No. 24A790

In the Supreme Court of the United States

SCOTT BESSENT, IN HIS OFFICIAL CAPACITY AS SECRETARY OF TREASURY, ET AL.,
Applicants,

v.

HAMPTON DELLINGER, IN HIS PERSONAL CAPACITY AND IN HIS OFFICIAL CAPACITY AS SPECIAL COUNSEL OF THE OFFICE OF SPECIAL COUNSEL,
Respondent.

SPECIAL COUNSEL HAMPTON DELLINGER'S OPPOSITION TO THE GOVERNMENT'S APPLICATION TO VACATE THE ORDER ISSUED BY THE U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA AND TO ENTER AN ADMINISTRATIVE STAY

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TO THE HONORABLE JOHN G. ROBERTS, CHIEF JUSTICE OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE D.C. CIRCUIT:

The government devotes most of its application to argumentation over weighty and complex questions of constitutional law and remedy. On its framing of the issues, the merits are everything and appellate jurisdiction is a mere afterthought. But that gets things backward. As the D.C. Circuit emphasized, a two-day appeal from the issuance of a TRO—which was itself issued just two days after this suit was first filed, and which will expire by its terms eight days after the Court receives this opposition brief—is not a proper vehicle through which to resolve separation-of-powers disputes.

Yet that does not deter the government, which openly solicits the Court to create an Article II exception to the general rule that TROs cannot be appealed. The government even offers an initial list of TROs it might wish to appeal on the basis that they allegedly infringe Article II prerogatives. In that sense, "this wolf comes as a wolf." *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting). For generations, including in untold cases involving government defendants, federal courts have adhered to the principle that TROs generally cannot be appealed unless they function as preliminary injunctions. That rule protects core judicial interests in orderly administration and sound deliberation; it also avoids needless inter-branch conflict and premature escalation of politically fraught disputes. But as evidenced by this very case—which reached the Supreme Court less than six days after it was first filed—the government now prefers a new arrangement. To accept its theory and grant its request for relief would be to invite more of the same: a rocket docket straight to this Court, even as high-stakes emergency litigation proliferates across the country.

In any event, the government's case for carving out a jurisdictional exception here is uniquely weak. *First*, contrary to the government's assertions, no injunctive relief has been ordered against the President, so this case does not evoke the special solicitude sometimes afforded to that office. *Second*, the government has conceded here that it violated a directly applicable statute which no federal court has enjoined—and we are unaware of any case where this Court has granted emergency relief (let alone from an ordinarily unappealable TRO) so that the government can continue to violate a federal statute. This is precisely the kind of circumstance in which a TRO that preserves the *status quo ante* is properly entered while the parties brief (and the courts evaluate) the merits of the constitutional questions. *Third*, the government seeks such an extraordinary intervention despite genuine disputes over open legal issues (some of which it failed to develop below)—and despite failing to identify any concrete, irreversible harm from maintenance of the TRO over the next eight days. *Finally*, the government has not identified any reason to doubt that the district court is proceeding swiftly and ably. In fact, the district court has set a highly expedited schedule to resolve the merits, and may well decide the case in ways that avoid any need for this Court's intervention (or at least create a proper record for it).

At bottom, there is no merit to the government's effort to declare a five-alarm fire based on a short-lived TRO that preserves the *status quo ante* as prescribed by a half-century-old statute. Courts regularly deny stays pending appeal based on similar claims of injury to abstract Article II interests, and there is certainly no good reason to treat this circumstance as an exception to the general rule against appealing TROs.

Separate of those considerations, the government's application should also be denied for three additional reasons: the government is not likely to succeed on the merits of its position; the government has failed to demonstrate irreparable injury in the absence of a stay; and the balance of the equities cuts firmly against relief. We address each of these points for the sake of completeness, subject to the caveat that this case is just eight days old and both the parties and the lower courts are still grappling with the issues (as evidenced, in part, by the government's presentation of arguments here that it barely developed—and that no court addressed—below). Of course, that is one reason why courts are so reluctant to authorize appeals of TROs, and it reflects the adverse consequences of the government's shoot-the-moon tactics.

BACKGROUND

A. The United States Office of Special Counsel

1. The Founding and Mission of the OSC

The Office of Special Counsel ("OSC") is an independent federal agency, originally established by the Civil Service Reform Act of 1978 ("CSRA"). *See* 5 U.S.C. § 1211(a). The CSRA was enacted to address widespread public concerns about the federal civil service—including evidence that it was vulnerable to political manipulation and failed to protect whistleblowers. *See Developments in the Law—Public Employment*, 97 Harv. L. Rev. 1619, 1631-32 (1984). The CSRA began with President Carter, who recommended creating a Special Counsel, "appointed by the President and confirmed by the Senate" to investigate abuses of civil service laws, and the Merit Systems Protection Board ("MSPB"), a nonpartisan board removable only for cause to adjudicate those disputes. *See* Federal Civil Service Reform Message

to the Congress (Mar. 2, 1978). This structure, President Carter explained, would "guarantee independent and impartial protection to employees" and thereby "safeguard the rights of Federal employees who 'blow the whistle' on violations of laws or regulations by other employees, including their supervisors." *Id.*

Congress accepted President Carter's proposal, including the MSPB and the Special Counsel with for-cause removal protections. *See* S. 2640, 95th Cong. (Mar. 3, 1978); H.R. Rep. No. 95-1403, at 388 (1978) (supp. views of Rep. S. Solarz). Congress made an express finding that "the authority and power of the Special Counsel" was required to "investigate allegations involving prohibited personnel practices and reprisals against Federal employees." Civil Service Reform Act of 1978, § 3(4), Pub. L. No. 95–454, 92 Stat. 1112. Consistent with this vision, Congress provided that the Special Counsel could be removed "by the President only for inefficiency, neglect of duty, or malfeasance in office." Civil Service Reform Act of 1978, § 1204. This provision drew an initial objection from the U.S. Department of Justice Office of Legal Counsel ("OLC"), which President Carter effectively overruled when he subsequently signed the law and declared it would create "a new system of excellence and accountability." *Compare Memorandum Opinion for the General Counsel, Civil Service Commission*, 2 Op. O.L.C. 120 (1978), *with President Jimmy Carter Remarks on Signing the Civil Service Reform Act of 1978 into Law* (Oct. 13, 1978).[1]

In 1988, Congress again grew concerned that federal whistleblowers were not adequately protected, and crafted the Whistleblower Protection Act to "strengthen

[1] The OLC opinion referenced here was requested not by President Carter but instead by the Civil Service Commission, which would be replaced in the proposed CSRA. 2 Op. O.L.C. at 120.

and improve protection for the rights of Federal employees, to prevent reprisals, and to help eliminate wrongdoing within the Government." Whistleblower Protection Act of 1989, § 2(b), Pub. L. No. 101–12, 103 Stat. 16.

As originally drafted, the Whistleblower Protection Act of 1988 separated the OSC from the MSPB, establishing the OSC as an independent agency. The original draft also vested the OSC with new powers. President Reagan, however, pocket vetoed this legislation, objecting to several new authorities that the legislation would vest in the OSC—singling out the authority to seek judicial review of adverse MSPB decisions in federal court, which would "permit[] the Executive branch to litigate against itself." Memorandum of Disapproval on a Bill Concerning Whistleblower Protection (Oct. 26, 1988). President Reagan also suggested hesitancy about the bill's for-cause removal protections, which were identical to those already in effect. *Id.*

After the pocket veto, Congress worked with Presidents Reagan and Bush to address their separation-of-powers concerns. After these negotiations, the revised bill—the enacted Whistleblower Protection Act of 1989—no longer authorized the OSC to pursue litigation against other agencies in federal court. *See* 135 Cong. Rec. 5012, 5036-38 (Mar. 21, 1989) (statement of Rep. P. Schroeder) ("[W]e agreed to make the changes requested by the administration to clip the special counsel's wings."); *id.* at 5039 (statement of Rep. S. Parris) ("As amended, S. 20 would resolve the administration's constitutional concerns by eliminating the right of the special counsel to sue in Federal court.").

