UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, Plaintiff, v. U.S. OFFICE OF SPECIAL COUNSEL; and HENRY KERNER, in his official capacity as Special Counsel, Defendants.	Case No. 1:19-cv-03757-JEB

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

More than 40 years ago, Congress comprehensively reformed the federal civil service system when it passed the Civil Service Reform Act (CSRA). Among the reforms was the creation of the Special Counsel, whom Congress charged with safeguarding the civil service merit system and authorized to prosecute a range of prohibited practices by federal government personnel. Those practices include political activity prohibited by the Hatch Act. In particular, Congress empowered the Special Counsel to pursue corrective and disciplinary actions before the U.S. Merit Systems Protection Board (MSPB) when the Special Counsel deems such action warranted. The Special Counsel's enforcement authority under the CSRA is broad and discretionary, but not without statutory constraints. Relevant here, shortly after passing the CSRA, Congress constrained the Special Counsel's Hatch Act enforcement authority against employees appointed by the President in the White House Office (WHO), among whom are many of his closest advisors. Indeed, Congress acknowledged the President's plenary power to select these employees, making clear that they perform such duties as the President prescribes, without regard to other laws regulating employment, such as the Hatch Act disciplinary enforcement provisions, that apply to other federal employees. More broadly, Congress limited the manner in which the Special Counsel may exercise his statutory enforcement authority for certain types of alleged workplace violations. But at the same time, for alleged Hatch Act violations by federal employees, Congress afforded the Special Counsel substantial discretion in undertaking the "complicated balancing of a number of factors which are peculiarly within [his] expertise" that the Supreme Court has recognized comes hand-in-hand with enforcement decisions. *See Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

The facts of this case illustrate how that statutory design operates in the context of the President's closest advisors in the WHO. In 2018 and 2019, the Special Counsel investigated

multiple allegations of Hatch Act violations by Counselor to the President Kellyanne Conway, one of the President's top aides within the WHO. Having concluded that the alleged violations had occurred, the Special Counsel exercised his enforcement discretion to refer those violations to the President for appropriate disciplinary action on March 6, 2018 and June 13, 2019. In the second referral, the Special Counsel recommended that Conway be removed from her position.

As is surely true for most, if not all, federal agencies charged with enforcing federal laws, members of the public are periodically dissatisfied with how the Office of the Special Counsel (OSC) decides to enforce the Hatch Act. This case flows from precisely that vein of case-specific dissatisfaction. Plaintiff Citizens for Responsibility and Ethics in Washington (CREW) is a non-profit organization that "routinely files complaints with government agencies," including OSC, "identifying potential legal violations by public officials, and requesting that the agency investigate or take other appropriate action against the official" in furtherance of its mission to "promot[e] governmental integrity and accountability." Compl. ¶ 13, ECF No. 1. While dissatisfaction with an agency's enforcement choices may be commonplace, the remedy that CREW asks for here is anything but ordinary: a judicial order compelling the Special Counsel to prosecute a specific case—Conway's—before the MSPB with the ultimate goal of removing her from public service. That CREW asks the Court to compel this action by the Special Counsel against one of the President's closest advisors makes its requested remedy all the more extraordinary.

CREW seeks this exceptional relief through two claims brought under the Administrative Procedure Act (APA). In Count I, CREW asserts that OSC's decision to refer Conway's alleged violations to the President rather than file a Hatch Act complaint with the MSPB constitutes both agency action that has been "unlawfully withheld," under 5 U.S.C. § 706(1), and an agency decision that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" under 5 U.S.C. § 706(2)(A). Compl. ¶¶ 64-65. In Count II, CREW alleges that OSC has a

"policy of categorically not filing MSPB complaints against non-Senate-confirmed presidential appointees, even though such appointees do not fit the exemption for Senate-confirmed appointees set forth in [5 U.S.C.] § 1215(b)" and asserts that such policy is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" under 5 U.S.C. § 706(2)(A). Compl. ¶¶ 70-71. Both claims fail for several independent reasons.

First, CREW lacks standing to bring these claims. CREW's allegations of injury do not establish any harm to its mission and thus cannot suffice to establish organizational standing under D.C. Circuit precedent. Moreover, a litigant, such as CREW here, has no judicially cognizable interest in the prosecution or non-prosecution of a third party. And even if CREW had adequately pled injury-in-fact, Conway's continued service in the White House owes not to OSC's decision to decline prosecution before the MSPB—where the outcome of that hypothetical prosecution is necessarily speculative—but to the President's determination not to impose disciplinary action. CREW's core alleged injury—that Conway continues to serve—is thus not caused by the Special Counsel or redressable by a favorable determination here.

Second, CREW has also failed to state a valid claim for relief. All of CREW's arguments in support of its claims rest on its interpretation of a single statutory provision—5 U.S.C. § 1215(a)—read in isolation from the remainder of the CSRA and other directly applicable statutes. But Congress made clear in another, subsequently-enacted statute that this provision does not apply to WHO employees who, like Conway, are appointed by the President. And even if it did apply to them, CREW's proffered interpretation of section 1215(a) falls apart when read in context and in conjunction with other applicable provisions, including neighboring section 1216, which expressly commits Hatch Act prosecution decisions to the Special Counsel's discretion. Accordingly, CREW cannot overcome the presumption that agency enforcement decisions are not reviewable. Nor can CREW identify a mandatory statutory obligation imposed on the Special

Counsel as required to state a claim under section 706(1). For the same reasons, CREW cannot establish any defect, cognizable under section 706(2)(A), with the Special Counsel's decision. Finally, although CREW alleges that OSC has a "policy of categorically not filing MSPB complaints against non-Senate-confirmed presidential appointees," it points to no official statement of any such policy. Compl. ¶ 70. Without that allegation, CREW cannot avail itself of any exception to the presumption of unreviewability that may apply where a plaintiff seeks judicial review of an agency's announced general enforcement policy.

Even if none of the foregoing provided a clear pathway to rejecting CREW's claims based on its argument that the Special Counsel has a mandatory statutory duty to file a Hatch Act complaint with the MSPB concerning Conway, its proffered interpretation of 5 U.S.C. § 1215(a) should nonetheless be rejected. That is because CREW's interpretation would deprive the President of his Article II power to choose those individuals upon whom he relies for advice and counsel in the closest quarters of the White House. Accepting CREW's interpretation would also subvert core separation-of-powers principles by licensing an Article III court to interfere with the President's authority over his White House advisors. This Court should follow a path that avoids such serious constitutional problems.

For all of these reasons, CREW's Complaint should be dismissed.

BACKGROUND

I. LEGAL BACKGROUND

In 1939, to ensure that "the President will have adequate machinery for the administrative management of the Executive branch of the Government," President Roosevelt signed an Executive Order establishing the White House Office as a division within the Executive Office of the President. Executive Order No. 8,248, *Establishing The Divisions Of The Executive Office Of*

The President And Defining Their Functions And Duties, 4 Fed. Reg. 3,864 (Sept. 8, 1939). The general functions and duties of the WHO are "to serve the President in an intimate capacity in the performance of the many detailed activities incident to his immediate office." *Id.* At its inception, the WHO comprised the Secretaries to the President, the Executive Clerk, and the Administrative Assistants to the President. *Id.* This latter category of employees was to consist of "personal aides to the President" who were "[t]o assist the President in such matters as he may direct." *Id.* Over the years, the WHO has expanded to include a variety of offices, including the Chief of Staff, the Domestic Policy Council, the National Economic Council, the Office of Communications, the Office of Legislative Affairs, and the White House Counsel. *See, e.g.*, Executive Office of the President, *Annual Report to Congress on White House Office Personnel* (June 29, 2018), https://www.whitehouse.gov/wp-content/uploads/2019/06/July-1-2019-Report-FINAL.pdf (last visited Apr. 20, 2020). As the D.C. Circuit has observed, WHO employees comprise the President's "immediate personal staff" whose role is to "advise and assist the President." *Meyer v. Bush*, 981 F.2d 1288, 1293-94 & n.3 (D.C. Cir 1993).

