No. 24A790

IN THE

Supreme Court of the United States

SCOTT BESSENT, SECRETARY OF THE TREASURY, ET AL., APPLICANTS

v.

HAMPTON DELLINGER

On Application to Vacate the Order Issued by the United States District Court for the District of Columbia and Request for an Immediate Administrative Stay

AMICUS CURIAE BRIEF OF THE NEW CIVIL LIBERTIES ALLIANCE IN SUPPORT OF AN ADMINISTRATIVE STAY AND VACATUR

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INTEREST OF THE AMICUS CURIAE[1]

The New Civil Liberties Alliance ("NCLA") is a nonpartisan, nonprofit civil rights organization and public-interest law firm devoted to defending constitutional freedoms from the administrative state's depredations. Professor Philip Hamburger founded NCLA to challenge multiple constitutional defects in the modern administrative state through original litigation, *amicus curiae* briefs, and other advocacy. The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as jury trial, due process of law, and the right to have laws made by the nation's elected lawmakers through constitutionally prescribed channels (*i.e.*, the right to self-government). These selfsame civil rights are also very contemporary—and in dire need of renewed vindication—precisely because Congress, the President, federal agencies, and even sometimes the Judiciary, have neglected them for so long.

NCLA aims to defend civil liberties—primarily by asserting constitutional constraints on the administrative state. Although the American People still enjoy the shell of their Republic, there has developed within it a very different sort of government—a type, in fact, that the Constitution was designed to prevent. This unconstitutional state within the Constitution's United States is the focus of NCLA's concern.

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

NCLA is particularly disturbed in this case by the district court's entry of a Temporary Restraining Order that flouts the Constitution's separation of powers and purports to override the President's absolute authority to remove executive branch officials. The lower court's order mandating the Special Counsel's reinstatement proves additionally troubling, for it compels the President to act contrary to his judgment "[to] take Care that the Laws be faithfully executed."[2] U.S. Const. Art. II, § 3. Finally, NCLA harbors grave concerns over the refusal of the U.S. Court of Appeals for the D.C. Circuit to immediately halt the district court's unconstitutional usurpation of the President's executive authority—a violation not merely of Article II but also an infringement of Americans' right to select the executive who, through the exercise of executive power, remains accountable to the people.

INTRODUCTION AND SUMMARY

Article II provides the executive power is "vested in a President of the United States of America." The text, structure, and historical context of the Constitution establish that the President, as the sole head of the Executive Branch, holds an absolute and unqualified removal authority over Executive Branch officials.

Three aspects of Article II of the Constitution are relevant to the question of the President's removal authority. *First*, Article II, Section 1, Clause 1, vests the

[2] Prior to granting Plaintiff a TRO, the district court, under the auspices of entering an Administrative Stay, ordered Dellinger to be reinstated as Special Counsel. That, too, represented an affront to Article II and the separation of powers, as the judicial branch cannot "stay" an executive action—it may only enjoin another branch of government and then only under limited circumstances. Josh Blackman, *Can You Appeal An Administrative Stay By A District Court?*, The Volokh Conspiracy (Feb. 13, 2025) ("This nomenclature is a perversion. Courts stay judicial rulings and enjoin government actions. Courts cannot stay an executive order or statute anymore than an appellate court can enjoin a lower court."), *available at* https://tinyurl.com/4shf5x3n.

"executive Power" in the President of the United States. U.S. Const. Art. II, § 1, Cl. 1. *Second*, § 3 of the same Article enjoins the President to "take Care that the Laws be faithfully executed." *Id.* § 3. *And third*, Section 2, Clause 2 of Article II, the Appointments Clause, provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law."[3]

When read together and in light of the proper historical understanding of the functional and structural nature of the provisions, and particularly the Constitution's express mandates governing the appointment of "Officers of the United States"—and its corresponding silence concerning their removal—Article II confers upon the President an absolute and unqualified removal authority. Accordingly, neither Congress nor the Courts have authority to interfere in the President's unilateral decision to remove Mr. Dellinger from his office as Special Counsel.

[3] The Constitution does provide for alternative means of appointing *inferior* officers; however, by definition, an "inferior" officer must have a "superior" other than the President. *United States v. Arthrex, Inc.*, 594 U.S. 1, 13 (2021) (quoting *Edmond v. United States*, 520 U.S. 651, 662 (1997)) (internal quotation marks omitted). Because the Special Counsel has no such "superior," it necessarily follows that he is a principal officer.

ARGUMENT

I. AN ABSOLUTE AND UNQUALIFIED REMOVAL AUTHORITY IS INHERENTLY NECESSARY TO PRESERVE EXECUTIVE POWER

The Constitution provides the executive power "shall be vested" in the President. The President, by himself, however, cannot execute the law, so he necessarily must rely on a hierarchy of subordinates—whether officers or employees—to do most of the execution. *See Myers v. United States*, 272 U.S. 52, 134 (1926); *Cunningham v. Neagle*, 135 U.S. 1, 63-64 (1890). Yet, the President, by use of subordinate officers or employees, does not also *irretrievably* delegate away his "executive power." Rather, that power remains fully and permanently vested in the President. As this Court held in *Seila Law LLC v. CFPB*, the President maintains the authority to both "supervise and remove the agents who wield executive power in his stead." 591 U.S. 197, 238 (2020).

