statute is manifestly unconstitutional under this Court's precedents. See pp. 9-13, *infra*. And the Court need not even reach those merits to vacate the TRO, which violates this Court's repeated holdings that courts of equity may not "restrain an executive officer from making a wrongful removal." *White* v. *Berry*, 171 U.S. 366, 377 (1898); see Appl. 23-24.

Respondent warns (Opp. 16) that granting relief here would "open the floodgates to many more fire-drill TRO appeals." But this case is easy to cabin in two respects. First, the district court issued an order that runs against the President. See p. 13, *infra*. The President "occupies a unique position in the constitutional scheme" as "the only person who alone composes a branch of government." *Trump*, 603 U.S. at 610 (citation omitted); App., *infra*, 51a-53a (Katsas, J., dissenting). Second, whether or not directed at the President, the court's order restrains the exercise of the President's "'conclusive and preclusive'" powers—which lie at the core of Article II, which "Congress cannot act on," and which "courts cannot examine." *Trump*, 603 U.S. at 609; see *id.* at 608-609 (identifying the removal, pardon, and recognition powers as examples of conclusive and preclusive powers). "[O]f course not all of the President's official acts fall within his 'conclusive and preclusive' authority." *Ibid.* Orders that do not enjoin the President or that do not involve his conclusive powers would raise different questions that the Court need not address today.

Meanwhile, respondent ignores the larger floodgates that his position risks opening. A TRO is an "emergency" order that a court should invoke only when the plaintiff faces an "immediate" threat, and a TRO should last only until "there is an opportunity to hold a hearing on an application for a preliminary injunction." 11A Charles Alan Wright et al., *Federal Practice & Procedure* § 2951 (3d ed. 2024). In recent weeks, however, district judges have issued putative TROs that defy all those

guardrails. Courts have issued nationwide TROs, worldwide TROs, and TROs interfering with important Article II powers.[1] If a TRO restraining the exercise of conclusive and preclusive Article II powers can escape appellate review, district courts are more likely to be enticed into issuing more aggressive TROs. Indeed, under respondent's theory, a district court's notorious injunction against the bombing of Cambodia during the Vietnam War would have been unreviewable had it simply been issued as a 28-day-long TRO. See *Holtzman* v. *Schlesinger*, 361 F. Supp. 553, 566 (E.D.N.Y.), rev'd, 484 F.2d 1307 (2d Cir. 1973); see *Holtzman* v. *Schlesinger*, 414 U.S. 1316 (1973) (Douglas, J., in chambers) (vacating the court of appeals' stay of the injunction); *Holtzman* v. *Schlesinger*, 414 U.S. 1321 (1973) (reinstating the stay).

At bottom, the choice is not between an unworkable system where every TRO gets immediately appealed to the court of appeals and then reviewed in this Court, and respondent's alternative, where "more than 1,000 active and senior district court judges, sitting across 94 judicial districts," *DHS* v. *New York*, 140 S. Ct. 599, 600-601 (2020) (Gorsuch, J., concurring), can do as they please for up to 28 days without appellate review. This Court controls its docket, and this Court controls the message lower courts take from the availability of further judicial review. By vacating this TRO, this Court can remind district courts to respect the limits of their equitable powers and deter further abuse of TROs going forward.

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[1] See, *e.g.*, *Doe* v. *McHenry*, No. 25-cv-286, 2025 WL 388218, at *1 (D.D.C. Feb. 4, 2025) (nationwide TRO blocking Executive Order directing the Attorney General to "ensure that males are not detained in women's prisons") (citation omitted); *AIDS Vaccine Advocacy Coalition* v. *United States Department of State*, No. 25-cv-400, 2025 WL 485324, at *6-*7 (D.D.C. Feb. 13, 2025) (worldwide TRO barring the "Department of State" from suspending any "federal foreign assistance award that was in existence as of January 19, 2025"); *New York* v. *Trump*, No. 25-cv-1144, 2025 WL 435411, at *1 (S.D.N.Y. Feb. 8, 2025) (*ex parte* TRO denying "political appointees" access to certain Treasury Department information), modified, 2025 WL 455406 (Feb. 11, 2025).

