No. 25-5028

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

HAMPTON DELLINGER,

Plaintiff-Appellee,

v.

SCOTT BESSENT, in his official capacity as Secretary of the Treasury, et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Columbia

EMERGENCY MOTION FOR A STAY PENDING APPEAL

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

Plaintiff is Hampton Dellinger. Defendants are Scott Bessent, in his official capacity as Secretary of the Treasury; Sergio Gor, in his official capacity as Director of the White House Presidential Personnel Office; Karen Gorman, in her official capacity as Acting Special Counsel; Karl Kammann, in his official capacity as Chief Operating Officer of the Office of Special Counsel; Donald J. Trump, in his official capacity as President of the United States of America; and Russell T. Vought, in his official capacity as Director of the Office of Management and Budget.

No amici curiae or intervenors participated before the district court.

B. Ruling Under Review

The ruling under review is a temporary restraining order the district court issued on February 12, 2025 (Dkt. 14). It is attached to this motion.

C. Related Cases

This case has previously been before this Court as No. 25-5025. We are not aware of any related cases.

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INTRODUCTION

As the Court is aware, this is a challenge by Hampton Dellinger to his removal by the President as the head of an agency within the Executive Branch—the Office of Special Counsel (OSC). Yesterday evening, the Court dismissed the government's prior appeal from the district court's "administrative stay" ordering plaintiff's immediate reinstatement as Special Counsel and denied mandamus relief. Judge Katsas filed a concurrence explaining that it was "unclear" whether the "serious but abstract separation-of-powers concerns" invoked by the government "would warrant treating an administrative stay or a [temporary restraining order (TRO)] as a preliminary injunction," but finding that the three-day duration of the order in question "cut[] strongly against interlocutory review at this juncture." Judge Katsas "express[ed] no view on the appealability or merits of any later order granting interim relief to Dellinger … , whether styled as a preliminary injunction or TRO."

The government respectfully returns to this Court today because, hours after this Court's decision, the district court last night issued a 27-page opinion granting a "temporary restraining order" and restoring plaintiff to office. The court declared that plaintiff is likely to prevail on the merits and

has established the equitable prerequisites for relief. Although the opinion fully addressed the issues raised in adversarial briefing—indeed, the district court invited the parties to "deem the motion in support of the temporary restraining order to be a memorandum in support of a motion for preliminary injunction [or summary judgment], with the opposition and reply similarly designated"—the court set the TRO to last for a full 14 days and specified that a hearing on "an appealable preliminary injunction" or summary judgment would not be held until February 26. Dkt. 14 at 27. Thus, even if the district court were to rule from the bench on the day of the scheduled hearing, the temporary relief the court has entered—first styled as an "administrative stay," now styled as a TRO—will have lasted for 16 days. And if the district court next extends the TRO to the 28-day maximum length permitted by Rule 65, to allow time for a ruling after the hearing, the court's incursion on the President's control over the Executive Branch could last for nearly a month.

This "temporary restraining order" is plainly an appealable injunction. The issues are entirely legal, the questions were fully briefed and resolved through adversarial presentation, and the district court issued a reasoned

opinion. If not stayed, the court's "temporary restraining order" could displace the President's judgment about who should run an executive agency for a meaningful portion of the President's first year in office. For all the reasons articulated in the government's prior motion and rearticulated below, a stay pending appeal (or, in the alternative, mandamus relief) is warranted.

Given that the Court has already considered our prior motion and is familiar with the issues, the Acting Solicitor General respectfully requests a ruling on this motion **by Friday, February 14 at noon** so that she has the opportunity to seek expeditious review from the Supreme Court if this Court denies relief. To facilitate a ruling on that timeline, the government waives any reply in support of this motion.

