No. 25A312

IN THE SUPREME COURT OF THE UNITED STATES

DONALD J. TRUMP, President of the United States, et al.,
Applicants,
v.
LISA D. COOK,
Respondent.

On Application to Stay the Preliminary Injunction of the United States District Court for the District of Columbia and Request for Administrative Stay

BRIEF OF AMICI CURIAE PATRICK J. BORCHERS, MICHAEL C. DORF, KELLEN FUNK, AZIZ HUQ, RILEY T. KEENAN, JAMES PFANDER, AND JONATHAN D. SHAUB IN SUPPORT OF RESPONDENT

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IDENTITY AND INTERESTS OF *AMICI CURIAE*[1]

Professors Patrick J. Borchers, Michael C. Dorf, Kellen Funk, Aziz Huq, Riley T. Keenan, James Pfander, and Jonathan D. Shaub, whose background and publications are described in the Appendix, submit this brief as *amici curiae*. Their interest in this matter is that of legal scholars on federal courts, jurisdiction, procedure, remedies, and the law governing federal adjudication of constitutional and statutory claims against the Federal Government and its officers.

PROCEDURAL POSTURE

This case is before the Court on the government's application for a stay of a grant of injunctive relief to Plaintiff Lisa Cook, *see Cook v. Trump*, No. 25-CV-2903, 2025 WL 2607761 (D.D.C. Sep. 9, 2025), and the government's request for an administrative stay. A three-judge panel of the United States Court of Appeals for the District of Columbia denied the government's motion to stay the injunction. *See Cook v. Trump*, No. 25-5326, 2025 WL 2654786, (D.C. Cir. Sep. 15, 2025).

Amici do not address Plaintiff's entitlement to her office, although the question of likely success on the merits plays a critical role in deciding whether to stay a district court's grant of relief. *See, e.g.*, *Smith v. Hamm*, 144 S. Ct. 414, 415 (2024). Instead, assuming the Court finds that the purported removal of Plaintiff was likely unlawful, *amici* address Plaintiff's claim that she may secure relief in the form of a preliminary injunction or, alternatively, in the nature of mandamus preventing her

[1] No counsel for a party authored this brief in whole or in part, and no person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

removal from her office. As that issue is raised in the government's application here, *see* Application to Stay the Preliminary Injunction of the United States District Court for the District of Columbia and Request for Administrative Stay ("Applicant's Br.") at 31-35, *Trump v. Cook*, No. 25A312 (Sep. 18, 2025), and was previously mentioned by members of this Court, *Bessent v. Dellinger*, 145 S. Ct. 515, 516-18 (2025) (Gorsuch, J., dissenting), *amici* offer this brief to aid the Court in its consideration of the availability of such relief.

INTRODUCTION AND SUMMARY OF ARGUMENT

"It is a settled and invariable principle," Chief Justice Marshall wrote, "that every right, when withheld, must have a remedy." *Marbury v. Madison*, 5 U.S. 137, 147 (1803) (citing 3 William Blackstone, *Commentaries on the Laws of England* 109 (Oxford, Clarendon Press 1768)). Assuming such a right was withheld here, the available remedy is clear: from 1789 to today, courts have consistently held that executive officers threatened with or subject to unlawful removal may properly be retained in office.

History and equitable practice support the district court's remedial order. Indeed, history and precedent definitively establish that federal courts have the authority to order the government to retain in office a federal officer removed unlawfully or threatened with such removal, whether that order takes the form of (I) an injunction, or (II) mandamus.[2]

[2] *Amici* use the term "mandamus" to encompass all forms of mandamus-like relief available in this context. *See infra* note 6.

That history started with *Marbury*, which drew upon English judicial practice in ordering specific relief against government officials. *See* 5 U.S. at 146-47. The Court made clear that because duties regarding executive officers' employment are "prescribed by law," a failure to uphold these duties constitutes an "illegal act" that presents "a plain case for" relief—in that case, mandamus. *Id.* at 158, 164, 170-73. This Court has since continued to acknowledge and provide for a remedy in cases involving challenges related to officeholding through both mandamus and injunctive relief. *See In re Sawyer*, 124 U.S. 200, 212 (1888); *Vitarelli v. Seaton*, 359 U.S. 535, 537, 546 (1959); *Sampson v. Murray*, 415 U.S. 61, 92 & n.68 (1974). As discussed herein, the characterization of the remedy has evolved as equity has absorbed aspects of the common law. But the fundamental principle has not. Officials subjected to an unlawful purported discharge may seek remedies beyond monetary relief.