B. The Government Is Likely To Succeed On The Merits

1. As to the most important factor for vacatur—likelihood of success on the merits—the TRO is untenable. Article II vests the "entire 'executive Power'" in "the President alone," *Seila Law LLC* v. *CFPB*, 591 U.S. 197, 213 (2020), yet the district court held that the executive power could continue to be exercised by a sole agency head whom the President had removed. This Court has "recognized only two exceptions to the President's unrestricted removal power," *id.* at 204, yet the district court overrode a removal that falls outside both exceptions. This Court has held that "the Constitution prohibits even 'modest restrictions' on the President's power to remove the head of an agency with a single top officer," *Collins* v. *Yellen*, 594 U.S. 220, 256 (2021) (citation omitted), yet the district court prevented the President from removing the sole head of the Office of Special Counsel. This Court has determined that "[i]nvestigative and prosecutorial decisionmaking is the 'special province of the Executive Branch,'" *Trump*, 603 U.S. at 620 (citation omitted), yet the district court deprived the Executive of control of a self-described "investigative and prosecutorial agency," https://osc.gov/Agency. And this Court has explained that the President's exercise of the removal power "may not be * * * reviewed by the courts," *Trump*, 603 U.S. at 621, yet the district court insisted that the government "justify the immediate ejection of the Senate-confirmed Special Counsel." Appl. App. 28a.

Respondent's defenses underscore the weakness of his position. First, respondent for the first time in these proceedings reclassifies (Opp. 26-28) himself as an inferior officer. That is plainly wrong. Someone is an inferior officer only if "'he has a superior' other than the President" who has the authority to "direc[t] and supervis[e] him." *United States* v. *Arthrex, Inc.*, 594 U.S. 1, 13 (2021) (quoting *Edmond* v. *United States*, 520 U.S. 651, 662 (1997)). Respondent suggests (Opp.8, 27, 36 n.12) that the

MSPB has some control over his investigations, but the MSPB does not appoint or remove him. Until recently, that was the President's job. Now that the district court has restored him to office and has barred the President from firing him even for cause, see Appl. 21, he arguably is not inferior even to the President. If respondent has any superior now, it is perhaps the district court—but that hardly helps his cause.

Further, respondent concedes (Opp. 3) that the Office of Special Counsel is a freestanding "federal agency" that is not contained within or subordinate to any other agency. That means that the Office is a "Departmen[t]" and the Special Counsel is its "Hea[d]." U.S. Const. Art. II, § 2, Cl. 2; see *Free Enterprise Fund* v. *Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 511 (2010). Department heads, by definition, cannot be inferior officers. See *Freytag* v. *Commissioner*, 501 U.S. 868, 884 (1991); *id.* at 917-918 (Scalia, J., concurring in part and concurring in the judgment).

Regardless, respondent's newfound claim to be an inferior officer does not save his tenure protection. In *Myers*, this Court held that Article II empowers the President to remove "inferior executive officers" whom he has appointed. 272 U.S. at 161; see *id.* at 158 (upholding the "removal of a postmaster" even though "a postmaster is an inferior officer"). True, this Court has upheld restrictions on the removal of certain inferior officers appointed by department heads, see *United States* v. *Perkins*, 163 U.S. 625 (1896), or by courts, see *Morrison* v. *Olson*, 487 U.S. 654 (1988). But *Myers* holds that if Congress may restrict the removal of inferior executive officers at all, Congress may do so only if it has "vest[ed] the appointment in some one other than the President with the consent of the Senate." 272 U.S. at 162. If an inferior officer is sufficiently important to require the Senate's participation in his appointment, then the President must be able to fire him at will. See *id.* at 161-162. The Special Counsel is a sole agency head appointed by the President with the Senate's consent.

Whether he is a principal or inferior officer, the President may remove him at will.