Just as the White House Office expanded over the years, so too did the federal civil service more broadly in the Executive Branch. When it came to regulating personnel matters within the growing federal bureaucracy, the disparate legal rules and regulations in effect across agencies led to "wide variations in the kinds of decisions . . . issued on the same or similar matters." *United States v. Fausto*, 484 U.S. 439, 445 (1988). In an effort to achieve a greater degree of consistency in these matters, Congress in 1978 passed the Civil Service Reform Act, which "comprehensively overhauled the civil service system." *Lindahl v. OPM*, 470 U.S. 768, 773 (1985); *see* An Act to Reform the Civil Service Laws, Pub. L. No. 95-454, 92 Stat. 1111 (1978). Cognizant of the "haphazard arrangements for administrative and judicial review of personnel action" that had proliferated over time, Congress replaced that "patchwork system with an integrated scheme of

administrative and judicial review, designed to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration." *Fausto,* 484 U.S. at 444-45.

The CSRA also established the Office of Special Counsel. *See* 5 U.S.C. § 1211 *et seq.* OSC's primary mission is to safeguard the merit system, including by investigating and prosecuting civil violations of the CSRA, the Whistleblower Protection Act, the Uniformed Services Employment & Reemployment Rights Act, and the Hatch Act. *See, e.g.*, S. Rep. No. 95-969, at 6-7. The Hatch Act, first enacted in 1939 and substantially amended in 1993, "limits the political activities of federal employees in the interests of promoting efficient, merit-based advancement, avoiding the appearance of politically-driven justice, preventing the coercion of government workers to support political positions, and foreclosing use of the civil service to build political machines." *Burrus v. Vegliante,* 336 F.3d 82, 85-86 (2d Cir. 2003); *see* An Act to Prevent Pernicious Political Activities, Pub. L. No. 76-252, 53 Stat. 1147 (1939); Hatch Act Reform Amendments of 1993, Pub. L. No. 103-94, 107 Stat. 1001 (codified in scattered sections of Title 5 of U.S. Code). The Act prohibits "political activity" by federal employees while they are in specifically defined on-the-job circumstances. 5 U.S.C. § 7324. It further prohibits, without regard to time or place, federal employees from using their official authority to influence an election, from affecting the political activity of those subject to government authority, from engaging in political fundraising, and from running for partisan political office. *Id.* § 7323(a)(1)-(4)

Congress authorized OSC to investigate alleged civil violations of the Hatch Act and, if warranted and appropriate, to pursue disciplinary action for those violations. 5 U.S.C. § 1216(a)(1). Any person or entity, whether or not employed by or associated with the federal government, may file with OSC an administrative complaint alleging that a federal employee has

engaged in prohibited political activity. *See id.* § 1216(c). Congress additionally authorized the Special Counsel, upon a determination that disciplinary action is warranted based on an employee's Hatch Act violation, to file with the Merit Systems Protection Board a written complaint against the employee, unless the employee is "in a confidential, policy-making, policy-determining, or policy-advocating position appointed by the President, by and with the advice and consent of the Senate." *Id.* § 1215(a)(1), (b). If an employee falls within this exception, the Special Counsel's complaint "shall be presented to the President for appropriate action in lieu of being presented [to the MSPB]." *Id.* § 1215(b).

In cases where the complaint is presented to the MSPB, after a hearing before an Administrative Law Judge (and, if necessary, further proceedings before the Board), the Board issues a final order. *Id.* § 1215(a)(2)-(3). The Board may dismiss the allegations or, upon finding a violation, may impose disciplinary action ranging from a reprimand to removal from federal service. *Id.* § 1215(a)(3)(A). An employee subject to disciplinary action by the MSPB is entitled to judicial review in the Federal Circuit. *Id.* §§ 1215(a)(4), 7703(b)(1).

Shortly after enacting the CSRA, Congress passed legislation "to clarify the authority for employment of personnel in the White House Office and the Executive Residence at the White House." Pub. L. No. 95-570, 92 Stat. 2445 (1978), codified at 3 U.S.C. § 105. This legislation authorized the President, subject to applicable salary limits, "to appoint and fix the pay of employees in the White House Office without regard to any other provision of law regulating the employment or compensation of persons in the Government services." *Id.*; 3 U.S.C. § 105(a)(1). Congress directed that employees appointed in the WHO "shall perform such official duties as the President may prescribe." *Id.*

As the Senate Governmental Affairs Committee and House Post Office and Civil Service Committee explained, these provisions were intended "to permit the President total discretion in

the employment, removal, and compensation (within the limits established by this bill) of all employees in the White House Office." S. Rep. No. 95-868, at 7; H.R. Rep. No. 95-979, at 6. The Committees further explained, however, that the phrase "'without regard to any other provision of law regulating the employment or compensation of persons in the government service' would not excuse any employee so appointed from full compliance with all laws, executive orders, and regulations governing such employee's conduct while serving under the appointment." S. Rep. No. 95-868, at 7; H.R. Rep. No. 95-979, at 6.

II. OSC ACTIVITY RELATING TO KELLYANNE CONWAY

Kellyanne Conway has served as Counselor to the President in the White House Office since January 20, 2017. In November and December 2017, OSC received complaints alleging that Conway violated the Hatch Act by engaging in political activity while participating in interviews with television news programs. Compl., Ex. 1, ECF No. 1-1, March 6, 2018 Report (First Conway Report) at 2. Specifically, the complaints alleged that during these interviews—which Conway conducted in her official capacity—she improperly advocated for the defeat of Democrat Doug Jones or expressed support for Republican Roy Moore, both of whom were candidates in the December 2017 Alabama special election for U.S. Senate. *Id.* OSC consolidated the complaints and investigated the allegations. *Id.* Following its investigation, OSC concluded that Conway violated the Hatch Act's prohibition against using one's official authority or influence for the purpose of interfering with or affecting the result of an election on two separate occasions. *Id.* at 7-10. OSC prepared a Report of Political Activity detailing its investigative findings regarding Conway's conduct. *Id.* at 2. "Considering the President's constitutional authority," OSC referred the Report to the President for "appropriate disciplinary action." *Id.* at 10.