Put simply, federal courts have always possessed the authority to prevent subordinate executive officials from unlawfully removing executive officers—with that authority originating in the form of mandamus and then extending into equity. In Section I, *amici* describe the English origins of this power, its integration into the federal courts, and its later absorption into equity, all of which support the district court's order here. In Section II, *amici* explain that should this Court find injunctive relief unavailable, mandamus would properly provide the same redress. And Section III explains that regardless of the specific remedial mechanism employed, given law and equity's relationship throughout history and this Court's precedent, the bottom line is that a court may provide effective relief to prevent the improper removal of a

federal officer regardless of the remedy's "label." *Bessent*, 145 S. Ct. at 516 (Gorsuch, J., dissenting).

ARGUMENT

I. Injunctive Relief Preventing Improper Removal of an Officer Accords with Foundational Principles of Equity and Binding Precedent.

"Equity is flexible." *Trump v. CASA, Inc.*, 606 U.S. 831, 846 (2025) (quoting *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 322 (1999)) (brackets omitted). Within limits, to be sure: as this Court recently emphasized, equitable practice "must have a founding-era antecedent," *id.* at 847, and equity's "flexibility is confined within the broad boundaries of traditional equitable relief," *id.* at 846 (quoting *Grupo Mexicano*, 527 U.S. at 322).

Injunctive relief to prevent unlawful officer removal accords with these principles. The practice developed gradually from the historical use of mandamus as the primary mechanism to establish entitlement to public office in eighteenth-century England. And because injunctions developed as the preferred means to restrain illicit executive action through case-by-case iteration and the traditional relationship between law and equity, they comply with the "traditional principles of equity jurisdiction." *Grupo Mexicano*, 527 U.S. at 319 (quoting 11A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2941 (2d ed. 1995)).

Perhaps the most fundamental principle of equity is that it has always operated to provide relief "where a plain, adequate, and complete remedy" cannot otherwise "be had." 1 Joseph Story, *Commentaries on Equity Jurisprudence, as Administered in England and America* § 33 (Boston, Hilliard, Gray & Co. 1836).

Equity thus necessarily contemplates interaction with legal remedies; it "presuppose[s] the existence of" and acts as a "gloss written round" the common law. F.W. Maitland, *Equity and the Forms of Action* 17-20 (A.H. Chaytor & W.J. Whittaker eds. 1910). Over time, therefore, equitable relief "adapt[s] to changes in the remedial system as a whole." *See* James E. Pfander & Jacob P. Wentzel, *The Common Law Origins of* Ex parte Young, 72 Stan. L. Rev. 1269, 1282 (2020). In other words, just as the "law is not static, the equity that corrects and supplements it cannot be static either." Samuel L. Bray & Paul B. Miller, *Getting into Equity*, 97 Notre Dame L. Rev. 1763, 1796 (2022).

This principle "works in both directions." *Id.* at 1796 n.102. For example, this Court recently explained that the "bill of peace" accorded by English equitable courts has "evolved into the modern class action" under Rule 23, diminishing the justification for "the quick [equitable] fix of a universal injunction." *CASA*, 606 U.S. at 849-50; *see Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 478 n.19 (1962) ("[P]rocedural changes which remove the inadequacy of a remedy at law may sharply diminish the scope of traditional equitable remedies by making them unnecessary."). On the other hand, there are certain "common law practice[s]" that equity has "absorbed." Pfander & Wentzel, *supra*, at 1282. For instance, early federal law provided a legal remedy of patent cancelation based on the English writ of scire facias. *Id.* at 1325-26. But over time, equity "substituted the injunction for the writ of scire facias, and suits for injunctive relief against invalid patents came to dominate the litigation landscape." *Id.* at 1326.

To be clear, the adaptation of equity to fill common-law gaps is subject to the traditional limits on equity's flexibility. *See CASA*, 606 U.S. at 846-47. Courts may not, for example, issue equitable relief beyond accepted practice merely to effectuate justice—that "conscience-based equity" model, wherein "the Chancellor considered the case as a whole and decreed what he personally thought should be done" regardless of remedial precedent, was rejected in England well before our Constitution's adoption. Owen W. Gallogly, *Equity's Constitutional Source*, 132 Yale L.J. 1213, 1243 (2023). But gradual, case-by-case development of equity jurisprudence has always been treated as legitimate. *See Bond v. Hopkins*, [1802] 1 Sch. & Lefr. 413, 429 (Ir. Ct. Ch.) (explaining that although English equitable courts were bound by "fixed and certain" jurisprudential rules, they were always empowered to "illustrate . . . the operation" of those rules through application to new cases); Henry Home, *Principles of Equity* 27 (Michael Lobban ed., Liberty Fund 2014) (1778) (similar); 1 Story, *Commentaries*, §§ 19-23 (similar). "From the beginning," this Court has emphasized, "the phrase 'suits in equity'" has contemplated the issuance of relief "according to the principles" of English equitable practice "*as they have been developed in the federal courts*." *Gordon v. Washington*, 295 U.S. 30, 36 (1935) (emphasis added).