STATEMENT

A. Statutory Background

Congress created the Office of the Special Counsel in the Civil Service Reform Act of 1978. Pub. L. No. 95-454, § 202(a), 92 Stat. 1111, 1122. The Act authorized the Special Counsel to receive and investigate "any allegation of a prohibited personnel practice," 92 Stat. at 1125, and to request corrective action from the Merit Systems Protection Board in cases where agency heads

declined to correct impermissible practices, *id.* at 1127, among other powers. The Act provided that the Special Counsel could "be removed by the President only for inefficiency, neglect of duty, or malfeasance in office." *Id.*

From the beginning, the Executive Branch objected to the constitutionality of that removal restriction. In a published opinion, the Carter Administration's Office of Legal Counsel explained that "[b]ecause the Special Counsel [would] be performing largely executive functions, the Congress [could] not restrict the President's power to remove him." *Memorandum Opinion for the General Counsel, Civil Service Commission*, 2 Op. O.L.C. 120, 122 (1978); *see Seila Law LLC v. CFPB*, 591 U.S. 197, 221 (2020) (noting this "contemporaneous constitutional objection"). And when Congress passed an initial version of the Whistleblower Protection Act in 1988, separating OSC from the Merit Systems Protection Board and vesting OSC with additional powers, President Reagan pocket-vetoed the legislation, explaining that it "raised serious constitutional concerns" by, among other things, "purport[ing] to insulate the Office from presidential supervision and to limit the power of the President to remove his subordinates from office." Public Papers of the Presidents, Ronald Reagan, Vol. II, Oct. 26, 1988, pp. 1391–1392

(1991); *see Seila Law*, 591 U.S. at 221 (citing this "veto on constitutional grounds").

Congress ultimately passed a revised version of the Whistleblower Protection Act that separated OSC from the Merit Systems Protection Board while removing certain of the additional powers that the initial version would have granted the Office. Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16. President George H.W. Bush signed that bill, notwithstanding its maintenance of the restrictions on removal of the Special Counsel. But the Executive Branch did not recede from its constitutional objection to Congress's placement of restrictions on the removal of agency heads. In 1994, for example, the Office of Legal Counsel advised President Clinton "that the [Social Security Administration]'s new structure as an agency led by a single person with tenure protection was 'extraordinary'" and that the tenure protection presented a "'serious constitutional question'" because it "'would severely erode the President's authority.'" *Constitutionality of the Commissioner of Social Security's Tenure Protection*, 45 Op. O.L.C. __, 2021 WL 2981542, at *2 (O.L.C. July 8, 2021) (quoting Letter for Lloyd N. Cutler, Counsel to the President, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel (July 29, 1994)).

Today, OSC exercises essentially the same powers as it originally possessed. The Special Counsel is vested with an array of executive powers and functions. *See* 5 U.S.C. § 1212. The Special Counsel's responsibilities include investigating allegations of prohibited personnel practices, 5 U.S.C. § 1214(a)(1)(A), and initiating disciplinary actions through the filing of complaints before the Merit Systems Protection Board, *see id.* § 1215(a)(1).

B. This Litigation

Hampton Dellinger was appointed by President Biden and confirmed by the Senate to serve as Special Counsel, beginning in March 2024. Dkt. 1 ¶ 1. On February 7, 2025, the Director of the White House Presidential Personnel Office informed Dellinger that the President had removed him from office effective immediately. *Id.* ¶ 2.

On Monday, February 10, Dellinger brought this suit to challenge his removal, Dkt. 1, and moved for a temporary restraining order, Dkt. 2. Upon receiving the motion, the district court set a near-immediate hearing, before the government had responded to the motion for a temporary restraining order. Several hours later, the court entered what it described as "a brief administrative stay" restoring Dellinger to the office of Special Counsel, reasoning that the stay was necessary "to preserve the status quo."

The government filed a notice of appeal and a motion for an emergency stay or, in the alternative, mandamus. On February 12, this Court dismissed the government's appeal, denied mandamus relief, and dismissed the stay motion as moot. *Dellinger v. Bessent*, No. 25-5025 (D.C. Cir. Feb. 12, 2025). The Court's order issued at approximately 6:30 pm. Two hours later, the district court issued a 27-page opinion granting a temporary restraining order, parsing the parties' arguments in detail, concluding that plaintiff is likely to succeed on the merits in this litigation, and finding that the balance of equities favored restoring plaintiff to office notwithstanding his removal by the President.

