No. 24A790

IN THE

Supreme Court of the United States

SCOTT BESSENT, SECRETARY OF THE TREASURY, *et al.*,

Applicants,

v.

HAMPTON DELLINGER, SPECIAL COUNSEL
OF THE OFFICE OF SPECIAL COUNSEL

ON APPLICATION TO VACATE THE ORDER ISSUED BY THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA CIRCUIT AND REQUEST FOR AN IMMEDIATE ADMINISTRATIVE STAY TO THE CHIEF JUSTICE OF THE UNITED STATES JOHN ROBERTS

BRIEF OF *AMICI CURIAE* FORMER PUBLIC OFFICIALS AND LEGAL SCHOLARS IN OPPOSITION TO APPLICATION TO VACATE AND REQUEST FOR AN IMMEDIATE STAY

MICHAEL LIEDER
MEHRI & SKALET, PLLC
2000 K Street NW,
Suite 325
Washington, DC 20006

NORMAN L. EISEN
TIANNA J. MAYS
JON M. GREENBAUM
Counsel of Record
STATE DEMOCRACY
DEFENDERS FUND
600 Pennsylvania Avenue SE,
#15180
Washington, DC 20003
(202) 601-8678
jgreenbaum@justicels.com

Counsel for Amici Curiae

376782

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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INTEREST AND IDENTITY OF AMICI CURIAE

Amici Donald Ayer, John J. Farmer, Jr., Trevor Potter, Alan Charles Raul, Robert Shanks, and Christine Todd Whitman (collectively "amici") are former elected officials, other government officials, and legal scholars who have collectively spent decades in public service defending the Constitution, the interests of the American people, and the rule of law.[1]

Amici have a strong interest in this case, based on their commitment to ensuring access to justice through the courts for federal public servants, preserving the proper scope of executive power, and the faithful and equal enforcement of the federal laws. As former government officials, including in the federal service, amici have personally witnessed the need for an independent Special Counsel at the head of the Office of Special Counsel. The unique perspective of amici, informed by their public service and scholarship, make them well qualified to present arguments and perspectives to this Court that the parties alone are not likely to present.

The individual *amici* and their relevant background are listed below:

- Donald B. Ayer served as Deputy Attorney General in the George H.W. Bush Administration (1989-1990); Principal Deputy Solicitor General in Reagan Administration (1986-1988); and U.S. Attorney for the Eastern District of California in the Reagan Administration (1981-1986).

[1] Pursuant to Supreme Court Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

- John J. Farmer Jr. served as New Jersey Attorney General, appointed by Governor Christine Todd Whitman (1999-2002); Chief Counsel to Governor Whitman (1997-1999); Deputy Chief Counsel to Governor Whitman (1996-1997); Assistant U.S. Attorney for the District of New Jersey in the George H.W. Bush and Clinton Administrations (1990-1994); and Senior Counsel to the 9/11 Commission (2003-2004).
- Trevor Potter served as Chairman of the Federal Election Commission (1994) and Commissioner of the Federal Election Commission (1991 to 1995).
- Alan Charles Raul served as Associate Counsel to the President (1986-1988); General Counsel of the Office of Management and Budget (1988-1989); General Counsel of the U.S. Department of Agriculture (1989-1993); Vice Chairman of the Privacy and Civil Liberties Oversight Board (2006-2008); and currently serves as a Lecturer on Law at Harvard Law School.
- Robert Shanks served as Deputy Assistant Attorney General, Department of Justice Office of Legal Counsel (1981-1984).
- Christine Todd Whitman served as the Governor of New Jersey (1994-2001) and Administrator of the Environmental Protection Agency in the George W. Bush Administration (2001-2003).

SUMMARY OF ARGUMENT

This case comes before the Court on Defendants' application to stay and then vacate a temporary restraining order ("TRO") issued by the district court four days

prior to the application. Defendants' application also was filed one day after Defendants' appeal to the Court of Appeals for the District of Columbia was denied. The Court should deny both prongs of Defendants' application.

