IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Sean M. Spicer
2308 Mt. Vernon Avenue #415
Alexandria, VA 22301; and

Russell T. Vought
300 Independence Avenue SE
Washington, DC 20003,
Plaintiffs,

v.

Joseph R. Biden Jr., in his official capacity as President of the United States
1600 Pennsylvania Avenue NW
Washington, DC 20500;

Catherine M. Russell, in her official capacity as director of the White House Presidential Personnel Office
Eisenhower Executive Office Building
1650 Pennsylvania Avenue NW
Washington, DC 20502;

Katherine L. Petrelius, in her official capacity as Special Assistant to the President in the White House Presidential Personnel Office
Eisenhower Executive Office Building
1650 Pennsylvania Avenue NW
Washington, DC 20502;

Charles A. "Dutch" Ruppersberger III, in his official capacity as Chairman of the United States Naval Academy Board of Visitors
121 Blake Road
Annapolis, MD 21402;

Raphael J. Thalakottur,
in his official capacity as Designated Federal Officer of the United States Naval Academy Board of Visitors
121 Blake Road
Annapolis, MD 21402; and

United States of America
950 Pennsylvania Avenue NW
Washington, DC 20530,
Defendants.

Civil Action No. 1:21-cv-2493

PLAINTIFFS' MEMORANDUM IN SUPPORT OF APPLICATION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

In 10 U.S.C. § 8468, Congress created a fifteen-member Board of Visitors to the Naval Academy to annually visit the Academy and make recommendations about its operations. Nine Board members are drawn from the legislative branch, and six members are designated by the President. Those members "serve for three years each." 10 U.S.C. § 8468(b). Every year, two members' terms expire, and the President may designate two new members. Absent a new appointment, the existing member continues in office until a new one is designated. The statute does not authorize the President to remove a member prior to the end of the three-year term.

The only question presented in this case is whether this three-year term is just what the statute says: a three-year term. The longstanding rule—since *Marbury v. Madison* and before—is that a statutory term of office displaces the power to remove that may otherwise accompany the power to appoint. That is the point of such terms and the interpretation given to them in *Humphrey's Executor* and elsewhere. Unlike some statutes, this law does not authorize the President to remove appointees prior to the end of their term of office. The staggered nature of these terms underscores that Congress gave the President only limited authority to shape the Board through two appointments each year. Thus, text, precedent, history, and context show an appointee cannot be removed at will. Indeed, no prior President has tried to remove a Board member before the end of his or her statutory term.

Contrary to the statutory text and the unbroken practice of his predecessors, President Biden has acted to remove several Board members, including Sean Spicer

and Russ Vought, before the end of their three-year terms of office. This action is *ultra vires* and invalid. Congress did not authorize the President to cut short the statutory tenure. Precedent, history, and statutory context confirm what the plain text says: Mr. Spicer and Mr. Vought cannot be removed by the President prior to the end of their terms.

President Biden does not have constitutional authority to remove Mr. Spicer and Mr. Vought. The Board is a purely advisory agency that does not exercise any executive power. It has no rulemaking, investigatory, enforcement, or adjudicative authority. Limitations on removal of Board members therefore cannot affect the President's exercise of the executive power vested in him by Article II. Courts have repeatedly upheld removal protections for members of independent, multimember agencies, even those that do exercise executive power.

Finally, the government is likely to contest this Court's jurisdiction. But there are no jurisdictional hurdles here. This Court has authority to declare that Mr. Spicer and Mr. Vought remain Board members and cannot be terminated at-will by the President. Other defendants here include those who oversee the Board's meetings and operations, and those individuals can provide full redress. And in any event, this Court has authority to enjoin all defendants including the President. Courts from the Supreme Court down have done so repeatedly.

Thus, Mr. Spicer and Mr. Vought are likely to succeed on the merits. And the other preliminary injunction requirements are easily satisfied. An illegal deprivation of a public office is an irreparable harm. The Board's next meeting is on December 6,

but the plaintiffs cannot fulfill their duties to visit and make recommendations about the Academy without participating in this meeting. That is especially obvious for Mr. Spicer, whose term expires at the end of December. Finally, the public interest is in a Board that can fulfill its congressionally mandated duties with the independence given to it by statute.

The application for a preliminary injunction should be granted. This injunction should direct that defendants Katherine Petrelius, Catherine Russell, Charles A. "Dutch" Ruppersberger III, and Raphael J. Thalakottur treat plaintiffs as full members of the United States Naval Academy Board of Visitors until their statutory terms of office expire and their replacements are appointed. If the Court finds that enjoining the President is necessary for effective relief, he should be included as a subject of the injunction. And the plaintiffs respectfully request that the Court issue such an injunction in time for their participation in the Board's next meeting on December 6, 2021.

STATEMENT OF THE CASE

A. Legal framework

The Naval Academy is a federal service academy that educates officers for commissioning, mostly into the United States Navy and United States Marine Corps. The Naval Academy Board of Visitors is an independent agency created by Congress. Its mission is to "inquire into the state of morale and discipline, the curriculum, instruction, physical equipment, fiscal affairs, academic methods, and other matters relating to the Academy" and submit an annual report of its views and

recommendations. 10 U.S.C §§ 8468(d)-(f). To fulfill these mandates, the Board conducts regular visits to the Academy. *Id.*

The Board does not wield any executive power. It also does not exercise "quasi-legislative" or "quasi-judicial" powers. Under its Charter, it "shall provide independent advice and recommendations." ECF No. 1-1, Charter ¶ 3; *see id.* ¶ 2 (describing the Board as "a non-discretionary advisory committee"). Each Board "member, based upon his or her individual experiences, exercises his or her own best judgment concerning matters before the Committee, does not represent any particular point of view, and discusses and deliberates in a manner that is free from conflicts of interest." ECF No. 1-2, Membership Balance Plan ¶ 3; *accord* Charter ¶ 12.

The Board consists of 15 members, including "(1) the chairman of the Committee on Armed Services of the Senate, or his designee; (2) three other members of the Senate designated by the Vice President or the President pro tempore of the Senate, two of whom are members of the Committee on Appropriations of the Senate; (3) the chairman of the Committee on Armed Services of the House of Representatives, or his designee; (4) four other members of the House of Representatives designated by the Speaker of the House of Representatives, two of whom are members of the Committee on Appropriations of the House of Representatives; and (5) six persons designated by the President." 10 U.S.C § 8468(a); Charter ¶ 12.

By statute, the six presidential appointees serve staggered three-year terms. The President may appoint "two persons each year to succeed the members whose terms expire that year." 10 U.S.C. § 8468(b). Under the statute, "any member whose term of office has expired shall continue to serve until his successor is appointed." *Id.* And "[i]f a member of the Board dies or resigns, a successor shall be designated for the unexpired portion of the term by the official who designated the member." *Id.* § 8468(c). The statute makes no provision or allowance for at-will presidential removal during or even after the three-year term. Only death, resignation, or a new appointment at or after the end of the term ends an appointee's service.

