No. 25A312

IN THE SUPREME COURT OF THE UNITED STATES

DONALD J. TRUMP, *Applicant*,
v.
LISA D. COOK, *Respondent.*

BRIEF OF SEPARATION OF POWERS CLINIC AS *AMICUS CURIAE* IN SUPPORT OF APPLICATION TO STAY

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IDENTITY AND INTEREST OF THE *AMICUS CURIAE*[1]

Amicus curiae the Separation of Powers Clinic at The Catholic University of America's Columbus School of Law (previously at the Antonin Scalia Law School at George Mason University) provides students an opportunity to discuss, research, and write about separation of powers issues in ongoing litigation. The Clinic has submitted over fifty briefs in federal cases implicating separation of powers, including the contours of removal protections for federal officials.

SUMMARY OF THE ARGUMENT

The strong default presumption under Article II is that the President can freely remove officials who exercise any executive power. *See* Part I, *infra*. To be sure, this Court has recognized some exceptions, but they are exceedingly narrow and questionable from an originalist perspective. The courts below erred by effectively broadening those exceptions, making it exceedingly difficult for the President to remove Respondent even when he has identified "cause" to do so.

The district court's primary error—albeit one that the D.C. Circuit refused to adopt—was concluding that "cause" in 12 U.S.C. § 242 means only "in-office conduct." App.39a. That is wrong as a matter of textual interpretation and also risks unnecessarily escalating personnel disputes into criminal matters, given the district court's suggestion that the way around this "in-office" rule is to imprison an official for pre-office conduct and *then* remove her from office. *See* Part II, *infra*.

[1] No counsel for any party has authored this brief in whole or in part, and no entity or person, aside from *amicus curiae* and its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

Further, the district court concluded that "cause" cannot include policy disagreements. That is also wrong. Even assuming § 242 incorporated some form of so-called "INM" restrictions (inefficiency, neglect of duty, or malfeasance), an official's refusal to comply with the President's policy is itself a form of inefficiency, as Judge Griffith explained in his concurrence in *PHH Corp. v. CFPB*. *See* Part III, *infra*.

Finally, both the D.C. Circuit majority and the district court envisioned a full-blown evidentiary hearing before Respondent could be terminated. But she has no private property interest in exercising the government powers inherent in her office; at most, perhaps she could claim an interest in her salary, which means her suit belongs in the Court of Federal Claims. Even if she could assert a private property interest in a government office and even if she were entitled to process before being removed from that office, the process due would be minimal. *See* Part IV, *infra*. She had public notice of the allegations here nearly a week before she was terminated; she therefore had an opportunity to respond, even assuming one was required. An evidentiary-style hearing would only risk needless escalation, as Respondent would presumably be put under oath and asked about potentially criminal conduct, raising the specter of self-incrimination.

Applicant has a strong likelihood of success on the merits. The Court should grant his emergency stay motion.

ARGUMENT

I. The Strong Default Rule Under Article II: The President Can Remove Principal Officers At Will.

"Our Constitution was adopted to enable the people to govern themselves" and "requires that a President chosen by the entire Nation oversee the execution of the laws." *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 499 (2010). Under Article II, "the 'executive Power'—*all of it*—is 'vested in a President,'" *Seila Law LLC v. CFPB*, 591 U.S. 197, 203 (2020) (emphasis added), and he must "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 1, cl. 1; *id.* § 3.

These provisions "grant[] to the President" the "general administrative control of those executing the laws, including the power of appointment *and removal* of executive officers." *Myers v. United States*, 272 U.S. 52, 163–64 (1926) (emphasis added). "[I]f any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws." *Free Enter.*, 561 U.S. at 492. Because the President cannot conduct all executive business alone, he must rely on "executive officers" to assist with that duty. *Id.* at 483. And "[s]ince 1789, the Constitution has been understood to empower the President to keep these officers accountable—by removing them from office, if necessary." *Id.*

"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. Wielding any executive power without full accountability to the President would "pose a significant threat to individual liberty and to the constitutional system of

separation of powers and checks and balances." *PHH Corp. v. CFPB*, 881 F.3d 75, 165 (D.C. Cir. 2018) (Kavanaugh, J., dissenting).