The case arises out of Defendants' termination of the employment of the Plaintiff-Respondent, Hampton Dellinger, who has served as the Special Counsel of the Office of Special Counsel since March 6, 2024. The Special Counsel serves a five-year term unless removed by the President for "inefficiency, neglect of duty, or malfeasance in office." 5 U.S.C. § 1211(b). Without identifying any inefficiency, neglect of duty, or malfeasance, the Director of the Presidential Personnel Office, Sergio Gor, sent Dellinger a curt email on February 7, 2025, purporting to terminate his employment, effective immediately. Dellinger sued and the TRO that the district court entered February 12 requires that Dellinger continue to serve as Special Counsel until the district court can rule on a motion for preliminary injunction. A hearing on that motion is scheduled in eight days, February 26.

Defendants' primary basis for arguing that the Court should stay then vacate the TRO is that the "for cause" provision in section 1211(b) supposedly is unconstitutional: "[t]he President's 'management of the Executive Branch' requires him to have 'unrestricted power to remove'" the executive's principal officers. Application at 1-2 (quoting *Trump v. United States*, 603 U.S. 593, 621 (2024)). Defendants are asking the Court to make this constitutional determination even though, except in unusual circumstances not present here, appellate courts lack jurisdiction to review TRO's. In this case, it would require this Court to decide a

complex constitutional decision on an expedited basis when the parties have had limited opportunity to make legal arguments and no opportunity to present any evidence. As shown by the history of *Moyle v. United States*, 144 S. Ct. 2015 (2024), it is risky for the Court to wade into difficult issues before the lower and intermediate courts have had an opportunity to develop the record and the legal arguments.

Defendants nonetheless contend that this Court must decide this constitutional question now because the President is being grievously harmed by Dellinger's continuation in the office. But Defendants have not identified one action that Dellinger has taken since President Trump took office, or before, that harms the President or the Administration, let alone any that he might make in the next few days that may cause harm. Moreover, there is no suggestion from Defendants that Dellinger has received any direction or request from the President that he rejected or ignored, or even that the Special Counsel under this or prior administrations has ever manifested any pattern or practice to reject or ignore presidential directions or requests.

The Court should not decide the difficult issues in this case now based on this type of speculative harm. It should wait until the lower and intermediate courts have had an opportunity to develop the record and legal arguments. The Court should deny the Government's application and allow the TRO to remain in place.

ARGUMENT

The Office of Special Counsel ("OSC") is an independent agency of the United States. Among other duties, it protects federal employees from prohibited personnel

practices (PPPs) such as retaliation for whistleblowing, provides a secure channel for federal employees to reveal wrongdoing, and civilly enforces the Hatch Act. *See* 5 U.S.C. § 1211 *et seq*. The OSC is not involved at all with employers other than the federal government or employees other than federal employees.

The OSC is led by the Special Counsel. The Special Counsel is appointed by the President and confirmed by the Senate. 5 U.S.C. § 1211(b). 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," and serves a five-year term unless removed by the President "only for inefficiency, neglect of duty, or malfeasance in office." *Id*.

This case comes to the Court on an extremely expedited basis. On February 7, 2025, the Director of the Presidential Personnel Office, Sergio Gor, sent Dellinger an email stating, "On behalf of President Donald J. Trump, I am writing to inform you that your position as Special Counsel of the US Office of Special Counsel is terminated, effective immediately. Thank you for your service[.]" The email did not provide any reason for the termination.

Since February 7, this case has moved with remarkable speed. Dellinger filed a complaint against the President and five Administration executives in their official capacities on February 10. Dellinger simultaneously requested a TRO to preserve the *status quo ante*. That afternoon, the district court held an in-person hearing, at which Defendants requested leave to file an opposition the next day. That night, the district court issued an administrative order that Dellinger be allowed to continue to serve in

his position for three days, until February 13. Defendants appealed the stay on February 11. The Court of Appeals for the District of Columbia Circuit dismissed the appeal the next day for lack of jurisdiction.