ARGUMENT

In considering a stay pending appeal, this Court examines "'(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the

other parties interested in the proceeding; and (4) where the public interest lies.'" *Nken v. Holder*, 556 U.S. 418, 426 (2009).[1]

A. This Court Has Jurisdiction.

This Court has jurisdiction to review the district court's order. Although TROs are ordinarily not appealable, they are appealable where they are "more akin to preliminary injunctive relief." *Garza v. Hargan*, 2017 WL 9854552, at *1 n.1 (D.C. Cir. Oct. 20, 2017), *vacated in part on reh'g en banc*, 874 F.3d 735 (D.C. Cir. 2017), *vacated sub nom. Azar v. Garza*, 584 U.S. 726 (2018); *see Belbacha v. Bush*, 520 F.3d 452, 455 (D.C. Cir. 2008) (treating denial of temporary restraining order as "'tantamount to denial of a preliminary injunction'"). That is true here for two reasons.

First, as our prior motion explained, the order works an extraordinary harm to the President's authority over the Executive Branch by reinstating the principal officer of a single-headed agency after the President's removal of the officer. This Court has identified the significance of the harm that a TRO poses to the Executive Branch as a relevant factor in determining the

[1] The government last night filed a stay motion in district court pursuant to Federal Rule of Appellate Procedure 8(a). We will notify the Court when the district court acts on that motion.

appealability of the TRO. *See Adams v. Vance*, 570 F.2d 950, 953 (D.C. Cir. 1978) (allowing appeal of a TRO that "commanded an unprecedented action irreversibly altering the delicate diplomatic balance in the environmental arena").

Second, the district court has now considerably prolonged that harm by setting its TRO to last for 14 days, on top of the two-day duration of its "administrative stay" (which, as discussed in our prior motion—and as plaintiff conceded in opposing that motion, *see* No. 25-5025 Opp. 11, 13—was itself effectively a TRO). It has done so even though the issues have been adversarially presented in briefs sufficiently comprehensive that the district court expressly invited the parties to deem them to be preliminary-injunction or summary-judgment papers. Dkt. 14 at 27. It has done so without offering any explanation of why a 14-day delay before a hearing is appropriate—particularly when the initial hearing, held prior to the entry of the administrative stay, was held in a matter of hours. And its order suggests that appeal is unavailable until after whatever ruling follows the February 26 hearing. *See id.* (referring to "an appealable preliminary injunction"). As our prior motion noted, the Supreme Court has stressed that a

district court cannot "shield its orders from appellate review merely by designating them as temporary restraining orders, rather than as preliminary injunctions." *Sampson v. Murray*, 415 U.S. 61, 86-87 (1974).

In any event, even if this Court were to conclude that the order is unappealable, the Court should exercise its discretion to treat this motion as a petition for writ of mandamus. *Ukiah Adventist Hosp. v. FTC*, 981 F.2d 543, 548 n.6 (D.C. Cir. 1992). The district court's extraordinary order readily satisfies the standard to grant mandamus. *See Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380-381 (2004). First, if the district court's order is not appealable, then there is "'no other adequate means,'" *id.* at 380-381, for the government to vindicate the President's authority under Article II to exercise the entire Executive power of the United States. Second, given the Supreme Court's recent decisions in *Collins v. Yellen*, 594 U.S. 220 (2021), and *Seila Law*, the government's "right to issuance of the writ is clear and indisputable," *Cheney*, 542 U.S. at 381 (quotation marks omitted). And finally, the issuance of the writ "is appropriate," *id.*—indeed, it is necessary—to protect our constitutional structure by safeguarding the President's prerogative against intrusion by the Judicial Branch.

B. The Government Is Likely To Prevail On The Merits.

OSC is an Executive Branch agency "headed by a single officer," *Seila Law*, 591 U.S. at 221. As described above, from the time OSC was first created in 1978, and across several administrations in the years since, the Executive Branch has expressed doubt as to whether Congress may preclude the President from removing the Special Counsel at will. Over the past five years, Supreme Court precedent has definitively resolved that question in the negative. Officials vested with sole responsibility for overseeing the exercise of executive power must be directly answerable to the President.