The Board members select the Chairman. Charter ¶ 12. The Chairman has responsibilities over the Board's operations and meetings, including to certify all meeting minutes. *See* Detail, FACADatabase.gov, https://bit.ly/2VXQd4w (https://perma.cc/TTE9-R33W); 5 U.S.C. Appendix, Federal Advisory Committee Act § 10(c). And the Board's Designated Federal Officer is designated by the Department of Defense. Charter ¶ 8. The Designated Federal Officer (or his approved alternate) must attend all Board meetings. *Id.* He "approves and calls all Board meetings; prepares and approves all meeting agendas; and adjourns any meeting when [he] determines adjournment to be in the public interest or required by governing regulations or DoD policy and procedures." *Id.*; *see* 5 U.S.C. Appendix, Federal Advisory Committee Act § 10(e)-(f).

B. Facts and proceedings

Mr. Spicer was appointed to the Board by former President Donald J. Trump in 2019 to a term ending December 30, 2021. *See* Members, United States Naval

Academy Board of Visitors, FACADatabase.gov, https://bit.ly/3ED1nNC (https://perma.cc/A523-RZ8Y); Spicer Decl. ¶¶ 3-4. Mr. Vought was appointed to the Board by former President Donald J. Trump in 2020 to a term ending December 31, 2023. *See* Members, United States Naval Academy Board of Visitors, FACADatabase.gov, https://bit.ly/3ED1nNC (https://perma.cc/A523-RZ8Y); Vought Decl. ¶¶ 3-4.

On September 8, 2021, Mr. Spicer and Mr. Vought received materially identical e-mails from Katherine L. Petrelius, Special Assistant to the President in the White House Presidential Personnel Office. Those emails said:

> I am writing to request your resignation from the Board of Visitors to the United States Naval Academy. If we do not receive your resignation by end of day today, you will be terminated. Attached is a formal letter. On behalf of the Office of Presidential Personnel, thank you for your service.

Spicer Decl. ¶ 5; Vought Decl. ¶ 5.

The emails each included an attached letter from Catherine M. Russell, director of the White House Presidential Personnel Office. The letters said:

> On behalf of President Biden, I am writing to request your resignation as a Member of the Board of Visitors to the U.S. Naval Academy. Please submit your resignation to me by the close of business today. Should we not receive your resignation, your position with the Board will be terminated effective 6:00 pm tonight. Thank you.

ECF Nos. 1-3, 1-4; Spicer Decl. ¶ 6; Vought Decl. ¶ 6.

Mr. Spicer and Mr. Vought have not resigned, and thus they are facing a threat of imminent termination in the midst of their statutory terms of office.

The Board's next meeting is scheduled for December 6, 2021. *See* U.S. Naval Academy, Office of the Superintendent, https://www.usna.edu/PAO/Superintendent/bov.php; Spicer Decl. ¶ 8; Vought Decl. ¶ 8.

LEGAL STANDARD

"The primary purpose of a preliminary injunction is to preserve the object of the controversy in its then existing condition—to preserve the status quo." *Beacon Assocs., Inc. v. Apprio, Inc.*, 308 F. Supp. 3d 277, 291 (D.D.C. 2018) (quoting *Aamer v. Obama*, 742 F.3d 1023, 1043 (D.C. Cir. 2014)). The relevant status quo is "the last uncontested status which preceded the pending controversy." *Id.* (quoting *Dist. 50, United Mine Workers of Am. v. Int'l Union, United Mine Workers of Am.*, 412 F.2d 165, 168 (D.C. Cir. 1969)).

A preliminary injunction is appropriate if the plaintiff establishes "[1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Id.* at 283 (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). "The last two factors 'merge when the Government is the opposing party.'" *Navajo Nation v. Azar*, 292 F. Supp. 3d 508, 512 (D.D.C. 2018) (quoting *Nken v. Holder*, 556 U.S. 418, 435 (2009)). Despite some suggestion that the law has changed, *id.*, the preliminary injunction factors have been balanced "on a sliding scale," *Beacon*, 308 F. Supp. 3d at 284.

ARGUMENT

The Court should grant injunctive relief to vindicate and protect Congress's design of an independent Board of Visitors. All factors support a preliminary injunction. The plaintiffs have an overwhelming likelihood of success on the merits. The statute's text, relevant precedent, history, and context confirm the three-year term that cannot be cut short by the President. Congress's careful design—with staggered terms added to protect Board members from removal—and constitutional authority would be upended and usurped if the President could remove appointees at will.

Not only does the President lack statutory authority to remove appointees, but he also lacks constitutional authority to do so. A purely advisory agency like the Board has no effect on the President's executive power. And though the government will likely try to distract from the clarity of this case with supposed jurisdictional hurdles, that effort will fail. The plaintiffs' injuries will likely be redressed by an order against some or all defendants to treat Mr. Spicer and Mr. Vought as present Board members. Similar cases are regularly resolved in such fashion.

The other injunction factors likewise support immediate relief. As far back as *Marbury*, courts recognized that an illegal deprivation of a public office constituted irreparable harm. And the public interest lies in executive compliance with the law, along with the operation of the independent Board that the law prescribes. The Court should grant the application for a preliminary injunction.

I. The President lacks authority to terminate Board appointees during their terms.

The President does not have statutory or constitutional authority to remove Board members at will prior to the end of their terms. The long-settled understanding of fixed term-of-office provisions is that they limit the appointing power's ability to remove the appointee. Chief Justice Marshall articulated exactly this interpretation in *Marbury*, and it is reflected in many precedents. For instance, *Humphrey's Executor* involved a substantively identical provision, and the Supreme Court had no trouble understanding its plain meaning: to prohibit at-will removals during the statutory term. The history of this provision and hitherto-unbroken practice by the executive itself confirm this meaning. And the context of the statute, including its enactment alongside other agency provisions that contained terms of office *and* allowances for presidential removal during the terms, further supports this interpretation.

Nothing in the Constitution overrides this statutory limitation on the President's ability to remove Board members. As the D.C. Circuit has explained, "The Constitution permits Congress to establish fixed terms for members of tribunals that are independent of the Executive Branch." *Kalaris v. Donovan*, 697 F.2d 376, 398 (D.C. Cir. 1983) (cleaned up). The Board exercises no executive power, so it cannot affect the President's Article II executive power or his duty to take care that the laws be faithfully executed. The Supreme Court has repeatedly upheld tenure protections for multimember independent agencies, even those that exercise significant executive

power. Under those precedents, this statutory arrangement is unquestionably constitutional.

A. The President has no statutory authority to terminate Board member appointments.

When interpreting a statute, the Court's "job is to interpret the words consistent with their ordinary meaning at the time Congress enacted the statute." *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2070 (2018) (cleaned up). The "traditional tools of statutory interpretation" are "the statute's text, history, structure, and context." *Loving v. IRS*, 742 F.3d 1013, 1021-22 (D.C. Cir. 2014). And "the role of this Court is to apply the statute[] as [it is] written—even if some other approach might accord with good policy." *English v. Trump*, 279 F. Supp. 3d 307, 311 (D.D.C. 2018) (cleaned up). All tools of interpretation here point to the same meaning: that the term-of-office provision prohibits at-will removal during the term.