Such removal authority is, in fact, essential if executive power is to be accountable. As the Court explained in *Myers*, 272 U.S. at 134, "[t]he imperative reasons requiring [the President to possess] an unrestricted power to remove the most important of his subordinates in their most important duties must therefore control the interpretation of the Constitution as to all appointed by him." *See, e.g., Seila Law*, 591 U.S. at 238 ("In our constitutional system, the executive power belongs to the President, and that power generally includes the ability to supervise and remove the agents who wield executive power in his stead."); *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 483 (2010) ("Since 1789, the Constitution has been understood to empower the President to keep … officers accountable—by removing them from office, if

necessary."); *Fleming v. United States Dep't of Agric.*, 987 F.3d 1093, 1114 (D.C. Cir. 2021) (Rao, J., concurring-in-part and dissenting-in-part) ("Article II executive power necessarily includes the power to remove subordinate officers, because anything traditionally considered to be part of the executive power 'remained with the President' unless 'expressly taken away' by the Constitution.") (quoting Letter from James Madison to Thomas Jefferson (June 30, 1789)).

Indeed, because of the vast growth in executive power, it is more important than ever that such power be accountable through Presidential removal. *See United States v. Arthrex, Inc.,* 594 U.S. 1, 11 (2021) ("Today, thousands of officers wield executive power on behalf of the President in the name of the United States. That power acquires its legitimacy and accountability to the public through 'a clear and effective chain of command' down from the President, on whom all the people vote.") (quoting *Free Enter. Fund*, 561 U.S. at 498). Accordingly, faithfulness to the Vesting Clause of Article II requires recognition of the President's untrammeled authority to remove executive branch officials, for if the President cannot retain and remove those who execute the law, he no longer holds the full law-executing authority bestowed on the Executive by the Constitution.

II. AN HISTORICAL UNDERSTANDING OF EXECUTIVE POWER FURTHER CONFIRMS THE PRESIDENT'S REMOVAL AUTHORITY IS ABSOLUTE AND UNQUALIFIED

The "executive power" is much broader than merely the power to execute the laws. Undoubtedly, such power includes the execution of law, but at the Founding it was understood as also including the nation's action, strength, or force. This more

expansive foundation reinforces and broadens the conclusion that the President's "executive power" includes the authority to remove subordinates at will.

An understanding of executive power as the "nation's action, strength, or force" was a familiar concept at the time of the Founding. *See* Philip Hamburger, *Delegation or Divesting*, 115 N.W. L. Rev. Online 88, 110-16 (2020). For example, Jean-Jacques Rousseau associated executive power with the society's "force," and Thomas Rutherforth defined it as the society's "joint strength." *See id.* at 112. As Alexander Hamilton understood and explained, the Constitution divides the government's powers into those of "Force," "Will," and "Judgment"—that is, executive force, legislative will, and judicial judgment. The Federalist No. 78, at 523 (Alexander Hamilton) (Cooke ed., 1961).

This vision of executive power included law enforcement but also much more. Conceiving of the executive power in this way has the advantage of, for example, explaining the President's power in foreign policy, which cannot easily be understood as mere law enforcement. That the Constitution adopted this broad vision of executive power is clear from its text—in particular, from the contrast between the President's "executive Power," U.S. Const, art. II, § 1, and his duty to "take Care that the Laws be faithfully executed," *id.*, § 3. Article II frames the President's authority in terms of executive power, not merely "executing the law." The latter is merely a component of the former, which on one hand is limited by the requirement that the President "take Care that the Laws be faithfully executed," but also includes the "nation's action, strength, or force."

It further follows that the more expansive the definition of "executive power," the broader the concomitant authority to remove executive officials must be. Accordingly, because the Constitution vests in the President the "nation's action, strength, or force," it follows that he must have sufficient authority to remove people whom he views as undermining that strength or lacking in action or forcefulness.

The second foundation matters not only because it is the more accurate understanding of the President's executive power but also because it clarifies the breadth of the President's removal authority. His law-executing authority (which is part of his executive power) reveals that he can hire and fire subordinates engaged in law enforcement. And his executive power—understood more fully as the nation's action or force—shows that he can also hire and fire all other sorts of subordinates. *See Collins v. Yellen*, 594 U.S. 220, 256 (2021) ("The President must be able to remove not just officers who disobey his commands but also those he finds negligent and inefficient, those who exercise their discretion in a way that is not intelligent or wise, those who have different views of policy, those who come from a competing political party who is dead set against the President's agenda, and those in whom he has simply lost confidence.") (cleaned up). Removal of subordinates is thus inherently part of the President's extensive executive power. *See Seila Law*, 591 U.S. at 238; *Free Enter. Fund*, 561 U.S. at 483; *Myers*, 272 U.S. at 134.