Second, respondent argues (Opp. 26-27) that the Special Counsel plays only a "limited" role and that "the Special Counsel's powers do not resemble the authority of the principal officers who lead the CFPB and FHFA." But *Collins* could not be clearer that "the Constitution prohibits even 'modest restrictions' on the President's power to remove the head of an agency with a single top officer"; that the "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 the scope of the removal power does not "hing[e] on" "an inquiry" into "the relative importance of the regulatory and enforcement authority of disparate agencies." 594 U.S. at 252-253, 256 (citation omitted); 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.") (citation omitted); see *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.'") (citation omitted).

Third, respondent appears to question (Opp. 29) whether the Special Counsel exercises "executive power" at all and argues that the Office promotes a "shared inter-branch interest." But the Office describes itself as an "investigatory and prosecutorial agency," https://osc.gov/Agency, that is located "within the executive branch," *U.S. Office of Special Counsel Annual Report for Fiscal Year 2023*, at 9. "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). Respondent emphasizes (Opp. 27 n.8) that the Special Counsel brings enforcement actions before the Merit Systems Protection

Board rather than before Article III courts. But the power to bring an administrative enforcement action is undoubtedly executive. See *United States* v. *Texas*, 599 U.S. 670, 679 (2023). And the lack of an Article III check makes presidential oversight more important, not less. Respondent adds (Opp. 29) that the Special Counsel ensures "compliance with congressionally imposed ethical and personnel requirements." That is a roundabout way of saying that he executes federal laws—the very job of executive officers subject to the President's supervision and control.

Fourth, respondent suggests (Opp. 30) that this Court should recognize a new exception to the President's removal power given the Office of Special Counsel's "unique" status and alleged "need for independence." But this Court has made clear that the President's "unrestricted removal power" is subject to "only two exceptions"; that those exceptions represent "'the outermost constitutional limits of permissible congressional restrictions'"; and that courts should not extend those exceptions to "'new situation[s],'" and certainly not to an agency led "by a single individual." *Seila Law*, 591 U.S. at 204, 218, 220 (citation omitted). The Court's precedents leave no room for a new exception for the sole head of the Office of Special Counsel.

Finally, respondent incorrectly suggests (Opp. 25, 30) that this Court in *Seila Law* endorsed the constitutionality of the Special Counsel's tenure restriction. In fact, the Court pointedly observed that the Office of Special Counsel, which was "created nearly 200 years after the Constitution, drew a contemporaneous constitutional objection from the Office of Legal Counsel under President Carter and a subsequent veto on constitutional grounds by President Reagan." *Seila Law*, 591 U.S. at 221.

This is not a close case. Because the Special Counsel is "the head of an agency with a single top officer," the President "must be able to remove" him at will. *Collins*, 594 U.S. at 256. The Special Counsel's investigative and prosecutorial functions and

the Executive Branch's repeated constitutional objections to his tenure protection just add "extra icing [to] a cake already frosted." *Van Buren* v. *United States*, 593 U.S. 374, 394 (2021) (citation omitted).

2. The foregoing aside, the district court's remedy departs so sharply from this Court's precedents that the Court could vacate the TRO on that basis alone. The district court enjoined the President to restore respondent as Special Counsel, even though the Court has held that a court may not "enjoin the President in the performance of his official duties." *Mississippi*, 4 Wall. at 501. And the district court did so even though the Court has warned that the President cannot properly discharge his responsibilities through subordinates who have been "imposed upon him" over his objection, *Myers*, 272 U.S. at 132 (citation omitted); even though it 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); even though no American court appears ever to have issued an injunction restoring a removed agency head; and even though respondent identifies no statute that purports to authorize such a remedy.

Respondent denies (Opp. 19) that the TRO actually enjoins the President. But the TRO provides that "Hampton Dellinger shall continue to serve as the Special Counsel," Appl. App. 29a, thus enjoining the President from removing him—not even for cause. And the TRO binds the "Defendants," *ibid.*, who include, under respondent's complaint, the President. Thus, the district court believed that the President's designation of an Acting Special Counsel "may have been contrary to" its order. *Id.* at 29a n.8 (Katsas, J., dissenting). At bottom, "the 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.