Congress has the legislative power to "establish offices" and make "the determination of their functions and jurisdiction, the prescribing of reasonable and relevant qualifications and rules of eligibility of appointees, and *the fixing of the term for which they are to be appointed*." *United States v. Wilson*, 290 F.3d 347, 358 (D.C. Cir. 2002) (emphasis in original) (quoting *Myers v. United States*, 272 U.S. 52, 129 (1926)). And "it is a general rule, that an office is held at the will of either party; *unless a different tenure is expressed*." *In re Hennen*, 38 U.S. 230, 260 (1839) (emphasis added). Here, Congress's statute says that "[t]he persons designated by the President serve for three years each," and that "any member whose term of office has expired shall continue to serve until his successor is appointed." 10 U.S.C. § 8468(b).

The plain meaning of this language—"serve[s] for three years" and "shall continue to serve"—is that the appointee is guaranteed a three-year term (or whatever remains of that term). This language points to a right to serve during the initial three-year term and a right to "continue to serve" until a new appointee is named. And the statute's description of this period as a "term of office" confirms this reading. Contemporaneous dictionaries defined "term" as a "definite extent of time: the time for which something lasts," or a "tenure." *Webster's Third New International Dictionary* 2358 (1966).

The staggered nature of appointees' terms further supports this reading. By giving the President two appointments each year, Congress balanced the goal of agency independence with ongoing executive involvement. A reading of the statute that permits the President to remove all appointees at will and substitute new appointees in their place upsets this statutory balance.

Thus, the statute's language sets a tenure for presidential appointees of (at least) three years. It contains no suggestion that anyone, including the President, may remove an appointee before the end of that tenure, or even after that tenure absent a new appointment. As shown in detail below, longstanding understandings of such terms, across many areas of law and continuing when Congress created the Board's term provision, is that they confine the ability to prematurely end the term. Indeed, that is the entire point of term protections, whether in employment contracts, service agreements, or agency statutes: to prevent at-will termination. If Congress

wanted to allow the President to remove an appointee during the term, it knew how to do so—and did so repeatedly elsewhere. But for the Board, it did not.

The President and his subordinates thus lack statutory authority to remove Board appointees prior to the end of their statutorily guaranteed three-year term. Precedent, history, and context all support this plain reading.

1. Precedent supports this interpretation.

Since at least *Marbury v. Madison*, courts have understood term protections to give the appointee "a right to hold" the office for the entire term, "independent of the executive." 5 U.S. 137, 162 (1803). In *Marbury*, the law authorized the President to create justices of the peace with five-year terms, which led Chief Justice Marshall to state the uncontroversial fact that during that term, "the appointment was not revocable." *Id.* *Hennen* affirmed this "general rule," 38 U.S. at 260, which was affirmed again in *Reagan v. United States*: "where the term of office is for a fixed period," "the appointing power" cannot "remove at pleasure." 182 U.S. 419, 425 (1901); *see also Blake v. United States*, 103 U.S. 227, 231 (1880).

Later cases confirm this longstanding interpretation of term provisions, including in the context of presidential removal of agency appointees. In *Humphrey's Executor v. United States*—decided just a few years before the term provision here was enacted—the Supreme Court considered President Roosevelt's attempted removal of a Federal Trade Commission member before the end of his fixed term. 295 U.S. 602, 618-19 (1935). Under the Federal Trade Commission Act, 15 U.S.C. §§ 41, 42, commissioners of the FTC were appointed for fixed rotating terms, and "[a]ny commissioner may be removed by the President for inefficiency, neglect of duty, or

malfeasance in office." 295 U.S. at 619. Focusing first on the term provision, the Court explained that "[t]he statute fixes a term of office, in accordance with many precedents," with the terms staggered by year. *Id.* at 623. The Court viewed the term provision as "definite and unambiguous." *Id.*

Thus, the Court held that "the fixing of a definite term subject to removal for cause, unless there be some countervailing provision or circumstance indicating the contrary, which here we are unable to find, is enough to establish the legislative intent that the term is not to be curtailed in the absence of such cause." *Id.* Specifically, the Court noted Congress's view that "a fixed term was necessary to the effective and fair administration of the law" because terms foster expertise and nonpartisanship. *Id.* at 624. The Court also emphasized that Congress had staggered the terms such "that the membership would not be subject to complete change at any one time." *Id.*

The statute's text and structure thus "demonstrate[d] the congressional intent to create a body of experts who shall gain experience by length of service; a body which shall be independent of executive authority, except in its selection, and free to exercise its judgment without the leave or hindrance of any other official or any department of the government." *Id.* at 625-26. "To the accomplishment of these purposes, it is clear that Congress was of opinion that length and certainty of tenure would vitally contribute." *Id.* at 626. Any suggestion that members with fixed terms nonetheless served "at the mere will of the President" would "thwart, in large

measure, the very ends which Congress sought to realize by definitely fixing the term of office." *Id.*

This case follows from *Humphrey's Executor*. The term provision there was substantively identical to the one here, including in its staggered nature. *Compare* 295 U.S. at 620 ("shall be appointed for terms of seven years"), *with* 10 U.S.C. § 8468(b) (setting a "term of office" of "three years"). To be sure, *Humphrey's Executor* also involved a for-cause removal limitation. *See* 295 U.S. at 619. But as shown in more detail in Part I.A.2 below, such a provision is separate from the protection of a term provision. As the D.C. Circuit has explained, "*Humphrey's Executor* placed equal weight on both the statutorily provided fixed terms and the stated grounds for removal." *Kalaris*, 697 F.2d at 395 n.77; *see also Staebler v. Carter*, 464 F. Supp. 585, 591 & n.14 (D.D.C. 1979) (reading *Humphrey's Executor* as holding that "terms of office . . . constrain[] the President's removal authority").

Wiener v. United States, 357 U.S. 349 (1958), further supports this understanding. There, the Supreme Court reviewed President Eisenhower's attempted removal of a member of the War Claims Commission, which adjudicated claims by U.S. citizens against Japan from World War II. *Id.* at 349-50. The statute "provided for a tenure [for Commissioners] defined by the relatively short period of time during which the War Claims Commission was to operate—that is, it was to wind up not later than three years after the expiration of the time for filing of claims." *Id.* at 352. "[N]othing was said in the [statute] about removal." *Id.*

The Supreme Court held that President Eisenhower's purported removal was invalid and thus Commissioner Wiener was entitled to backpay. *Id.* at 356. The Court rejected "the claim that the President could remove a member of an adjudicatory body like the War Claims Commission merely because he wanted his own appointees on such a Commission," concluding "that no such power . . . is impliedly conferred upon him by statute simply because Congress said nothing about it." *Id.* According to the Court, "[t]he philosophy of *Humphrey's Executor*, in its explicit language as well as its implications, precludes such a claim." *Id.*; *see id.* ("Congress did not wish to have hang over the Commission the Damocles' sword of removal by the President for no reason other than that he preferred to have on that Commission men of his own choosing.").

