UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAMPTON DELLINGER *in his personal capacity and* *in his official capacity as* *Special Counsel of the* *Office of Special Counsel*, Plaintiff, v. **SCOTT BESSENT** *in his official capacity as* *Secretary of the Treasury*, *et al.*, Defendants.	Civil Action No. 25-0385 (ABJ)

ORDER

Plaintiff Hampton Dellinger brought this action against defendants 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 Principal Deputy Special Counsel; Karl Kammann, in his official capacity as the Chief Operating Officer of the Office of Special Counsel; Donald J. Trump, in his official capacity as President of the United States; and Russell Vought, in his official capacity as Director of the Office of Management and Budget. *See* Compl. [Dkt. # 1]. Pending before the Court is plaintiff's motion for a temporary restraining order preventing defendants from removing him from his position as Special Counsel, who heads the Office of the Special Counsel ("OSC"). Pl.'s Mot. for a Temporary Restraining Order [Dkt. # 2] ("Pl.'s TRO"); Compl. ¶ 1.

After receiving plaintiff's motion for a temporary restraining order on February 10, 2025, the Court set what it intended to be scheduling hearing for 4:30 p.m. the same day. *See* Notice of Hr'g (Feb. 10, 2025). At the hearing, counsel for defendants represented that they had not yet had an opportunity to file a response to the motion, and that defendants were "not prepared to" take a position as to whether they would be willing to freeze plaintiff's firing until the Court resolved the legal issues. Tr. of Proceedings [Dkt. # 9] ("Tr.") at 3.

After hearing some argument from both sides with respect to the applicable factors, the Court decided to issue a brief administrative stay so that it could consider the matter with the benefit of the defendants' position. *See* Minute Order (Feb. 10, 2025). The administrative stay ordered that plaintiff continue to serve as Special Counsel until midnight on February 13, 2025. *Id.*

In addition to filing an emergency appeal of the Court's administrative stay, Notice of Appeal [Dkt. # 7],[1] and a motion to stay the Court's administrative stay, Mot. to Stay Ct.'s Administrative Stay [Dkt. # 10], defendants have filed their opposition to the motion for temporary restraining order. Defs.' Opp. to Pl.'s TRO [Dkt. # 11] ("Defs.' Opp.).

1 Defendants' appeal of the administrative stay did not divest this Court of jurisdiction to consider the instant motion. Only "a non-frivolous appeal from the district court's order divests the district court of jurisdiction over those aspects of the case on appeal." *Bombadier Corp. v. Nat'l R.R. Passenger Corp.*, No. 02-7125, 2002 WL 31818924, at *1 (D.C. Cir. 2002), citing *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982). A motion is "frivolous" when its disposition is obvious and the legal arguments are wholly without merit. *Reliance Ins. Co. v. Sweeney Corp.*, 792 F.2d 1137, 1138 (D.C. Cir. 1986). It is well-settled that even a temporary restraining order "is not generally appealable," *Adams v. Vance*, 570 F.2d 950 (D.C. Cir. 1978), and that principle applies to the brief administrative stay entered to preserve the status quo. *See Griggs*, 459 U.S. at 58 ("[N]otice of appeal from unappealable order does not divest district court of jurisdiction."), citing *Ruby v. Sec'y of the U.S. Navy*, 365 F.2d 385, 389 (9th Cir. 1966).

For the reasons stated below, plaintiff's motion for a temporary restraining order will be **GRANTED.**

BACKGROUND

A. Statutory Background

The Office of Special Counsel is an independent agency originally created by the Civil Service Reform Act of 1978 ("CSRA"), 5 U.S.C. § 1206 *et seq.*, to "safeguard" federal civil service employees "who 'blow the whistle' on illegal or improper official conduct." *See Wren v. Merit Systems Protection Bd.*, 681 F.2d 867, 872–83 (D.C. Cir. 1982). The OSC was first established as a part of the Merit Systems Protection Board ("MSPB"), but in 1989, Congress separated the OSC as an independent agency in the Whistleblower Protection Act of 1989, Pub. L. No. 101–12, 103 Stat. 16 (Apr. 10, 1989).

The statute that spells out the powers and functions of the Office of the Special Counsel states that OSC "shall protect [federal] employees, former employees, and applicants for employment from prohibited personnel practices." 5 U.S.C. § 1212(a)(1). To fulfill this mandate, OSC is authorized to "receive and investigate allegations of prohibited personnel practices," and "where appropriate, bring petitions for stays and petitions for corrective action." *Id.* § 1212(a)(2).

The statute enables the agency to operate in three primary ways. First, under section 1213, the agency acts as a confidential channel for a federal employee to disclose "information" that the individual "reasonably believes evidences": (1) "a violation of any law, rule, or regulation"; (2) "gross mismanagement"; (3) "a gross waste of funds"; (4) "an abuse of authority"; or (5) a "substantial and specific danger to public health or safety." *Id.* § 1213(a)(1)(A), (B). The "identity of any individual who makes a disclosure . . . may not be disclosed by the Special Counsel, with certain narrow exceptions. *Id.* § 1213(h). If the Special Counsel determines that there is a "substantial likelihood" that the information discloses a violation of law, or other enumerated wrongdoing, the Special Counsel asks the relevant agency to investigate and report on the matter. *Id.* § 1213(c). The OSC then reviews the agency's report, gives the whistleblower an opportunity to comment, creates its own assessment of the report, and submits both the agency report and the OSC's findings to Congress and the President. *Id.* § 1213(e). In these types of disclosure cases, the OSC does not have independent authority to investigate. *See generally id.* § 1213.

Second, the agency can "receive" and "investigate" allegations of prohibited personnel practices, including whistleblower and other types of discrimination or retaliation. *Id.* § 1212(a)(2); *id.* § 2302(b)(1)–(14) (defining "prohibited personal practice"). In furtherance of this duty, the OSC may "issue subpoenas" and order "the taking of depositions" and "responses to written interrogatories." *Id.* § 1212(b)(2)(A), (B).

If the OSC determines "that there are reasonable grounds to believe" that a prohibited practice has occurred, exists, or will occur, it can work with the relevant agency to ensure that is corrective action is taken. *See id.* § 1214(b)(2). But, "[i]f, after a reasonable period of time, the agency does not act to correct the prohibited personnel practice," OSC may petition the Merits System Review Board for corrective action. *Id.* § 1214(b)(2)(C); *id.* § 1212(a)(2)(A). The OSC has no authority over the MSPB, which is itself an independent adjudicatory agency. *See id.* § 1202.

Similarly, the OSC has authority under the Hatch Act, 5 U.S.C. § 7321 *et seq.*, to investigate "any allegation" concerning prohibited "political activity" and "any activity relating to political intrusion in personnel decisionmaking." *Id.* § 1216(a)(1), (4). If the Special Counsel determines "that disciplinary action should be taken," the Special Counsel must "prepare a written complaint against the employee" to present to the MSPB, which ultimately adjudicates the matter and determines whether disciplinary measures are appropriate. *Id.* § 1215. The OSC also has authority to investigate and enforce claims under the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), 38 U.S.C. §§ 4301–35, which prohibits employment discrimination against members of the uniformed services and veterans "because of their service in the uniformed services." 38 U.S.C. §§ 4301(a)(3), 4311. The agency can further "review rules and regulations issued by the Director of the Office of Personnel Management" and can "file a written complaint" with the MSPB if it "finds that any such rule or regulation would, on its face or as implemented, require the commission of a prohibited personnel practice." 5 U.S.C. § 1212(a)(4).

Third, the OSC has reporting obligations to Congress. The Special Counsel must submit a report to Congress "[o]n an annual basis" regarding the "activities" of the agency, which must include, among other things, "the number, types, and disposition of allegations of prohibited personnel practices filed with the Special Counsel and the costs of resolving such allegations." *Id.* § 1218(1)–(13). And each time the OSC resolves an allegation "by an agreement between any agency and an individual," it must submit a report to Congress "regarding the agreement." *Id.* § 1217(b)(1). Further, "on the request of any committee or subcommittee," the Special Counsel or his designee "shall transmit to the Congress . . . by report, testimony, or otherwise, information and the Special Counsel's views on functions, responsibilities, or other matters relating to the Office." *Id.* § 1217(a). That information is also "transmitted concurrently to the President and any other appropriate agency in the executive branch." *Id.*

The Office of the Special Counsel is led by the Special Counsel, 5 U.S.C. § 1211(a), who is "appointed by the President, by and with the advice and consent of the Senate" to serve "for a term of five years." *Id.* § 1211(b). Congress requires that the Special Counsel must "be an attorney who, by demonstrated ability, background, training, or experience, is especially qualified to carry out the functions of the position." *Id.* And, by statute, "[t]he Special Counsel may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office." *Id.*

B. Factual Background

On October 3, 2023, President Biden nominated Hampton Dellinger to be Special Counsel. Compl. ¶ 30. The Senate confirmed Dellinger on February 27, 2024, and he was sworn into office on March 6, 2024. Compl. ¶ 30. His five-year term will expire in 2029. Compl. ¶ 30.