Later, in October 2018 and May 2019, OSC received further complaints alleging that Conway's conduct during media interviews and on her Twitter account, "@KellyannePolls,"

violated the Hatch Act. Compl., Ex. 5, ECF No. 1-5, May 30, 2019 Report (Second Conway Report) at 2. In response, OSC opened two cases. *Id.* Following its investigation, OSC again concluded that Conway violated the Hatch Act by attacking several Democratic Party candidates for President during official media interviews. *Id.* OSC also determined that Conway engaged in significant political activity by advocating against the Democratic candidates and endorsing the President's reelection on her Twitter account, "@KellyannePolls," which Conway uses to execute her official duties. *Id.* at 3. Further, OSC's investigation identified "[n]umerous aggravating factors" related to Conway's conduct: (1) Conway had "substantial knowledge of the Hatch Act and was previously found to have violated the law by engaging in very similar conduct" and "was the subject of another disciplinary action referral from OSC to the President for engaging in political activity during official media interviews"; (2) OSC had repeatedly requested that Conway comply with the law, and Conway failed to comply with OSC's requests; and (3) after OSC had communicated to the White House that Conway's conduct violated the law, Conway "escalated her partisan critiques of candidates." *Id.* OSC concluded that Conway "continues to violate the Hatch Act and signals that she will not comply with the law." *Id.* OSC prepared for the President a Report of Political Activity detailing its investigative findings regarding the October 2018 and May 2019 complaints about Conway's conduct, *id.* at 2, referred the Report to the President, *id.*, and "respectfully request[ed] Ms. Conway's removal from federal service," *id.* at 17.

III. THIS LITIGATION

On December 17, 2019, CREW filed its Complaint for Injunctive and Declaratory Relief. CREW asserts two claims under the APA. First, CREW claims that OSC's failure to file a Hatch Act complaint against Conway in accordance with 5 U.S.C. § 1215 is "unlawfully withheld" agency action under 5 U.S.C. § 706(1) and is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" under 5 U.S.C. § 706(2)(A). Compl. ¶¶ 57-65. Second,

CREW claims that OSC's alleged "policy of categorically not filing MSPB complaints against non-Senate-confirmed presidential appointees, even though such appointees do not fit the exemption for Senate-confirmed appointees set forth in [5 U.S.C.] § 1215(b)," is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" under 5 U.S.C. § 706(2)(A). *Id.* ¶¶ 66-71. CREW seeks declaratory relief as to both claims, *id.*, Prayer for Relief ¶¶ 1, 3, and requests that the Court "[o]rder OSC to file a complaint against Conway in the MSPB," and "[e]njoin OSC from invoking its unlawful policy of not filing MSPB complaints against non-Senate-confirmed presidential appointees in accordance with 5 U.S.C. § 1215 in response to CREW's future Hatch Act complaints," *id.* ¶¶ 2, 4.

LEGAL STANDARD

Defendants move for dismissal under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction. In reviewing a motion to dismiss under Rule 12(b)(1), a court is guided by the principle that "[f]ederal courts are courts of limited jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Thus, a federal court must presume that it "lack[s] jurisdiction unless the contrary appears affirmatively from the record." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 n.3 (2006) (citation omitted). The burden of demonstrating the contrary rests upon "the party asserting federal jurisdiction." *Id.* When considering jurisdiction based on the face of a plaintiff's complaint, a court must accept "well-pleaded factual allegations as true and draw all reasonable inferences from those allegations in the plaintiff's favor." *Arpaio v. Obama*, 797 F.3d 11, 19 (D.C. Cir. 2015). However, the court need not assume the truth of "legal conclusions," *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), nor "accept inferences that are unsupported by the facts set out in the complaint," *Islamic Am. Relief Agency v. Gonzales*, 477 F.3d 728, 732 (D.C. Cir. 2007). Rather, in order to avoid dismissal, a complaint must contain sufficient factual matter "to state a claim [of standing] that is plausible on its face." *Iqbal*, 556

U.S. at 678. The plausibility standard "asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* Thus, where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of entitlement to relief." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007).

Defendants also move for dismissal under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. A Rule 12(b)(6) challenge "tests the legal sufficiency of a complaint." *Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002). In evaluating such a claim, the plausibility requirement of *Iqbal* and *Twombly* applies to the merits of a plaintiff's claims. "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Iqbal*, 556 U.S. at 679. Thus, to withstand a motion to dismiss under Rule 12(b)(6), a plaintiff must "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678. The plaintiff's allegations must be sufficiently detailed "to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. The court may consider "the facts alleged in the complaint, any documents either attached to or incorporated in the complaint and matters of which [the court] may take judicial notice." *EEOC v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624 (D.C. Cir. 1997).

ARGUMENT

I. CREW LACKS STANDING TO BRING ITS CLAIMS.

CREW's Complaint should be dismissed because CREW cannot satisfy the elements of standing demanded by Article III. Longstanding precedents hold that a litigant, such as CREW here, has no judicially cognizable interest in the prosecution or non-prosecution of a third party, such as Conway. And while CREW alleges that its mission—"ensuring integrity in government"—has been impaired as a result of OSC's decision not to prosecute Conway before

the MSPB, its own allegations make clear that efforts in support of that mission have continued uninterrupted. Moreover, much of CREW's asserted injury is of the type that the D.C. Circuit has categorically held insufficient under Article III. Compl. ¶ 48. Even if CREW had adequately pled injury-in-fact, its injury is not caused by OSC's decision not to prosecute, but rather by the President's determination not to impose disciplinary action. CREW would not, for example, be satisfied merely by OSC's filing of a complaint with the MSPB, where the outcome of that hypothetical MSPB proceeding is by definition speculative and not certain to result in Conway's removal, the only outcome CREW has demanded. *See id.* ¶¶ 53(a)-(b), (d)-(f). Any suit against the President, meanwhile, would be barred by separation-of-powers principles, and CREW's asserted harm is not redressable for that reason.

A. CREW Has Not Alleged A Cognizable Article III Injury.

1. An organization can seek to establish standing on its own behalf—organizational standing—or on behalf of its members—associational standing. *People for the Ethical Treatment of Animals v. U.S. Dep't of Agric.*, 797 F.3d 1087, 1093 (D.C. Cir. 2015) (*PETA II*). CREW here proceeds solely on a theory of organizational standing, which requires allegations that it has "suffered a 'concrete and demonstrable injury to its activities.'" *Id.* (quoting *Equal Rights Ctr. v. Post Props., Inc.*, 633 F.3d 1136, 1138 (D.C. Cir. 2011)). Meeting this standard demands alleging "far more than simply a setback to the organization's abstract social interests." *Id.* (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)). The D.C. Circuit's two-part test for satisfying this organizational-injury requirement asks "first, whether the agency's action or omission to act 'injured the organization's interest' and, second, whether the organization 'used its resources to counteract that harm.'" *Id.* at 1094 (quoting *Equal Rights Ctr.*, 633 F.3d at 1140). This test is conjunctive. Because CREW fails to satisfy the first step, it fails to establish the injury required by Article III.

To satisfy the first part of this test, a plaintiff "must allege that the defendant's conduct perceptibly impaired the organization's ability to provide services." *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 919 (D.C. Cir. 2015). Such impairment occurs when "when the defendant's conduct causes an 'inhibition of the organization's daily operations.'" *Id.* at 919 (quoting *PETA II*, 797 F.3d at 1094). Although CREW parrots this "perceptibly impairs" language, *see* Compl. ¶¶ 9, 50, it falls well short of actually alleging any inhibition of its operations sufficient to confer Article III injury. In fact, CREW's allegations make clear that its operations continue apace without any disruption owing to OSC's decision not to prosecute Conway.