This case is much easier than *Wiener*. There, the statute did not explicitly provide a term of office, yet the Court implied the "tenure of the Commissioners" from the three-year life of the Commission itself. *Id.* at 350, 352. Here, by contrast, the statute explicitly states a three-year term of office. If removal could not bring an end to the implied three-year term in *Wiener*, it certainly cannot end the express three-year term here.

Reviewing these cases, the D.C. Circuit has agreed that "fixed terms of office" are an attribute of an agency appointment that "limit the Executive's removal power." *Kalaris*, 697 F.2d at 395 n.77. In *Kalaris*, the court considered the removability of members of the Department of Labor's Benefits Review Board. The statute was "silent concerning the members' tenure and the terms of their removal." *Id.* at 380.

In holding that the members could be removed at the Secretary of Labor's discretion, the D.C. Circuit emphasized (at the very outset of its statutory analysis) that "Congress plainly considered" but rejected a recommendation that "members of workers' compensation appeals boards like the Benefits Review Board be appointed for fixed terms with protection against removal." 697 F.2d at 390. And the "protection against removal" *was* the "fixed term[]": the recommendation was that "the members of the appeals board or commission be appointed for substantial terms," and the report recognized that such terms would diminish the executive's ability "to select agency policymakers." Nat'l Comm'n on State Workmen's Comp. Laws, *The Report of the National Commission on State Workmen's Compensation Laws (July 1972)*, at 102-03 (E-Book 2008); *see Kalaris*, 697 F.2d at 390 n.56 ("[T]he desire for such accountability was an argument against tenure with fixed terms."). But though "Congress gave most careful consideration to this report," it "did not adopt the fixed term proposal." *Id.* at 390 (cleaned up). And the D.C. Circuit relied on this rejection as evidence "that Congress affirmatively intended for Board members . . . to serve . . . at the discretion of the Secretary." *Id.* The D.C. Circuit's analysis makes sense only if a three-year term prevents at-will removal during the term.

Likewise, in *United States v. Wilson*, 290 F.3d 347 (D.C. Cir. 2002), the D.C. Circuit emphasized the protection from removal provided by the six-year terms for members of the United States Commission on Civil Rights. There, the question was whether six-year terms ran from the date of appointment or were fixed "slots" of time that did not depend on the date of appointment. *Id.* at 353. Considering the "history

and background" of initial terms that had been staggered, the D.C. Circuit held that "[s]taggered terms must run with the calendar, rather than with the person, to preserve staggering." *Id.* at 355. In accord with "widely held traditional understandings of statutes defining terms of office," the Court explained that a number of years "fixes the duration of the term" and a staggered provision "fixes the time of termination." *Id.* at 356. And the Court emphasized that "the creation of staggered terms was one of several structural features adopted . . . to establish the Commission as an independent, bipartisan entity, to insulate it from political influence, and to protect its integrity and credibility." *Id.* at 360. Indeed, those terms were a statutory response to President Reagan's removal of multiple commission members, so "in staggering the membership (among other features), Congress was insulating the Commission from *carte blanche* replacement at any given time." *Id.* at 359. None of this makes any sense if the President, despite a staggered, fixed-term provision, can still remove all appointees at will.

Once again, this case is like *Wilson*. There, as here, members initially "serv[ed] open-ended terms at the pleasure of the President." *See id.* at 350; *see infra* Part I.A.2. And there, as here, Congress later added term protections with a staggered feature that would provide independence from members from the executive.

Finally, this district too has read similar term provisions to mean that the appointing authority cannot remove an appointee at will. In *Borders v. Reagan*, President Reagan tried to remove a member of the District of Columbia Judicial Nomination Commission before the end of his statutory five-year term. 518 F. Supp.

250, 251 (D.D.C. 1981). The court held that "[t]he language of the statute makes clear that Congress did not intend that a member of the Commission serve only at the pleasure of the appointing authority or that he be removable at will; rather, once an appointment is made it is anticipated that the member will serve a complete term." *Id.* at 255. The court emphasized that term provisions "for a set period of years" help protect appointees "from political considerations and political changes in order that they may exercise their decisions free from outside influences." *Id.* Thus, under "the plain language of the Act," the member had the "right" "to serve out his term without fear of removal": "Removal at will is not consistent with the intent of Congress." *Id.* Though the decision was later vacated as moot on appeal, 732 F.2d 181 (D.C. Cir. 1982) (per curiam), this analysis confirms what other courts have held: that fixed statutory terms prohibit removal during the term. *See also, e.g.*, *Allman v. Padilla*, 979 F. Supp. 2d 205, 219 (D.P.R. 2013) ("[B]y including a fixed term of ten years, the Legislature gave a clear indication of its desire to preserve separability between the Office of the Veteran's Ombudsman and the Executive Branch" and "validly limited the Governor's power of removal."), *remanded on other grounds sub nom. Montanez-Allman v. Garcia-Padilla*, 782 F.3d 42, 44 (1st Cir. 2015).

The Government is likely to point to *Parsons v. United States*, 167 U.S. 324 (1897), which held that the President had the power to remove United States Attorneys during their statutory four-year terms. But that case involved a unique statutory scheme that differs in fundamental ways from the one here. First, *Parsons* does not purport to change the default rule (as articulated in *Hennen* and many other

cases) that a fixed tenure is a restriction on removal. *Parsons* directly approved of *Hennen*. *Id.* at 331. (And even if *Parsons* had challenged that rule, *Humphrey's Executor* returned the Court to the *Hennen* rule.) Second, most of *Parsons* was dedicated to a recitation of the legislative history of the four-year term provision for U.S. Attorneys, along with the Tenure of Office Act. The four-year term provision had been expressly added in "An act to limit the term of office of certain officers" and stated that U.S. Attorneys "shall be appointed for the term of four years, but shall be removable from office at pleasure." *Id.* at 338. The last clause was later removed to prohibit any "conflict[]" with the new Tenure of Office Act, which protected tenures of other offices. *Id.* at 342. The Tenure of Office Act was then repealed, showing the intent of Congress "to concede to the President the power of removal." *Id.* at 342-43 (cleaned up). Based on this unique "history of the subject," the Court held that the four-year term was "one of limitation" and did not protect the tenure of U.S. Attorneys. *Id.* at 342; *see generally* Jane Manners & Lev Menand, *The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence*, 121 Colum. L. Rev. 1, 24 n.137 (2021) (explaining how *Parsons* is based on "the unusual drafting history of the relevant provision"). No similar history exists here, so the term provision should be given its ordinary meaning in accord with many precedents.

2. History supports this interpretation.

The historical background of both term provisions generally and this specific term provision also supports this understanding. *See Wilson*, 290 F.3d at 354 (considering "the contextual background against which Congress was legislating,

including relevant practices of the Executive Branch which presumably informed Congress's decision, prior legislative acts, and historical events").