Thus, "[i]f there is any point in which the separation of the legislative and executive powers ought to be maintained with great caution, it is that which relates to officers and offices." *Myers*, 272 U.S. at 116. As this Court summarized just last year, "the President's power to remove 'executive officers of the United States whom he has appointed' may not be regulated by Congress." *Trump*, 603 U.S. at 621.

If anything, that principle applies even more strongly at the beginning of a new Administration. "New Presidents *always* inherit thousands of Executive Branch officials whom they did not select. It is the power to supervise—and, if need be, remove—subordinate officials that allows a new President to shape his administration and respond to the electoral will that propelled him to office." *Collins v. Yellen*, 594 U.S. 220, 277–78 (2021) (Gorsuch, J., concurring in part). Otherwise, there would be "wholly unaccountable government agent[s]" who "assert[] the power to make decisions affecting individual lives, liberty, and property," yet are not accountable to "those who govern." *Id.* at 278.

Article II thus establishes the strong default rule that the President can remove principal officers at will. To be sure, the Court has recognized narrow exceptions, but they are just that—narrow. The lower courts here erred by imposing substantial roadblocks to the President's ability to remove a principal officer even when he has identified cause to do so.

II. The District Court's Limitation of "Cause" in Section 242 to Actions While in Office Is Textually Unsupported and Risks Needless Escalation.

The district court made several errors. Foremost among them was concluding that "cause" in 12 U.S.C. § 242 means only "in-office conduct that demonstrates ineffective or unfaithful execution of statutory duties." App.39a. The D.C. Circuit refused to adopt that approach—and for good reason. It is wrong textually and also encourages turning personnel disputes into criminal proceedings.

First, unlike other statutory for-cause provisions, § 242 does not limit "cause" to actions or consequences while "in office." *E.g.*, 12 U.S.C. § 5491(c)(3). Section 242 in no other way refers to actions while in office, either. The text thus strongly indicates that cause is not limited to "in-office conduct." App.39a. Combine that with § 242's omission of so-called "INM" factors (inefficiency, neglect of duty, or malfeasance), and there is only one conclusion: the for-cause provision in § 242 is as broad as could be imagined. *See Collins*, 594 U.S. at 255–56 (contrasting the two types of clauses). That alone should have led the district court to conclude that "cause" in § 242 is not limited to in-office conduct.

Second, it makes little sense to limit § 242 to actions while in office. Imagine Respondent were alleged to have bribed her way to Senate confirmation. That would be action before she took office and thus, under the district court's view, could not be a basis for dismissal. It is unbelievable that this would not qualify as "cause" for removing her from that same position.

The district court's response was that such an official should be indicted and convicted for that pre-office conduct, at which point there would be in-office action (a conviction) that reduces her efficiency (because she's in prison). App44a–45a. That is an unnecessary and extreme escalation just to remove an official from office—a power that is otherwise the strong default for executive officials under Article II. *See* Part I, *supra*. A President should not have to literally imprison a federal official just to remove her from office.

Even setting that aside, what if the prior crime were beyond the statute of limitations or could not be proven beyond a reasonable doubt? There is no indication of such requirements in the otherwise broad term "for cause." The district court erred by introducing them.

Further, even if only in-office conduct could satisfy "cause," it is unclear why Respondent's in-office refusal to respond substantively to the allegations against her would not qualify. The district court acknowledged that an in-office conviction for pre-office conduct would qualify as cause. Under the same logic, an in-office refusal to rebut the charge against her should qualify just the same. In any event, surely that construction is at least preferable to one that encourages Respondent to be arrested and imprisoned.