CREW characterizes its mission as "ensuring integrity in government," which it allegedly pursues by "monitor[ing] and scrutiniz[ing] government officials' conduct to identify potential Hatch Act violations," "fil[ing] complaints with OSC," or "publicly disseminat[ing] its Hatch Act complaints and related documentation." *Id.* ¶ 48. CREW further alleges that OSC's non-prosecution of Conway "perceptibly impairs CREW's ability to fulfill its mission by depriving it of an essential avenue of redress for Hatch Act violations." *Id.* ¶ 50. As a result, CREW complains, it has "been forced to resort to alternative avenues," *see id.* ¶ 53, which include: mounting a "public campaign" against Conway and her conduct, *id.* ¶ 53(a), publishing an op-ed, ¶ 53(b), "increas[ing] efforts to monitor Conway's public activity," *id.* ¶ 53(c), issuing a "detailed report" of Conway's alleged Hatch Act violations, *id.* ¶ 53(d), submitting written testimony to Congress about Conway's conduct, *id.* ¶ 53(e), advocating to OSC that it should prosecute Conway, *id.* ¶ 53(f), and conveying information to the public through media appearances, *id.* ¶ 53(g).

It is difficult to discern how undertaking any of these measures impairs CREW's mission or inhibits its operations. If anything, it appears that OSC's decision not to prosecute Conway has *accelerated* CREW's efforts to monitor the conduct of government officials, lobby OSC and

Congress about the Special Counsel's decision, and publicize its views on Conway's and OSC's conduct through the media and other channels. *Id.* ¶ 48. When, by all appearances, CREW's mission is to do the very things it continues to do unabated, it cannot plausibly maintain that OSC has somehow "impaired" that mission. *See, e.g.*, Citizens for Responsibility & Ethics in Washington, Press Release: Kushner Appears to Break Law Running Campaign from White House (April 2, 2020), https://www.citizensforethics.org/press-release/jared-kushner-trump-campaign-white-house/ (last visited Apr. 20, 2020) (publicizing CREW's recent filing of a Hatch Act complaint with OSC).[1] These allegations contrast sharply with those that have been found sufficient to support Article III organizational injury. For example, in *PETA II*, the D.C. Circuit found adequate that as a result of the USDA's refusal to regulate cruelty to birds, the plaintiff organization could not file mistreatment complaints with the USDA, as it wished to do, and was deprived of investigatory information into the conditions of bird abuse. 797 F.3d at 1094-95.

Moreover, many of CREW's alleged injuries are the types of harms that the D.C. Circuit categorically excludes as viable bases for Article III standing. For example, CREW's choice to divert resources to monitoring Conway's conduct and urging OSC to take action before this suit was filed, *see* Compl. ¶¶ 53(c), (f), "is considered a 'self-inflicted' budgetary choice that cannot qualify as an injury in fact for purposes of standing." *Am. Soc'y for Prevention of Cruelty to Animals v. Feld Entm't, Inc.*, 659 F.3d 13, 25 (D.C. Cir. 2011) (quoting *Equal Rights Ctr.*, 633 F.3d at 1139-40); *Abigail All. for Better Access to Developmental Drugs v. Eschenbach*, 469 F.3d 129, 133 (D.C. Cir. 2006) ("[A]n organization is not injured by expending resources to challenge

[1] This Court "may consider materials outside the pleadings in deciding whether to grant a motion to dismiss for lack of jurisdiction." *Jerome Stevens Pharm., Inc. v. Food & Drug Admin.*, 402 F.3d 1249, 1253 (D.C. Cir. 2005). In addition to the April 2020 Hatch Act complaint concerning Jared Kushner, Plaintiff has filed no fewer than five other Hatch Act complaints since OSC made the decision Plaintiff challenges in this case. For many of those actions, Plaintiff accompanied its filing with a press release.

the regulation itself; we do not recognize such self-inflicted harm."). Similarly, CREW's ongoing campaigns to influence Congress, the media, and the public, *see* Compl. ¶¶ 53(a), (b), (d), (e), (g), cannot support standing because they "arise[] from the effect of [OSC's non-prosecution] on [CREW's] lobbying activities." *PETA II*, 797 F.3d at 1093; *see also Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1434 (D.C. Cir. 1995) ("NTU's self-serving observation that it has expended resources to educate its members and others regarding Section 13208 does not present an injury in fact."); *id.* ("The impact of Section 13208 upon NTU's programs, such as its educational and legislative initiatives, also does not constitute an injury in fact.").

Notably, CREW "ha[s] not identified any specific projects that [it] had to put on hold or otherwise curtail in order to respond to" OSC's decision not to file an MSPB complaint, as this Court found essential to demonstrate an injury-in-fact in *International Academy of Oral Medicine & Toxicology v. FDA*, 195 F. Supp. 3d 243, 257 (D.D.C. 2016) (*IAOMT*) (quotation omitted). And even if CREW's alleged activities did take time, *see* Compl. ¶ 54 (citing 175 hours spent on such activities), they are no different from the activities that, by CREW's admission, it pursues in the ordinary course, *see id.* ¶ 48, and CREW nowhere specifies what alleged "resources" have been "drain[ed]" from undertaking these activities, or how those resources would have otherwise been spent, *id.* ¶ 55. Rather, CREW's alleged activities "fall[] neatly within the core set of activities it has long performed." *IAOMT*, 195 F. Supp. 3d at 258. Although CREW asserts that it "would not need to expend (or expend to the same extent) the[se] resources" if OSC had filed a Hatch Act complaint against Conway before the MSPB, Compl. ¶ 56, CREW "has not explained how [OSC's decision] has forced it to divert or modify its activities in any meaningful way from its standard programmatic efforts that existed before" that decision was made. *IAOMT*, 195 F. Supp. 3d at 259.

Finally, CREW's stated mission is "ensuring integrity in government," not ensuring that

OSC invariably files a MSPB complaint whenever it finds a Hatch Act violation. Compl. ¶ 48. Referring certain Hatch Act matters to the President for decision is "not necessarily inconsistent" with CREW's mission, *see Nat'l Treasury Employees Union v. United States*, 101 F.3d 1423, 1430 (D.C. Cir. 1996) (*NTEU*), since the President has plenary authority to take the action that, in CREW's view, would "ensur[e] integrity." And CREW by its own telling remains entirely capable of "bring[ing] [Hatch Act] violations to the attention of [OSC] and continu[ing] to educate the public" about Conway's (or others') conduct—operations it could not continue were its mission actually impaired. *PETA II*, 797 F.3d at 1095.

OSC's decision is, moreover, "neutral with respect to [CREW's] substantive mission" since it is unknown and "entirely speculative" how the MPSB would resolve a hypothetical Hatch Act complaint filed against Conway. *Id.*; *see Am. Soc. for Prevention of Cruelty to Animals*, 659 F.3d at 25, 27. In *PETA II*, for instance, it was "conceded" that if the defendant agency were to take the disputed action—regulating cruelty to birds—it would advance the plaintiff's mission. 797 F.3d at 1095. Here, by contrast, the Court cannot take as a given that, even if OSC were to prosecute Conway, the MSPB would agree with the Special Counsel that a Hatch Act violation has occurred, and that, even if it did, the MSPB would remove (or otherwise discipline) Conway. *See* 5 U.S.C. § 1215(a)(3) (authorizing, but not requiring, MSPB to impose specified penalties). Put differently, merely prosecuting Conway would not advance CREW's asserted mission (particularly if that hypothetical prosecution were to absolve Conway of wrongdoing or not culminate in discipline); rather, only actual removal from employment would vindicate CREW's asserted mission, as its myriad public statements on the matter demonstrate. *See NTEU*, 101 F.3d at 1430 ("But the plaintiff's mission is not to influence the President's views on the rights of government workers. NTEU's mission is to obtain improved worker conditions—a mission not necessarily inconsistent with the Line Item Veto Act. For a myriad of reasons, a given President

may be disinclined to exercise the item veto power as to government employee benefits.").