As noted, the "general rule" was (and remains) "that an office is held at the will of either party"—"unless a different tenure is expressed." *Hennen*, 38 U.S. at 260. Such term-of-years offices "have been a feature of English and American law since at least the eighteenth century." Manners & Menand, *supra*, at 6. And the history of these provisions shows that "[s]ince before the Founding, offices held for a term of years, in the absence of constitutional or statutory language to the contrary, were designed to be inviolable: Short of impeachment, their holders could not be removed before the end of their terms." *Id.* at 5.

"Grants of office in early modern England" were "conceived of as property rights." *Id.* at 19. Thus, "a term of years was something that its holder possessed—something defeasible, and something that would descend to the officer's heirs should the officer die in the middle of their term." *Id.* In Revolutionary America, "while no longer treated as a defeasible property right, the stickiness of term-of-years offices remained, as evidenced by states' early constitutions, legislative history, and the statements of Framing-Era jurists and legal thinkers." *Id.* at 20.

Thus, in Federalist No. 39, Madison described three types of tenure: "during pleasure, for a limited period, or during good behavior." The Federalist No. 39, at 209 (James Madison) (E. H. Scott ed., Chicago, Scott, Foresman & Co. 1898). He further explained that "[t]he tenure of the ministerial offices generally, will be a subject of legal regulation, conformably to the reason of the case and the example of the State

[c]onstitutions." *Id.* at 211. And when he proposed an early position to be held "during [a certain number of] years, unless sooner removed by the President," Madison recognized the novelty of the proposal—showing "that his contemporaries understood an ordinary term-of-years tenure to be one that did not allow for removal." Manners & Menand, *supra*, at 22; *accord* Jed Handelsman Shugerman, *Presidential Removal: The* Marbury *Problem and the Madison Solutions*, 89 Fordham L. Rev. 2085, 2090 (2021) ("[T]he first Congress understood that a fixed term of years for an office meant that either an officer could not be removed or that removal could be limited by conditions similar to requirements of high crimes and misdemeanors.")

Congress would go on to use similar approaches for many positions, often with words like "but" or "unless" before the allowance for removal. *See* Manners & Menand, *supra*, at 22-23. This "underscores the contrast between the ordinary understanding of a term of years and the tacked-on removal permission." *Id.* at 23. The widely-held, ordinary understanding explains why Chief Justice Marshall did not hesitate when explaining in *Marbury* that a five-year term is "not revocable; but vested in the officer legal rights, which are protected by the laws of this country." 5 U.S. at 162; *accord* 2 Joseph Story, Commentaries on the Constitution of the United States § 1537 (2d ed. 1851) (stating that "the power of removal" is only relevant "in the absence" of a congressionally-mandated "term of office").

"Marshall's understanding—that absent statutory or constitutional language to the contrary, a term-of-years office foreclosed executive removal—was uncontroversial and widely accepted," and it was "reflected in state and federal case

law, treatises, and legislative history throughout the nineteenth century." Manners & Menand, *supra*, at 25-26 (collecting citations). This "understanding persisted for most of the twentieth century" too, *id.* at 26-27, including in the 1940s when presidential Board appointees here were given terms of office. *See, e.g.*, 119 A.L.R. 1437 (originally published in 1939) ("It is a general rule that officers appointed for a fixed and definite term are not removable except for cause, in the absence of express statutory or constitutional authority to remove without cause."); 63C Am. Jur. 2d *Public Officers and Employees* § 170 & n.1 (Aug. 2021 ed.) (collecting cases for the rule that "[w]hen the term or tenure of a public officer is not fixed by law, and the removal is not governed by a constitutional or statutory provision, as a rule, the power of removal is incident to the power to appoint");[1] *Adamczyk v. Town of Caledonia*, 190 N.W.2d 137, 139–40 (Wis. 1971) (same and collecting cases); *U.S. ex rel. Palmer v. Lapp*, 244 F. 377, 382 (6th Cir. 1917) (same); *Peterson v. Dean*, 777 F.3d 334, 343 n.4 (6th Cir. 2015) (same).[2]

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[1] The D.C. Circuit has relied on this treatise to provide "widely held traditional understandings of statutes defining terms of office." *Wilson*, 290 F.3d at 356.

[2] *See also Federal Election Reform, 1973: Hearings on S. 23, S. 343, S. 372, S. 1094, S. 1189, S. 1303, S. 1355, and S.J. Res. 110 Before the Subcomm. on Priveleges [sic] & Elections and the S. Comm. on Rules & Admin.*, 93rd Cong. 225 (1973) (statement of Robert O. Dixon, Jr., Assistant Att'y Gen.) (testifying that a term-of-years provision without removal permissions meant that appointees "could not be removed by the President during their term of office"); Memorandum from Ramsey Clark, Deputy Att'y Gen., DOJ, to Jake Jacobsen, The White House (July 2, 1965) (stating that where a term is "prescribed by statute, it is reasonably clear that" an office holder cannot be removed before the end of that term); Ilan Wurman, *In Search of Prerogative*, 70 Duke L.J. 93, 142 n.205 (2020) ("agree[ing] with [the] statutory analysis" above).

In short, from the nation's founding to after the time the relevant provision was adopted, the broad understanding of term provisions has been that they limit at-will removal during the term.

This statute's history confirms that it incorporates the general understanding. When the Board of Visitors was created in 1879, the presidential appointees did not have guaranteed terms of office. *See* 20 Stat. 290. In 1913, Congress got rid of the presidential appointees entirely. *See* 37 Stat. 907-08. In 1916, Congress added back seven presidential appointees to the Board, still without terms of office. 39 Stat. 608. Then, in 1948—just a few years after *Humphrey's Executor*—Congress reconstituted the Boards of Visitors of the Naval Academy and the U.S. Military Academy (West Point) in largely their modern forms, each with "[s]ix persons to be appointed by the President." 62 Stat. 1094. "The first Board to be appointed pursuant" to this reworked provision included "two persons appointed to serve for a period of one year, two persons appointed to serve for a period of two years, and two persons appointed to serve for a period of three years. Two Presidential appointees shall be appointed to each subsequent Board to serve for a period of three years." *Id.* Once this staggered appointment process was "executed," the 1-2-3 year language was "eliminated," leaving the "existence of such terms" "recognized by the" reference to two appointments each year. 10 U.S.C. § 6968 (1958) (historical note); *see* 70A Stat. 434 (1956).

Thus, just as in *Wilson*, "Congress went to great lengths to put various structural features in place to preserve the independence, autonomy, and non-

partisan nature of the" Board. 290 F.3d at 359. Reading Board appointees terms to remain at the President's whim would "disrupt the system [Congress] meticulously put into motion." *Id.*

Finally, still more historical evidence supporting this interpretation is provided by the executive's actual practice with the Board. "Longstanding practices of the Executive Branch can place a gloss on Congress's action in enacting a particular provision." *Id.* at 356 (cleaned up); *see also* NLRB v. Noel Canning, 573 U.S. 513, 525, 134 S. Ct. 2550, 2559, 189 L. Ed. 2d 538 (2014)573 U.S. at 525 ("[T]he longstanding practice of the government can inform our determination of 'what the law is.'" (cleaned up)).