At 7:22 p.m. on Friday, February 7, 2025, Sergio N. Gor, identified in his email signature as "Assistant to the President, Director of Presidential Personnel Office" sent Dellinger an email that stated simply:

> 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."

Ex. A to Compl. [Dkt. # 1-1] ("Ex. A").

Plaintiff filed this action on Monday morning, February 10, 2025, and the complaint consists of five claims. *See* Compl. Count One alleges that the termination by President Trump was *ultra vires* and in "clear violation" of 5 U.S.C. § 1211(b). Compl. ¶¶ 37–41. Count Two alleges that to the extent defendants Bessent, Gor, Gorman, Kammann, and Vought exercise authority on behalf of the Office of Special Counsel without regard to plaintiff's position as Special Counsel, those actions are "not in accordance with law," "contrary to a constitutional right, power, privilege, or immunity," and "in excess of statutory jurisdiction" under the Administrative Procedure Act, 5 U.S.C. § 706(2). Compl. ¶ 43. Count Three seeks a declaratory judgment that the President does not have authority to remove plaintiff absent inefficiency, neglect of duty, or malfeasance in office. Compl. ¶ 45. Count Four alleges a violation of the separation of powers under Article I, section 8 and Article II, sections 2 and 3 of the Constitution. Compl. ¶ 47. And Count Five seeks a writ of mandamus prohibiting plaintiff's removal from office. Compl. ¶ 50.

ANALYSIS

I. Legal Standard

"A temporary restraining order is an extraordinary remedy, one that should be granted only when the moving party, by a clear showing, carries the burden of persuasion." *Sibley v. Obama*, 810 F. Supp. 2d 309, 310 (D.D.C. 2011), citing *Mazurek v. Armstrong*, 520 U.S. 968, 972, (1997); *Munaf v. Geren*, 553 U.S. 674, 690–91 (2008).

As the Supreme Court explained in *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008), when considering a motion for a preliminary injunction, the Court must consider whether the movant has met its burden of demonstrating that: 1) it "is likely to succeed on the merits"; 2) it is "likely to suffer irreparable harm in the absence of preliminary relief"; 3) "the balance of equities tips in [its] favor"; and 4) an injunction serves the public interest. *Id.* "The court considers the same factors in ruling on a motion for a temporary restraining order." *Morgan Stanley DW Inc. v. Rothe*, 150 F. Supp. 2d 67, 72 (D.D.C. 2001).

The manner in which courts should weigh the four factors "remains an open question" in this Circuit. *Aamer v. Obama*, 742 F.3d 1023, 1043 (D.C. Cir. 2014). For some time, the Court of Appeals adhered to the "sliding-scale" approach, where "a strong showing on one factor could make up for a weaker showing on another." *Sherley v. Sebelius*, 644 F.3d 388, 392 (D.C. Cir. 2011) (citations omitted). However, the *Sherley* opinion explains that because the Supreme Court's decision in *Winter* "seemed to treat the four factors as independent requirements," the Court of Appeals has more recently "read *Winter* at least to suggest if not to hold 'that a likelihood of success is an independent, free-standing requirement for a preliminary injunction.'"

Id. at 393, quoting *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1296 (D.C. Cir. 2009) (Kavanaugh, J., concurring). The Court will follow this approach.

Although the D.C. Circuit has not yet announced "whether the 'sliding scale' approach remains valid after *Winter*," *League of Women Voters v. Newby*, 838 F.3d 1, 7 (D.C. Cir. 2016), it has ruled that a failure to show a likelihood of success on the merits is sufficient to defeat a motion for a preliminary injunction. *See Ark. Dairy Coop. Ass'n, Inc. v. U.S. Dep't of Agric.*, 573 F.3d 815, 832 (D.C. Cir. 2009); *Apotex, Inc. v. FDA*, 449 F.3d 1249, 1253–54 (D.C. Cir. 2006). As another court in this district has observed, "absent a substantial indication of likely success on the merits, there would be no justification for the Court's intrusion into the ordinary processes of administration and judicial review." *Navistar, Inc. v. EPA*, Civil Action No. 11-cv-449 (RLW), 2011 WL 3743732, at *3 (D.D.C. Aug. 25, 2011) (alteration omitted), quoting *Hubbard v. United States*, 496 F. Supp. 2d 194, 198 (D.D.C. 2007).

Regardless of whether the sliding scale framework applies, it remains the law in this Circuit that a movant must demonstrate irreparable harm, which has "always" been a "basis of injunctive relief in the federal courts." *Sampson v. Murray*, 415 U.S. 61, 88 (1974), quoting *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506–07 (1959). A failure to show irreparable harm is grounds for the Court to refuse to issue an injunction, "even if the other three factors entering the calculus merit such relief." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006).

II. The likelihood of success on the merits.

The Court finds that there is a substantial likelihood that plaintiff will succeed on the merits. The effort by the White House to terminate the Special Counsel without identifying any cause plainly contravenes the statute, which states, "[t]he Special Counsel may be removed by the

President only for inefficiency, neglect of duty, or malfeasance in office." 5 U.S.C. § 1211(b). This language expresses Congress's clear intent to ensure the independence of the Special Counsel and insulate his work from being buffeted by the winds of political change.

Defendants' only response to this inarguable reading of the text is that the statute is unconstitutional. Defs.' Opp. at 8–11. But no court has said so, and to 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. Moreover, the reasoning underlying the decisions relied upon by defendants does not extend to the unique office and official involved in this case.

In *Seila Law LLC v. CFPB*, 591 U.S. 197 (2020), a party resisting a civil investigative demand ("CID") issued by the Consumer Finance Protection Bureau ("CFPB") challenged the legitimacy of the agency's structure. *Id.* at 208. The Ninth Circuit upheld the for-cause removal protection for the single head of the independent agency, agreeing with the *en banc* decision of the D.C. Circuit in *PHH Corp. v. CFPB*, 881 F.3d 75 (D.C. Cir. 2018). *See CFPB v. Seila Law LLC*, 923 F.3d 680, 682 (9th Cir. 2019). The Supreme Court granted certiorari. Because the government agreed with the petitioner on the constitutional issue, the Court appointed an amicus to defend the judgment of the Ninth Circuit. *Seila Law*, 591 U.S. at 209

The Court began by repeating its prior holding that "'as a general matter,' the Constitution gives the President 'the authority to remove those who assist him in carrying out his duties." *Id.* at 204, quoting *Free Enterprise Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 513–14 (2010). It explained that "[t]he President's power to remove – and thus supervise – those who wield executive power on his behalf flows from the text of Article II," and that "[w]ithout such power, the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else." *Seila* Law, 591 U.S. at 204.

But the Court did not announce a blanket rule that the President has the power to remove the head of every independent agency led by a single director, as defendants would have this Court believe. The Court held that the CFPB's leadership by a single individual removable only for statutorily prescribed reasons violated the separation of powers, *id.* at 205, and it went into considerable detail as to why the Director of the CFPB in particular should not be shielded from Presidential control.

Before it turned its attention to the CFPB, the Court reviewed its prior decisions concerning the President's removal power in general, and it repeated its observation in *Humphrey's Executor v. United States*, 295 U.S. 602, 631–32 (1935) that Congress's ability to impose removal restrictions "will depend upon the character of the office." *Seila Law*, 591 U.S. at 215. *Humphrey's Executor* involved the President's authority to replace five members of the New Deal-era Federal Trade Commission ("FTC"), and looking at the agency as it was constituted in 1935, the Court held that the restrictions on replacing the panel members were lawful. *Humphrey's Executor*, 295 U.S. at 619, 623–25, 628–29. In the *Seila Law* opinion, the Supreme Court listed some of the circumstances that animated its opinion in *Humphrey's Executor*, and several of them pertain to the OSC today: the Court noted that the agency performed specified duties to aid the legislature, such as making investigations and reports to Congress, and like the OSC, the five member board of the FTC was "designed to be non-partisan and to act with entire impartiality." *Seila Law*, 591 U.S. at 215–16 (internal quotation marks omitted). The *Seila Law* Court also pointed out that *Humphrey's Executor* found that "[t]he FTC's duties were 'neither political nor executive,' but instead called for 'the trained judgment of a body of experts' 'informed by experience.'" *Id.* at 216, quoting 295 U.S. at 64.