Because CREW's alleged injury falls well short of impairing its ability to provide service or inhibiting its daily operations, *see Food & Water Watch*, 808 F.3d at 919, it fails to establish the first step of the D.C. Circuit's test for organizational standing and its claims must be dismissed.

2. CREW's claim to Article III injury also fails in a broader sense and differentiates it from the typical plaintiff who asserts organizational standing in a suit against the government. The Supreme Court has "consistently h[e]ld that a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution." *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973); *see Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 37 (1976) (noting as "settled doctrine that the exercise of prosecutorial discretion cannot be challenged by one who is himself neither prosecuted nor threatened with prosecution"). Indeed, "seeing that the laws are enforced" is not "legally cognizable within the framework of Article III." *Sargeant v. Dixon*, 130 F.3d 1067, 1069 (D.C. Cir. 1997); *see also Lujan v. Defs. of Wildlife*, 504 U.S. 555, 574-78 (1992) (generalized grievance about proper application of laws does not support standing).

For these reasons, the D.C. Circuit has found no standing for a plaintiff who, like CREW here, sought to compel a government official to take a procedural action that might culminate in the conviction of a third party. In *Sargeant v. Dixon*, the plaintiff sought a writ of mandamus to compel the Attorney General, under 18 U.S.C. § 3332, to present to a grand jury evidence he possessed of alleged wrongdoing by a third party. 130 F.3d at 1069. The plaintiff lacked standing, the court explained, because he lacked any "legally cognizable interest" in having his evidence heard, and his "ulterior interest in seeing certain persons prosecuted" was not sufficient. *Id.* at 1069-70. The same should hold for CREW here: it lacks a judicially cognizable interest in having OSC file a complaint with the MSPB because its interest is no different from the "general interest

common to all members of the public," *Lujan*, 504 U.S. at 575, and CREW's "ulterior interest" in seeing Conway removed is likewise "not legally cognizable within the framework of Article III." *Sargeant*, 130 F.3d at 1069; *see also Linda R.S.*, 410 U.S. at 619 ("[A] private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another."); *Cmty. for Creative Non-Violence v. Pierce*, 786 F.2d 1199, 1201 (D.C. Cir. 1986) (*CCNV*) (judicial authority is "non-existent" when the plaintiff's interest lies in seeing a third party prosecuted). The Complaint should be dismissed for lack of Article III injury.

B. Any Cognizable Injury to CREW Was Not Caused by the Special Counsel's Decision to Refer Conway's Violations to the President, Nor Is It Redressable.

CREW also lacks standing because, even if it has suffered a cognizable injury, it was not caused by OSC's decision not to prosecute Conway before the MSPB. CREW's "ulterior interest," *Sargeant*, 130 F.3d at 1069-70, is in Conway's removal. But her non-removal was not caused by OSC's referral decision, nor would removal be achieved through a court order here.

That Conway's non-removal is what CREW actually seeks to contest—and that prosecution by OSC before the MSPB would not redress CREW's injury or satisfy it[2]—is evident from CREW's attempts to establish injury-in-fact. CREW alleges that "[t]o counteract OSC's non-compliance with section 1215, CREW has been forced to resort to alternative avenues of redress separate and apart from its normal practice of submitting Hatch Act complaints to OSC, including efforts directed to Congress, the public, and private companies." Compl. ¶ 53. CREW then lists a number of the "efforts" it has undertaken, which include: (1) "launch[ing] a multi-

[2] Even if the Court concluded that OSC's decision not to prosecute Conway before the MSPB might have played a causal role in Conway's non-removal, that would not confer standing on Plaintiff, since redressability would still be absent. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 106 n.7 (1998) (rejecting suggestion that "redressability always exists when the defendant has directly injured the plaintiff," because otherwise "the redressability requirement would be entirely superfluous).

faceted public campaign calling for Conway's *resignation*," *id.* ¶ 53a. (emphasis added); (2) writing an op-ed "calling on Conway to *resign*," *id.* ¶ 53b. (emphasis added); (3) using the media to "convey[] to the public the importance of Conway *facing consequences* for her rampant Hatch Act violations," *id.* ¶ 53g. (emphasis added) (citing Bart Jansen, *'Egregious, notorious and ongoing': Watchdog agency urges firing of Kellyanne Conway over political remarks*, USA TODAY (June 13, 2019), https://www.usatoday.com/story/news/politics/2019/06/13/watchdog-kellyanne-conway-should-removed-political-statements/1444402001/ (last visited April 20, 2020), in which CREW's executive director is reported as "saying Conway should be *removed from office* to demonstrate the offenses won't be taken lightly" (emphasis added)). In CREW's own telling, its efforts seek to bring about the termination—whether by resignation, firing, or removal—of Conway's employment in the White House. Plainly, CREW would not be satisfied with the mere filing of a complaint against Conway before the MSPB. Thus, the only Article III injury these allegations could support is an injury caused by Conway's non-removal.

But the Special Counsel and OSC—the only defendants before this Court—lack the power to remove for Hatch Act violations *any* federal employee, including Conway. Indeed, the statute authorizes the Special Counsel only to make *referrals* to others (whether it be the MSPB, the agency head, or the President) who have such authority. *See* 5 U.S.C. § 1215(a)(1), (b), (c)(1). Given this reality, standing becomes "substantially more difficult to establish," because it depends on the "unfettered choices made by independent actors not before the courts." *Lujan*, 504 U.S. at 562 (quotations omitted); *see also Am. Freedom Law Ctr. v. Obama*, 821 F.3d 44, 48-49 (D.C. Cir. 2016) ("When the existence of one or more of the essential elements of standing depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict, it becomes substantially more difficult to establish standing."); *US Ecology, Inc. v. U.S. Dep't of Interior*, 231

F.3d 20, 24-25 (D.C. Cir. 2000) ("When redress depends on the cooperation of a third party, it becomes the burden of the [plaintiff] to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury."); *Urban Health Care Coal. v. Sebelius*, 853 F. Supp. 2d 101, 107 (D.D.C. 2012) ("[R]edressability cannot depend upon the action or discretion of a non-party not before the court.").

And that "heightened burden," *Tel. & Data Sys., Inc. v. FCC*, 19 F.3d 42, 46 (D.C. Cir. 1994), cannot be met here because not only has CREW not sued either of the two parties who could even arguably effect Conway's removal—the President and the MSPB—but any attempt to sue those parties would fail. (Defendants, to be clear, maintain that only the President, and not the MSPB, has authority to remove Conway. *See infra* Section II.A.3.) The Supreme Court and D.C. Circuit have made clear that courts lack authority to issue injunctive or declaratory relief against the President in his official capacity. *See, e.g.*, *Franklin v. Massachusetts*, 505 U.S. 788, 802 (1992); *Newdow v. Roberts*, 603 F.3d 1002, 1013 (D.C. Cir. 2010) (holding that plaintiff failed to show redressability where the "only apparent avenue of redress for plaintiffs' claimed injuries would be injunctive or declaratory relief against . . . the President himself" and finding such relief "unavailable" because "[w]ith regard to the President, courts do not have jurisdiction to enjoin him, and have never submitted the President to declaratory relief"); *Swan v. Clinton*, 100 F.3d 973, 976 n.1 (D.C. Cir. 1996) (recognizing that the same concerns that preclude injunctive relief against the President also preclude declaratory relief).