The plaintiffs are unaware of another example where a President has tried to remove a Board member prior to the expiration of his statutory term of office. Against that "consistent treatment of appointments by the Executive Branch," *Wilson*, 290 F.3d at 356, Congress has reenacted and reauthorized the Board multiple times, always preserving the three-year term.[3] Because "Congress is presumed to be aware of established practices and authoritative interpretations of the coordinate branches," *id.* at 357, the best interpretation of the three-year term even in light of executive practice is that removal prior to the term is not permitted. *Cf. id.* at 359 (emphasizing how past presidential administrations "treat[ed] the Commission" in resolving the proper interpretation of the term-of-office provision).

[3] *See* 70A Stat. 434 (1956); Pub. L. No. 96-579, § 13(b) (Dec. 23, 1980); Pub. L. No. 104-106, Div. A, Title X, § 1061(e)(2), Title XV, § 1502(a)(12) (Feb. 10, 1996); Pub. L. No. 106-65, Div. A, Title X, § 1067(1) (Oct. 5, 1999).

3. Context supports this interpretation.

Additional support for this interpretation come from the provision's "broader context" and the Board's "structure . . . as a whole," as well as related "legislative acts." *Wilson*, 290 F.3d at 354. It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Id.* at 355 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)).

First, under any other reading, the term-of-office provision borders on surplusage. Courts "will avoid a reading which renders some words altogether redundant." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 574 (1995); *see* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 174-79 (2012). But if the President had unfettered removal power in addition to his appointment power, he could easily ignore the term-of-office provision by removing Board members whenever he pleased. The existence of the staggered term provision counsels against a reading of the statute that ultimately leaves the Board's appointments at any time to the President's complete discretion.

Next, any other reading would render "statutory terms" passed alongside this provision "surplusage." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001). The same Congresses that enacted the term provision for Board appointees repeatedly provided for other terms of office that were expressly subject to removal by the President or others in the executive branch. These specific allowances for removal would be surplusage if the executive always had that authority during a fixed statutory term. *See, e.g.*, 70A Stat. 495 (1956) (Air Force Judge Advocate General, "The term of office

is four years, but may be sooner terminated or extended by the President."); 62 Stat. 1259 (1948) (setting terms for members of the Atomic Energy Commission and also setting forth circumstances in any a "member of the Commission may be removed by the President"); 70A Stat. 287 (1956) ("The Chief shall be appointed for a term of not more than four years, to serve at the pleasure of the Secretary."); 70A Stat. 291 (1956) (Naval Research Advisory Committee, "Each member serves for such term as the Secretary specifies.").[4]

Thus, the Congresses that set the Board's terms knew that statutory terms protect the appointee from executive removal. And they knew that to allow removal during the term, additional language was necessary. They did not use any additional language here, instead using a standard staggered-terms provision with no allowance for removal. Courts "presume differences in language like this convey differences in meaning." *Wis. Cent.*, 138 S. Ct. at 2071 (cleaned up) (considering similar terms in a "companion statute"). "And that presumption must bear particular strength when the same Congress passed both statutes to handle much the same task." *Id.* at 2071-72.

[4] Other Congresses around this time passed similar provisions that combined a fixed term with an allowance for removal. *See* 80 Stat. 399 (1966) (providing that the "term of office of each Civil Service Commissioner is 6 years" and further providing that "[t]he President may remove a Commissioner"); 80 Stat. 617 (1966) (U.S. Attorneys "appointed for a term of four years," but "[e]ach United States attorney is subject to removal by the President"); 80 Stat. 619 (1966) (U.S. marshals "appointed for a term of four years," and "[o]n expiration of his term," he "shall continue to perform the duties of his office until his successor is appointed and qualifies, unless sooner removed by the President"); Act of Sept. 13, 1982, Pub. L. No. 97-258, sec. 1, § 304, 96 Stat. 877 (director of the Bureau of the Mint: "The term of the Director is 5 years. The President may remove the Director from office.")

Congress's "choice to use the narrower term in the context of" the Board "requires respect, not disregard." *Id.* at 2072.

Third, the Board's duties confirm that Congress did not intend for Board appointees to be removable by the President during the statutory term. The "nature of the [agency's] function" can be a "reliable factor for drawing an inference regarding the President's power of removal." *Wiener*, 357 U.S. at 353. Here, the Board does not exercise executive power. And the Board's independence is important to its mission of providing objective recommendations about the Academy's "state of morale and discipline, the curriculum, instruction, physical equipment, fiscal affairs, academic methods, and other matters." 10 U.S.C. § 8468(e). The Board's Charter emphasizes this independence: "Each Board member is appointed to exercise his or her own best judgment," "without representing any particular point of view, and to discuss and deliberate in a manner that is free from conflicts of interest." Charter ¶ 12; *cf.* *Humphrey's Executor*, 295 U.S. at 625-26 (explaining the value of "a body of experts who shall gain experience by length of service; a body which shall be independent of executive authority, except in its selection, and free to exercise its judgment without the leave or hindrance of any other official").

Thus, the Board's indicia of independence, including staggered and "fixed terms of office," "separation from any Executive agency," and its "functions," make the proper reading of the term-of-office provision—as preventing removal before the expiration of the term—all the more obvious. *Kalaris*, 697 F.2d at 396 n.77. Board appointees may not be removed at will during their three-year terms of office.

President Biden does not have statutory authority to remove Mr. Spicer and Mr. Vought from the Board.

B. The President has no constitutional authority to terminate Board appointments.

Because the President lacks statutory authority to remove Board appointees prior to the end of their term, President Biden's threatened removals could only be valid if he has superseding constitutional authority to do so. He does not. *See Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2199 (2020) (explaining that the President has no constitutional prerogative to remove members of "multimember expert agencies that do not wield substantial executive power").

Article II vests "[t]he executive Power" in the President. U.S. Const. art. II, § 1, cl. 1. It also requires the President to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. A constitutional problem can arise when a removal restriction deprives the President of control over an officer who exercises executive powers. *See, e.g.*, *Free Enterprise Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 483–84, 492 (2010). But absent the exercise of executive power, an agency appointee can constitutionally be protected from removal, including through a "fixing of the term for which [he is] to be appointed." *Myers*, 272 U.S. at 129; *accord Bowsher v. Synar*, 478 U.S. 714, 732 (1986) (if "Congress has retained removal authority," the appointee "may not be entrusted with executive powers"). That is because an appointee who does not exercise executive power does not affect the President's ability to "ensure that the laws are faithfully executed." *Free Enterprise Fund*, 561 U.S. at 496; *see Morrison v. Olson*, 487 U.S. 654, 691 (1988) ("[T]he real question [in these

cases] is whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty."). Thus, as the D.C. Circuit has said, "when Congress statutorily specifies the terms of tenure" for appointees who "are independent of the Executive Branch," "it does not infringe upon the autonomy of the Executive Branch." *Kalaris*, 697 F.2d at 398.