But those negotiations did not displace the OSC's status as an independent agency or its existing for-cause removal provision. As the House Subcommittee on Civil Service stated, federal employees required "assurance that the Office of Special Counsel is a safe haven," because otherwise it "can never be effective in protecting victims of prohibited personnel practices." *Id.* at 5034 (Joint Explanatory Statement); *id.* at 5032 (statement of Rep. G. Sikorski) ("Until whistleblowers are confident that the Office of Special Counsel is on their side, that office will not be an effective advocate for their cause."). Following this inter-branch agreement on the importance of maintaining a measure of independence for the OSC, President Bush's Attorney General thanked the bill's sponsor for "forg[ing] a mutually acceptable resolution of our serious constitutional concerns" and "pledge[d]" to lobby for the Act as drafted. *See Letter from Office of the Attorney General to Sen. Levin dated Mar. 3, 1989*, 135 Cong. Rec. 5012, 5033-34.

Ultimately, President Bush agreed that the revisions had "addressed" the "constitutional concerns" he and President Reagan had raised about the Act. *See* George H.W. Bush, *Remarks on Signing the Whistleblower Protection Act of 1989* (Apr. 10, 1989). Indeed, he specifically praised that the Act would "enhance the authority of the Office of Special Counsel to protect whistle-blowers," and that it "retain[ed] current law which provides that the Special Counsel may only be removed for inefficiency, neglect of duty, or malfeasance." *Id.* Rather than reserve the question or call this provision into doubt, President Bush thus made apparent his approval of

the for-cause removal limitation, which reflected a deliberate inter-branch settlement of constitutional issues (and which was essential to the OSC's core purpose).

2. The OSC's Limited Jurisdiction and Functions

As contemplated by Congress and two Presidents in the enactments described above, the OSC maintains a unique and partly independent position to protect federal employees from prohibited personnel practices ("PPPs")—especially reprisal for whistleblowing. The OSC also affords a secure channel for employees to blow the whistle on wrongdoing. And it assists Congress's legislative and oversight agendas.

To be clear, none of the OSC's authorities empowers it to regulate or penalize private activity. Instead, as an "ombudsman" and "watchdog," *Frazier v. Merit Sys. Prot. Bd.*, 672 F.2d 150, 162-63 (D.C. Cir. 1982), the OSC has "only limited jurisdiction to enforce certain rules governing Federal Government employers and employees," *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 221 (2020). Even as to federal employees, moreover, the OSC does not impose any discipline or other adverse action. Instead, the OSC receives allegations of PPPs and Hatch Act violations, assesses and investigates such complaints, and promotes a proper course of action. *See* 5 U.S.C. §§ 1212(a), 1216(c). Where the OSC finds that an allegation was warranted, it first works with the relevant agency head to encourage voluntary corrective action and relief for the PPP victim (or voluntary discipline from an agency head in the case of a Hatch Act violation). However, any recommended action by the OSC may be rejected: the Special Counsel has no power to bind any other agency. Absent voluntary settlement, the OSC may petition the MSPB on the injured

employee's behalf. *Id.* § 1214. But an injured employee may also petition the MSPB directly (subject to certain procedural requirements). *Id.* § 1221.

In addition, the OSC can refer a complaint to the MSPB, asking that a perpetrator of a PPP or Hatch Act violation be disciplined. *See id.* §§ 1215, 1216. In such circumstances, the OSC exercises no authority over the MSPB, which is an independent adjudicatory agency whose members separately enjoy for-cause removal protections. *Id.* § 1202(d). "[T]he MSPB is free to disagree with the Special Counsel and often does." *Am. Fed'n of Gov't Emps., AFL-CIO v. O'Connor ("AFGE")*, 747 F.2d 748, 753 (D.C. Cir. 1984). In that respect, the MSPB supervises the OSC's exercise of authority to refer complaints and makes its own decisions. Similarly, while the OSC has limited authority to issue subpoenas, only the MSPB can seek to enforce such subpoenas. 5 U.S.C. § 1212(b)(3)(A). Thus, as the D.C. Circuit has explained, "the Special Counsel's 'seemingly broad powers are greatly circumscribed in practice, [in part] by the Special Counsel's lack of authority to require either the Board or other agencies to do its bidding.'" *AFGE*, 747 F.2d at 753 (quoting 97 Harv. L. Rev. at 1643). Even when the MSPB chooses to impose discipline, the maximum "civil penalty" it can issue is $1,330. 5 U.S.C. § 1216(a)(3); 5 CFR § 1201.126(a). And any decision by the MSPB is subject to judicial review in federal court. 5 U.S.C. §§ 1214(c)(2), 1215(a)(4), 7703(b). The OSC cannot participate in any litigation in any Article III court, except in a limited role as *amicus curiae*. *See id.* § 1212(h).

Beyond its human-resources investigative role, the Whistleblower Protection Act authorizes the OSC to receive reports from employee-whistleblowers within

agencies. *See id.* § 1213(a). However, if a report appears credible, the OSC cannot conduct its own investigation or otherwise take direct action on the report. Instead, it may only review the investigation conducted by the whistleblower's agency, and then report the investigation and the OSC's own assessment of it to Congress and the President. *See id.* §§ 1212(a)(3), 1213(c)-(e). The Special Counsel must keep the identity of any whistleblower strictly confidential. *Id.* § 1213(h).[2]

The OSC is also vested with limited authority to "prescribe . . . regulations," although this authority is strictly and statutorily limited only to internal matters "necessary to perform the functions of the Special Counsel." *Id.* § 1212(e). The Special Counsel may separately issue nonbinding advisory opinions concerning the Hatch Act, but he has no rulemaking authority that compels compliance. *Id.* § 1212(f); *see also, e.g.*, *AFGE*, 747 F.2d at 752 ("[T]he advice the Special Counsel is permitted to give creates no law and binds neither the public nor any agency or officer of government."); *Authority for Issuing Hatch Act Regulations*, 18 Op. O.L.C. 1, 1 (1994).

Finally, virtually every action taken by the OSC—from receipt of allegations, to investigations, to agreed corrective actions, to complaints in the MSPB—must be directly reported to Congress to inform important legislative functions, including oversight and legislation in this space. 5 U.S.C. §§ 1217, 1218.

[2] In a similarly advisory capacity, the OSC reviews regulations issued by the Office of Personnel Management for any rule that would require committing a PPP. *See* 5 U.S.C. § 1212(a)(4).

B. Procedural History

Plaintiff Hampton Dellinger has served as Special Counsel since March 6, 2024, following his nomination by the President and confirmation by the Senate to a five-year term. On February 7, 2025, at 7:22 PM, Special Counsel Dellinger received an email from Sergio Gor, Assistant to the President and Director of the White House Presidential Personnel Office, that stated: "On behalf of President Donald J. Trump, I am writing to inform you that your position as Special Counsel of the US Office of Special Counsel is terminated, effective immediately. Thank you for your service[.]" Ex. A to Compl., No. 25 Civ. 385 (D.D.C. Feb. 10, 2025), ECF 1-1.