The MSPB, meanwhile, could not be enjoined to adopt OSC's interpretation of the Hatch Act or to impose a specific disciplinary action on Conway. Congress provided that the MSPB, not OSC, has authority to determine whether a civil Hatch Act violation has occurred and, if so, whether to impose disciplinary action. *See* 5 U.S.C. §§ 1204(a), 1215(a)(3), 1215(b); 5 C.F.R. § 734.102(b). And neither the MSPB, nor the Federal Circuit on judicial review of an MSPB

order, is bound to accept OSC's interpretations of the Hatch Act or any discipline it might recommend. *See Am. Fed'n of Gov't Emps., AFL-CIO v. O'Connor*, 747 F.2d 748, 753 (D.C. Cir. 1984). Congress instead established a dedicated administrative scheme in order to resolve disputes over Hatch Act violations and disciplinary remedies, and an attempt to disturb that scheme with an action brought directly in district court would fail, particularly if it were brought by an entity that is no more than an observer to the proceedings. *See Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 201 (1994); *Am. Fed'n of Gov't Employees v. Trump*, 929 F.3d 748, 754 (D.C. Cir. 2019).

Accordingly, because CREW has not shown that the action underlying its allegations of injury—Conway's non-removal—was caused by the Special Counsel or OSC, nor that this injury can be redressed by this Court through an order directed at the Special Counsel or OSC, CREW's claims must be dismissed for lack of standing.

II. CREW HAS FAILED TO STATE A VALID CLAIM UNDER THE APA.

In addition to the standing defect, CREW's claims also fail because they misinterpret section 1215 and identify no official policy of OSC's that could possibly sustain Count II.

A. OSC Is Not Required By Statute To File a Disciplinary Action Before the MSPB Against Presidential Appointees in the White House Office (Count I).

CREW's first claim rests on an erroneous interpretation of 5 U.S.C. § 1215(a). According to CREW, section 1215 imposes a "mandatory and non-discretionary" duty on the Special Counsel to file a complaint with the MSPB when "three conditions are met: (1) [he] has determined the employee violated the Hatch Act; (2) [he] has determined that the violation warrants disciplinary action; and (3) the employee is not a Senate-confirmed presidential appointee." Compl. ¶ 24; *see also id.* ¶ 3 ("Under the statute's plain terms, OSC's duty to file an MSPB complaint is mandatory, not discretionary, if the triggering conditions are met."). On this interpretative basis, CREW

asserts that the Special Counsel has "unlawfully withheld" agency action under 5 U.S.C. § 706(1).

The Supreme Court has made clear, however, that the "only agency action that can be compelled under the APA is action legally *required*." *Norton v. S. Utah Wilderness All.* (*SUWA*), 542 U.S. 55, 63 (2004); *see also id.* at 64 (holding that a plaintiff cannot maintain a claim under 5 U.S.C. § 706(1) without a mandatory statutory obligation that an agency take the specific, discrete action the plaintiff contends the agency should have taken). "The limitation to *required* agency action rules out judicial direction of even discrete agency action that is not demanded by law . . . ." *Id.* at 65.

Here, CREW has not identified a mandatory statutory obligation that OSC file a Hatch Act complaint with the MSPB under the facts of this case. Nor could it. *First*, Congress in 3 U.S.C. § 105(a) exempted the President's appointees in the WHO from the Hatch Act disciplinary procedures that generally apply to the civilian workforce. This exemption from CSRA disciplinary procedures for the President's closest advisors in the White House, whose duties he is expressly and exclusively authorized to prescribe, is consistent with the differential treatment courts afford close White House advisors under other provisions of Title 5. *Second*, section 1215(a)(1), when viewed in the context of neighboring statutory provisions and the CSRA as a whole, does not uniformly mandate the Special Counsel to file a Hatch Act complaint whenever he determines that a Hatch Act violation warrants disciplinary action. Similarly, reading the CSRA as a whole makes clear that the Special Counsel's Hatch Act enforcement decisions are "committed to agency discretion by law," 5 U.S.C. § 701(a)(2), and therefore unreviewable under *Heckler v. Chaney*. 470 U.S. at 832. CREW cannot focus exclusively on section 1215 and ignore the remainder of the CSRA in its effort to discern a "mandatory, nondiscretionary duty." *SUWA*, 542 U.S. at 61 (quotation omitted). *Finally*, even if the Court has any doubts about the proper interpretation of these provisions, it has a duty to adopt any "fairly possible" reading of a statutory provision that

will avoid lurking constitutional problems. *Boos v. Barry*, 485 U.S. 312, 330-31 (1988). Such difficulties would arise under CREW's proposed construction of the CSRA, since it would compel the prosecution and potential removal of one of the President's closest advisors, all over the President's objection. For all of these reasons, CREW's assertion that section 1215 imposes a mandatory duty on the Special Counsel should be rejected, and its section 706(1) claim dismissed.

1. Section 105(a) precludes OSC from pursuing disciplinary action against Conway.

OSC is not required to prosecute Conway under 5 U.S.C. § 1215 as CREW claims because 3 U.S.C. § 105(a) vests in the President the exclusive authority to control the terms of Conway's employment. Section 105(a) provides that "the President is authorized to appoint and fix the pay of employees in the White House Office without regard to any other provision of law regulating the employment or compensation of persons in the Government service." Section 1215 and its contemplation of formal disciplinary proceedings affecting the terms of an employee's employment, is a "provision of law regulating the employment or compensation of persons in the Government service," and it is therefore superseded by the later-enacted and more specific section 105(a). A regime in which OSC, without the President's consent, could subject Conway to the burdens of an MSPB hearing would impede her ability to perform duties as prescribed by the President, and if she were to be removed, she of course could not perform any duties at all.

To begin with, the provisions of the CSRA that permit OSC to file Hatch Act complaints with the MSPB and, in turn, authorize the MSPB to impose disciplinary action against federal employees plainly constitute "provision[s] of law regulating the employment . . . of persons in the Government service." *Id.* And, in the circumstances of this case, those CSRA provisions interfere with the President's authority to "appoint and fix the pay" of WHO employees. *Id.* The specific action that OSC requested the President take against Conway (and which CREW likewise desires,

see Compl. ¶ 53(b))—removal from service—is plainly a regulation of employment. And even had OSC instead requested that the President take one of the other disciplinary measures contemplated by the CSRA, those too would constitute a regulation of Conway's employment, her compensation, or both. *See* 5 U.S.C. § 1215(a)(3)(A) (authorizing MSPB to impose removal, reduction in grade, debarment from Federal employment for a period not to exceed five years, suspension, or reprimand).