Here we have a statute that incorporates Congress's judgment with respect to the qualifications to be the Special Counsel, *see* 5 U.S.C. § 1211(b) ("The Special Counsel shall be an attorney who, by demonstrated ability, background, training, or experience, is especially qualified to carry out the functions of the position."), as well as the restrictions on removal. *Id.* *Seila Law* summed up *Humphrey's Executive* as recognizing the President's "unrestrictable power . . . to remove *purely executive* officers," but it did not extend the principle to less obvious situations. *Seila Law*, 591 U.S. at 217 (emphasis added).

The *Seila Law* court also chose not to walk away from the Court's decision in *Morrison v. Olson*, 487 U.S. 654 (1988) that upheld the statutory protection from removal afforded to an independent counsel under the now-defunct Independent Counsel Act. *See Seila Law*, 591 U.S. at 217–18. Even though the independent counsel was a single person exercising law enforcement functions typically performed by the executive branch, the Court held that the requirement of for-cause removal did not unduly interfere with the President's powers because the petitioner was "an inferior officer under the Appointments Clause, with limited jurisdiction and tenure and lacking policymaking or significant administrative authority." *Morrison*, 487 U.S. at 691. While plaintiff does not argue here, and the Court would not presume to rule at this time that the Special Counsel is an "inferior officer" akin to a naval cadet engineer, *see United States v. Perkins*, 116 U.S. 483, 485 (1886), it is relevant that like the independent counsel, plaintiff does not appear to have policymaking or significant administrative authority.

Seila Law then differentiated the agency officials it found were entitled to protection from removal in *Humphrey's Executor* from the Director of the CFPB:

> [T]he CFPB Director is hardly a mere legislative or judicial aid. Instead of making reports and recommendations to Congress, as the 1935 FTC did, the Director possesses the authority to promulgate binding rules fleshing out 19 federal statutes, including a broad prohibition on unfair and deceptive practices in a major segment of the U.S. economy. And instead of submitting recommended dispositions to an Article III court, the Director may unilaterally issue final decisions awarding legal and equitable relief in administrative adjudications. Finally, the Director's enforcement authority includes the power to seek daunting monetary penalties against private parties on behalf of the United States in federal court—a quintessentially executive power not considered in *Humphrey's Executor*.

Seila Law, 591 U.S. at 218–19. And then it distinguished the Director of the CFPB from the independent counsel in *Morrison*:

> Unlike the independent counsel, who lacked policymaking or administrative authority, the Director has the sole responsibility to administer 19 separate consumer-protection statutes that cover everything from credit cards and car payments to mortgages and student loans. It is true that the independent counsel in *Morrison* was empowered to initiate criminal investigations and prosecutions, and in that respect wielded core executive power. But that power, while significant, was trained inward to high-ranking Governmental actors identified by others, and was confined to a specified matter in which the Department of Justice had a potential conflict of interest. By contrast, the CFPB Director has the authority to bring the coercive power of the state to bear on millions of private citizens and businesses, imposing even billion-dollar penalties through administrative adjudications and civil actions.

Id. at 219.[2]

All of this points to a conclusion that *Seila Law* does not answer the question presented in this case. While the Special Counsel's role is not entirely analogous to that of the FTC panel

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2 The Court also observed that the CFPB does not rely on the annual Congressional appropriations process, but it receives its funding directly from the Federal Reserve, which is also funded outside the appropriations process. *Seila Law*, 591 U.S. at 207; *see also id.* at 225 ("The Director does not even depend on Congress for annual appropriations.") and 226 ("The CFPB's receipt of funds outside the appropriations process further aggravates the agency's threat to Presidential Control."). The OSC does not present these concerns.

members from 1935 or an individual appointed under the old Independent Counsel Act, who was confined to a single criminal prosecution, the circumstances do not present the sort of concerns that troubled the Supreme Court when it looked at the functions assigned to the Director of the CFPB.

Indeed, the Chief Justice took the trouble to say just that.

The CFPB's defenders tried to compare the agency to the OSC, but the Court resisted the analogy:

> The OSC exercises only limited jurisdiction to enforce certain rules governing Federal Government employers and employees. *See* 5 U.S.C. § 1212. It does not bind private parties at all or wield regulatory authority comparable to the CFPB.

Id. at 221.[3]

This Court's review of the statutory provisions establishing the Special Counsel's purview confirms that the agency is not "comparable to the CFPB," *id.*, and that *Seila Law* does not compel the conclusion advanced by the defendants. One can hardly describe the OSC as "an independent agency led by a single director *and vested with significant executive power*" as *Seila Law* described the CFPB. *Id.* at 220 (emphasis added). Therefore, the showing that the statute establishing the

3 Before making this comparison, the Court did point out that while the OSC had been headed by a single officer since 1978, its structure "drew a contemporaneous constitutional objection from the Office of Legal Counsel under President Carter and a subsequent veto on constitutional grounds by President Reagan." *Seila Law*, 591 U.S. at 221, citing *Memorandum Opinion for the General Counsel, Civil Service Commission*, 2 Op. O.L.C. 120, 122 (1978); Public Papers of the Presidents, Ronald Reagan, Vol. II, Oct. 26, 1988, 1391–92 (1991). It is equally worth observing that notwithstanding that opinion, President Carter signed the legislation in 1978, and that after President Reagan's action in 1988, negotiations concerning the legislation continued, and President George H.W. Bush signed the Whistleblower Protection Act into law in 1989. The Court has not been provided with materials showing that any administration since then has sought to have the statute amended.

Office of Special Counsel has been unquestionably violated supports a finding that plaintiff has made the necessary showing of a likelihood of success on the merits.

The holding in *Collins v. Yellin*, 594 U.S. 220 (2021), does not compel a different conclusion. The opinion reiterated the importance of guarding against new intrusions on the President's Article II powers, and it explained that the "nature and breadth of an agency's authority" should not be "dispositive in determining whether Congress may limit the President's power to remove its head." *Id*. at 251–52. The Court rejected the notion that it should apply different rules depending on an agency's size, power, or perceived "importance." *Id.* at 252–53. But when the court-appointed *amicus curiae* in that case warned that a decision invalidating the removal restrictions in the Housing and Economic Recovery Act would call into question the constitutionality of other agencies, including the OSC, the Court chose to reply, "[n]one of these agencies is before us, and we do not comment on the constitutionality of any removal restriction that applies to their officers." *Id.* at 256 n.21.

Also, while the opinion made clear that the number of individuals or businesses regulated by any particular agency should not be the touchstone, it noted that the agency in question, the Federal Housing Finance Agency, did in fact "regulate[] a small number of Government-sponsored enterprises," receiving roughly half of its budget from those regulated entities. *Id.* at 251. It also pointed out:

> [W]hile the CFPB has direct regulatory and enforcement authority over purely private individuals and businesses, the FHFA has regulatory and enforcement authority over two companies that dominate the secondary mortgage market an have the power to reshape the housing sector . . . . FHFA actions with respect to those companies could have an immediate impact on millions of private individuals and the economy at large.

Id. at 253; *see also id.* at 224 ("[T]he President's removal powers serves important purposes regardless of whether the agency in question affects ordinary Americans by directly regulating them or by taking actions that have a profound but indirect effect on their lives.") These things cannot be said about the OSC, even if, like the FHFA, it is authorized to issue subpoenas. *See id.* at 254.[4]

The OSC is not an agency endowed with the power to articulate, implement, or enforce policy that affects a broad swath of the American public or its economy. It does not have broad rulemaking authority or wield substantial enforcement authority over private actors; it has no authority over private actors. It is an agency with limited jurisdiction: its job is to investigate government employees' allegations of specifically identified prohibited personnel practices, and where appropriate, to seek corrective or disciplinary action. The agency's statutory functions require it to report directly to Congress about what it has found and whether any executive agency has stood in its way. While the federal workforce includes a large number of

4 It is notable that after *Collins*, the Office of Legal Counsel issued an opinion firmly concluding that the combination of the rulings in *Seila Law* and *Collins* compelled the conclusion that the protections against removing the Commissioner of the Social Security Administration ("SSA") were constitutionally infirm. *Constitutionality of the Commissioner of Social Security's Tenure Protection*, 45 Op. O.L.C. __, 1 (O.L.C. July 8, 2021). But the OLC included an explicit caveat that this vindication of the President's prerogative did not necessarily extend to the Office of Special Counsel. *See id.* at 10 n.3 ("This opinion does not address the validity of tenure protections conferred on the Special Counsel, whose removal restrictions implicate different considerations," contrasting the massive impact, enormous budget, and exceptionally broad rulemaking authority of the SSA with the OSC's right to recommend regulatory changes); *see also id.* at 15, citing *Seila Law*, 591 U.S. at 217–18 ("We emphasize the limited scope of our conclusion regarding the [SSA] Commissioner. It does not imply any similar determination with respect to the validity of tenure protections conferred on other executive officials – for example, the Special Counsel, another single member agency had whose removal restrictions implicate different considerations, such as the Special Counsel's primary investigative function and 'limited jurisdiction.'").

people, the Special Counsel is only called upon to interact with a small subset of them on an individual basis, and only in connection with one aspect of their personal employment situations; he does not guide or direct them in any way in connection with the policies they will promulgate or implement in the course of that employment.