1. At-will removal is the general rule, and OSC does not fit within any exceptions.

Article II of the Constitution provides that "the 'executive Power'—all of it—is 'vested in a President,' who must 'take Care that the Laws be faithfully executed.'" *Seila Law*, 591 U.S. at 203 (quoting U.S. Const. art. II, § 1, cl. 1; *id.* § 3). To discharge those responsibilities, the President "as a general matter" has "authority to remove those who assist him in carrying out his duties." *Free Enterprise Fund v. Public Accounting Oversight Board*, 561 U.S. 477, 513-514 (2010). "Without such power, the President could not be held fully accountable for discharging his own responsibilities; the buck would

stop somewhere else." *Id.* at 514; *see also, e.g.*, *Exela Enter. Sols., Inc. v. NLRB*, 32 F.4th 436, 445 (5th Cir. 2022) ("The President's power to remove is essential to the performance of his Article II responsibilities and control over the Executive Branch.").

The Supreme Court has "recognized only two exceptions to the President's unrestricted removal power." *Seila Law*, 591 U.S. at 203. First, in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), the Court held that Congress could "give for-cause removal protections to a multimember body of experts, balanced along partisan lines, that performed legislative and judicial functions and was said not to exercise any executive power." *Seila Law*, 591 U.S. at 216. Second, the Court has held that "Congress could provide tenure protections to certain *inferior* officers with narrowly defined duties." *Id.* at 204 (citing *Morrison v. Olson*, 487 U.S. 654 (1988), and *United States v. Perkins*, 116 U.S. 483 (1886)).

The Special Counsel does not fit within either of these exceptions. He is not an inferior officer with narrowly defined duties; he is a principal officer appointed by the President with Senate confirmation, *see* U.S. Const. art. II, § 2, cl. 2; 5 U.S.C. § 1211(b), who oversees his own Department and is not subservient to any other principal officer, *see* 5 U.S.C. §§ 1211-1212. *See*

also Free Enterprise Fund, 561 U.S. at 511 (explaining that a Department "is a freestanding component of the Executive Branch, not subordinate to or contained within any other such component"). Nor does the Special Counsel work as part of a "multimember expert agency," *Seila Law*, 591 U.S. at 218; he serves as the sole head of his agency, 5 U.S.C. § 1211(a).

The district court acknowledged that the Special Counsel "is not entirely analogous" to either the Federal Trade Commission in the form approved in *Humphrey's Executor* or the Independent Counsel approved in *Morrison*. Dkt. 14 at 12. The court's analysis should have stopped there. As the Supreme Court has explained, those are the "only two exceptions to the President's unrestricted removal power" and those exceptions should not be extended to "novel context[s]." *Seila Law*, 591 U.S. at 204.

2. Heads of single-member Executive departments must be removable at will by the President.

Five years ago, the Supreme Court surveyed the Executive Branch and identified only four then-existing examples of single-member agencies whose heads were afforded protection against at-will removal. *See Seila Law*, 591 U.S. at 290-292. As described below, the Supreme Court has now itself invalidated the removal protections for two of these agencies (the CFPB and

the FHFA). The Office of Legal Counsel and two courts of appeals have concluded that the removal protections for a third (the Social Security Administration) are likewise invalid. The Office of Special Counsel is the fourth.

In *Seila Law*, the Supreme Court invalidated the removal restrictions for the Director of the CFPB, explaining that the "single-Director structure contravenes" the Constitution's "carefully calibrated system by vesting significant governmental power in the hands of a single individual accountable to no one." 591 U.S. at 224. When the Founders chose to vest executive authority in a single person, the Court explained, they ensured that the President would be "the most democratic and politically accountable official in Government … elected by the entire Nation." *Id.* Thus, while executive officers assist the President in carrying out his responsibilities, they "remain[] subject to the ongoing supervision and control of the elected President." *Id.* By contrast, the CFPB Director could "*unilaterally*, without meaningful supervision, issue final regulations, oversee adjudications, set enforcement priorities, initiate prosecutions, and determine what penalties to impose," *id.* at 225, while the President was constrained to permit the Director to do so absent "inefficiency, neglect of duty, or malfeasance in office," 12 U.S.C. § 5491(c)(3). The Court held that restriction unconstitutional, concluding

that "principal officers who, acting alone, wield significant executive power" must be removable at will by the President. *Seila Law*, 591 U.S. at 238.