As explained in the remainder of this Section, it is through this gradual development of federal-court precedent that injunctive relief has displaced mandamus as the favored mechanism to adjudicate the employment of executive officials. This process, which neither created novel relief nor expanded federal courts'

authority, occurred through the gradual development of remedial precedent reflecting equity's fundamental role in supplementing the common law. *See* Maitland, *supra*, at 17-20; Bray & Miller, *supra*, at 1796. As a result, although—as discussed in Section II—the legal remedy of mandamus was the primary mechanism for establishing entitlement to public office in eighteenth-century England, the use of injunctions to prevent the illegal removal of federal officers today is entirely consistent with foundational equitable principles.

Start at this nation's founding. Although courts at law adjudicated public legal rights in eighteenth-century England, "[o]ver the course of the nineteenth century," American "courts more actively deployed their equitable powers in public law controversies" to provide complete relief and fill gaps in common law remedies. *See* Pfander & Wentzel, *supra*, at 1278-80. As one example, because the English common law writ of "prohibition" failed to take hold in America as a vehicle to restrain government officials, equitable injunctions absorbed the writ's former function to afford complete relief. *See id.* at 1317-18; *Att'y Gen. v. Chi. & Nw. Ry. Co.*, 35 Wis. 425, 520 (1874) (using both mandamus and an injunction to enjoin the enforcement of unlawful railroad tolls); Louis L. Jaffe, *Judicial Control of Administrative Action* 468 (Little, Brown & Co. 1965) ("The public action . . . evolved principally through mandamus and injunction.").

Equity's use in public law included relief against public officials, as early American courts embraced equity to prevent officials from performing illicit acts. In 1824, for instance, this Court affirmed an order of restitution and an injunction—

both equitable remedies—against Ohio state officials, reasoning that "[t]he suit . . . might be as well sustained in a Court of equity as in a Court of law." *Osborn v. Bank of U.S.*, 22 U.S. 738, 869-71 (1824). In determining the availability of such relief, the relevant fault-line was *not* whether the remedy was legal or equitable. Instead, the "most relevant historical limitation[] on the equitable remedial power . . . [was] the traditional inability of courts to interfere with discretionary"—that is, non-ministerial—"governmental decisions." Jonathan David Shaub, *Interbranch Equity*, 25 U. Pa. J. Const. L. 780, 839 (2023). Numerous cases confirmed that relief could issue for an official's violation of ministerial duties but not discretionary judgments. *See, e.g.*, *Gaines v. Thompson*, 74 U.S. 347, 352-53 (1868) (noting that "whether it be by writ of mandamus or injunction," an officer could not be "required to abandon his right to exercise his personal judgment," but could be forced to exercise "definite dut[ies]"); *Bd. of Liquidation v. McComb*, 92 U.S. 531, 536 (1875) (explaining that in sufficiently "clear" cases, courts could "interpose by injunction or mandamus" to restrain state officials from acting in violation of the law (emphasis removed)).

In accordance with that precedent, by the early twentieth century, this Court had affirmed or issued equitable relief running against both state and federal officers. *See, e.g.*, *Pennoyer v. McConnaughy*, 140 U.S. 1, 18, 25 (1891) (affirming "an injunction" that "restrained and enjoined" Oregon officials from acting under a statute that would be "destructive of [the plaintiff's] rights"); *Am. Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 110-11 (1902) (granting a "temporary injunction" against the Postmaster General to "prohibit the further withholding of the mail from

[the] complainants"). Mid-twentieth century, this Court affirmed the district court's issuance of injunctive relief against the Secretary of Commerce in *Youngstown Sheet & Tube Co. v. Sawyer*, rejecting the government's argument that such equitable relief was improper. 343 U.S. 579, 584 (1953); *see id.* at 595 (Frankfurter, J., concurring) (agreeing that the district judge was empowered "to issue a temporary injunction in the circumstances of [the] case").[3]

The uncontroversial use of equitable relief as a proper remedy against governmental officials formed the backdrop for numerous decisions affirming the propriety of injunctive relief to prevent removal of federal employees. Most directly, in *Vitarelli*, an unlawfully dismissed Department of the Interior employee sought and received both "a declaration that his dismissal" had been "illegal and ineffective," *and* "an injunction requiring [the employee's] reinstatement." 359 U.S. at 537, 546. *Vitarelli* affirmed what this Court had acknowledged in a trio of then-recent cases in which wrongfully dismissed employees had sought reinstatement—*i.e.*, that injunctive relief requiring the government to reinstate the employee was an available remedy so long as the individual remained entitled to the office. *See Service v. Dulles*, 354 U.S. 363, 370, 388-89 (1957) (permitting a wrongfully terminated employee, on remand, to pursue "an order directing the [government] to reinstate him to his