In sum, the OSC is an independent agency headed by a single individual, but otherwise, it cannot be compared to those involved when the Supreme Court found the removal for cause requirement to be an unconstitutional intrusion on Presidential power.

III. Irreparable harm

Next, the plaintiff must show that he is likely to suffer irreparable harm in the absence of preliminary relief. *Winter*, 555 U.S. at 20.

The D.C. Circuit "has set a high standard for irreparable injury" – it "'must be both certain and great; [and] it must be actual and not theoretical.'" *Chaplaincy of Full Gospel Churches,* 454 F.3d at 297, quoting *Wisc. Gas Co. v. FERC,* 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam). The same opinion instructs that "the injury must be beyond remediation." *Id.* It explains:

> The key word in this consideration is *irreparable.* Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation weighs heavily against a claim of irreparable harm.

Id. (emphasis in original), quoting *Va. Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958).

Plaintiff asserts that being deprived of his "statutory entitlement to serve as the lawful agency head of OSC" – his right to fulfill the five-year position created and defined by Congress to which he was nominated and confirmed by the Senate – has caused and will continue to cause him to suffer irreparable harm. Pl.'s TRO at 14–15. He submits that this is not something that can be remediated with economic damages, and it is compounded by the loss of the opportunity to fulfill the duty he owes to all federal employees, and whistleblowers in particular, regardless of their political affiliation, to be free from prohibited practices on the part of federal agencies. *See* Pl.'s TRO at 15.

Defense counsel announced at the hearing that injunctive relief was completely foreclosed by *Sampson v. Murray*, 415 U.S. 61 (1974), which counsel represented to be "binding precedent that job loss does not constitute irreparable harm." Tr. at 4, 6. Defendants backed away from that overstatement in their written submission and argued that under *Sampson*, "[t]he loss of government employment constitutes irreparable harm only in a genuinely extraordinary situation," Defs.' Opp. at 2 (internal quotations omitted), and they maintain that the circumstances in this case do not meet that test.

But that authority is entirely distinguishable. In *Sampson*, the district court temporarily enjoined the discharge of a "probationary employee" from the General Services Administration pending an administrative appeal to the Civil Service Commission. *Sampson*, 415 U.S. at 62–63. The plaintiff claimed that the discharge, which came just four months after she started, would cause irreparable harm by depriving her of income and causing "her to suffer the embarrassment of being wrongfully discharged." *Id.* at 62–63, 66.

It is well established now, of course, that allegations of economic losses that can be cured with money damages do not constitute irreparable harm. But there is no claim for lost earnings or compensation in the complaint.

Sampson held that while a district court "is not totally without authority to grant interim injunctive relief to a discharged [g]overnment employee," *Sampson*, 415 U.S. at 63, the claimed irreparable injury was insufficient to support a temporary injunction. *Id.* at 92–93. The Court explained that the irreparable harm must be "in kind and degree to override" three factors that the court should "give serious weight": (1) the "disruptive effect which the grant of the temporary relief" has on the administrative process; (2) "the well-established rule that the [g]overnment has traditionally been granted the widest latitude in the dispatch of its own internal affairs"; and (3) "the traditional unwillingness of courts . . . to enforce contracts for personal service." *Id.* at 83 (internal quotation marks omitted). But *Sampson* recognized that:

> [C]ases may arise in which the circumstances surrounding an employee's discharge, together with the resultant effect on the employee, may so far depart from the normal situation that irreparable injury might be found. Such extraordinary cases are hard to define in advance of their occurrence . . . . [W]e do not wish to be understood as foreclosing relief in the genuinely extraordinary situation. Use of the court's injunctive power, however, when discharge of probationary employees is an issue, should be reserved for that situation rather than employed in the routine case.

Id. at 92 n.68.

This is not a routine case. There is no contract for personal services involved, and plaintiff is not a "probationary employee"; he was appointed to serve the statutory term of five years. Compl. ¶ 30. The *Sampson* court observed that it was "dealing . . . not with a permanent Government employee, a class for which Congress has specified certain substantive and procedural protections, but with a probationary employee, a class which Congress has specifically recognized as entitled to less comprehensive procedures." *Sampson*, 415 U.S. at 80–81. So, its analysis is of little utility here.

There are no facts to suggest that an order maintaining Dellinger in the role he occupied for the past year would have a "disruptive" effect on any administrative process; if anything, it would be his removal that is disruptive, as he suggests.[5] And while it may be that the government traditionally has wide "latitude" in dispatching its internal affairs, whether it does or should have that latitude in the face of a statutory provision to the contrary is the question at the heart of the merits.

Furthermore, plaintiff's irreparable injury cannot be compared to the loss of income or embarrassment involved in the typical employment action, for which there are remedies that do not involve equitable relief. This case falls outside of the typical paradigm since the OSC is an independent agency and the White House is not plaintiff's employer. In short, plaintiff's injury stems directly from "extraordinary" circumstances as *Sampson* requires; namely, that for the first time, a President has removed the Special Counsel from his statutorily prescribed term without any cause or explanation.

Plaintiff relies on *Berry v. Reagan*, Civil Action No. 83-3182, 1983 WL 538 (D.D.C. Nov. 14, 1983), and the Court finds it to be instructive although not on all fours with the instant situation. In *Berry*, the plaintiffs moved for a temporary restraining order and preliminary injunction "to enjoin the President . . . from removing them as Commissioners of the U.S. Commission on Civil Rights." *Id.* at *1. The Commission was a "temporary, bipartisan agency established by Congress," that was "composed of six members, appointed by the

5 By hanging their hat on *Sampson*, defendants imply that it would be too disruptive to the business of the agency to have Special Counsel Dellinger resume his work. But any disruption to the work of the agency was occasioned by the White House. It's as if the bull in the china shop looked back over his shoulder and said, "What a mess!" Moreover, any disruption caused by the proposed temporary restraining order would be minimal; plaintiff served as Special Counsel from March 6, 2024 through the end of the workday on Friday, February 7, 2025. Compl. ¶¶ 2, 30, He received the email announcing that his position was terminated later that evening, and according to defendants, the Acting Special Counsel took over on Monday morning. By Monday night, this Court had already entered an administrative stay restoring the Special Counsel to the position he'd occupied for the prior year. *See* Minute Order (Feb. 10, 2025). Defendants have not proffered any facts to show that maintaining this rapid return of the torch will affect agency operations.

President, . . . with the advice and consent of the Senate," who investigated and collected information "regarding deprivations of both civil rights and equal administration of justice." *Id.* To perform its function, the Commission was permitted to "hold hearings and issue subpoenas for the attendance and testimony of witnesses and the production of evidence." *Id.* One month before the Commission was set to expire, President Regan terminated the plaintiffs from the Commission. *Id.* at 1, n.1.

Berry undertook to apply the *Sampson* test that "a federal employee seeking injunctive relief must make a strong showing of irreparable injury 'sufficient in kind and degree to override the factors cutting against the general availability of preliminary injunctions [such as disruption of the administrative process] in Government personnel cases.'" *Berry*, 1983 WL 538 at *5, quoting *Sampson*, 415 U.S. at 84. It then explained that the "deprivation of [plaintiffs'] statutory right to function as Commissioners until the Commission expires," and "their unlawful removal from office by the President" did constitute irreparable injury. *Id.* The Court noted the "obviously disruptive effect" that denial of preliminary relief would have on the Commission's final activities, including that it would leave the Commission "without a quorum" to conduct its mandated "wind–up" duties. *Id.* The Court further stated it was "not clear that the President has the power to remove Commissioners at his discretion," and that the plaintiffs did not have "administrative, statutory, or other relief that is readily available to many federal employees." *Id.*

While the Special Counsel is not a "temporary" employee with a set term in which his duties must be completed, 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." 5 U.S.C. § 1212. And the loss of the ability to do what Congress specifically directed him to do cannot be remediated with anything other than equitable relief.[6]

Defendants insist, though, that there is authority that has already foreclosed the argument that the deprivation of a "statutory right to function" is irreparable harm. Defs.' Opp. at 2. They note that in *English v. Trump*, 279 F. Supp. 3d 307 (D.D.C. 2018), "another district court in this Circuit rejected the identical argument in analogous circumstances." Defs.' Opp. at 2. But putting aside the point that district court opinions are not binding on this Court, the circumstances in *English* are in no way "analogous."