The Supreme Court applied the same logic when it invalidated the "for cause" removal restriction for the Director of the FHFA. *Collins*, 594 U.S. at 226-228. The Court explained that *Seila Law* was "all but dispositive," as the FHFA was "an agency led by a single Director" for whom Congress had "restrict[ed] the President's removal power." *Id.* at 250-251. In doing so, the Court rejected an argument that the FHFA should be treated differently because it did not exercise as much executive authority as the CFPB did. *Id.* at 251. "[T]he nature and breadth of an agency's authority is not dispositive," the Court explained, "in determining whether Congress may limit the President's power to remove its head." *Id.* at 251-252. The key purpose of the removal power is to ensure that "Executive Branch actions" are subject "to a degree of electoral accountability," which is "implicated whenever an agency does important work." *Id.* at 252. *Collins* thus declined to carve out an exception to the general rule of at-will removal based on "the relative importance of the regulatory and enforcement authority of disparate agencies." *Id.* at 253.

In the wake of *Seila Law* and *Collins*, President Biden removed the Commissioner of Social Security without cause, contrary to the statutory limitations that restricted removal of that agency head except for "neglect of duty or malfeasance in office." 42 U.S.C. § 902(a)(3). In supporting the legality of that decision, the Department of Justice explained that "the best reading of *Collins* and *Seila Law*" led to the conclusion that "the President need not heed the Commissioner's statutory tenure protection." *Constitutionality of the Commissioner of Social Security's Tenure Protection*, 2021 WL 2981542, at *1, 7. The only courts of appeals to have considered the question—the Ninth and Eleventh Circuits—have both concluded that the removal restrictions for the single-headed Social Security Administration are unconstitutional. *Rodriguez v. SSA*, 118 F.4th 1302, 1313-1314 (11th Cir. 2024); *Kaufmann v. Kijakazi*, 32 F.4th 843, 848-849 (9th Cir. 2022).

OSC is indistinguishable from the other single-headed agencies identified in *Seila Law*. In his concurrence to the dismissal of the government's prior appeal in this case, Judge Katsas observed that "it would be difficult for Dellinger to show a likelihood of success in light of" *Collins* and *Seila Law*,

"which held that Article II of the Constitution prevents Congress from restricting the President's ability to remove officers who serve as the sole heads of agencies that wield significant executive power."

There can be no serious dispute that the Special Counsel exercises executive authority: He may "investigate allegations of prohibited personnel practices," 5 U.S.C. § 1212(a)(2); "bring actions concerning allegations of violations of other laws within the jurisdiction of" his office, *id.* § 1212(a)(4); issue subpoenas, *id.* § 1212(b)(2)(A); intervene in other proceedings before the Merit Systems Protection Board, *id.* § 1212(c)(1); appoint others, *id.* § 1212(d)(1); prescribe regulations, *id.* § 1212(e); appear in federal court as an amicus curiae, *id.* § 1212(h)(1); and bring disciplinary actions against federal employees, *id.* § 1215(a)(1). These are core executive functions.