Here, Board members do not exercise any "quintessentially executive power." *Seila Law*, 140 S. Ct. at 2200. Like the independent counsel in *Morrison*, they "lack[] policymaking or administrative authority." *Id.* And like the commission in *Humphrey's Executor*, the Board "is charged with the enforcement of no policy." 295 U.S. at 624. It is a purely advisory body with no rulemaking, investigatory, enforcement, or adjudicative authority. It can merely provide "its views and recommendations pertaining to the Academy." 10 U.S.C. § 8468(f).

The Supreme Court has upheld removal provisions even for appointees who exercise much *more* executive power (*Humphrey's Executor*, *Wiener*, and *Morrison*), and the Court has recently adhered to those decisions. *E.g.*, *Seila Law*, 140 S. Ct. at 2199-2200. If Congress can set a non-illusory term of office for *anyone*, it can set them for Board members. In short, it is obvious that Board members are not "so central to the functioning of the Executive Branch as to require as a matter of constitutional law that [they] be terminable at will by the President." *Morrison*, 487 U.S. at 691-92.

To be sure, some have argued that "[f]ree-floating agencies simply do not comport with th[e] constitutional structure" and therefore that *Humphrey's Executor* should be overruled. *Seila Law*, 140 S. Ct. at 2216-19 (Thomas, J., concurring in part

and dissenting in part). But under governing law, the President does not have the constitutional prerogative to remove Board members at will prior to the end of the tenure guaranteed them by Congress.

II. Mr. Spicer and Mr. Vought have standing, and this Court has jurisdiction.

The government is likely to challenge this Court's jurisdiction, but such a challenge would be meritless. Because the Court has the power to declare that Mr. Spicer and Mr. Vought may continue their service on the Board, their injury is redressable and they have standing. Article III standing requires that the plaintiff "have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). "When the suit is one challenging the legality of government action" and "the plaintiff is himself an object of the action," "there is ordinarily little question that the action . . . has caused him injury, and that a judgment preventing . . . the action will redress it." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561-62 (1992).

Here, Mr. Spicer and Mr. Vought have a concrete injury-in-fact: an imminent removal. They have causation: the defendants threaten their removal. And they have redressability: this Court can declare and require by injunction that the President and/or other defendants must continue to treat Mr. Spicer and Mr. Vought as members of the Board unless and until they decide to conclude their service on their own accord.

In *Swan v. Clinton*, 100 F.3d 973 (D.C. Cir. 1996), the D.C. Circuit confronted a similar jurisdictional question and resolved it in the plaintiff's favor. There, President Clinton purported to remove Robert Swan from the Board of the National Credit Union Administration, and Swan sued to maintain his position. *Id.* at 974. The court avoided whether it could enjoin the President by focusing on his subordinate officers—specifically, an Assistant to the President and the agency's Executive Director. *Id.* at 975. The court emphasized "the bedrock principle that our system of government is founded on the rule of law," explaining that "it is sometimes a necessary function of the judiciary to determine if the executive branch is abiding by the terms of legislative enactments." *Id.* at 978. When the President himself is involved, "any conflict between the desire to avoid confronting the elected head of a coequal branch of government and to ensure the rule of law can be successfully bypassed, because the injury at issue can be rectified by injunctive relief against subordinate officials." *Id.* After all, if the plaintiff's "injury can be redressed by injunctive relief against subordinate officials, he clearly has standing." *Id.* at 979.

The court found redressability and standing even though "only the President has the power to . . . reinstate NCUA Board members." *Id.* As the court explained, "the critical question in determining redressability is not whether subordinate officials have the legal power to remove or reinstate NCUA Board members," but "rather whether injunctive relief against such officials alone could provide Swan with an adequate remedy." *Id.* The court found an adequate remedy via two routes. First, the court noted that the agency's director "has responsibility for coordinating the

activities of the senior executive staff of the NCUA, and thus could direct the staff to treat Swan as a Board member." *Id.* Second, though the director did "not appear to have the authority to order the *other* Board members to treat Swan as a Board member," the court held that the complaint reasonably "encompass[ed] relief against subordinate branch officials not named as parties" by asking "'for such additional relief as the court shall deem just and proper.'" *Id.* at 979-80 (emphasis added).

The court held that "[i]njunctive relief against [the director] and these added defendants could on balance substantially redress Swan's injury and is sufficient to satisfy the redressability requirement of standing." *Id.* at 980. These officials could be ordered to "treat[] Swan as a member of the NCUA Board and allow[] him to exercise the privileges of that office." *Id.* According to the court, "such partial relief is sufficient for standing purposes when determining whether we can order more complete relief would require us to delve into complicated and exceptionally difficult questions regarding the constitutional relationship between the judiciary and the executive branch." *Id.* at 981 (cleaned up).

If anything, this is an easier case than *Swan*. In *Swan*, the appointee had been purportedly removed and another person had been put into the seat. *Id.* at 975. But Mr. Spicer and Mr. Vought have not even been purportedly removed, much less had their seats filled by others. The Court can order relief against the Board's Chairman and its Designated Federal Officer, who together oversee all the Board's operations. *See supra* pp. 4-5; Charter ¶ 8 (noting that the Designated Federal Officer "approves and calls all Board meetings; prepares and approves all meeting agendas; and

adjourns any meeting"). Such relief is "likely" to redress the plaintiffs' injuries, and that is enough for standing. *Spokeo*, 136 S. Ct. at 1547.

If the Court needed to go further, much of the same reasoning also applies to Ms. Russell and Ms. Petrelius. As the Supreme Court has explained, "[s]uits against . . . Presidential aides . . . generally do not invoke separation-of-powers considerations to the same extent as suits against the President himself." *Harlow v. Fitzgerald*, 457 U.S. 800, 811 n.17 (1982). These defendants sent the email and letter threatening to terminate Mr. Spicer and Mr. Vought. They can retract that threat. Even if there is a "reluctance to bring judicial power to bear directly on the President," there is also a "long established" history of vindicating "claim[s] directed at a subordinate executive official." *Chamber of Com. of U.S. v. Reich*, 74 F.3d 1322, 1331 n.4 (D.C. Cir. 1996); *Nixon v. Sirica*, 487 F.2d 700, 709 (D.C. Cir. 1973) ("[A]s a matter of comity, courts should normally direct legal process to a lower Executive official.").[5]

Finally, the government is likely to argue that the Court cannot issue relief against the President himself. For the reasons explained above, such relief should not