III. UNLIKE THE CONSTITUTION'S APPOINTMENTS CLAUSE, THE POWER OF REMOVAL IS ABSOLUTE

Although the President's executive power includes both hiring and firing authority, the Constitution treats them differently. Article II modifies and limits the

Executive's power of appointments, but in its purposeful silence leaves the removal power unrestrained.

That executive power to remove officers is absolute was spelled out in 1789 by Representative John Vining of Delaware:

> [T]here were no negative words in the Constitution to preclude the President from the exercise of this power, but there was a strong presumption that he was invested with it; because, it was declared, that all executive power should be vested in him, except in cases where it is otherwise qualified; as, for example, he could not fully exercise his executive power in making treaties, unless with the advice and consent of the Senate—the same in appointing to office.

John Vining (May 19, 1789), in 10 Documentary History of the First Federal Congress 728 (Charlene Bangs Bickford, et al., eds.) (The Johns Hopkins Univ. Press, 1992). James Madison was equally emphatic, writing:

> The legislature creates the office, defines the powers, limits its duration, and annexes a compensation. This done, the legislative power ceases. They ought to have nothing to do with designating the man to fill the office. That I conceive to be of an executive nature. . . . The nature of things restrains and confines the legislative and executive authorities in this respect; and hence it is that the constitution stipulates for the independence of each branch of the government.

James Madison (June 22, 1789), in 11 Documentary History of the First Federal Congress 1032 (Charlene Bangs Bickford, et al., eds.) (The Johns Hopkins Univ. Press, 1992).

Madison rejected the argument that limits on Presidential appointments implied similar limits on removals, writing that although the power of appointment

"be qualified in the constitution, I would not extend or strain that qualification beyond the limits precisely fixed for it." *Id.* (quoted in *Myers*, 272 U.S. at 128).

The First Congress confirmed these views: In 1789, the First Congress rejected efforts to statutorily limit the President's removal authority, in what has since been misleadingly referred to as "The Decision of 1789." Branding this rejection a "decision" inaccurately suggests the President owes his unlimited removal authority to congressional acquiescence. In fact, it has always been the Constitution's text and structure that established the President's absolute removal authority—by granting the President executive power without additional language qualifying his executive removal authority. The 1789 debate, thus, merely provides further evidence of the contemporaneous understanding of the Constitution.[4]

In short, at the time of the Founding it was clearly understood that the President's unlimited removal power differed from, and stood in contrast to, his somewhat cabined power of making appointments. Although both powers are part of the "executive power," the latter was substantially qualified by the text of the Constitution itself, whereas the former remained unqualified and thus absolute.

IV. ONLY BY POSSESSING AN ABSOLUTE REMOVAL AUTHORITY CAN THE PRESIDENT "TAKE CARE THAT THE LAWS BE FAITHFULLY EXECUTED"

The Executive's absolute removal authority provides the sole mechanism for the President to "take Care that the Laws be faithfully executed." U.S. Const, art II, § 3. The President, of course, may, and indeed must, delegate much of his *authority* to

[4] According to this Court: "Since 1789, the Constitution has been understood to empower the President to keep [his] officers accountable—by removing them from office, if necessary." *Free Enter. Fund*, 561 U.S. at 483. More accurately, the Court might have said: "Since 1787, … "

carry the laws into execution to subordinates. *See Myers*, 272 U.S. at 117; *Cunningham*, 135 U.S. at 63-64. At the same time his *duty* "to take Care that the Laws be faithfully executed" is non-delegable, and he remains exclusively responsible for this function of the Government. It therefore follows that the President must hold the power to remove individuals who, in his view, do not help him fulfill, or worse yet, undermine his duty of faithful execution of the Nation's law. Said otherwise, if such subordinates are essential for executing the law, then the Constitution must also "empower the President to keep these officers accountable—by removing them from office, if necessary." *Free Enter. Fund*, 561 U.S. at 483.

Only by threat of removal may the President exercise control over his subordinates, thereby ensuring that through *their* actions or inactions, *he* doesn't fail in *his* duty "to take Care that the Laws" are faithfully executed. "[T]o hold otherwise would make it impossible for the President, in case of political or other difference with the Senate or Congress, to take care that the laws be faithfully executed." *Myers*, 272 U.S. at 164.

"A lawsuit is the ultimate remedy for a breach of the law, and it is to the President … that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed.'" *Buckley v. Valeo*, 424 U.S. 1, 138 (1976) (quoting U.S. Const. art. II, § 3). In other words, the power to bring suits for violation of law on behalf of the United States is a core executive power. It therefore follows that any official who is authorized to bring suit on behalf of the United States as a "remedy for a breach of [federal] law" must be directly answerable to the President and removable

by him. The Take Care Clause thus underlines and confirms that the President's executive power includes a discretionary authority to remove officials who exercise his authority under that Clause.

CONCLUSION

For the foregoing reasons and those provided by Applicants, the Court should grant an administrative stay and vacate the district court's TRO.

January 18, 2025

Respectfully submitted,

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