III. "Cause" Can Include Policy Disagreements.

The district court also erred by concluding that "cause" in § 242 cannot include "policy disagreement[s]." App.35a. The court cited *Humphrey's Executor* as allegedly

supporting that conclusion. *Id.* The D.C. Circuit again refused to adopt that view—and again, there is good reason.

First, as noted above, § 242 does not include INM language, unlike the clause in *Humphrey's Executor*. So even if *Humphrey's Executor* did hold that policy disagreements cannot amount to INM, that says nothing about whether such disagreements would amount to "cause" under § 242.

Second, as Judge Griffith has explained, *Humphrey's Executor* did *not* hold that policy disagreements cannot amount to INM. *Humphrey's Executor* "nowhere addressed the extent to which the INM standard insulated Humphrey. When the Court determined that President Roosevelt failed to comply with the INM standard, it was not because he removed Humphrey for any specific policy the Commissioner had pursued. Instead, the President failed to comply with the INM standard because he expressly chose to remove Humphrey *for no cause at all*." *PHH Corp.*, 881 F.3d at 128 (Griffith, J., concurring in the judgment) (emphasis in original).

Rather, as Judge Griffith explained, policy disagreements assuredly can amount to "inefficiency," which "is the broadest of the three INM removal grounds." *Id.* at 131–32. Dictionary definitions, historical evidence, and contemporary usage all demonstrated that "an officer is 'inefficient' when he fails to produce or accomplish some end." *Id.* at 134. For example, in the context of the Comptroller, "the breadth of the 'inefficiency' ground permitted Congress to remove him for failing to perform his duties in the manner Congress wanted." *Id.* at 133.

Surveying this extensive record, Judge Griffith concluded that "an officer is inefficient when he fails to produce or accomplish the agency's ends, as understood or dictated by the President operating within the parameters set by Congress." *Id.* at 134. Other judges across the ideological spectrum have agreed that this is a reasonable interpretation of "inefficiency" and that it also comports with "avoidance" principles. *CFPB v. All Am. Check Cashing, Inc.*, 952 F.3d 591, 602 (5th Cir. 2020) (Higginbotham & Higginson, JJ., concurring).

Thus, even if § 242 adopted some variation of INM (it doesn't), the President is still authorized to terminate Respondent for policy disagreements.

IV. There Is No Property Interest in the Office Itself, and Any Required Process Would Not Be "Onerous."

The district court and D.C. Circuit majority concluded that Respondent was deprived of her office without due process. Again, that is incorrect.

If there were any private property interest here, it would be in Respondent's salary, not in the continued occupation of a principal office itself. *See* App.16a–17a (Katsas, J., dissenting). She has no vested private interest in exercising governmental power. *Id.* Thus, at most, she could sue only for her salary on the theory that she was improperly terminated without due process, as fired FTC Commissioner Humphrey did. That suit would belong in the Court of Federal Claims, not the D.C. District Court—and accordingly this Court should grant the Application because the lower courts lacked jurisdiction.

But even assuming Respondent could assert a due process interest in her office, and even assuming she was entitled to process before being removed from that office,

the process that would be due is not burdensome. As Judge Griffith explained, "there is little reason to think it would impose an onerous burden on the President." *PHH Corp.*, 881 F.3d at 135 (Griffith, J., concurring in the judgment). Here, Respondent was undoubtedly on notice of the proposed basis for her removal. Notice was publicly given, and she had an opportunity to respond. But the district court demanded more, suggesting that Respondent be given a "formal evidentiary hearing." App.61a.

Again, this forces needless escalation. Should Respondent be put under oath and asked questions about her potential commission of a crime? What if she equivocates or invokes the Fifth Amendment? Could the President still fire her then? What if she challenges her removal again after this proceeding occurs?

Neither the D.C. Circuit majority nor the district court had answers. Again, it seems the lower courts' preferred path was to force escalation by converting personnel decisions into criminal inquisitions. It should not have to come to that. Even Respondent should agree.

CONCLUSION

The Court should grant the Application.

September 18, 2025

Respectfully submitted,

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