As the D.C. Circuit has held, the "plain meaning" of a "without regard to" provision like the one in section 105(a) is to exempt the subject of the statute from the legal rules that would otherwise apply to its conduct. *See Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1054 (D.C. Cir. 1987) (interpreting a "without regard" provision applicable to the HHS Secretary "to exempt HHS from . . . the vast corpus of laws establishing rules regarding the procurement of contracts from the government"). Thus, statutory rules that otherwise might apply can effectively be nullified if Congress chooses to exempt specified subjects from the rules it has imposed as a general matter. *See, e.g.*, *Friends of Animals v. Jewell*, 824 F.3d 1033, 1045 (D.C. Cir. 2016); *Nat'l Coal. to Save Our Mall v. Norton*, 269 F.3d 1092, 1097 (D.C. Cir. 2001); *see also All. for the Wild Rockies v. Salazar*, 672 F.3d 1170, 1174 (9th Cir. 2012). Put differently, Congress can "amend[] the applicable substantive law" by enacting a statute that governs specific situations or individuals. *Nat'l Coal. to Save Our Mall*, 269 F.3d at 1097. Section 105(a) is such a statute. It "obviously changes the reach" of the Hatch Act and the CSRA for WHO employees. *Friends of Animals*, 824 F.3d at 1045. "[E]ven though [the CSRA disciplinary action procedures] apply to other" federal employees, they "*no longer apply*" to WHO employees by virtue of Congress's enactment of section 105(a). *Id.*; *see also Crowley Caribbean Transp., Inc. v. United States*, 865 F.2d 1281, 1283 (D.C. Cir. 1989) (analyzing "[n]otwithstanding any other provision of law" language in later-enacted statute and concluding that a "clearer statement [of exemption] is difficult to imagine"

(first alteration in original)).

That WHO employees are not subject to Hatch Act disciplinary action other than by the President is confirmed by legislative history from both houses of Congress. In reporting on the legislation, committees in the House and Senate explained that the "without regard" language in section 105(a) expressed an "intent to permit the President *total discretion* in the *employment, removal, and compensation* (within the limits established by this bill) of all employees in the White House Office." H.R. Rep. No. 95-979, at 6 (1978) (emphasis added); S. Rep. No. 95-868, at 7 (1978) (emphasis added). A legal regime in which the President's "total discretion" to control the terms of Conway's employment, including the most fundamental term—whether she continues to serve—can be overridden by the prosecutorial choices of the Special Counsel and adjudicative decisions of the MSPB is wholly incompatible with the text of and legislative intent underlying section 105(a).

That conclusion aligns with Supreme Court and D.C. Circuit precedent exempting those parts of the White House "whose sole function is to advise and assist the President" from other generally applicable provisions of Title 5 whose plain terms might otherwise reach there. *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 156 (1980) (quoting H.R. Conf. Rep. No. 93-1380, at 15 (1974)) (concluding that the Office of the President is not subject to the FOIA); *see also Sweetland v. Walters*, 60 F.3d 852, 855 (D.C. Cir 1995) (holding that Executive Residence of the President is not an "agency" subject to FOIA requirements, and citing, *inter alia*, section 105(b)(1)'s directive that Executive Residence employees "shall perform such official duties as the President may prescribe").

In *Haddon v. Walters*, for example, the D.C. Circuit concluded that the judicial review afforded to federal employees who claim discrimination under Title VII of the Civil Rights Act of 1964 did not apply to the Executive Residence of the President because the Residence was not an

"executive agency" within the meaning of Title 5. 43 F.3d 1488, 1490 (D.C. Cir. 1995). The court distinguished "the President's advisors and the staff of the Executive Residence" who are appointed by the President under section 105 from "agency employees" whose working conditions are set by the provisions of Title 5. *Id.*; *cf. Ass'n of Am. Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 905 (D.C. Cir. 1993) (declining to apply Federal Advisory Committee Act, part of Title 5, to President's Task Force on National Health Care Reform chaired by First Lady and expressing "doubt that Congress intended to include the White House or the Executive Office of the President" within Title 5's definition of "executive agency"). The D.C. Circuit likewise suggested that the President's White House appointments differ from employment decisions he might make elsewhere in the federal government, and are therefore exempt from statutes that apply to the general civilian workforce. *See Haddon*, 43 F.3d at 1490 (interpreting anti-nepotism statute to "bar[] [a President] from appointing his brother as Attorney General, but perhaps not as a White House special assistant").

Congress's decision, following *Haddon*, to pass legislation expressly subjecting entities within the Executive Office of the President, including the WHO, to certain federal workplace statutes offers further evidence that it did not intend to subject Presidential advisors to disciplinary action by OSC and the MSPB. While Congress extended a variety of workplace protections to White House employees, including Title VII of the Civil Rights Act, the Fair Labor Standards Act, the Americans with Disabilities Act, the Age Discrimination in Employment, and the Family and Medical Leave Act, it did not purport to mandate Hatch Act prosecution of such employees whenever the Special Counsel determines that disciplinary action is warranted. *See* Pub. L. No. 104-331, § 2(a), 110 Stat. 4053, 4055 (1996) (codified at 3 U.S.C. §§ 401, 402, 411). Thus, although Congress may have pulled back the effect of the "without regard" language in section 105(a) with respect to the workplace laws it later expressly enumerated, it did not extend

the CSRA's Hatch Act disciplinary procedures to the WHO.

This is not to suggest, however, that the substantive prohibitions of the federal Hatch Act, *see* 5 U.S.C. §§ 7323, 7324, do not apply to Conway and other WHO employees. As the Office of Legal Counsel within the Department of Justice has previously concluded, those provisions do apply to WHO employees because an "Executive agency" as defined in 5 U.S.C. § 7322(1) includes the WHO. *See Application of 18 U.S.C. § 603 to Contributions to the President's Re-Election Committee*, 27 Op. O.L.C. 118 (2003); *Whether 18 U.S.C. § 603 Bars Civilian Executive Branch Employees and Officers from Making Contributions to a President's Authorized Re-Election Campaign Committee*, 19 Op. O.L.C. 103 (1995). Moreover, those substantive prohibitions are not themselves "provision[s] of law regulating the employment or compensation of persons in the Government service," 3 U.S.C. § 105(a), but are, rather, restrictions on the expressive activity of federal employees. So while WHO employees like Conway are exempt from disciplinary proceedings before the MSPB for alleged Hatch Act violations, proceedings which clearly "regulat[e] the employment or compensation of persons in the Government service," *id.*, they are not exempt from the substantive obligations of the Hatch Act.

Finally, interpreting section 105 to foreclose mandatory prosecution of Presidential advisors as CREW demands also makes practical sense. Vesting in the President, alone, decisions about the employment fate of his closest advisors ensures clear accountability for the conduct of those advisors, whereas empowering the Special Counsel and the MSPB could blur the lines of responsibility in the eyes of the public. And, in any event, section 105 would plainly permit the President to rehire Conway to the WHO if the MSPB were to order her removed or even debarred from federal employment since the President enjoys plenary authority to make such an appointment "without regard to any other provision of law regulating the employment . . . of persons in the Government service." 3 U.S.C. § 105(a). It would therefore make little sense to

subject the President's close advisors to the MSPB disciplinary process, given the President's ability to re-appoint any advisors whose counsel he desires—even those who have previously been removed from service.

2. The Special Counsel's decisions regarding Hatch Act prosecution and enforcement are committed to his discretion, and Congress did not displace that discretion with a mandatory duty to file a complaint with the MSPB.

The APA precludes judicial review of agency action that "is committed to agency discretion by law." 5 U.S.C. § 701(a)(2). Construing this provision in the context of a challenge to an agency's refusal to take an enforcement action, the Supreme Court held that "an agency's decision not to prosecute or enforce . . . is a decision generally committed to an agency's absolute discretion." *Chaney*, 470 U.S. at 831. For this reason, "in cases that involve agency decisions not to take enforcement action, [the analysis] begin[s] with the presumption that the agency's action is unreviewable." *Sierra Club v. Jackson*, 648 F.3d 848, 855 (D.C. Cir. 2011). This Court's opinion in *People for the Ethical Treatment of Animals v. U.S. Department of Agriculture* exemplifies this analysis: considering a section 706(1) "challenge to individual [agency non-enforcement] decisions," the Court dismissed the claim on the basis that "those decisions are unreviewable [under 5 U.S.C. § 701(a)(2)] because they are 'committed to agency discretion by law.'" 7 F. Supp. 3d 1, 13 (D.D.C. 2013) (*PETA I*) (citation omitted).