On Monday morning, February 10, 2025, Special Counsel Dellinger filed a complaint and simultaneously sought a temporary restraining order to preserve the *status quo ante* pending further proceedings.[3] That afternoon, the district court held an in-person hearing, where the government did not appear fully prepared to address the Court's questions. The district court proposed that the government "extend the effective date of the President's proposed action while [the parties] brief [the motion]," but the government refused that proposal. Feb. 10, 2025 Tr. ("Tr.") 3:1-18, No. 25 Civ. 385 (D.D.C.), ECF 9. The government then requested leave to file an opposition the next day to Special Counsel Dellinger's TRO application. *Id.* 27:23-24. The district court agreed, noting that it may issue an administrative stay to preserve the *status quo ante* while it decided the TRO application. *Id.* 25:8-11, 25:17-20. That evening,

[3] Special Counsel Dellinger sought, and received, a TRO only against defendants Bessent, Gor, Gorman, Kammann, and Vought, not the President. *See* App. 42a n.1; TRO Motion at 1-2, *Dellinger v. Bessent*, 2025 WL 471022 (Feb. 10, 2025).

the district court issued a three-day administrative stay, ordering that Special Counsel Dellinger be allowed to continue to serve in his position through midnight on February 13, 2025. *See* Order, No. 25 Civ. 385 (D.D.C. Feb. 10, 2025, 8:20 PM).

The next morning, the government filed in the U.S. Court of Appeals for the D.C. Circuit a motion for an emergency stay pending appeal. No. 25-5025 (D.C. Cir. Feb. 11, 2025), ECF 4. One day later, Special Counsel Dellinger filed a response. No. 25-5025 (D.C. Cir. Feb. 12, 2025), ECF 7. That same evening, the D.C. Circuit denied the government's motion and *sua sponte* dismissed the government's appeal, holding unanimously that the court lacked appellate jurisdiction over the administrative stay and that the government was not entitled to mandamus relief. *See* App. 1a-2a (Katsas, Childs, Pan, JJ.). Judge Katsas issued a concurring opinion. *See id.* at 3a.

Even later that night, the district court granted Special Counsel Dellinger's TRO application. App. 29a. Consistent with Federal Rule of Civil Procedure 65, the district court limited its TRO to a fourteen-day period and scheduled a hearing on February 26 to decide whether to issue "an appealable preliminary injunction." *Id.* at 30a. The government responded to that order by filing a notice of appeal and a second emergency stay application in the D.C. Circuit. The government also filed a second stay application in the district court, which the district court denied the next day while reaffirming that it would "continue to act with extreme expedition," App. 32a.

Consistent with that commitment, the district court issued an order two days later consolidating consideration of a preliminary injunction with consideration of the merits. Order, No. 25 Civ. 385 (D.D.C. Feb. 15, 2025, 4:27 PM). It also adopted an

expedited schedule by which all issues will be briefed by February 27, 2025, after which point it will issue an appealable final judgment in this matter. *See id.* By virtue of that schedule, the district court will have an opportunity to address the disputes here with more fulsome briefing and weeks of study—which was not possible when it first issued a TRO two days after the filing of the complaint, and which will render the issue of interim relief irrelevant (given that it will adjudicate the ultimate merits).

Shortly before midnight on Saturday, February 15, the D.C. Circuit denied the government's second motion for an emergency stay and dismissed its appeal, again finding that the government had failed to demonstrate appellate jurisdiction or the propriety of mandamus relief. App. 47a. The court began by observing that "the relief requested by the government is a sharp departure from established procedures that balance and protect the interests of litigants, and ensure the orderly consideration of cases before the district court and this court." App. 28a. In support of that sharp departure, however, the government advanced only "unsubstantiated claims of 'extraordinary harm'" based on abstract theories of injury to alleged Article II interests. *Id.* To accept the government's view, the court reasoned, would be to invite a "deluge of TRO appeals," each of which "would be litigated at a breakneck pace." *Id.* at 41a. It would be particularly imprudent to proceed that way, the court emphasized, because the government's position effectively smuggled the merits inquiry into the threshold jurisdictional determination. *See id.* at 41a-42a. This approach would open the floodgates to immediately appeal any TRO whenever any Article II interest is asserted—or, alternatively, would require the adjudication of weighty and unresolved

constitutional merits questions at the outset to assess the appealability of a TRO. *Id.* Because such reasoning is at odds with precedent, the court rejected it, emphasizing that the government had made no substantial showing of injury that could not be properly remedied in the normal course following expiration of the TRO. *See id.* at 43a-44a. Judge Katsas dissented. *See id.* at 48a-59a.

The following morning—merely six days after Special Counsel Dellinger first filed suit, and with only ten days remaining before the TRO is set to expire—the government asked this Court to vacate the TRO and enter an administrative stay.

ARGUMENT

To obtain the relief that it requests, the government must show that this Court is reasonably likely to grant review of the ruling below, that there is a fair prospect it will reverse that ruling, that irreparable harm will likely result without emergency relief, and that the equities and relative balance of harms to the parties favor relief. *See, e.g.*, *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). Because the D.C. Circuit dismissed this appeal for lack of appellate jurisdiction, the government faces an especially high bar: it must not only show that this Court would likely review and reverse that jurisdictional ruling, but also that this Court would further reach and resolve the merits of the underlying stay application in its favor. As demonstrated below, it cannot make any of those showings. So its application should be denied.

I. This Court Is Unlikely to Review or Reverse the D.C. Circuit's Holding That It Lacked Appellate Jurisdiction to Review the TRO

In addressing its likelihood of success on the merits, the government focuses primarily on questions of constitutional law, returning only grudgingly at the end of

its brief to remark on jurisdiction. But as the D.C. Circuit held, the jurisdictional inquiry is the central one—and the government has failed to carry its heavy burden of demonstrating that this short-lived TRO is immediately appealable. Under these circumstances, this Court is unlikely to review or reverse the D.C. Circuit's fact-bound, unpublished, and well-reasoned opinion dismissing for lack of jurisdiction.

A. Appellate Courts Presumptively Lack Jurisdiction to Review District Court Decisions Granting or Denying TROs

Subject to limited exceptions, appellate courts may review only final judgments of district courts. *See* 28 U.S.C. § 1291. Congress set forth one such exception in 28 U.S.C. § 1292(a)(1), which creates appellate jurisdiction over "[i]nterlocutory orders of the district courts . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions." By virtue of this restriction to "injunctions," the "general rule is that orders granting, refusing, modifying, or dissolving temporary restraining orders are not appealable under § 1292(a)(1)," whereas orders granting or denying preliminary injunctions are appealable as of right, 16 Wright & Miller, *Federal Practice & Procedure* § 3922.1 (3d ed.); *Abbott v. Perez*, 585 U.S. 579, 595 (2018). To be sure, a district court cannot "shield" an injunction from appellate review merely by labelling it a temporary restraining order. *Sampson v. Murray*, 415 U.S. 61, 87 (1974). But when an interim injunction is limited to the short timeframe permitted for TROs, does not conclusively resolve the issues, and does not pretermit future action for preliminary injunctive relief, there is a robust presumption against appealability. *See, e.g.*, *Almeida-Leon v. WM Cap. Mgmt., Inc.*, No. 20-2089, 2024 WL 2904077, at *4-5 (1st Cir. June 10, 2024) ("To ensure an order

is not an injunction masquerading as a TRO, we look primarily to the order's duration. TROs are temporary and short; injunctions need not be."). That is particularly true where a TRO merely preserves the *status quo ante*—understood as the "last actual, peaceable uncontested status which preceded the pending controversy." *Mastrio v. Sebelius*, 768 F.3d 116, 120 (2d Cir. 2014) (cleaned up).