[3] The district court's order in *Cook*, which enjoined subordinate executive officers but not the President, accorded with the unbroken tradition supporting judicial authority to compel the executive's subordinates to comply with law—as exemplified by *Youngstown*, *Marbury*, and numerous additional decisions. *Cook*, 2025 WL 2607761, at *22. This Court accordingly need not address what if any power federal courts possess to issue injunctions operating on the President himself.

employment"); *Cole v. Young*, 351 U.S. 536, 540-41, 558 (1956) (same); *Peters v. Hobby*, 349 U.S. 331, 348-49 (1955) (granting a wrongfully dismissed employee a "declaratory judgment that his removal and debarment were invalid" as well as an injunction ordering the government to expunge records, but denying reinstatement because the employee's term would have already expired). Despite strenuous arguments by the government that the courts lacked authority to interfere in personnel matters, this Court never suggested reinstatement was not an available remedy. *See also Sampson*, 415 U.S. at 62-63, 92 & n.68 (recognizing that courts could, in appropriate cases, properly use their "injunctive power" to reverse the discharge of even probationary employees, though declining to do so based on a balance of the equities).

Lower courts have likewise approved of injunctions against subordinate officials preventing a federal officer's removal. *See, e.g.*, *Swan v. Clinton*, 100 F.3d 973, 978 (D.C. Cir. 1996) (explaining that a court could properly grant "injunctive relief against subordinate [executive] officials"); *id.* at 989 (Silberman, J., concurring) (explaining that the court could properly "compel all [relevant] officials . . . to treat [the plaintiff] as the rightful" officeholder); *Severino v. Biden*, 71 F.4th 1038, 1042-43 (D.C. Cir. 2023) (explaining that the Court could "enjoin 'subordinate executive officials' to reinstate a wrongly terminated official '*de facto*'" (quoting *Swan*, 100 F.3d at 980)). As these cases demonstrate, the centuries-long, gradual absorption of the common law into equity has culminated in the widespread acceptance of injunctive relief to prevent the unlawful purported removal of federal officials.

The gradual adoption of injunctive relief as the primary mechanism to keep federal officials in office is also supported by a development in the Federal Rules of Civil Procedure. In 1938, Rule 81(b) abolished the writs of mandamus and scire facias, but explained that "[r]elief previously available through them may be obtained by appropriate action or motion." Fed. R. Civ. P. 81(b). Although Rule 81(b) and a later change to the U.S. Code support the continued issuance of relief in the nature of mandamus, *see* 28 U.S.C. § 1361 (discussed *infra* Section II), Rule 81(b)'s contemplation of using any "appropriate action or motion" to obtain relief formerly available under mandamus explains the reliance on injunctions in the mid-to-late-twentieth-century decisions chronicled above. *See, e.g.*, *In re Cheney*, 406 F.3d 723, 728-29 (D.C. Cir. 2005) (explaining that because Rule 81(b) abolished the formal writ of mandamus, what were formerly mandamus principles "now govern attempts to secure similar relief, such as a mandatory injunction ordering a government employee or agency to perform a duty owed to the plaintiff" (internal citation omitted)); *Mical Commc'ns, Inc. v. Sprint Telemedia, Inc.*, 1 F.3d 1031, 1036 n.2 (10th Cir. 1993) ("Fed. R. Civ. P. 81(b) abolished writs of mandamus, and provided that relief formerly available by mandamus may now be obtained by 'appropriate motion' such as a motion for injunctive relief."); *Marshall v. Whirlpool Corp.*, 593 F.2d 715, 720 n.7 (6th Cir. 1979) ("Since the writ of mandamus has been abolished in federal practice [by Rule 81(b)] the [Occupational Health and Safety] Act presumably contemplates injunctive relief against the Secretary [of Labor].").

History, precedent, and the federal rules thus establish that injunctive relief is available where other remedies are inadequate to prevent the unlawful removal of a federal officer. The government's reliance on *CASA* and *Grupo Mexicano* to claim otherwise is unavailing. *See* Applicant's Br. at 32. This Court has made clear that the key question in equitable practice is whether the remedy afforded accords with the "traditional principles of equity jurisdiction." *Grupo Mexicano*, 527 U.S. at 319 (quoting 11A Wright & Miller, *supra*, § 2941). That limitation is one of "substance," not "form," *Liu v. SEC*, 591 U.S. 71, 76 n.1 (2020) (quoting *Aetna Health Inc. v. Davila*, 542 U.S. 200, 214 (2004)), so what matters is not the remedial "label" but whether the issued relief "reflect[s] a foundational principle" of equitable jurisprudence, *id.* at 79. For the reasons explained above, the relief issued here does so.