The exercise of those duties clearly implicates the faithful execution of federal law. When Congress first created OSC in 1978, the Carter Administration objected and explained that "Congress may not properly limit the grounds for removal of the Special Counsel by the President," because the Special Counsel "must be removable at will." *Memorandum Opinion for the General Counsel, Civil Service Commission*, 2 Op. O.L.C. at 120. That is because "the Special Counsel's functions are executive in character," and his "role in

investigating and prosecuting prohibited practices is much the same as that of a U.S. Attorney or other Federal prosecutors," which "are directed at the enforcement of the laws." *Id.* Even at that time, before *Seila Law* and *Collins*, it was clear that *Humphrey's Executor* did "not extend to an officer appointed by the President with the advice and consent of the Senate, who performs predominantly executive functions and who, by reason of the statutory scheme, is independent of the quasi-judicial process." *Id.* at 122. And President Reagan reiterated those "serious constitutional concerns" about the Special Counsel's insulation from electoral accountability. *See* Public Papers of the Presidents, Ronald Reagan, Vol. II, Oct. 26, 1988, pp. 1391–1392 (1991).

3. The district court's contrary reasoning does not withstand scrutiny.

The district court analogized the Special Counsel to the Independent Counsel whose removal protections were sustained in *Morrison*. Dkt. 14 at 11. But *Morrison* concerned a removal-protected *inferior* officer, not the head of a freestanding component within the executive branch. Indeed, as the district court acknowledged, plaintiff "does not argue here … that the Special Counsel is an 'inferior officer.'" *Id.* Because the concerns implicated by a removal-protected principal officer, who has no superior other than the

President, are different from those applicable to inferior officers, *Morrison* is inapposite.

The district court also mistakenly claimed support for its conclusion in the fact that *Collins* did "not comment on the constitutionality of any removal restriction that applies to" the Special Counsel, among other officers not then before the Court. Dkt. 14 at 14 (quoting *Collins*, 594 U.S. at 256 n.21). The Supreme Court's care in not reaching questions not directly before it in *Collins* provides no meaningful basis for distinguishing the Special Counsel from the office addressed in *Collins*, just as *Seila Law*'s analysis of a different office was "all but dispositive" in *Collins* itself. *Collins*, 594 U.S. at 250, 256 n.21.

The district court also minimized the significance of the executive authority wielded by the Special Counsel, contrasting it against that of the CFPB and the FHFA. But *Collins* explained that "[c]ourts are not well-suited to weigh the relative importance of the regulatory and enforcement authority of disparate agencies" and that "the constitutionality of removal restrictions" does not "hinge[] on such an inquiry." 594 U.S. at 253. As noted above, the Special Counsel exercises meaningful prosecutorial and regulatory authority, including through the initiation of proceedings before the

Merit Systems Protection Board. *See generally* 5 U.S.C. § 1212; *see also, e.g.*, *Rieth-Riley Constr. Co. v. NLRB*, 114 F.4th 519, 531 (6th Cir. 2024) (recognizing in the context of the NLRB General Counsel that "[t]he authority to initiate or dismiss complaints is a purely executive, not judicial, function" and "is squarely on the prosecutorial side of the 'prosecutorial versus adjudicatory line'"). That is sufficient to place OSC within the rule established in *Seila Law* and *Collins*.

The district court also deemed it significant that Presidents Carter and George H.W. Bush signed the two pieces of legislation that give OSC its current structure. Dkt. 14 at 13 n.3. But "it is not uncommon for Presidents to approve legislation containing parts which are objectionable on constitutional grounds." *INS v. Chadha*, 462 U.S. 919, 942 n.13 (1983). And the Supreme Court in *Seila Law* expressly noted the Justice Department's longstanding objections in explaining that there was no historical pedigree for single-member agency heads with removal protections. 591 U.S. at 221.

The district court also noted that Office of Legal Counsel opinion concerning the Commissioner of Social Security stated that it was not opining on "the validity of tenure protections conferred on other executive officials—

for example the Special Counsel"—and identified two ways in which it believed the Special Counsel differed from the Commissioner of Social Security (namely the Special Counsel's primarily investigatory function and "limited jurisdiction"). Op. 15 n.4; *see Constitutionality of the Commissioner of Social Security's Tenure Protection*, 2021 WL 2981542, at *9. But the Office did not disavow, or even mention, its prior determination that "[b]ecause the Special Counsel [would] be performing largely executive functions, the Congress [could] not restrict the President's power to remove him," 2 Op. O.L.C. at 122. The 2021 opinion does not undercut the applicability of *Seila Law* here.