Respondent's lack of any precedent supporting any order that prevents the

President's removal of a principal executive officer speaks volumes. Officers have traditionally challenged their removals through suits for back pay. Respondent notes (Opp. 33-34) that the officers in *Myers* and *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935), had died. But Myers and Humphrey were, of course, very much alive at the time of their removals, yet neither sought an injunction restoring him to office. Each waited, let back-pay claims accumulate, and eventually asserted those claims in court, directly or through an executor. Myers was removed in February 1920, sued for back pay in April 1921, and was later succeeded by his administratrix. *Myers*, 272 U.S. at 106, 108. And Humphrey's executor sought salary due "from October 8, 1933, when the President undertook to remove him from office, to the time of his death on February 14, 1934." *Humphrey's Executor*, 295 U.S. at 618.

Respondent also has no good answer to the wall of precedent establishing that a court "will not, by injunction, restrain an executive officer from making a wrongful removal." *White*, 171 U.S. at 377 (citation omitted); see Appl. 23-24 (collecting cases). Respondent observes (Opp. 32) that courts historically used writs such as "*quo warranto*" to resolve disputes about title to public offices. But respondent has sought and obtained a TRO (an equitable remedy), not a writ of *quo warranto* (which, as respondent concedes, is a "remedy in law," Opp. 32). There are important differences between the two remedies. To begin, the D.C. Circuit "has stated that [*quo warranto*] actions against public officials (as opposed to actions brought against officers of private corporations) can *only* be instituted by the Attorney General." *Andrade* v. *Lauer*, 729 F.2d 1475, 1498 (1984); see *Wallace* v. *Anderson*, 5 Wheat. 291, 292 (1820) (Marshall, C.J.). And a federal statute requires a plaintiff to follow special procedures before

instituting a *quo warranto* action. See D.C. Code §§ 16-3501 to 16-3503.[2] He must first petition the Attorney General or U.S. Attorney to institute an action. See *id.* § 16-3502. If those officials refuse, he must "apply to the court by certified petition for leave to have the writ issued." *Id.* § 16-3503. The court "has broad discretion to deny the writ," *Andrade*, 729 F.2d at 1498, and may grant the writ only if "the reasons set forth in the petition are sufficient in law," D.C. Code § 16-3503. And the plaintiff must post "a bond with sufficient surety" for "all costs incurred in the prosecution of the writ." *Id.* § 16-3502. Respondent skipped all those procedures. He cannot now overcome the traditional rule against issuing an "injunction" to "restrain" "a wrongful removal," *White*, 177 U.S. at 377, by equating an injunction or TRO with the legal remedy of *quo warranto*.

Respondent suggests (Opp. 34-35) that, even though this Court has held that courts may "not, by injunction, restrain * * * a wrongful removal," *White*, 171 U.S. at 377, courts should now invent such an equitable remedy in order to effectuate the "statutory design," Opp. 34. But courts have no such authority. Under Article I, the "remedies available are those 'that Congress enacted into law'"; "courts may not create [new remedies], no matter how desirable that might be as a policy matter, or how compatible with the statute." *Alexander* v. *Sandoval*, 532 U.S. 275, 287 (2001) (citation omitted); see *Grupo Mexicano de Desarrollo S.A.* v. *Alliance Bond Fund, Inc.*, 527 U.S. 308, 332 (1999) ("[T]he equitable powers conferred by the Judiciary Act of 1789 did not include the power to create [new] remedies."). At a minimum, courts should not create such a remedy in the face of the serious Article II concerns raised by a judicial order preventing the President from removing a principal executive officer.

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[2] Although the relevant provisions are codified in the D.C. Code, they were enacted by Congress. See District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, 84 Stat. 561.

See Appl. 22-23; cf. *Collins*, 594 U.S. at 250 (requiring a clear statement before concluding that a statute restricts the removal power).