The statute establishing the Consumer Finance Protection Bureau prescribes that the Deputy Director "shall . . . serve as acting Director in the absence or unavailability of the Director." 12 U.S.C. § 5491(b)(5). In *English*, the Director of the CFPB resigned and named the plaintiff as his Deputy Director in what the court characterized as "an apparent attempt to select his successor." *English*, 279 F. Supp. 3d at 311. Meanwhile, the President appointed a different acting Director pursuant to his power under the Federal Vacancies Reform Act of 1998. *Id.* The plaintiff filed suit to temporarily enjoin the President's pick from serving as the head of the CFPB

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6 Plaintiff directs the court to another district court opinion, *Mackie v. Bush*, 809 F. Supp. 144 (D.D.C. 1993), but it is not comparable. *See* Pl.'s TRO at 15. In *Mackie*, the plaintiffs were members of the Board of Governors of the Postal Service Board, which was "a party to litigation pending" in the D.C. Circuit. 809 F. Supp. at 144–145. The President threatened to remove the plaintiffs if they did not withdraw from that lawsuit, and the district court temporarily enjoined "removal of the plaintiffs" because the removal "could jeopardize" the jurisdiction of the D.C. Circuit over the Postal Service Board's pending suit, which could have determined that the Board was "independent." *Id.* at 146. The Court also noted that "in the circumstances here, neither a damages remedy nor a declaratory judgment would provide an adequate remedy" because "neither a damage award in the Claims Court nor a declaratory judgment in [the district court] would afford our Court of Appeals, and thus the Judicial Branch, an opportunity to protect its jurisdiction over a matter pending before it and the several issues lurking there." *Id.* at 147 (footnote omitted). So, the procedural and jurisdictional concerns dictating temporary relief do not pertain here.

and restrain the President from appointing any acting Director other than herself. *Id.* at 315. The court summarized the issue presented as "whether the President is authorized to name an acting Director of the [CFPB] or whether his choice must yield to the ascension of the Deputy Director, who was installed in that office by the outgoing Director in the hours before he resigned." *Id.* at 311. The court denied the temporary relief on the grounds that the plaintiff had not demonstrated a likelihood of success on the merits, not had she made a showing of the necessary irreparable harm. *Id.* at 333, 336.

In making that finding, the court looked to *Sampson* and it differentiated the case before it from the way *Sampson* was applied in *Berry*. It noted that in *Berry*, the court considered the Commission's inability to complete its work and the individual plaintiffs' injury to be one and the same: the frustrated statutory objective also applied to each of them personally, as they could not do what they had been appointed and confirmed to do. *Id.* at 335. But English, according to the court, did not identify any harm that she would suffer personally if the injunction did not issue, as the work of the agency would go forward. *Id.* And while she may have been appointed as Deputy Director in a manner that was arguably consistent with the governing statute, she did not occupy a position established by Congress, for which she was subject to Senate confirmation, like the plaintiff in our case does.

But the more significant distinction drawn by the court in *English* was that "in *Berry*, the plaintiffs were attempting to preserve a status quo in which they had a 'statutory right to function as Commissioners,' after they were appointed by President Carter, with the advice and consent of the Senate, pursuant to the authorizing statute of the Commission. In contrast, there was never a time here in which English functioned as the CFPB's acting Director." *Id*. (citation omitted). In other words, the requested order requiring the President to withdraw his choice for acting Director and name the plaintiff to that position would not restore the "status quo," which is defined as the "last uncontested status which preceded the pending controversy," *Id.* at 335–36, citing *District 50, United Mine Workers of Am. v. Int'l Union, United Mine Workers of Am.*, 412 F.2d 165, 168 (D.C. Cir. 1969). Plaintiff had never been the acting Director, but she was simply picked by the outgoing Director to serve as his Deputy, who would be entitled to then ascend to the Director's position.[7]

Finally, defendants argue that the harm is not irreparable because the OSC "continues to operate" with another individual "functioning as acting Special Counsel." Defs.' Opp. at 13 (internal quotations omitted); Tr. at 4 ("There is currently an acting special counsel who is another official from the Office of Special Counsel who is serving in that rule currently."). Plaintiff submits that whether the agency is still up and running in some format, with some person at the helm, is not the point. He is concerned that in the absence of a leader lawfully appointed to fulfill the statutory duties of the Special Counsel, there would be no way to ensure the confidentiality and continuity of ongoing matters under his purview, no clarity as to what employees who have been subjected to prohibited actions or retaliation should do or where they should turn, and no

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7 Defendants also argue that the harm is not irreparable because if plaintiff prevails in this lawsuit, he can be restored to his position then. *English* did observe that while the harm suffered by the plaintiff Commissioners in *Berry* was irreparable because once the term of the Commission expired, they could no longer be reappointed to it by a court, English could be reinstated to the "Acting" Deputy slot if her suit succeeded. *See English*, 279 F. Supp. 3d at 335. Here, plaintiff worries that unless he is restored to his position, the President could choose to fill the vacancy he unlawfully created, extinguishing any possible judicial remedy. That appears to be less speculative than the scenario rejected by the court in *English*, where the President had not just deposed the Senate-confirmed agency head. But even if the Court were to find *English* to be instructive, it would not advance the defendants' position given the fundamental difference between the equitable relief the plaintiff is seeking here and what was at issue in *English*. Dellinger wants to maintain the Presidential appointment he held until his removal; English was seeking an appointment to a position for which she was eligible, but she never received. Moreover, English is not a fair comparator as she was not ejected from a Presidential appointment with a fixed term.

assurance that only people with appropriate authorization will access the confidential and sensitive information maintained by the OSC, including information it is required by statute to keep secret. *See* 5 U.S.C. § 1213(h); Tr. at 18–19.

Plaintiff's assertion that it is irreparable harm to be deprived of the ability to perform his statutory functions and fulfill his statutory obligations to current and future whistleblowers overlaps considerably with his argument on the merits: that it is Congress that established his position, his duties, and the sole grounds for his removal, and that the structure of the OSC reflects a Congressional determination that his independence is fundamental to the position it created. One problem in *English* was that the Court found that the complaint failed on the merits, while this Court has already found that plaintiff has made a strong showing of success on the merits. Since it also it finds that he has made a sufficient showing, for now, that these harms are indeed significant, impending, and irreparable, it will, consistent with *Winter* and *Sherley*, go on to the third and fourth factors.

IV. The balance of the equities and the public interest

Plaintiff advances the arguments concerning the third and fourth factors together, Pl.'s TRO at 16–17, and defendants' response addresses them together as well. Defs.'s Opp. at 14–15. The Court agrees that in this case, they are necessarily intertwined: plaintiff is a public official suing public officials, and both the scope of legitimate Presidential authority and the existence and extent of any remedies available to displaced civil servants and officials are very much matters of public interest.

Plaintiff maintains that recent "personnel actions have generated widespread uncertainty," and that "[i]n this context, the proper functioning of the OSC is more vital than ever." Pl.'s TRO at 16. According to plaintiff, his termination "creates a gap in protections provided by the OSC, risking severe confusion over the leadership, mission, and role of the agency (as well as doubt over the lawfulness of any actions that it takes and fear that confidential information may fall into unauthorized hands)." *Id.*

For purposes of the temporary restraining order, the Court can and will consider these factors without characterizing or purporting to address the lawfulness of Presidential actions that have not been presented to it for review and may well be the subject of proceedings before other courts.

Defendants tie their argument to the merits: that the relief requested would cause harm to the Executive and to the separation of powers by intruding on his Article II authority. Defs.' Opp. at 2, 14–15. But they proffer no 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 issue is subject to calm and thorough deliberation.