4. Plaintiff cannot show entitlement to reinstatement.

The district court also did not meaningfully grapple with the grave separation-of-powers issues posed by a judicial order reinstating a principal officer who has been removed by the President. Neither plaintiff nor the district court has cited any decision from this Court or the Supreme Court suggesting such a remedy would be appropriate. When principal officers have been removed from their posts, they generally have challenged that removal in suits for back pay. *See Humphrey's Executor*, 295 U.S. at 612 (challenge sought "to recover a sum of money alleged to be due"); *Myers v. United States*, 272 U.S. 52, 106 (1926) (same); *Wiener v. United States*, 357 U.S. 349,

349-351 (1958) (same). The President cannot be compelled to retain the services of a principal officer whom the President no longer believes should be entrusted with the exercise of executive power. Such a remedy would undermine the objective of electoral accountability within the Executive Branch that animated the holdings in *Seila Law* and *Collins*.

C. The Equitable Factors Favor A Stay.

Finally, the equitable factors likewise weigh decisively in the government's favor, and "the public interest and balance of equities factors merge" where, as here, "the government is the party" against whom an injunction is sought, *MediNatura, Inc. v. FDA*, 998 F.3d 931, 945 (D.C. Cir. 2021).

1. As discussed above, the district court's order works an extraordinary harm to the President's authority to exercise "all of" "the 'executive Power'" of the United States, *Seila Law*, 590 U.S. at 203. Because of that order, a person the President has chosen to remove from office is exercising executive power over the President's objection. That sort of harm to the Executive, and to the constitutional separation of powers, is transparently irreparable.

In its TRO ruling, the district court asserted that the government had failed to identify "circumstances that required the President's hasty, unexplained action or that would justify the immediate ejection of the Senate-

confirmed Special Counsel while the legal is subject to calm and thorough deliberation." Dkt. 14 at 25. But that language only underscores the threat the TRO poses to the President's authority under Article II. The President does not need to persuade federal courts of the wisdom or deliberateness of his exercise of core authorities, such as the designation or removal of agency heads, before his actions are permitted to take effect. There is nothing wrong with "calm and thorough" review by a district court, *id.*, but enjoining the President's exercise of his authority while that review takes place is another matter.

2. Conversely, a stay is not necessary to prevent any cognizable harm to plaintiff. As Judge Katsas wrote in his concurrence to the dismissal of the government's prior appeal, "it would be difficult for Dellinger to show irreparable injury during whatever modest amount of time may be necessary to adjudicate an expedited motion for preliminary injunction, either to himself or to an agency that would otherwise have a presidentially designated acting head."

The district court reasoned that "plaintiff was appointed for a fixed term, and he has a statutory mission that his removal has rendered him unable to fulfill: to 'protect employees, former employees, and applicants for

employment from prohibited personnel practices.'" Dkt. 14 at 20. But the fulfillment of that mission is an obligation of the agency, not of plaintiff in his personal capacity. It is the President to whom the Constitution assigns the prerogative to determine who should lead the agency in fulfilling that mission. And plaintiff's "fixed term" in office poses no separate obstacle to his removal, as this Court has recognized. *See Severino v. Biden*, 71 F. 4th 1038, 1047 (D.C. Cir. 2023). Any cognizable harm to plaintiff here, should his removal ultimately be held to have been unlawful, could be remedied by an award of back pay.

CONCLUSION

This Court should stay the district court's order pending appeal. To the extent the Court harbors any doubt about its appellate jurisdiction, it should treat this appeal as a petition for a writ of mandamus and grant a writ directing the district court to vacate its order. The Acting Solicitor Gen-

eral respectfully requests that the Court rule on this motion **by Friday, February 14 at noon** so that she has the opportunity to seek expeditious review from the Supreme Court if this Court denies relief.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume limit of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 4,874 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Word for Microsoft 365 in 14-point Book Antiqua, a proportionally spaced typeface.

/s/ Daniel Winik
Daniel Winik