C. The Equities Support Relief

Respondent dismisses (Opp. 2, 37) the injury that the district court's order inflicts on the President as too "abstract" and demands that the government identify "concrete" "action or inaction that [respondent] has taken that would result in irreparable harm to the President's agenda" to obtain relief. But "courts cannot examine" "the President's actions on subjects within his 'conclusive and preclusive' constitutional authority." *Trump*, 603 U.S. at 609. If a district court issued a TRO blocking a pardon or the recognition of a foreign sovereign, this Court would surely vacate the order without requiring the President to explain how the TRO harms his agenda. Removal can hardly be a plenary presidential power if courts can demand that Presidents show an urgent need to exercise that it.

In any event, the district court's order plainly inflicts concrete harm on the President. The Special Counsel is not merely an officer; he is the head of an executive department. See p. 10, *supra*. The statute empowers him to appoint subordinates in his department, see 5 U.S.C. 1212(d)(1), and the Appointments Clause requires that he be able to supervise inferior officers below him, see *Arthrex*, 594 U.S. at 13. If the President loses control of the Special Counsel, he loses control of the Office. It should be self-evident that depriving the President of control over an entire executive department in the earliest days of his administration inflicts irreparable harm.

The district court's order also harms the government by threatening to cause the mass invalidation of everything that the Special Counsel does during his court-ordered, court-insulated tenure. See Appl. 30. Respondent denies (Opp. 37-38) that the order would lead to such a result, but his argument conflicts with two clear rules

set forth in *Collins*: (1) "the Constitution prohibits even 'modest restrictions' on the President's power to remove the head of an agency with a single top officer," and (2) if "the President had attempted to remove a Director but was prevented from doing so by a lower court decision," the tenure restriction would "inflict compensable harm." 594 U.S. at 256, 259 (citation omitted).

Respondent emphasizes (Opp. 15) that the district court's intrusion into the heartland of Article II "lasts only for a very short duration." But there is no 14-day no-harm-no-foul exception to Article II for district court TROs. Besides, if this Court denies vacatur, the intrusions on Article II will last far longer. The district court began by issuing a two-day "administrative stay" that respondent has conceded was effectively a TRO. See No. 25-5025 Resp. C.A. Opp. 11, 13. The court then issued the 14-day TRO at issue here. Under Federal Rule of Civil Procedure 65(b), the court could seek to extend that for 14 more days before issuing a preliminary injunction. See Fed. R. Civ. P. 65(b)(2). Then, the Executive Branch may need to spend weeks more litigating a stay motion in the district court, a stay motion in the court of appeals, and a stay application in this Court. By the end, the President may be deprived of control of an entire executive department for over two months.

Respondent next objects (Opp. 36) that the government's arguments regarding irreparable harm presuppose that the government is correct on the merits. But irreparable harm and the merits are intertwined. Respondent's counsel put the point well when at a hearing in district court: "With respect to irreparable harm, the only question is, assuming we're correct on the merits, which is always the standard for irreparable injury in an interim relief posture, assuming that we're otherwise meritorious, * * * is Hampton Dellinger going to experience some kind of irreparable harm in the interim while the Court considers the case?" 2/10/25 D. Ct. Tr. 14-15.

Just so. Assuming that the government is correct on the merits, the district court's usurpation of the President's exclusive removal power works irreparable harm.

On the other side of the ledger, respondent fails to identify any irreparable harm to himself. Respondent notes (Opp. 38) that a person who has been fired has suffered an "injury," but the crucial point is that the injury is not *irreparable*. A court can repair an injury to an individual from loss of employment by awarding back pay. But a court cannot repair the injury to the separation of powers, the President, and our democratic system from a judicial order that deprives the President of control of an executive department for several weeks.

This Court should not allow district courts to enjoin the President's exercise of his conclusive Article II powers and then tell the President to come back in two weeks or a month if he wants to appeal. The United States respectfully asks that this Court vacate the district court's unprecedented order and restore the executive power to the person whom the American people elected to exercise all of it—the President.

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For the foregoing reasons and those stated in the government's application, this Court should vacate the district court's February 12, 2025 order granting respondent's motion for a temporary restraining order.

Respectfully submitted.

SARAH M. HARRIS
Acting Solicitor General

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