Under those standards, the TRO entered here plainly qualifies as a true TRO rather than a *de facto* preliminary injunction. It simply preserves the *status quo ante* that existed before the government's alleged unlawful conduct. It does not foreclose any further proceedings. It was issued in less than 48 hours and with highly limited briefing and argument. And it lasts only for a very short duration—consistent with Federal Rule of Civil Procedure 65(b)—while the district court engages in extremely expedited proceedings to address the merits of the parties' underlying dispute.[4]

B. The Government's Arguments for an Exception Lack Merit

The government contends that this TRO should be treated as appealable for a reason that this Court has not previously recognized: because it allegedly intrudes upon the President's Article II powers. Of course, whether the President in fact enjoys an Article II prerogative to fire the Special Counsel without cause is the core merits

[4] This case is thus nothing like those cited by the government. *See* Mot. 31-32. In *Brunner v. Ohio Republican Party*, 555 U.S. 5 (2008), the district court issued a TRO that operated as "a litigation-altering and litigation-ending injunction because it [gave] the parties no 'meaningful appellate options' about a significant issue of law given the imminence of an irreversible event [namely, the 2008 general election]." *Ohio Republican Party v. Brunner*, 544 F.3d 711, 715 (6th Cir.) (*en banc*), *vacated*, 555 U.S. 5 (2008). The decision in *Brewer v. Landrigan*, 562 U.S. 996 (2010), similarly concerned an irreversible event—an execution. *See Landrigan v. Brewer*, 625 F.3d 1144, 1145 n.1 (9th Cir. 2010). The government's other authorities do not even involve temporary restraining orders. *See Abbott*, 585 U.S. at 579 (indefinite prohibition on the use of Texas's preferred maps qualified as an injunction); *Carson v. Am. Brands*, 450 U.S. 79, 84 (1981) (denial of a joint consent decree that "would have permanently enjoined respondents" from discriminatory hiring practices was appealable).

issue in this case. In that respect, the government seeks to collapse the jurisdictional and merits inquiries—or, at minimum, to leverage its merits arguments into a basis for exercising appellate jurisdiction over an otherwise unappealable order. The Court should reject that maneuver, which would open the floodgates to many more fire-drill TRO appeals and which is particularly unjustified in the context of this litigation.

1. This lawsuit was first filed six days before the government's application for emergency relief in this Court. During that short period, the district court entered two orders, the D.C. Circuit decided two appeals, and this Court was asked (less than 12 hours after the D.C. Circuit issued its second opinion at 11:06 PM on Saturday over a holiday weekend) to hurriedly pronounce on major issues of constitutional law. To accept the government's position here would inevitably invite more of the same. The government could not be clearer: its application cites a series of recent TROs and asks the Court to green light immediate appeals whenever such orders allegedly intrude on any of the President's broadly conceived Article II powers. Mot. 5 & n.1.

As the D.C. Circuit recognized, the government's position is a stark break from historical practice: "We see no reason to incentivize more requests for two-day rulings when the appeal of preliminary injunctions in the normal course has heretofore been adequate to protect the interests of litigants, including the government, in the vast majority of cases." App. 41a. Moreover, endorsing that approach "at a time when emergency litigation is becoming more prevalent" would risk deluging federal courts (including this one) with emergency appeals "litigated at a breakneck pace." *Id.*

Cases involving the separation of powers, and many other asserted Article II interests, present greater (not lesser) reason for orderly judicial resolution. Such proceedings necessarily call upon courts to address the fundamental architecture of our constitutional system. Further, they often arise in politically fraught contexts. In these disputes, care and deliberation are particularly important, and courts should be wary of Executive Branch demands to bypass the procedural rules that exist to protect sound judicial decisionmaking. The premature adjudication of issues touching upon the structural separation of powers—especially when it occurs on an accelerated timeframe, without full briefing and argument, and with an underdeveloped record—can provoke destabilizing, harmful consequences. And it may do so in cases where this Court's intervention may not ultimately prove necessary in the normal course.[5]

There are good reasons why this Court usually disfavors adjudicating cases in an emergency or interlocutory posture. *See, e.g.*, *Moyle v. United States*, 603 U.S. 324, 334 (2024) (Barrett, J., concurring in the dismissal of writs of certiorari before judgment as improvidently granted); *see also City of Tulsa v. Hooper*, 143 S. Ct. 2556, 2557 (2023) (statement of Kavanaugh, J., respecting denial of application for stay); *Does 1-3 v. Mills*, 142 S. Ct. 17, 18 (2021) (Barrett, J., concurring in denial of

[5] For example, the government presumably will not seek certiorari if it convinces the district court in just over a week to deny a preliminary injunction and grant summary judgment in its favor. *See, e.g.*, Op. & Order, *Am. Fed'n. of Govt' Emps., AFL-CIO v. Ezell*, No. 25 Civ. 10276 (D. Mass. Feb 12, 2025), ECF 66 (dissolving TRO and denying preliminary injunction to union plaintiffs who lacked standing to challenge OPM's "Fork in the Road" directive). Or the President might reconsider his decision to terminate Special Counsel Dellinger, or the parties may arrive at some other consensual resolution. *See, e.g.*, Mem. for Heads of Exec. Dep'ts & Agencies from Matthew J. Vaeth, Acting Dir., Off. of Mgmt. & Budget (Jan. 29, 2025) (rescinding OMB memorandum from two days prior instructing federal agencies to freeze federal funding). In these and potentially other respects, the issues presented here may resolve without this Court's intervention.

application for injunctive relief). Moreover, several Justices have noted reservations about emergency requests to review "administrative stay" orders—which, much like the TRO here, are "supposed to be a short-lived prelude to the main event" and a tool for "minimiz[ing] harm while the court deliberates." *United States v. Texas*, 144 S. Ct. 797, 799 (2024) (Barrett, J., concurring in denial of applications to vacate stay).

Those prudential and practical considerations also speak to this circumstance. This proceeding reached the Supreme Court in less than six days, during which time the arguments of the parties evolved significantly, the D.C. Circuit dismissed two appeals for lack of jurisdiction, and the district court entered a short TRO principally meant to preserve the *status quo ante* while it reaches an expedited and appealable disposition. Having raced here at breakneck speed, the government now asks the Court to immediately address important constitutional questions with slight briefing and no argument, and to do so on grounds that would concededly open the floodgates to many more such "emergency" requests. The Court should reject that application—and affirm that the Judiciary will continue to uphold jurisdictional rules that have governed constitutional cases for generations without imperiling Article II.

2. The government's request for an exception to the presumptive rule against appealing TROs is particularly weak in this case. That is true for four main reasons.

First, the government materially misdescribes the TRO. In its application, the government rests substantial parts of its case on the premise that the TRO applies to the President. On that basis, it invokes precedents that relax jurisdictional and procedural requirements due to solicitude for the Presidency. Mot. 32-33; *but see* App.

42a n.1 (noting the government's failure to raise these arguments below). But these cases are inapposite. Special Counsel Dellinger sought a declaratory judgment (not injunctive relief) against the President. *See* Compl. at 13-14, No. 25 Civ. 385 (D.D.C. Feb. 10, 2025), ECF 1; Pl.'s Mot. for TRO at 2, No. 25 Civ. 385, ECF 2. And the D.C. Circuit made clear that the TRO "is properly read as not applying directly to the President but rather to the other defendants acting on his behalf." App. 42a n.1. This case therefore does not "involve[] the President" in a manner similar to the cases cited by the government, where relief was sought or issued *directly* against a current or former president. Mot. 32-33. Special Counsel Dellinger and the lower courts have proceeded with proper solicitude for the Presidency, and the TRO thus applies only to subordinate executive officials (as is customary in suits like this one), undercutting any assertion that personal presidential prerogatives are imperiled.