Nor are older cases questioning the availability of equitable remedies to prevent public-officer removal or appointment to the contrary. *See In re Sawyer*, 124 U.S. at 212; *White v. Berry*, 171 U.S. 366, 376-77 (1898).[4] To start, a "critical limitation" on the holding of *Sawyer*—the foundation of cases cited by the government—is that it merely represented disagreement regarding the availability in that era of a *mandatory* injunction; it did not question a distinct line of precedent

[4] The government cites two additional cases predating Rule 81(b)'s abolition of mandamus and much of the accretive adaptation of equitable practice described above. *See* Applicant's Br. at 32-33 (citing *Harkrader v. Wadley*, 172 U.S. 148, 165 (1898); *Walton v. House of Representatives of Okla.*, 265 U.S. 487, 490 (1924)). It also cites *Baker v. Carr*, 369 U.S. 186, 231 (1962), but that case merely described the limits on equity jurisprudence as articulated in *In re Sawyer*, *Walton*, and *White* as a means of distinguishing the Court's inquiry in *Baker*; this Court did not have occasion or reason to consider whether the analysis in the earlier cases remained applicable.

"where equity would grant preliminary injunctions to prevent the removal of an officer while the legal process played out." Samuel L. Bray, *Remedies in the Officer Removal Cases*, SSRN 28 (Sep. 23, 2025) (draft publication), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5515261 [https://perma.cc/6FYH-K3G4];[5] *see* Henry L. McClintock, *Handbook of the Principles of Equity* § 167, at 453 (2d ed. 1948) ("It has been held that equity may protect the occupant of an office from dispossession pending the determination at law of the dispute as to his right.").

More broadly, *Sawyer*, *White*, and other cases cited by the government relied on considerations absent here, such as the reluctance to interfere with acknowledged discretion or the existence of quasi-criminal proceedings. And they are best viewed as reflecting judicial uncertainty as the traditional contours of common law relief were being absorbed into equity. *Compare, e.g.*, *Ewing v. City of St. Louis*, 72 U.S. 413, 418-19 (1866) (calling it "well-established doctrine" that a mayor's alleged due process violations could be remedied only through legal relief—a writ of *certiorari*—rather than an injunction), *with Gaines*, 74 U.S. at 353 (reasoning two years post-

[5] Professor Bray's views are particularly notable here, as his work featured heavily in *CASA*. *See* 606 U.S. at 840, 841, 842, 843, 844, 845, 847, 848, 850, 854; *see also id.* at 863, 864, 865 (Thomas, J., concurring). As discussed further *infra* Section III, Professor Bray's recent scholarship—which affirms that principal officers are entitled to equitable remedies and that equitable principles support the use of injunctive relief to reduce the confusion that could result from an officeholder "*flipping*" multiple times, *see* Bray, *Remedies in the Officer Removal Cases*, *supra*, at 4-6—directly contradicts multiple aspects of the government's position here, *see* Applicant's Br. at 33-35. Indeed, Professor Bray directly supports Plaintiff's position before this Court. Bray, *Remedies in the Officer Removal Cases*, *supra*, at 8 ("The Court should deny the Solicitor General's request for a stay of the injunction protecting Federal Reserve Governor Lisa Cook.").

Ewing that there is "no difference in the principle" by which federal courts could interfere with official duties, whether "by writ of mandamus or injunction"). "Much water has flowed over the dam since 1898," *Sampson*, 415 U.S. at 71, and even more since 1789. That precedential water, in *Sampson's* telling, is the gradual adaptation and accretion of equity practice to account for evolution in the common law. That adaptation is itself a fundamental principle of equity. To reject the availability of injunctive relief to retain officers in office during litigation would thus run counter to the bedrock principle that courts of equity may adapt injunctive relief to new "circumstances and conditions brought under consideration"—as federal courts have done for centuries. W.A. Woods, *Injunction in the Federal Courts*, 6 Yale L.J. 245, 245 (1897).

II. If the Court Concludes that Injunctive Relief is Not Available, Mandamus-Like Legal Relief is Available.

If the attempted removal of Plaintiff was likely unlawful, an alternative remedy in the nature of mandamus is available to maintain her position. *See* 28 U.S.C. § 1361 ("The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."); *In re Cheney*, 406 F.3d at 728 (Section 1361 provides for "mandamus-type relief").[6] Thus, even if this Court

[6] Though the nomenclature used to describe mandamus-like relief is somewhat inconsistent, there is no debate that courts may issue such relief. *See* 33 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 8305 (2d ed. 2024) ("Although Rule 81(b) in some sense abolished mandamus in name, it did not abolish its substance, and Congress did not intend for the phrasing 'in the nature of mandamus' to change this underlying substance, either." (citing sources)); *see also In*

were to determine that injunctive relief is unavailable, relief in the nature of mandamus is an available and appropriate remedy, particularly in light of its historic function of preserving the positions of public officials purportedly ousted through improper means.