[5] *See, e.g.*, *TikTok Inc. v. Trump*, 507 F. Supp. 3d 92, 96 (D.D.C. 2020) (enjoining the Secretary of Commerce); *Gomez v. Trump*, 485 F. Supp. 3d 145, 165, 205 (D.D.C. 2020) (enjoining the Attorney General, the Secretary of State, and the Acting Secretary of Homeland Security); *Nw. Immigrant Rts. Project v. USCIS*, 496 F. Supp. 3d 31, 41 (D.D.C. 2020) (enjoining Acting Secretary of Homeland Security and Senior Official Performing the Duties of the USCIS Director and Deputy Secretary of Homeland Security); *Doe #1 v. Trump*, 957 F.3d 1050, 1070 (9th Cir. 2020) (denying motion to stay preliminary injunction against the Secretary of State, Secretary of Health and Human Services, and Acting Secretary of Homeland Security); *accord Marbury*, 5 U.S. at 173 (approving mandamus relief against the Secretary of State); *Nat'l Treasury Emps. Union v. Nixon*, 492 F.2d 587, 602 (D.C. Cir. 1974) (explaining that relief can "unequivocal[ly]" be granted against "federal official[s] other than the President").

be necessary—unless the government argues that no one else can provide adequate relief. Regardless, courts—from the Supreme Court down—have repeatedly approved judgments against the President. The Supreme Court did it in *Clinton v. City of New York*, affirming a declaratory judgment against President Clinton that the Line Item Veto Act and the President's use of that Act were unconstitutional. *See* 524 U.S. 417, 425 n.9 (1998); *CREW v. Trump*, 302 F. Supp. 3d 127, 139 n.5 (D.D.C. 2018) (noting this precedent); *Karnoski v. Trump*, 926 F.3d 1180, 1193 & n.10 (9th Cir. 2019) (same); *accord Marbury*, 5 U.S. at 170 ("It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done that the propriety or impropriety of issuing a mandamus, is to be determined.").

The D.C. Circuit did it in *National Treasury Employees Union v. Nixon*, which involved a suit by a federal employee union against only President Nixon seeking to force him to implement a pay raise passed by Congress. 492 F.2d at 616. The court held "that jurisdiction in this case exists . . . to support the issuance of a writ of mandamus directing the President to effectuate the pay raise." *Id.* That remedy gave the court jurisdiction, but the court ultimately concluded that it was more "appropriate" to issue a declaratory judgment "that the President has a constitutional duty forthwith to grant . . . the federal pay increase mandated by the Congress." *Id.* The court thus sought to avoid "any clash between the judicial and executive branches of the Government" while also recognizing that a "failure to permit the President to be sued on the ground of separation of powers" could prevent citizens from "enforcing [their] legal rights in federal court." *Id.* at 614-16. This decision remains binding

circuit precedent, and district courts have directly enjoined the President in the removal context. *See, e.g.*, *Mackie v. Bush*, 809 F. Supp. 144, 148 (D.D.C.), *vacated as moot*, *Mackie v. Clinton*, 10 F.3d 13 (D.C. Cir. 1993); *accord Nat'l Wildlife Fed'n v. United States*, 626 F.2d 917, 923 (D.C. Cir. 1980) ("Mandamus is not precluded because the federal official at issue is the President of the United States." (citing *NTEU*)); *id.* at 926 n.17 (same for declaratory judgments); *Sirica*, 487 F.2d at 709 (explaining that "the court's order must run directly to the President").

Though the D.C. Circuit's divided decision in *Newdow v. Roberts*, 603 F.3d 1002, 1013 (D.C. Cir. 2010), claimed that courts "have never submitted the President to declaratory relief," that is incorrect. *Newdow* cited only a solo concurrence for this proposition, and ignored the above decisions showing that "the D.C. Circuit *has itself* submitted the President to declaratory relief." *CREW*, 302 F. Supp. 3d at 139 n.6; *cf. LaShawn A. v. Barry*, 87 F.3d 1389, 1395 (D.C. Cir. 1996) ("One three-judge panel . . . does not have the authority to overrule another three-judge panel of the court."). The President is not "above the law." *United States v. Nixon*, 418 U.S. 683, 715 (1974); *see United States v. Lee*, 106 U.S. 196, 220 (1882) ("All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it.").

Because the Court has multiple avenues that would likely redress the plaintiffs' injuries, they have standing and the Court has jurisdiction.

III. The other preliminary injunction factors support relief.

The other preliminary injunction favors also support immediate relief against the President's threatened terminations. First, the plaintiffs face irreparable harm

absent an injunction: deprivation of a valid commission to serve in the government. Irreparable harm "must be certain and great," "imminent," and "beyond remediation" after final judgment. *League of Women Voters of United States v. Newby*, 838 F.3d 1, 8 (D.C. Cir. 2016) (cleaned up). An illegal deprivation of a public office easily suffices. As recognized since *Marbury*, "The value of a public office not to be sold, is incapable of being ascertained; and the applicant has a right to the office itself, or to nothing." 5 U.S. at 173. Thus, the Court there found a similar action to be "a plain case for" a writ of mandamus, *id.*, which requires an extremely demanding showing of irreparable harm. *See In re Exec. Off. of President*, 215 F.3d 20, 23 (D.C. Cir. 2000) (requiring a "showing of harm of the sort required to justify the drastic remedy of mandamus," harm that would not be "correctable on appeal"). Moreover, the threatened terminations would deprive the plaintiffs of their right to participate in the Board's functions—visiting the Academy, meeting, and providing recommendations—and no eventual judgment could wind back the clock. It makes no difference that the President has (apparently) not followed through on his promised termination: "As a preliminary injunction requires only a likelihood of irreparable injury, Damocles's sword does not have to actually fall on all [plaintiffs] before" an injunction can be issued. *Newby*, 838 F.3d at 8-9 (citation omitted).

Second, the balance of equities and public interest weigh in favor of relief. The plaintiffs' "extremely high likelihood of success on the merits is a strong indicator that a preliminary injunction would serve the public interest," for "[t]here is generally no public interest in the perpetuation of unlawful [executive] action." *Newby*, 838 F.3d

at 12. And the public has a specific interest in the Board's independent judgment and recommendations as to the Naval Academy. By statute and its Charter, the Board "provides independent advice and recommendations" "on the state of morale and discipline, the curriculum, instruction, physical equipment, fiscal affairs, academic methods, and other matters relating to the Academy that the Board decides to consider." Charter ¶ 4; *see* 10 U.S.C. § 8468 (d)-(f). Not only will the plaintiffs' forced absence from the Board deprive it of relevant views, it will discourage other Board members from exercising the necessary independence in fulfilling the Board's functions. This will deprive the people of the public body their representatives intended: "a body which shall be independent of executive authority, except in its selection, and free to exercise its judgment without the leave or hindrance of any other official or any department of the government." *Humphrey's Executor*, 295 U.S. at 625-26.

CONCLUSION

For the foregoing reasons, the Court should grant a preliminary injunction directing that defendants Katherine Petrelius, Catherine Russell, Charles A. "Dutch" Ruppersberger III, and Raphael J. Thalakottur treat plaintiffs as full members of the United States Naval Academy Board of Visitors until their statutory terms of office expire and their replacements are appointed. If the Court finds that enjoining the President is necessary for effective relief, he should be included as a subject of the injunction. The plaintiffs respectfully request that the Court rule by November 30,

2021, to enable their full, unhindered participation in the Board's next meeting on December 6.

Respectfully submitted,

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