Second, the government concedes that it violated a clear, directly applicable, and longstanding statutory requirement when it fired Special Counsel Dellinger without cause. In light of that concession, it is difficult to comprehend how temporary continued adherence to the OSC's statutory scheme—which has been upheld by presidents for half a century (and which was negotiated and expressly approved by President George H.W. Bush)—constitutes a crisis for the separation of powers and an emergency that overrides limits on appellate jurisdiction. It is one thing for the government to now dispute the continued constitutionality of the OSC's for-cause removal protection in light of recent jurisprudence. It is quite another for the government to willfully violate that provision, which no court has ever invalidated,

and to then declare that any judicial remedy (no matter how temporary) works such an extreme and irreparable harm to Article II that the Supreme Court must intervene within a matter of days. This is precisely the kind of circumstance in which the Court should decline to review a TRO that briefly preserves the *status quo ante* while the Judiciary reviews the merits in an orderly, expedited, and deliberate fashion.

Indeed, the government fails to identify any other case in which this Court has granted emergency relief to allow the government to continue violating a federal statute that it was concededly violating. On its face, that is an improbable basis for the exercise of emergency authority. And this would be a strange case in which to create that precedent. The district court and D.C. Circuit both preliminarily held that the government's position on the merits is at least contestable as an extension of this Court's authorities. *See* App. 46a; *id.* at 18a-19a. Therefore, they reasonably declined to "presume[] that the government is correct on the merits." *Id.* 41a. To grant the government's application, in contrast, would require the Court to partially collapse the constitutional merits inquiry into the threshold jurisdictional analysis—thus significantly complicating an otherwise straightforward jurisdictional limitation and departing from precedent that ordinarily separates these two inquiries. *See, e.g.*, *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 n.4 (2014). To take those steps in a case where the government wishes to continue violating an Act of Congress—one whose constitutionality has not been reviewed by this Court—would mark an extraordinary and unwarranted new frontier in emergency relief.[6]

[6] Nor is it reasonable for the government to blame Special Counsel Dellinger for somehow "creat[ing] this emergency." Mot. 34. A White House staffer sent him a cursory email terminating him without

Third, the government asks the Court to take this leap in a case where the underlying merits and its theory of irreparable injury are (at minimum) subject to serious dispute. We address these points in detail below. *See infra* at II.A, II.B.1. As we demonstrate, there are very substantial reasons to doubt the government's claim that the TRO intruded on any Article II prerogative and, in any event, the government fails to identify any concrete, immediate, irreversible consequences from the TRO lasting eight more days. Whatever relief might be proper in a case where the government could point to a clearly established and definite injury resulting from a TRO, the open questions and abstract theories of harm it cites here come nowhere close to justifying an extraordinary exemption from the ordinary jurisdictional bar.

Finally, the government fails to identify any basis to doubt the district court's able handling of the case, or to view its TRO as somehow improper. To the contrary, the district court has proceeded with diligence and expedition. After Special Counsel Dellinger filed his TRO application, it held a same-day hearing, granted a request by government counsel to file an opposition the next day, and entered an interim order to preserve the *status quo ante* for three days. Two days later, it ruled on the TRO petition and set a preliminary injunction hearing for February 26, 2025. Over the following days, it reaffirmed its commitment to "extreme expedition," App. 32a, and set a quick briefing schedule that consolidated the preliminary injunction hearing

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cause—in direct violation of a statutory for-cause removal protection—late on a Friday night. Special Counsel Dellinger quickly asked the district court to preserve the *status quo ante* while the legality of that termination was resolved. It was then the government that created this emergency (and several others before it) through a series of emergency filings at odds with settled jurisdictional limitations. And it was the government that asked this Court to grant it emergency relief to violate a statute.

with summary judgment cross motions (thus ensuring an appealable final resolution), *see* Order, No. 25 Civ. 385 (D.D.C. Feb. 15, 2025, 4:27 PM). In fewer than nine days, the district court might well issue a final decision on the constitutional issues here. *See* App. 30a. As that summary of the proceedings makes clear, unlike in some of the cases cited by the government, the district court presiding over this matter is clearly acting with sincere efforts to render a timely and appropriately reasoned decision that respects the rights of all parties involved. There is thus no basis in the district court proceedings to disturb the usual rule that TRO proceedings cannot be appealed; certainly, this TRO is not a "stealth" injunction.

Together, the considerations set forth above support the D.C. Circuit's narrow and carefully reasoned conclusion that it lacked appellate jurisdiction over this case at this juncture. This Court is unlikely to review or reverse that decision, and for that reason alone it should deny the government's unprecedented request for relief.

As a fallback, the government refers to the All Writs Act. But absent a distinct source of appellate jurisdiction, the Act does not support the government's position. See *Clinton v. Goldsmith*, 526 U.S. 529, 534-35 (1999) ("[T]he express terms of the Act confine the power of the [court] to issuing process 'in aid of' its existing statutory jurisdiction; the Act does not enlarge that jurisdiction."); 33 Wright & Miller, *Federal Practice & Procedure* § 8313 (2d ed.) ("As the text of the All Writs Act indicates, it does not create an independent source of jurisdiction.").[7] In passing, the government

[7] The cases cited by the government confirm as much. In *U.S. Alkali Export Association v. United States* (which predated § 1292), this Court emphasized that because the All Writs Act "may not be used as a substitute for an authorized appeal," where Congress limits "appellate review of interlocutory orders," an "extraordinary writ is not permissible in the face of the plain indication of

also cites mandamus, but does not urge this Court to exercise any mandamus jurisdiction and offers no serious response to the D.C. Circuit's analysis of why it "fails the *Cheney* test at every step." App. 47a. These abbreviated references to the All Writs Act and mandamus thus fail to salvage the government's position.

II. Every Other Consideration Weighs Against Granting Relief

Even if this Court were to review and reverse the D.C. Circuit's holding as to appellate jurisdiction, it should still reject the government's application for relief: the government is not likely to prevail on the merits, has failed to establish irreparable injury, and cannot show that the equities and relative harms weigh in its favor.

A. The Government Is Not Likely to Prevail on the Merits

Special Counsel Dellinger's claims rest on a single premise: that it was unlawful to remove him from office without cause, in violation of his statutory for-cause removal protection. *See* 5 U.S.C. § 1211(b). The government does not dispute that it violated this statutory limitation. Instead, it advances two arguments: first, that the for-cause removal provision is unconstitutional; and second, that even if the provision is constitutional, the district court was powerless to order reinstatement in its TRO. The government is not substantially likely to prevail on either argument.

1. The government's lead submission is that § 1211(b) violates the separation of powers. As the district court and D.C. Circuit concluded, that contention fails to

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the legislative purpose to avoid piecemeal reviews." 325 U.S. 196, 203 (1945); *accord Pa. Bureau of Corr. v. U.S. Marshals Serv.*, 474 U.S. 34, 41 (1985) ("In *United States Alkali*, the Court rejected use of the all writs provision to enable the Court to review a lower court's determination where jurisdiction did not lie under an express statutory provision."). Even less relevant is *Coleman v. Paccar, Inc.*, where issuance of a writ to vacate a 60-day stay of a federal regulation by the circuit court was justified because that order was "the equivalent of a preliminary injunction." 424 U.S. 1301, 1303 (1976); *see id.* ("[E]ven the full Court under § 1651 may issue writs only in aid of its jurisdiction.").

grasp significant distinguishing features of the OSC. *See* App. 12a ("[T]o date, the Supreme Court has taken pains to carve the OSC *out* of its pronouncements concerning the President's broad authority to remove officials who assist him in discharging his duties at will."); *id.* at 46a ("[T]he cited cases do not hold that the President has unrestricted power to remove the Special Counsel."). The application of a for-cause removal rule to the OSC advances core statutory purposes, reflects a considered inter-branch agreement, and poses no harm to Article II prerogatives.

This Court's original pronouncement on for-cause removal limits is *Humphrey's Executor v. United States*, which upheld the constitutionality of a materially identical restriction on the President's authority to remove members of the Federal Trade Commission. 295 U.S. 602, 625-26, 629 (1935). More broadly, the Court recognized in *Humphrey's Executor* that Congress could shield agency heads from removal without cause where Congress deemed such protections necessary to secure a modest measure of impartiality, expertise, and independence. As the Court is aware, that ruling continues to form the basis for an important part of the modern federal government. *E.g.*, *Wiener v. United States*, 357 U.S. 349, 355-56 (1958).