Mandamus to protect executive officials has been an accepted feature of judicial power since at least the King's Bench decision in *Bagg's Case* in 1615, where the court granted a "writ of restitution" against the mayor and city council for removing Bagg from his residence in Plymouth with no legal basis. *James Bagg's Case*, 77 Eng. Rep. 1271, 1272 (1615) (C.J., Coke). Writs of mandamus in eighteenth-century England generally were offered "in the form of a command." Audrey Davis, *A Return to the Traditional Use of the Writ of Mandamus*, 24 Lewis & Clark L. Rev. 1527, 1530 (2020) (citing Thomas Tapping, *The Law and Practice of The High Prerogative Writ of Mandamus as it Obtains Both in England, and in Ireland* 57 (1853)). These writs "depended exclusively on 'the character of the act or decision that was impugned,' and not that 'of the body that had acted or decided'—in other words, no officer was above such a writ." Pfander & Wentzel, *supra*, at 1301 & n.183 (quoting Lord Woolf et al., *De Smith's Judicial Review* 789-90 (6th ed. 2007)); *see also R. v. Barker,* 97 Eng. Rep. 823, 824 (1762) (asserting that whenever a subject was

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re Cheney, 406 F.3d at 729 (noting that "it is not technically accurate to speak of . . . a *writ* of mandamus" (emphasis added)); *but see Heckler v. Ringer*, 466 U.S. 602, 616 (1984) (noting in dicta that Section 1361 "codified" the common law writ of mandamus).

"dispossessed" of a public right, and had "no other specific legal remedy," the courts of common law "ought to assist by a mandamus").

Notably, use of mandamus to prevent wrongful removal of public officers was a common practice. In fact, by the seventeenth and eighteenth centuries, this was one of the *primary* uses of the writ of mandamus in England. *See* Davis, *supra*, at 1540 & n.116 (citing, *inter alia*, *R v. Corp. of Wells*, 98 Eng. Rep. 41, 41-42 (1767) and *R v. Mayor of Wilton*, 87 Eng. Rep. 642, 642 (1697)); Blackstone, *supra*, at *264-65 ("mandamus" is a "full and effectual remedy" "for refusal of admission where a person is intitled to an office" and "for wrongful removal, where a person is legally possessed" and "the franchise[] concern[s] the public"); Tapping, *supra*, at 221 ("The writ of mandamus . . . has by a great number of cases held to be grantable . . . to restore him who has been wrongfully displaced, to any office, function, or franchise of a public nature . . . ."); *see also*, *e.g.*, *R. v. Mayor of London*, 100 Eng. Rep. 96, 98 (1787) (recognizing power to issue mandamus reinstating public official); *R. v. Mayor and Aldermen of Doncaster*, 96 Eng. Rep. 795, 795 (1752) (restoring municipal official to his office after improper removal by town council); *R. v. Mayor, Bailiffs, and Common Council of the Town of Liverpool*, 97 Eng. Rep. 533, 537 (1759) (restoring municipal official to his office after improper removal, with Lord Mansfield explaining, "the return must set out all the necessary facts, precisely; to shew that the person is removed in a legal and proper manner, and for a legal cause"). And it was this development of mandamus during the eighteenth century, especially under Lord Chief Justices Holt and Mansfield, that would become "authoritative statements of

. . . mandamus to which American courts would later refer." Pfander & Wentzel, *supra*, at 1305 & n.206 (citing treatises).

Specifically, the English roots of mandamus were adopted into early cases in United States federal courts and through the passage of the All Writs Act and its absorption of Sections 13 and 14 of the Judiciary Act of 1789. *See* Davis, *supra*, at 1543-45 (discussing, *inter alia*, *United States v. Lawrence*, 3 U.S. 42, 42 (1795); *United States v. Deneale*, 25 Fed. Cas. 817, 817 (C.C.D.C. 1801) (No. 14,946); *Marbury*, 5 U.S. at 176). Although unavailable in the exercise of this Court's original jurisdiction, mandamus remedies took hold in the lower federal courts and have been part of the federal judiciary's remedial toolkit since *Kendall v. U.S. ex. rel. Stokes*., 37 U.S. 524 (1838).

A series of decisions from the latter half of the nineteenth century confirms the availability of mandamus in proper cases, including cases involving public law. *See U.S. ex rel. Hall v. Union Pac. R.R. Co.*, 28 F. Cas. 345, 348-52 (C.C.D. Iowa 1875), *aff'd sub nom. Union Pac. R.R. Co. v. Hall*, 91 U.S. 343 (1875) (granting mandamus to restrain a publicly chartered railroad from enforcing policies that were contrary to its organic statute); Pfander & Wentzel, *supra*, at 1309-10 (describing how "[t]he breadth of the remedy affirmed in *Hall* represents a logical outgrowth of public law litigation under the administrative writs as they had developed at common law"); *Gaines*, 74 U.S. at 353 (implying that in proper cases, a court could issue mandamus or an injunction to interfere with official action); *Litchfield v. Reg. & Receiver*, 76 U.S. 575 (1869) (similar); *McComb*, 92 U.S. at 536 (explaining that in proper cases, a court

could "interpose by injunction or mandamus" wherever state executive officers failed to conform their conduct to law (emphasis omitted)).[7] And twentieth-century cases have specifically held that mandamus could properly be used to adjudicate entitlement to public office. *See, e.g.*, *Rudolph v. Sullivan*, 277 F. 863, 863 (D.C. Cir. 1922) (affirming mandamus against the Commissioners of the District of Columbia to reinstate a police officer); *U.S. ex rel. Arant v. Lane*, 47 App. D.C. 336, 340 (D.C. Cir. 1918) (noting that a legal right to reinstatement can be vindicated through mandamus).[8]