The Office of Special Counsel is a unique federal agency with a unique, but narrow focus. Congress created the position of Special Counsel to play a singular and important role that has strong bipartisan support: to protect whistleblowers within the executive branch from reprisals and prohibited personnel practices, even as administrations change hands. *See* Whistleblower Protection Act of 1989, Pub. L. No. 101–12, 103 Stat. 16 (Apr. 10, 1989) ("[T]he primary role of the Office of Special Counsel is to protect employees, especially whistleblowers, from prohibited personnel practices[.]"). Notwithstanding defendants' assertion, unsupported by any authority, that "the public interest is better served by a Special Counsel who holds the President's confidence," Defs.' Opp. at 15, Congress contemplated and established a structure that reflects a different priority. Independence is essential to any Special Counsel's ability to perform the unique set of duties and reporting requirements set forth in the statute. Defendants have identified no impending injury or alleged constitutional error that cannot be fixed in the future that would outweigh the harm that will flow from the precise circumstance Congress deliberately chose to prohibit. Therefore, the Court finds that the last two factors weigh heavily in favor of the temporary restraining order.

CONCLUSION

For the reasons set forth above, plaintiff's motion for a temporary restraining order [Dkt. # 2] is **GRANTED**.

It is hereby **ORDERED** that from the date of entry of this order until the Court rules on the entry of a preliminary injunction, plaintiff Hampton Dellinger shall continue to serve as the Special Counsel of the Office of Special Counsel, the position he occupied at 7:22 p.m. on Friday, February 7, 2025 when he received the email from the Assistant to the President. Defendants may not deny him access to the resources or materials of that office or recognize the authority of any other person as Special Counsel.

In light of this Order, the administrative stay entered on February 10, 2025, *see* Minute Order (Feb. 10, 2025) is hereby **VACATED,** and defendants' motion to stay the Court's administrative stay [Dkt. # 10], which was never granted, is **DENIED AS MOOT**.[8]

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8 Putting aside the question of whether 5 U.S.C. § 3345 gives the President authority to appoint an Acting Special Counsel under the circumstances here, the appointment described in defendants' Notice [Dkt. # 13] as having taken place on February 11, 2025 may have been contrary to the order the Court issued on February 10th. *See* Minute Order (Feb. 10, 2025) ("[I]t is HEREBY ORDERED that from the time of this order through midnight on February 13, 2025, plaintiff Hampton Dellinger shall continue to serve as the Special Counsel of the Office of Special Counsel, the position he occupied at 7:22 p.m. on Friday, February 7, 2025 . . . ."). As of that date, there was no vacancy to fill.

The Court will hold a hearing on plaintiff's request for an injunction pending resolution of the case on the merits, i.e., an appealable preliminary injunction, on **February 26, at 10:00 a.m**. The parties are directed to confer and inform the court by **February 14** of their position (or positions if they do not agree) on whether, given the legal nature of the dispute, the Court should consolidate consideration of the request for a preliminary injunction with consideration of the merits pursuant to Federal Rule of Civil Procedure 65(a)(2), and they must submit a proposed schedule for any additional submissions they believe are warranted. The parties may propose that the Court deem the motion in support of the temporary restraining order to be a memorandum in support of a motion for preliminary injunction, with the opposition and reply similarly designated, and/or existing pleadings can be deemed to be motions and oppositions or cross motions under Federal Rule of Civil Procedure 56. The Court notes that an order of consolidation does not require the consent of the parties.

SO ORDERED.

Amy B Jackson

AMY BERMAN JACKSON
United States District Judge

DATE: February 12, 2025

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAMPTON DELLINGER,

Plaintiff,

v.

SCOTT BESSENT, *et al.*,

Defendants.

Civil Action No. 1:25-cv-00385-ABJ

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR A TEMPORARY RESTRAINING ORDER

On February 7, 2025, the President removed Plaintiff Hampton Dellinger as the head of the Office of Special Counsel (OSC), an Executive Branch agency with a single leader. The Supreme Court has recently made clear in two separate cases that Article II precludes Congress from placing limits on the President's authority to remove principal officers of the United States who serve as sole heads of an Executive Branch agency. *Collins v. Yellen*, 594 U.S. 220 (2021); *Seila Law LLC v. CFPB*, 591 U.S. 197 (2020). Consistent with those cases, in 2021, President Biden removed the Commissioner of Social Security, and the only courts of appeals to have addressed the constitutionality of that removal have sustained it. *Rodriguez v. SSA*, 118 F.4th 1302, 1313-14 (11th Cir. 2024); *Kaufmann v. Kijakazi*, 32 F.4th 843, 848-49 (9th Cir. 2022). The President lawfully exercised that same authority when he removed Plaintiff from his post last week.

Nonetheless, on February 10, 2025, Plaintiff filed this lawsuit challenging his removal. Compl., ECF No. 1. That day, he also filed a motion for a temporary restraining order, requesting that the Court reinstate him to his former position and enjoin Defendants from recognizing "any other person" as the head of OSC. *See* Pl.'s Mot. for Temporary Restraining Order at 1-2, ECF No. 2. Such an order would be an unprecedented intrusion into the well-established authority of the Executive.

For the following reasons, the Court should deny this extraordinary request.

First, Plaintiff has not demonstrated that he is likely to succeed on the merits. As noted, binding Supreme Court precedent holds that removal restrictions imposed on single-agency heads violate the President's Article II power to supervise those who wield executive power on his behalf. In *Seila Law*, the Court invalidated the statutory restrictions on removal of the Director of the Consumer Financial Protection Bureau (CFPB), and in *Collins*, the Court explained that *Seila Law* was "all but dispositive" as to the invalidity of similar restrictions on the removal of the Director of the Federal Housing Finance Agency (FHFA), explaining that "[t]he FHFA (like the CFPB) is an agency led by a single Director." 594 U.S. at 250-51. Plaintiff offers no compelling reason why these holdings would not equally apply to the head of the OSC, the only single-head agency whose removal restrictions have not yet been addressed by a federal court.

Second, Plaintiff has not demonstrated that in the absence of a temporary restraining order, he will suffer imminent irreparable harm. The loss of government employment constitutes irreparable harm only in a "genuinely extraordinary situation," *Sampson v. Murray*, 415 U.S. 61, 92 & n.68 (1974), and Plaintiff does not even attempt to argue that he meets this high bar. Rather, he casts his claim of irreparable harm as a deprivation of a "statutory right to function" as the head of OSC, *see* Pl.'s Mem. of Law in Support of Pl.'s Mot. for a Temporary Restraining Order ("Pl.'s Mot.") at 15, ECF No. 2-1. But in *English v. Trump*, another district court in this Circuit rejected the identical argument in analogous circumstances. 279 F. Supp. 3d 307, 333 (D.D.C. 2018) (holding that loss of status as Acting CFPB director did not constitute irreparable harm to plaintiff). And if Plaintiff asserts irreparable harm to the functioning of OSC itself, that assertion is misplaced, both because OSC can continue to function with an Acting Special Counsel (who had already assumed Plaintiff's role before this Court's administrative stay) and because Plaintiff would lack standing to raise such a harm.

Third, the balance of the equities and public interest favor Defendants. The relief that Plaintiffs seek—an order requiring the President to reinstate a person who he has chosen to remove from office—is unprecedented. And with good reason: such an order would greatly impede President's authority to exercise "all of" "the 'executive Power'" of the United States. *Seila Law*, 590 U.S. at 203.

Allowing Plaintiff to exercise executive power over the President's objection unquestionably inflicts irreparable harm on both the Executive and the separation of powers.

Because the merits and the other temporary restraining order factors all cut against Plaintiff, his motion for extraordinary preliminary relief should be denied.

BACKGROUND

I. Statutory Background

Congress created the Office of the Special Counsel as part of 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. OLC 120, 122 (1978); *see Seila Law*, 591 U.S. at 221 (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 both the same powers as it originally possessed and more. The Special Counsel is vested with an array of executive powers and functions, including a broad range of investigatory and disciplinary powers. *See* 5 U.S.C. § 1212. For example, the Act provides that the Special Counsel "shall receive any allegation of a prohibited personnel practice and shall investigate the allegation to the extent necessary to determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken," *id.* § 1214(a)(1)(A), but it also permits the Special Counsel to conduct such an investigation "in the absence of an allegation," *id.* § 1214(a)(5). The Special Counsel has the authority to "examine witnesses, take depositions, and receive evidence," as well as to "issue subpoenas" and "order the taking of depositions and order responses to written interrogatories." *Id.* § 1212(b)(1)-(2). The Special Counsel can also "bring petitions for stays, and petitions for corrective action," and "file a complaint or make recommendations for disciplinary action" to the Merit Systems Protection Board. *Id.* § 1212(a)(2)(A)-(B). That can result in "removal, reduction in grade, debarment from Federal employment for a period not to exceed 5 years, suspension, or reprimand." *Id.* § 1215(3)(a). And in 2017, Congress enhanced OSC's investigatory powers, including by barring any assertions of common law privileges that would "prevent the Special Counsel from obtaining any material" within its purview. *See id.* § 1212(a)(5)(C)(i);

Pub. L. No. 115-91, §1097(a), 131 Stat. 1615 (2017).