In recent years, this Court has invalidated removal limits for principal officers leading single-headed agencies that wield binding regulatory and enforcement authority over private actors. As relevant, first came *Seila Law LLC v. Consumer Financial Protection Bureau*, 591 U.S. 197 (2020). There, the Court noted that for-cause removal limits for single-person agency leadership structures are a relatively recent phenomenon and warrant closer scrutiny. *See id.* at 220-22. It then concluded

that applying such statutory protections to the Director of the CFPB, in particular, raised exceptionally grave concerns in light of the Director's power to "issue final regulations, oversee adjudications, set enforcement priorities, initiate prosecutions, and determine what penalties to impose on private parties." *Id.* at 225. As the Court noted, the Director's authority to "dictate and enforce policy for a vital segment of the economy affecting millions of Americans"—and to do so without accountability to the President through at-will removal—infringed on Article II. *Id.* Accordingly, the Court held that the President must be able to remove the CFPB Director at will. *See id.* at 234-38. In reaching this conclusion, however, the Court expressly distinguished the OSC, which "exercises only limited jurisdiction to enforce certain rules governing Federal Government employers and employees" and "does not bind private parties at all or wield regulatory authority comparable to the CFPB." *Id.* at 221.

Whereas *Seila Law* distinguished removal protections at the OSC, it expressly cast into doubt such protections at the Federal Housing Finance Agency ("FHFA")—which were stricken down one year later in *Collins v. Yellen*, 594 U.S. 220 (2021). In reaching this conclusion, *Collins* reasoned that asserted differences between the CFPB and FHFA regarding the "nature and breadth" of their authority were not dispositive of the constitutional analysis—adding that the FHFA was in some respects *more* powerful than the CFPB and that it had direct "regulatory and enforcement authority over two companies that dominate the secondary mortgage market and have the power to reshape the housing sector." *Id.* at 251, 253.

Taken together, *Humphrey's Executor*, *Seila Law*, and *Collins* all support the constitutionality of the OSC's for-cause removal limitation. That is true for two independent reasons: (a) the Special Counsel is an inferior rather than principal officer (and those cases all concerned principal officers); and (b) the central reasons given for invalidating for-cause removal restrictions in those cases do not apply here.

a. It has long been settled that, for inferior officers, Congress can "limit and restrict the power of removal as it deems best for the public interest." *United States v. Perkins*, 116 U.S. 483, 485 (1886); *see also Myers v. United States*, 272 U.S. 52, 161-64 (1926); *Morrison v. Olson*, 487 U.S. 654, 689 n.27 (1988). This Court recognized that important distinction concerning inferior officers in *Seila Law*. *See* 591 U.S. at 218-20 (discussing *Morrison*). In assessing whether a given official is an inferior or principal officer, the central question is "whether he has a superior other than the President." *United States v. Arthrex, Inc.*, 594 U.S. 1, 13 (2021) (cleaned up). Courts also consider the "nature, scope, and duration of an officer's duties." *Seila Law*, 591 U.S. at 217 n.3 (citing *Edmond v. United States*, 520 U.S. 651, 661 (1997)).

Under that standard, the Special Counsel of the OSC in an inferior officer—and Congress is thus freer to set terms for his removal from office. As explained above, the Special Counsel's role is important but limited. In essence, he is an ombudsman. He cannot regulate or penalize (directly or indirectly) any private conduct. Within the world of federal employment, moreover, he cannot impose any discipline or adverse action on his own authority. Instead, he receives complaints and encourages agencies to seek consensual resolutions; in some cases, he may also petition the MSPB on an

injured employee's behalf or petition it to address a possible Hatch Act violation, but it is then entirely up to the MSPB how it wishes to act on the petition. *See AFGE*, 747 F.2d at 753 ("[T]he MSPB is free to disagree with the Special Counsel and often does."). The Special Counsel can issue subpoenas while investigating, but he cannot enforce them—only the MSPB can do so. Similarly, although the Special Counsel can issue internal regulations and Hatch Act advisory opinions, they "bind[] neither the public nor any agency or officer of government." *Id.* at 752. The Special Counsel cannot bring an action in federal court. Nor can he conduct his own investigation of reports from employee-whistleblowers within agencies; for such cases, his role is limited to reviewing and assessing any investigations by the relevant agency.

In these ways, the Special Counsel is effectively supervised by and accountable to the MSPB and the other agencies where whistleblowers raise concerns: they must exercise their independent discretion in assessing whether to uphold or pursue his positions. The Special Counsel does not engage in "prosecutorial decisionmaking" in any standard sense, Mot. 2, and it is quite an overstatement to compare his HR-oriented administrative function to the criminal enforcement power wielded by U.S. Attorneys, Mot. 15.[8] Similarly, the Special Counsel's powers do not resemble the authority of the principal officers who lead the CFPB and FHFA. The CFPB Director, for instance, wields the power to "unilaterally issue final regulations, oversee adjudications, set enforcement priorities, initiate prosecutions, and determine what

[8] For instance, federal prosecutors face checks and balances from Article III courts, whereas the Special Counsel's authorities (except for his reporting duties) are all checked and balanced *within* Article II. Additionally, federal prosecutors hold power to bind and make representations on behalf of the United States. The Special Counsel lacks power to bind *anyone*.

penalties to impose on private parties." *Seila Law*, 591 U.S. at 225. The FHFA Director, in turn, can "hold hearings," "suspend corporate officers," "bring civil actions in federal court," and "impose penalties ranging from $2,000 to $2 million per day." *Collins*, 594 U.S. at 230. The Special Counsel possesses no such executive powers.

Accordingly, the Special Counsel is properly considered an inferior officer under this Court's precedent—and the for-cause removal provision is thus lawful.

b. Alternatively, the government has failed to establish a likelihood of success on the merits because the OSC is distinguishable from the CFPB and FHFA in ways that powerfully support the continued constitutionality of its removal limitation.

First, *Seila Law* and *Collins* were animated by a profound concern about the President's inability to remove officials sitting atop single-headed agencies that exercise core executive power in ways that could "dictate and enforce policy for a vital segment of the economy affecting millions of Americans." *Seila Law*, 591 U.S. at 225; *accord Collins*, 594 U.S. at 255. As the Court appropriately recognized when it distinguished the OSC in *Seila Law*, however, that concern is not present here.

Fundamentally, the OSC is an investigative agency with limited advisory and reporting functions—all of which are focused on HR issues. In performing these functions, the OSC does not regulate or penalize private activity. *See Seila Law*, 591 U.S. at 221 (noting that the OSC "does not bind private parties at all"). The OSC also lacks the power to issue binding regulations, oversee adjudications, commence prosecutions, determine what penalties to impose, appear in an Article III tribunal (except as an amicus), or control in any way the substantive regulatory framework

for any public or private entities. In these essential respects, none of the OSC's authorities comes close to the exercise of "substantial executive power." Mot. 17 n.5. Consistent with those statutory limitations, the OSC's authority to "promulgate regulations," Mot. 6, 28, is strictly confined to nonbinding advisory opinions and internal OSC affairs, *see AFGE*, 747 F.2d at 752 (observing that such regulations "bind[] neither the public nor any agency or officer of government"). And only the MSPB, rather than the OSC, can "issue[] . . . decisions in administrative adjudications." Mot. 17 n.5. While the OSC's work is essential, it occurs within a "limited jurisdiction" related to federal employers and employees. *Seila Law*, 591 U.S. at 221. It poses no "special threat to individual liberty" for the Special Counsel to receive limited independence from political control in reviewing and investigating confidential whistleblower reports from federal employees. *Id.* at 223.