Defendants also submitted their opposition to the TRO on February 11. On February 12 – the same day the court of appeals denied the challenge to the administrative stay – the district court issued the TRO. It ordered that Dellinger continue to serve as Special Counsel until the court can rule on a motion for preliminary injunction. In addition, the court scheduled a hearing on that injunction motion as well as summary judgment for February 26. Additionally, the court also consolidated the preliminary injunction with a trial on the merits pursuant to Federal Rule of Civil Procedure 65(a)(2). The schedule includes further briefing by the parties.

The day after the TRO was granted, February 13, Defendants filed another emergency motion with the District of Columbia Circuit, asking that it stay the TRO pending appeal or, alternatively, provide mandamus relief. Dellinger opposed. And on February 15, the appellate court dismissed Defendants' appeal for lack of jurisdiction, dismissed the emergency motion for stay as moot, and denied the request for mandamus relief. Judge Katsas dissented.

Defendants filed their application to this Court the next day, a mere six days after the complaint was filed. According to Defendants, the President has unfettered power under the Constitution to remove heads of executive agencies and Congress violated that power by restricting the President's ability to remove the Special Counsel. Application at 1-3. And now, Defendants argue, courts also are interfering

with the President's powers. For weeks, "plaintiffs challenging President Trump's initiatives have persuaded district courts to issue TROs that intrude upon a host of the President's Article II powers." *Id.* at 5. In this case, the trial judge supposedly "seize[d] executive power by dictating to the President how long he must continue employing an agency head against his will." *Id.* at 4.

Clearly, the lower courts recognize the importance of the issues. They are moving this case from filing to merits in a little over two weeks.

But that does not mean this Court should jump in now to decide the constitutional issues. The Defendants' premature leap to this Court, six days after the lawsuit was filed, has left no time to develop the factual record and little opportunity to develop the legal arguments. The parties will have more time to do so between now and February 26.

Possibly, Defendants will present to the district court evidence that might obviate the need for a ruling on Constitutional grounds, such as evidence that Dellinger had indeed been inefficient, neglected his duties, or engaged in malfeasance in office. *See Camreta v. Greene*, 563 U.S. 692, 705 (2011) ("a 'longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them.' ") (quoting *Lyng v. Northwest Indian Cemetery Protective Assn.*, 485 U.S. 439, 445 (1988) and citing *Ashwander v. TVA*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring)). *AFGE v. Ezell*, No. CV 25-10276-GAO, 2025 WL 470459 (D. Mass. Feb. 12, 2025), provides a recent example of a preliminary injunction hearing resulting in a ruling that avoided a constitutional

confrontation. In *AFGE*, the district court initially issued a TRO preventing the Government from enforcing the deadline in its so-called "Fork in the Road" directive based on statutory and constitutional challenges, but at the preliminary injunction hearing several days later dissolved the TRO and denied an injunction. In that case, the court found that the plaintiff unions lacked standing and that the court lacked subject matter jurisdiction. *Id.* at *1-2. Although that result is unlikely in this case, the *Ezell* decision undermines Defendants' suggestion that district courts are hellbent on issuing TROs that infringe on the President's Article II powers.

And if a decision on Constitutional grounds proves necessary, the parties should at least have an opportunity to present evidence that might inform that decision. *See Brown v. Chote,* 411 U.S. 452, 457 (1973) ("The record in this case [which had proceeded only through a preliminary injunction, one step further than in Dellinger's case] clearly reflects the limited time which the parties had to assemble evidence and prepare their arguments," and "the resulting record was simply insufficient to allow that court to consider fully the grave, far-reaching constitutional questions presented"). For example, evidence concerning the actions that Dellinger and his predecessors have taken to attempt to protect federal employees against PPPs, and evidence concerning the reactions of other federal executives up to and including the President to those actions, may shed light on the importance of the Special Counsel's for cause protections. *See* Letter from Representatives Gerald E. Connolly and Eleanor Holmes Norton to Special Counsel Hampton Dellinger dated January 22, 2025 (online at https://oversightdemocrats.house.gov/sites/evo-

subsites/democrats-oversight.house.gov/files/evo-media-document/2025-01-22.GEC%20et%20al.%20to%20Dellinger-OSC%20re%20OSC%20Importance_0.pdf) (explaining the role of the OSC in monitoring actions during the first Trump Administration).[2] Such evidence may assist the judicial branch in evaluating the constitutionality of this legislative branch restriction on the chief executive's power to terminate the Special Counsel at will.