History and precedent thus leave no doubt that preventing the wrongful removal of a public officer merits issuance of mandamus. From the eighteenth century to today, a plaintiff seeking mandamus has been required to show a clearly established legal right requiring the performance of a clear non-discretionary duty and the unavailability of other adequate relief. *See Heckler*, 466 U.S. at 616 (articulating this standard under this Court's jurisprudence (citing cases)); Davis,

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[7] Today, lower federal courts frequently issue or approve of mandamus-like relief on matters of public law through Section 1361, otherwise known as the Mandamus and Venue Act, which was passed in 1962. *See, e.g.*, *Am. Hosp. Ass'n v. Burwell*, 812 F.3d 183, 188, 194 (D.C. Cir. 2016) (Tatel, J., joined by Kavanaugh & Srinivasan, JJ.) (reversing the dismissal of a motion seeking mandamus under Section 1361 to compel the Secretary of Health and Human Services to reach decisions within a statutory timeframe); *Naporano Matal & Iron Co. v. Sec'y of Lab. of U.S.*, 529 F.2d 537, 539, 542-43 (3d Cir. 1976) (affirming mandamus requiring the Secretary of Labor to certify the plaintiff for employment).

[8] Because *Kendall* recognized a distinctive legal basis for courts in the District of Columbia to grant mandamus relief, federal courts in other districts were not understood to have the power to enter such relief until Section 1361 was passed in 1962. *See* Clark Byse & Joseph V. Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action*, 81 Harv. L. Rev. 308, 311 (1967).

supra, at 1533-37 (articulating this standard for the eighteenth-century King's Bench). In *Swan*, the D.C. Circuit held "that these prerequisites for stating a cause of action under the mandamus statute are met" where a federal officer seeks reinstatement. 100 F.3d at 976 n.1. Assuming this Court determines that Plaintiff's purported removal from the Board of Governors of the Federal Reserve System was likely unlawful, the same is true here.

In that circumstance, regardless of the reason this Court were to find for Plaintiff—either based on the reviewability of the President's cause determination or the process to which Plaintiff is entitled before removal—it is "clear and indisputable" that Plaintiff will be entitled to assemble a record to support her claim to office. *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 381 (2004) (quoting *Kerr v. U.S. Dist. Ct.*, 426 U.S. 394, 403 (1976)). Moreover, the subordinate executive officials subject to the district court's injunction may properly be ordered to treat Plaintiff as a valid officeholder—that is, to complete "a precise, definite act about which an official ha[s] no discretion whatever." *In re Nat'l Nurses United*, 47 F.4th 746, 757 (D.C. Cir. 2022) (quoting *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 63 (2004)); *see* Davis, *supra*, at 1541 (noting that mandamus could issue regarding an individual's entitlement to public office because "[it] involved little to no discretion"). And because Plaintiff is a *public* officer, backpay is insufficient to remedy the harm that would occur from her unlawful removal.[9]

[9] Notably, at common law, courts pondering issuance of mandamus deferred to adequate alternative remedies, much the way courts do today in evaluating the issuance of injunctive relief. *See* Tapping, *supra*, at 58 (noting that mandamus is used

Indeed, protection of one's position as a public officer was "the primary type of case" for which mandamus was used in the seventeenth and eighteenth centuries, because a "plaintiff [c]ould easily show a lack of an adequate remedy by claiming that the only way to reclaim what he was duly owed—his position—was to compel the defendant to restore the plaintiff to his position." Davis, *supra*, at 1540. *Sawyer* and *White*, moreover, confirm the availability of non-monetary relief in this context. *Sawyer*, 124 U.S. at 211; *White*, 171 U.S. at 377. In short, if the Court finds that an injunction is unavailable, history and precedent confirm that mandamus is an appropriate remedy.

III. In Any Event, Plaintiff is Entitled to *Some* Remedy Preventing Her Removal.

The above discussion reveals that reasonable minds can differ about the proper remedy to prevent Plaintiff's removal. But the historical record cannot be fairly read to support the government's conclusion that *neither* legal nor equitable relief is available. Applicant's Br. at 33-34. That heads-we-win, tails-you-lose proposition ignores the existence of a remedy directly drawn from founding-era practice—mandamus—and the modern equitable remedy for which mandamus is a "historical analogue," *CASA*, 606 U.S. at 847—the injunction. In cases of "removal of public officers," as in others, either "non-equitable remedies" are available "to vindicate the rights at issue," or "equity [is] able to act." Bray, *Remedies in the Officer Removal Cases*, *supra*, at 29.