Second, consistent with the reasoning of *Humphrey's Executor*, the OSC exists to vindicate functions and interests held in common by Congress, the Executive Branch, and the public. Congress carefully designed the OSC to play an important reporting role with respect to legislative oversight and deliberations. *See* 5 U.S.C. § 1217. The OSC's work also furthers the distinct and shared inter-branch interest in promoting Executive Branch compliance with congressionally imposed ethical and personnel requirements. In that respect, the OSC is more than just an aspect of the executive power or extension of presidential will. *See Humphrey's Executor*, 295 U.S. at 628. Moreover, the OSC's structure—including its for-cause removal provision—reflects a heavily negotiated inter-branch resolution that was embraced by President

Bush when he signed the Whistleblower Protection Act (and by his Attorney General in cooperating to pass the bill). In fact, not one, but two Presidents—Carter and Bush—signed legislation with for-cause removal protections at the OSC, making clear that any interstitial concerns raised by their subordinates at the OLC had either been addressed or overruled in practice by the Office of the President.[9]

Finally, the need for independence at the OSC is unique in its character and purposes. With respect to the CFPB and FHFA, the case for agency independence rested heavily on a substantive belief that economic regulation should be free of specific forms of presidential political control. *See Seila Law*, 591 U.S. at 207; *Collins*, 594 U.S. at 229-30. Agency independence in those settings was specifically designed to restrain the President's ability to direct the agencies' regulatory powers consistent with his agenda. Here, in contrast, the OSC lacks any regulatory powers—and the independence afforded by its statutory for-cause removal provisions serves an entirely different function. Rather than hamper the President's substantive regulatory agenda, the OSC's independence protects and assures whistleblowers. If the official charged with protecting whistleblowers from retaliation was himself utterly vulnerable to retaliation and removal for taking on politically charged or inconvenient cases, then the OSC's whistleblower protection purpose might fail when it is most needed. Simply put, Congress reasonably found—and two Presidents agreed—that the Special Counsel cannot serve as an independent watchdog, or

[9] It is surprising to see the government invoke concepts rooted in the unitary executive theory while treating OLC opinions from the 1970s as more authoritative than President Bush's own statement concerning the for-cause removal language in the Whistleblower Protection Act of 1989.

protect whistleblowers, if he is subject at all times to removal without cause. *See, e.g.*, *Constitutionality of the Commissioner of Social Security's Tenure Protection*, 2021 WL 2981542, at *6 n.3, *9 (O.L.C. July 8, 2021) (concluding that *Collins* rendered the Social Security Commissioner removable at-will but did not necessarily apply to the OSC by virtue of its "primarily investigatory function" and "limited jurisdiction").

For these reasons, the government has not shown a substantial likelihood of success on the merits of its position that the OSC's for-cause removal protection is unconstitutional. At minimum, this remains an open question of constitutional law and is not properly resolved in an emergency appeal from a TRO. *See* App. 46a.

2. The government separately argues that it is likely to prevail on the theory that courts lack the power in equity (and otherwise) to issue reinstatement remedies to unlawfully removed officials. Mot. 21-25. Much of this argument is focused solely on the reinstatement of principal officers and is distinguishable on the basis that the Special Counsel is an inferior officer. *See supra* at 26-28. More troubling, having barely developed this argument below, the government now seeks to raise complex issues with little recent instructive precedent to guide the inquiry (and no on-point reasoning from either the district court or D.C. Circuit here). These tactics counsel against making major pronouncements on the law of remedies—or resting decisions on such hastily developed points—in an emergency appeal from a TRO.

In any event, the government's argument is flawed in several respects. To start, Special Counsel Dellinger did not seek, and the district court did not direct in its TRO, "reinstatement" to the office of Special Counsel. Rather, he sought a

declaration that his termination was unlawful (and therefore void *ab initio*), as well as injunctive relief, and the district court issued a TRO providing that he "*shall continue to serve* as the Special Counsel." App. 29a (emphasis added). As explained above, that relief does not run directly to the President but instead to "subordinate executive officials" who may "*de facto*" provide Special Counsel Dellinger with the privileges and authorities of his office. *Severino v. Biden*, 71 F.4th 1038, 1042-43 (D.C. Cir. 2023); *see also, e.g.*, *Swan v. Clinton*, 100 F.3d 973, 989 (D.C. Cir. 1996) (Silberman, J., concurring). Whatever the general rule as to reinstatement, this TRO preserved rather than reinstated the Special Counsel's ongoing tenure in office.

Nor is the government right to assert that reinstatement to office is prohibited as a judicial remedy. Mot. 23. For example, courts have long recognized proceedings in *quo warranto* as "a plain, speedy, and adequate" remedy in law "for trying the title to office." *Delgado v. Chavez*, 140 U.S. 586, 590 (1891); *see also, e.g.*, *Newman v. U.S. ex rel. Frizzell*, 238 U.S. 537, 544 (1915) ("The writ thus came to be used as a means of determining which of two claimants was entitled to an office . . . ."). This procedure vests courts with the traditional remedial authority "not only to oust the respondent [officer] but also to install the relator [officer]." Floyd R. Mechem, *A Treatise on the Law of Public Offices and Officers* § 496 (1890); *e.g.*, *Boyd v. Nebraska*, 143 U.S. 135, 151 (1892); *U.S. ex rel. Crawford v. Addison*, 73 U.S. 291, 297 (1867) (observing that upon judgment of ouster, "relator thereupon became entitled to the office").

In fact, the government's lead case (which declined to enjoin a state proceeding) says as much in portions that the government omits: "The jurisdiction to determine the title to a public office belongs exclusively to the courts of law, and is exercised either by . . . *mandamus*, prohibition, *quo warranto*, or information in the nature of a writ of *quo warranto*, according to . . . the mode of procedure, established by the common law or by statute." *In re Sawyer*, 124 U.S. 200, 212 (1888); *see also id.* at 213, 216, 220 (same). The government's other authorities say the same, or rested on the very distinct point (also at issue in *Sawyer*) that federal courts should abstain from adjudicating *state* offices. *See, e.g.*, *Walton v. House of Representatives of State of Okl.*, 265 U.S. 487, 490 (1924) (eligibility of state representative); *Harkrader v. Wadley*, 172 U.S. 148, 165 (1898) (declining to enjoin state criminal proceeding). As a matter of first principles, there is no reason that reinstatement is not available to an officer removed by the President in violation of for-cause removal protections. *See* Laurence H. Tribe, *American Constitutional Law* 250 n.20 (2d ed. 1988).

To be sure, the government attempts to derive a "backpay-only" rule from a handful of prior cases involving removed officers. But this overlooks a key point: a litigant's choices about what remedy to seek may reflect practical considerations rather than a legal prohibition. For instance, Myron Wiener originally *did* sue for reinstatement, but the War Claims Commission from which he was removed was abolished by Congress while his suit was pending, and he subsequently refiled to seek only backpay. *See Wiener*, 357 U.S. at 350. As for Messrs. Myers and Humphrey, neither petitioned the Court for reinstatement because both had died over a year

before their cases were decided—which made reinstatement awfully unlikely, but certainty did not prove the unavailability of reinstatement remedies. *See Humphrey's Executor*, 295 U.S. at 612; *Myers*, 272 U.S. at 52 (suit by "administratrix").[10]

Regardless, the district court here did not issue its relief in a vacuum, but rather by reference to a statutory provision that seeks to achieve important purposes in securing a measure of agency independence from direct political control. It is appropriate to describe equitable remedies by reference to that statutory scheme. *See CIGNA Corp. v. Amara*, 563 U.S. 421, 444-45 (2011); *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946); *Hecht Co. v. Bowles*, 321 U.S. 321, 330-31 (1944). In creating for-cause removal protections, Congress fundamentally undertook to safeguard covered officials against removal without cause. It follows from this core statutory design that officials removed without cause can, in the first instance, seek a judicial order (just like the one issued here) providing for their continuance in office.