The Court should not rush into this case without good reason. It should allow the proceedings below to proceed on the expedited schedule that the district court has set. The district and appellate courts are working expeditiously *and* meticulously on this case and there is no reason to think that will change. *See United States v. Abbott*, 92 F.4th 570, 572 (5th Cir. 2024) (Willett, J., with Richman, Elrod, Southwick, & Wilson, JJ., concurring) ("We agree with the district court that this litigation, involving unprecedented action regarding the Texas border, deserves expeditious resolution—but more, it deserves *meticulous* resolution.") (emphasis in original).

This Court experienced last term the downside of prematurely entering a case that was far more developed than this one. In *Moyle v. United States*, 144 S. Ct. 2015 (2024), this Court dismissed as improvident writs of certiorari before judgment that it had granted five months before and vacated the stays it had entered in a case challenging the enforcement of Idaho's abortion law. In that case, the district court had conducted hearings and entered a preliminary injunction that the Ninth Circuit had declined to lift before this Court weighed in. The decision to dismiss the writs of

[2] Work product of the OSC referenced in footnote 10 of the letter is now unavailable.

certiorari was announced in four splintered opinions (two concurrences, one dissent, and one concurrence and dissent). This case is far less ready for the Court to weigh in.

Defendants nonetheless suggest that there is no need for restraint in this case because "this Court has twice held that restrictions on the President's authority to remove principal officers who serve as the sole heads of executive agencies violate Article II—in those cases, the single heads of the Consumer Financial Protection Bureau and the Federal Housing Finance Agency. *See Seila Law LLC v. CFPB*, 591 U.S. 197 (2020); *Collins v. Yellen*, 594 U.S. 220 (2021)." Application at 2. But those cases differ from this case in two critical respects. First, performance of the Special Counsel's duties can antagonize the leaders of other agencies, creating disputes that easily can rise to the President's level. As a result, Congress reasonably believed that the Special Counsel needed the type of protection afforded by allowing removal "only for inefficiency, neglect of duty, or malfeasance in office." 5 U.S.C. § 1211(b). Without that protection, it would be very difficult to find an attorney with the "demonstrated ability, background, training, or experience …to carry out the functions of the position" who would be willing to accept it, knowing that zealous performance of the Special Counsel duties could lead to termination of employment. *Id.* The principal duties of the heads of the CFPB and FHFA, by contrast, are outward facing toward private individuals and entities, and don't raise the same concerns about conflicts with other government agencies. Second, the records in *Seila Law* and *Collins* were fully developed when those cases reached the Court.

Finally, Defendants argue that it will cause "irreparable harm to the President if he is judicially barred from exercising exclusive and preclusive powers of the Presidency [to remove Dellinger] for at least 16 days, and perhaps for a month." Application at 3. That argument might have a modicum of weight if Defendants had pointed to one action that Dellinger had taken during his eleven months of service, let alone in the month that President Trump has been in office, that was at odds with the President's programs or policies. It has not. Purely speculative harm to one of the Defendants, President Trump in his official capacity, should not be enough for the Court to address the Constitutional issues that Defendants raise prematurely.

CONCLUSION

For the reasons set forth above, amici urge the Court to deny Defendants' application and permit the district court to conduct the hearing scheduled for February 26. If the case ultimately returns to this Court, it will be with a much more solid basis with which to decide any remaining Constitutional questions.

Respectfully submitted,

Dated: February 18, 2025

/s/ Jon M. Greenbaum
NORMAN L. EISEN
TIANNA J. MAYS
JON M. GREENBAUM
Counsel of Record
STATE DEMOCRACY DEFENDERS FUND
600 Pennsylvania Avenue SE #15180
Washington, DC 20003
Tel: (202) 601-8678
jgreenbaum@justicels.org

MICHAEL LIEDER
MEHRI & SKALET, PLLC
2000 K Street N.W, Suite 325
Washington, DC 20006

Counsel for Amici Curiae