II. The Present Controversy

Plaintiff was appointed to serve as Special Counsel by President Biden in October 2023, and confirmed by the Senate in February 2024. Compl. ¶ 30. He was sworn in on March 6, 2024. *Id.* ¶ 1. On February 7, 2025, the Director of the White House Presidential Personnel Office informed Plaintiff that he was being removed from his position as Special Counsel, effective immediately. *Id.* ¶ 2. On February 10, 2025, Plaintiff filed this lawsuit. *See generally* Compl. Later that day, he also filed a motion for a temporary restraining order, requesting that he be reinstated as Special Counsel. *See* ECF No. 2. Upon receiving the motion, the 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," reasoning that the stay was necessary "to preserve the status quo." The Court's order temporarily restored Plaintiff to the office of Special Counsel and enjoined defendants from "deny[ing] him access to the resources or materials of that office or recogniz[ing] the authority of any other person as Special Counsel." Feb. 10, 2025 Minute Order. Defendants have since appealed that order and are seeking emergency relief in the U.S. Court of Appeals for the District of Columbia Circuit. ECF No. 7.

LEGAL STANDARD

Plaintiff seeks a temporary restraining order—"an extraordinary remedy never awarded as of right." *Winter v. NRDC*, 555 U.S. 7, 24 (2008). To obtain such extraordinary relief, a plaintiff "must show (1) 'he is likely to succeed on the merits,' (2) 'he is likely to suffer irreparable harm in the absence of preliminary relief,' (3) 'the balance of equities tips in his favor,' and (4) issuing 'an injunction is in the public interest.'" *Hanson v. District of Columbia*, 120 F.4th 223, 231 (D.C. Cir. 2024) (quoting *Winter*, 555 U.S. at 20); *see also Chef Time 1520 LLC v. Small Bus. Admin.*, 646 F. Supp. 3d 101, 109 (D.D.C. 2022) ("The decision of whether to award a TRO is analyzed using the same factors applicable to preliminary injunctive relief[.]" (cleaned up)). When "the Government is the opposing party," the assessment of "harm to the opposing party" and "the public interest" merge. *Nken v. Holder*, 556 U.S. 418, 435 (2009).

Plaintiff must do more than merely show the possibility of prevailing on the merits, but rather must show "a substantial likelihood of success on the merits." *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 913 (D.C. Cir. 2015). Plaintiff also must establish irreparable harm, as failure do so is "grounds for refusing to issue [preliminary relief], even if the other three factors entering the calculus merit such relief." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006); *accord* Wright & Miller, 11A Fed. Prac. & Proc. Civ. § 2948.1 (3d ed.) (irreparable harm is "the single most important prerequisite for the issuance of a preliminary injunction" as "[o]nly when the threatened harm would impair the court's ability to grant an effective remedy is there really a need for preliminary relief").

Mandatory injunctions that "would change the status quo" are disfavored as "an even more extraordinary remedy" than the typical preliminary injunction, "especially when directed at the United States Government." *Kondapally v. USCIS*, No. CV 20-00920 (BAH), 2020 WL 5061735, at *3 (D.D.C. Aug. 27, 2020) (citations omitted); *see also Mylan Pharms., Inc. v. Shalala*, 81 F. Supp. 2d 30, 36 (D.D.C. 2000) ("In this Circuit, 'the power to issue a preliminary injunction, especially a mandatory one, should be sparingly exercised.'" (quoting *Dorfmann v. Boozer*, 414 F.2d 1168, 1173 (D.C. Cir. 1969))). "Plaintiffs seeking this type of relief . . . face 'an additional hurdle' when proving their entitlement to relief," and courts "exercise extreme caution in assessing" such motions. *Kondapally*, 2020 WL 5061735, at *3. "As a rule, when a mandatory preliminary injunction is requested, the district court should deny such relief unless the facts and law clearly favor the moving party." *Id.* (cleaned up).

ARGUMENT

Plaintiff fails to satisfy any of the factors necessary for the extraordinary remedy he seeks—a mandatory temporary restraining order compelling Defendants, including the President, to reinstate him to a position from which he has been removed. Such an order would be unprecedented and unwarranted.

I. Plaintiff Cannot Succeed 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.

A. 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 LLC v. CFPB*, 591 U.S. 197, 203 (2020) (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, 513-14 (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.

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.

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 LLC*, 591 U.S. at 218; he instead serves as the sole head of his agency, 5 U.S.C. § 1211(a).

B. 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 290-92. 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 Consumer Financial Protection Bureau, 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, 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 obviously 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, holding 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.[1]

The Supreme Court applied the same logic when it invalidated the "for cause" removal restriction for the Director of the Federal Housing Finance Agency. *Collins*, 594 U.S. at 226-28. 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 250-51. 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 in determining whether Congress may limit the President's power to remove its head." *Id.* at 251-52. 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.

Consistent with those holdings, President Biden removed the Commissioner of Social Security without cause, contrary to the statutory limitations that restricted removal over that agency head except for "neglect of duty or malfeasance in office." 42 U.S.C. § 902(a)(3); *see L.M. v. Commissioner*, 2021 WL 8268034, at *1 (M.D. Ga. Dec. 3, 2021). 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*, 45 Op. O.L.C. ---, 2021 WL 2981542, at *1, 7 (O.L.C.

[1] Plaintiff attempts to distinguish this case by selectively quoting from the Supreme Court's statement in *Seila Law* that OSC does not "wield regulatory authority comparable to the CFPB." *See* Pl.'s Mot. at 11-12 (citing *Seila Law*, 591 U.S. at 221). In fact, the Supreme Court cast doubt on the viability of the Special Counsel's removal protections, noting that OSC was "created nearly 200 years after the Constitution was ratified" and "drew a contemporaneous constitutional objection from the Office of Legal Counsel under President Carter and a subsequent veto on constitutional grounds by President Reagan." *Seila Law*, 591 U.S. at 221. The Court then characterized the SSA and FHFA in similar terms, *id.* at 221-22, and as explained, the removal protections for the heads of those agencies have since been held unconstitutional.

July 8, 2021). Perhaps unsurprisingly, the only courts of appeal 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, 1313-14 (11th Cir. 2024); *Kaufmann v. Kijakazi*, 32 F.4th 843, 848-49 (9th Cir. 2022).

There is no doubt 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.[2] *See, 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'"). Indeed, Plaintiff himself, represented at the time by the Department of Justice, has argued that the Special Counsel engages in core executive functions like investigation and prosecution. Final Appellee Br., *America First Legal Foundation v. Dellinger*, No. 24-5168 (D.C. Cir.), at 15-16.

Notwithstanding Plaintiff's attempt to minimize the significant executive authority wielded by OSC, *see* Pl.'s Mot. at 12-13, its exercise of that authority clearly implicates the faithful execution of

[2] Plaintiff strains to describe OSC as "quasi-legislative," Pl.'s Mot. at 13, but only references OSC's ability to enforce compliance "with congressionally imposed ethical and personnel requirements" and the requirement that OSC transmit to Congress upon request "the Special Counsel's views on functions, responsibilities, or other matters relating to the Office" and a report when "an allegation submitted to the Special Counsel is resolved by an agreement between an agency and an individual," 5 U.S.C. § 1217. These are plainly not quasi-legislative functions, which the Supreme Court has "[b]ack[ed] away from" relying on in any event. *Seila Law*, 591 U.S. at 217. Indeed, OSC's authority to enforce federal statutes only underscores that its power is akin to that of a federal prosecutor, who exercises a core executive function.

federal law.[3] As the Carter Administration explained in 1978, "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." *Memorandum Opinion for the General Counsel*, Civil Service Commission, 2 Op. OLC at 120. For these reasons, the Carter Administration objected to the Office of Special Counsel when it was first created, explaining 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." *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). Since that time, these serious constitutional concerns have only been heightened, as evidenced by the Supreme Court's recent pronouncements that similar restrictions are unconstitutional.

C. Plaintiff cannot show entitlement to reinstatement.

If that were not enough, Plaintiff is deeply mistaken in seeking judicial reinstatement to a principal office. When principal officers have been removed from their posts, they 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 who the President no longer believes should be entrusted with the exercise of executive power. Such a remedy would undermine the objective of electoral

[3] To the extent Plaintiff claims that OSC exercises a more "limited" set of executive functions, Pl.'s Mot. at 12, the Supreme Court expressly rejected this argument in *Collins*, explaining that "the nature and breadth of an agency's authority is not dispositive in determining whether Congress may limit the President's power to remove its head." 594 U.S. at 251-52.

accountability within the Executive Branch that animated the holdings in *Seila Law* and *Collins*.