To hold otherwise would reduce for-cause removal protections to rubble—which is now the government's publicly stated goal, *see* Mot. 17 n.5, but which it would be mightily strange to endorse through a procedurally improper TRO appeal. On the government's view, a President could fire independent agency officials at will and, at most, months or years later, after final judgment and appeal, those fired officials might be able to recover some backpay from the Treasury . . . but nothing more. On this logic, a century of ink and energy devoted to agency independence has

[10] This may not come as a surprise to the government, which apparently deleted "the deceased" from its description of *Humphrey's Executor* in its brief. *See* Mot. 22 (describing *Humphrey's Executor* as a "suit 'to recover a sum of money alleged to be due * * * for salary," where "* * *" replaces "the deceased").

been a colossal misadventure: all it would cost is a few thousand dollars from the U.S. Treasury for a President to buy his way out of for-cause removal restrictions. Rather than infer that so many presidents, legislators, courts, scholars, and agency officials misunderstood how for-cause removal restrictions work—namely, to keep covered officials in office unless they are properly terminated with cause—the far more natural inference is that equity permits courts to afford continuance or reinstatement remedies as necessary to effectuate these longstanding statutory safeguards.

For these reasons, the government is not likely to succeed on the merits of this argument. At minimum, in light of the government's failure to develop this point below—and given the absence of any reasoning on these issues from either lower court or from any recent opinion of this Court—the government has not carried its heavy burden of demonstrating entitlement to emergency relief on this ground.[11]

B. The Remaining Equitable Factors Cut Against Relief

Finally, the government's application should be denied because it cannot show that it would be irreparably harmed by the denial of a stay or that the balance of the equities (including the relative harms to the parties) supports its request for relief.

1. The D.C. Circuit held that the government failed to demonstrate the kind of concrete, here-and-now, and irreparable harm that would support emergency relief. App. 47a. In this Court, the government seeks to show otherwise by citing "transparently irreparable" harm "to the Executive Branch, to the separation of

[11] The government asserts that the TRO prevents the President from terminating Special Counsel Dellinger for cause without going to the district court first. Mot. 21. The government did not raise this concern to either court below. If it wishes to do so, the appropriate place to start is the district court.

powers, and to our democratic system." Mot. 26. This claim, like the government's jurisdictional arguments, confuses the merits with irreparable harm. In any event, it is unconvincing: these asserted democratic and constitutional interests will not be irreparably harmed by a short, time-limited order; rather it is only "the resolution of the case on the merits, not whether the [order] is stayed pending appeal, that will affect those principles." *Texas v. United States*, 787 F.3d 733, 767-68 (5th Cir. 2015).

Indeed, the government frequently asserts analogous interests while seeking stays—but even when it has cited "core" executive interests, including interests in controlling criminal and immigration enforcement practices, courts have repeatedly declined to stay orders, finding that they do not inflict irreparable harm. *See, e.g.*, *id.* at 767-69 (denying stay of order that affirmatively required the enforcement of federal immigration laws); *State v. Biden*, 10 F.4th 538, 558-60 (5th Cir. 2021) (denying stay pending appeal in similar circumstances); *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 778 (9th Cir. 2018) (denying stay of order that precluded the enforcement of immigration entry requirements); *Washington v. Trump*, 847 F.3d 1151, 1168 (9th Cir. 2017) (*per curiam*) (denying stay of TRO that temporarily blocked an executive order restricting entry by certain foreign nationals); *accord* App. 3a (Katsas, J., concurring) (finding it unclear if "serious but abstract separation-of-powers concerns . . . amount to the kind of concrete, immediate, irreversible consequences that would warrant treating . . . a TRO as a preliminary injunction").[12]

[12] The government separately asserts a harm to democracy itself because the district court's order keeps in the office of the Special Counsel "a person who answers to no one and for whom no one voted." Mot. 28-29. But as set forth above, the Special Counsel answers to the MSPB and to other agency officials, wields no regulatory power over any private citizen, and cannot directly take adverse action

The government further claims that the TRO has deprived the President of the ability to "implement his agenda through a principal officer of his choosing." Mot. 27. But even if the Special Counsel were a principal officer (which he is not), nowhere in its brief does the government identify any action or inaction that Special Counsel Dellinger has taken that would result in irreparable harm to the President's agenda. And given the President's obligations under the Take Care Clause, it is not apparent that the government could show irreparable harm from any lawful action by Special Counsel Dellinger to promote compliance with statutory protections for federal employees. Nor does the government reconcile its broad assertions of harm with the limited authorities exercised by the OSC, which (as explained above) include the receipt of complaints by federal employees, investigations of the same (or reviews of investigations by other agencies), reports to Congress and the President, and filing complaints at the MSPB. *See supra* at 7-9. While the government objects that the President should be allowed to fire the Special Counsel for any reason or none at all, Mot. 27, here it seeks to stay a TRO and must therefore show irreparable injury—and yet it continues to fail to identify any irreparable, substantial harm.

Finally, the government claims an irreparable harm to the OSC because of the risk that the Special Counsel's actions will be "exposed . . . to legal challenge." Mot. 30. But Special Counsel Dellinger—as the presidentially nominated and Senate-

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even within the sphere of federal employment. So the government's concern has little substance. And the government ignores entirely the significant democratic interest in complying with a 50-year-old statute implemented by the people's representatives in Congress, signed by two Presidents elected by the people, which responded to public concern that public-minded whistleblowers in the federal civil service required independent protection from potential political reprisal. *See supra* at 4-6.

confirmed leader of the agency—is by far the most legally secure leader of the OSC. And any confusion concerning his authority is due principally to the government itself, which removed him without cause (in direct violation of an applicable statute) and then purported to name another Acting Special Counsel even after the district court had granted interim relief in this case. *See* App. 22a n.5, 31a. It is in everybody's interest to clarify the leadership of the OSC. But the government is holding a big stone in a tiny glass house if it believes that Mr. Dellinger is responsible for any uncertainty over the lawful leadership of this whistleblower-protection agency.

The government has had ample and repeated opportunity to identify concrete and irreparable harm from the TRO that maintains Special Counsel Dellinger in his office. Nevertheless, it continues to offer only abstract and non-specific interests, and fails to show how they are irreparable or to distinguish cases denying relief on similar grounds. For this independent reason, the government's application should be denied.

2. In its balancing of the equities, the government insists that Special Counsel Dellinger suffered no injury when he was unlawfully terminated—and that he thus has no personal stake or equity in the outcome of this proceeding. Mot. 30-31. As the district court explained at length, with hardly any response from the government, that counterintuitive position is mistaken. *See* App. 19a-27a. Simply put, Special Counsel Dellinger suffered well-recognized, cognizable harm from the government's unlawful conduct—and (by virtue of this suit in his official capacity) is also a proper party to assert the substantial institutional equities of the OSC itself in preserving the independence necessary to its confidential whistleblower protection function.

Those interests, as well as the public interest, further support maintaining the TRO—which, again, is set to expire on February 26—while the legal issues in this case are resolved in an appropriately deliberative and orderly fashion. Otherwise, there may be continued whiplash at the OSC as courts assess the legality of its for-cause removal protection (and the purported removal of Special Counsel Dellinger). Of course, this would be an especially unfortunate moment at which to weaken the OSC, given the historic upheaval currently occurring within federal employment and the continued importance of ensuring that whistleblowers are guarded from reprisal.

CONCLUSION

For the reasons set forth above, the government's application to vacate the TRO and alternative request for an immediate administrative stay should be denied.

Respectfully submitted,

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