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when there is no specific or adequate legal remedy). Routine issuance of mandamus for public officers thus confirms more generally the inadequacy of remedial alternatives.

Nor is there any support for the government's bespoke, backstop remedial argument: that Plaintiff is entitled to neither mandamus nor what it terms a "reinstatement injunction" while litigation proceeds. Applicant's Br. at 34-35. To the contrary, both mandamus and preliminary injunctions are frequently and have historically been implemented during litigation. For instance, courts have traditionally issued "alternative" writs of mandamus during the pendency of litigation that functioned like a "show cause" order to show why the officer to which it was directed should not vindicate the petitioner's right. *See, e.g., Farmer's Irrigation Dist. v. Nebraska ex rel. O'Shea,* 244 U.S. 325, 327 (1917); *Riggs v. Johnson Cnty.*, 73 U.S. 166, 185 (1867). If the officer failed to rebut the petitioner's claim of right, then a peremptory writ issued. *See, e.g.*, *Farmer's Irrigation*, 244 U.S. at 327-29. And the most common modern use of mandamus is to secure an interlocutory appeal during litigation. *See, e.g.*, *Cheney*, 542 U.S. at 380-81.

Likewise, preliminary injunctions properly issue during litigation, including to prevent removal. This Court has recognized that district courts may "grant interim injunctive relief to a discharged Government employee." *Sampson*, 415 U.S. at 63. And leading treatises recognize that whatever the proper permanent remedy for unlawful officer removal, the historical record demonstrates without question that "equity [will] protect the de facto officeholder while the legal process play[s] out." Bray, *Remedies in the Officer Removal Cases*, *supra*, at 29; *see* McClintock, *supra* § 167, at 453; 2 James L. High, *Treatise on the Law of Injunctions* § 1315, at 1030-31 (3d ed. 1890).

The government's cases are inapposite. They suggest, at most, that in some circumstances an executive officer may properly suspend an officer or employee even if termination would be improper. *See* Appellant's Br. at 35. But that concerns the *merits* of what the executive may lawfully do, separate and apart from what *remedies* are available once a court has found that a plaintiff was unlawfully terminated (or suspended).

Indeed, the government's position fundamentally misunderstands the remedial function of preliminary injunctions. They are *preliminary*, aimed "merely to preserve the relative positions of the parties until a trial on the merits can be held." *Starbucks Corp. v. McKinney*, 602 U.S. 339, 346 (2024) (quoting *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981)). So where an officer remains in her position and acts quickly to prevent removal, the proper "presumption [is] that the court should issue a preliminary injunction keeping the officer in place," and that injunction "should not be stayed or reversed." Bray, *Remedies in the Officer Removal Cases*, *supra*, at 18. The government's proposed blanket ban on preliminary injunctions would vitiate their status-quo-maintaining purpose.

Whatever "disruptive effect[s]" result from preliminary injunctions, Applicant's Br. at 35 (quoting *Trump v. Wilcox*, 145 S. Ct. 1415, 1415 (2025)), pale in comparison to the disruption that would result from automatically precluding preliminary injunctions in this context. If the government's proposal were accepted, a district court could find that a purportedly removed officer was plainly terminated unlawfully and easily satisfied the injunction factors established by this Court in

Winter v. Natural Resources Defense Council, Inc., 555 U.S. 7, 20 (2008)—but would be powerless to stop the officer's removal. The executive could nominate and install a successor, who could in turn exercise executive power, only to later be replaced when the original officer's litigation terminated. Particularly because "[t]he courts of appeals and this Court can (and regularly do) expeditiously review" and adjudicate "district court decisions awarding or denying preliminary injunctive relief," *CASA*, 606 U.S. at 869-70 (Kavanaugh, J., concurring), there is no need to invite the chaos that the government's rule would create. To the contrary, a careful analysis of the available remedies and equities at play suggests that should this Court find that the purported removal of Plaintiff was likely unlawful, it should reject the government's "request for a stay of the injunction protecting Federal Reserve Governor Lisa Cook, because she is the de facto officer and should be maintained in place." Bray, *supra*, *Remedies in the Officer Removal Cases*, *supra*, at 8.

CONCLUSION

History and tradition confirm that individuals threatened with or subject to unlawful removal from office may secure relief, both by injunction and by relief in the nature of mandamus, to be retained in office. Accordingly, if the Court finds that Plaintiff's rights were likely violated, either injunctive relief or relief in the nature of mandamus are available remedies.

Dated: September 25, 2025

Respectfully submitted,

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