II. Plaintiff Fails To Identify Any Irreparable Harm

The "high standard for irreparable injury"—even higher here insofar as Plaintiff requests a mandatory injunction that would alter the status quo, *Phillip v. Fairfield Univ.*, 118 F.3d 131, 133 (2d Cir. 1997)—requires a two-fold showing by Plaintiff: First, because an irreparable injury "must be both certain and great," Plaintiff "must show 'the injury complained of is of such *imminence* that there is a "clear and present" need for equitable relief to prevent irreparable harm.'" *Chaplaincy of Full Gospel Churches*, 454 F.3d at 297 (quoting *Wisc. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)). And second, "the injury must be beyond remediation." *Id.*

Plaintiff has failed to meet his burden for either of the two required showings. He principally contends that his ongoing harm stems from his inability "to serve as the lawful agency head of the OSC." Pl.'s Mot. at 14-15. But only in a "genuinely extraordinary situation" may loss of employment constitute irreparable harm. *Sampson*, 415 U.S. at 92 & n.68. And this is not such a situation. *See id.* at 89-92 (holding loss of income, face, and reputation do not amount to irreparable harm). Indeed, court after court in this Circuit and others have concluded that loss of employment does not constitute irreparable harm. *See, e.g.*, *Hetreed v. Allstate Ins. Co.*, 135 F.3d 1155, 1158 (7th Cir. 1998); *Davis v. Billington*, 76 F. Supp. 3d 59, 65-66 (D.D.C. 2014) (collecting cases); *Farris v. Rice*, 453 F. Supp. 2d 76, 79-80 (D.D.C. 2006) ("cases are legion holding that loss of employment does not constitute irreparable injury"). And to the extent that Plaintiff attempts to distinguish his former position from a "garden-variety employment dispute," Pl.'s Mot. at 16, courts have repeatedly rejected the notion that the deprivation of a unique, singular, or high-level position is any more of an irreparable injury. *See Hetreed*, 135 F.3d at 1158 (loss of position as senior manager leading audit department not irreparable injury); *Marxe v. Jackson*, 833 F.2d 1121, 1122 (3d Cir. 1987) (division manager); *Rubino v. City of Mount Vernon*, 707 F.2d 53 (2d Cir. 1983) (mayoral-appointed City Assessor); *Franks v. Nimmo*, 683 F.2d 1290, 1291 (10th Cir. 1982) (Associate Chief of Staff for Research and Development position at Department of Veterans Affairs Medical Center); *EEOC v. City of Janesville*, 630 F.2d 1254, 1256 (7th Cir. 1980) (Chief of Police); *Levesque v. Maine*, 587 F.2d 78, 79 (1st Cir. 1978) (Maine Commissioner of Manpower);

Nichols v. Agency for Int'l Dev., 18 F. Supp. 2d 1, 2, 4 (D.D.C. 1998) (Chief of Information Management Systems, Office of Inspector General); *Burns v. GAO Emps. Fed. Credit Union*, No. 88-3424, 1988 WL 134925, at *1–2 (D.D.C. Dec. 2, 1988) (President of Credit Union Board of Directors).

Plaintiff also argues that his purported deprivation of his "statutory right to function" as the head of OSC constitutes irreparable harm. Pl.'s Mot. at 15. But the district court in *English v. Trump* rejected an identical argument, holding that the plaintiff could not show that deprivation of her purported status as Acting Director of the CFPB constituted irreparable harm. 279 F. Supp. 3d at 333-36. Plaintiff omits any citation to *English* (despite his counsel having appeared as counsel of record in that case), instead relying solely on two cases that are plainly distinguishable and that were both later vacated by the D.C. Circuit: *Berry v. Reagan*, No. 83-3182, 1983 WL 538, at *5 (D.D.C. Nov. 14, 1983), *vacated*, 732 F.2d 949 (D.C. Cir. 1983), and *Mackie v. Bush*, 809 F. Supp. 144, 146 (D.D.C.), *vacated sub nom. Mackie v. Clinton*, 10 F.3d 13 (D.C. Cir. 1993).

Indeed, *English* held that the district court's vacated analysis in *Berry v. Reagan* did not control for reasons that apply here with equal force. In *Berry*, President Reagan removed several members of the Commission on Civil Rights, an action that dissolved the Commission and meant that it could not complete a report it was statutorily required to complete by a date certain. *Id.* at *1, *5. But like in *English*, Plaintiff and OSC "are not similarly situated" to the plaintiffs in *Berry*, as OSC "continues to operate" with Ms. Gorman "functioning as acting" Special Counsel. *English*, 279 F. Supp. 3d at 335. And like in *English*, "any such harm" to Plaintiff coming solely from him not functioning as the Special Counsel "can be remediated in the ordinary course of this case." *Id.* That stands in contrast to *Berry*, in which "any harm suffered by the commissioners was plainly irreparable because the commission would have expired and they could not have been reinstated to it." *Id.*

Similarly, in *Mackie v. Bush*, the President sought to remove the majority of the Board of Governors of the Postal Service Board, an action that would "be irrevocably disruptive of the Board's function." 809 F. Supp. at 146. As noted, OSC is perfectly capable of functioning without Plaintiff, just as it did before he became Special Counsel less than one year ago. Moreover, in *Mackie*, the district court entered an injunction preventing the removal of the governors *before* their removal was effectuated, *id.* at 148—it did not reinstate an officer who had already been removed, as Plaintiff requests this Court do here.

Plaintiff's remaining claims of irreparable harm are similarly unavailing. Plaintiff first claims that a temporary restraining order is warranted because another person could be nominated and confirmed such that his claim would be moot. Pl.'s Mot. at 15. This argument is specious—as Plaintiff well knows, Plaintiff's own nomination occurred 147 days before he was confirmed, Compl. at 8, and a temporary restraining order lasts at most 28 days, Fed. R. Civ. Pro. 65(b)(2).

Plaintiff next argues that denying him preliminary relief would deprive OSC of the "ability to fulfill" its "mandate." Pl.'s Mot. at 15 (citing *Berry*, 1983 WL 538, at *5). But as explained, unlike in *Berry*, OSC can continue to fulfill its mandate without Plaintiff, since the Acting Special Counsel has stepped into his role. In any event, Plaintiff would have no standing to claim he is suffering this purported harm, since he is neither a whistleblower nor a party subject to OSC's authority. *See Allen v. Wright*, 468 U.S. 737, 758 (1984). Even assuming any injury attributable to a lack of ability for OSC to fulfill its mandate (which there is not), that is not an injury to Plaintiff, but one to the interests of the public and of the United States. And those interests have to be informed and defined by the Executive, who has determined that Plaintiff's service as the Special Counsel is no longer in the best interests of the public.

Finally, Plaintiff asserts—without any supporting evidence—that Plaintiff's removal "may result in individuals who lack lawful authorization" accessing OSC information. Pl.'s Mot. at 15-16. This argument is entirely speculative and lacks any basis in the record of this case. And again, Plaintiff's alleged injury stems from the removal of his job duties, not from any hypothetical injury concerning the information of others. *See Warth v. Seldin*, 422 U.S. 490, 493 (1975). He may not obtain a temporary restraining order based on irreparable harm to some other, unidentified individuals.

III. The Balance Of Equities And Public Interest Favor Defendants

Granting the extraordinary relief requested would be an unprecedented intrusion into the President's authority to exercise "all of" "the 'executive Power'" of the United States. *Seila Law*, 590 U.S. at 203. Defendants are unaware of any historical precedent where a federal court reinstalled a single agency head of the United States after the President has removed him. That sort of harm to the Executive, and to the constitutional separation of powers, is transparently irreparable.

Moreover, the public interest is better served by a Special Counsel who holds the President's confidence, and thus will more effectively serve him in executing his duties as Commander-in-Chief. And "the Government has traditionally been granted the widest latitude in the 'dispatch of its own internal affairs.'" *Sampson*, 415 U.S. at 83 (quoting *Cafeteria and Restaurant Workers Union, Local 473, A.F.L.-C.I.O. v. McElroy*, 367 U.S. 886, 896 (1961)). The public interest is best served by maintaining this traditional deference to the government's internal management of its own personnel.

CONCLUSION

For the reasons above, the Court should deny Plaintiff's motion for a temporary restraining order.

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Respectfully submitted,

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