This "presumption of unreviewability of decisions not to enforce" may be overcome only where the statute "quite clearly withdrew discretion from the agency" such that Congress "indicated an intent to circumscribe agency enforcement discretion." *Chaney*, 470 U.S. at 834. CREW interprets 5 U.S.C. § 1215 to displace the Special Counsel's discretion and to impose upon him a mandatory enforcement duty that, according to CREW, would sustain its section 706(1) claim. As detailed below, however, relevant provisions of the CSRA—specifically, 5 U.S.C. §§ 1212(a)(5) and 1216(c)—confirm that Congress did not "clearly withdr[a]w" or "inten[d] to

circumscribe" the Special Counsel's enforcement discretion. 470 U.S. at 834. CREW's section 706(1) claim thus fails because OSC's non-enforcement decision is within the broad discretion afforded by the CSRA, and therefore is immune from judicial review. *Chaney*, 470 U.S. at 832. For the same reasons, CREW cannot identify the "mandatory statutory obligation" necessary to sustain its section 706(1) claim. *SUWA*, 542 U.S. at 64; *see Sheldon v. Vilsack*, 538 F. App'x 644, 650 (6th Cir. 2013) ("What permits judicial review of agency action under § 701(a)(2) resembles what will enable a court to 'compel agency action' under § 706(1)."); *Young America's Found. v. Gates*, 560 F. Supp. 2d 39, 47 (D.D.C. 2008) (finding it "improper to employ § 706(1) to compel [an agency] to launch enforcement proceedings against [third parties] because prosecutorial choices are not ministerial or non-discretionary acts; to the contrary, they are inherently discretionary").

a. "The Supreme Court's 'whole act rule' reminds reviewing courts that '[s]tatutory construction . . . is a holistic endeavor.'" *McConnell v. Fed. Election Comm'n*, 251 F. Supp. 2d 176, 368 n.146 (D.D.C. 2003) (Henderson, Cir. J., concurring in part) (quoting *United Sav. Ass'n v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988)); *id.* (citing William N. Eskridge, Jr. et al., Legislation and Statutory Interpretation 263 (2000)). When viewed as a whole, the CSRA does not impose on the Special Counsel a mandatory obligation to file a complaint with the MSPB as to the Hatch Act violations here.

Nine statutory sections within the CSRA describe the authority of the Special Counsel. *See generally* 5 U.S.C. §§ 1211-1219. Section 1212 sets out the Special Counsel's responsibilities, one of which is to "investigate and, where appropriate, bring actions concerning allegations of violations of other laws within the jurisdiction of the Office of Special Counsel (as referred to in [5 U.S.C.] section 1216)." 5 U.S.C. § 1212(a)(5). Section 1216, in turn, provides in paragraph (a)(1) that "[i]n addition to the authority otherwise provided in this chapter, the Special Counsel

shall . . . conduct an investigation of any allegation concerning . . . political activity prohibited under subchapter III of chapter 73 [of the U.S. Code] [*i.e.*, what is commonly referred to as the Hatch Act], relating to political activities by Federal employees." *See* 5 U.S.C. § 1216(a)(1). Subsection (c) of section 1216 further provides that "[i]f the Special Counsel receives an allegation concerning any matter under paragraph (1) . . . of subsection (a), the Special Counsel may investigate and seek corrective action under section 1214 and disciplinary action under section 1215 in the same way as if a prohibited personnel practice were involved." *See* 5 U.S.C. § 1216(c).

Section 1216(c), by its plain terms, applies to the Special Counsel's enforcement activities and obligations for Hatch Act violations. While section 1215(a) might, at first blush, appear to speak in mandatory language about the Special Counsel's responsibilities upon determining that disciplinary action is warranted for a variety of violations, *see* 5 U.S.C. § 1215(a) (using "shall"), section 1216(c) logically precedes section 1215 and makes clear that whether to pursue discipline under section 1215's procedures (as opposed to some other process, or not at all) is, in the first instance, a decision within the Special Counsel's discretion. *See* 5 U.S.C. § 1216(c) (providing that the Special Counsel "may" upon receipt of an allegation of a Hatch Act violation by a federal employee, "investigate and seek . . . disciplinary action under section 1215 in the same way as if a prohibited personnel practice were involved"). The only instance of "shall" in section 1216 refers to the Special Counsel's duty to investigate, *see* 5 U.S.C. § 1216(a), whereas when referring to how the Special Counsel should proceed with that investigation and any ensuing disciplinary action, Congress used the word "may," *id.* § 1216(c). Thus, while the Special Counsel has a mandatory duty to *investigate* a federal Hatch Act complaint, Congress left to his discretion *how* to conduct that investigation, *whether* to pursue disciplinary action for a violation, and if disciplinary action is deemed warranted, *what* action to seek and *how* to seek it.

Similarly, the Special Counsel's responsibility, set forth in section 1212, to "bring actions"

against federal employees for Hatch Act violations arises only "where appropriate," 5 U.S.C. § 1212, and nowhere does the CSRA—in section 1215 or anywhere else—define "appropriate." Put differently, Congress provided no "meaningful standard against which to judge the agency's exercise of discretion" in deciding when it is "appropriate" to bring an action to enforce the federal Hatch Act. *Chaney*, 470 U.S. at 830 (citing *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971)).

Further, both sections 1215(a) and 1216(c) address several categories of allegations, only one of which is an allegation of Hatch Act violations by federal employees. But section 1216(c) is, plainly, more specific in its application than section 1215(a). Section 1216(c) applies only to allegations of: (1) Hatch Act violations by federal employees; (2) "arbitrary or capricious withholding of information prohibited under" the Freedom of Information Act; (3) "activities prohibited by any civil service law, rule, or regulation, including any activity relating to political intrusion in personnel decisionmaking," also known as "prohibited activities"; and (4) "involvement . . . in prohibited discrimination found by any court or appropriate administrative authority to have occurred in the course of any personnel action." 5 U.S.C. § 1216(a), (c). Section 1215(a), by contrast, applies to all four of the categories of allegations to which section 1216(c) applies, and also applies to allegations of: (5) commission of a prohibited personnel practice; (6) Hatch Act violations by state and local employees; and (7) noncompliance with an order of the MSPB. "'It is a commonplace of statutory construction that the specific governs the general,' and this is ordinarily true where two statutes irreconcilably conflict." *Howard v. Pritzker*, 775 F.3d 430, 438 (D.C. Cir. 2015) (citations omitted). Here, if CREW is correct that the plain language of section 1215(a) imposes a mandatory duty on the Special Counsel to file a complaint with the MSPB when the Special Counsel has determined that a violation in any of the listed categories warrants disciplinary action, that mandatory duty would irreconcilably conflict with section

1216(c)'s grant of discretionary authority to the Special Counsel as to how to proceed following investigation of an allegation under one of the four specifically delineated categories. In that circumstance, then, section 1216(c)—the specific—governs over section 1215(a)—the general.

The structure of the CSRA also shows Congress's intent that sections 1214 and 1215 generally govern the investigation and prosecution of allegations of prohibited personnel practices, while section 1216 generally govern allegations of Hatch Act violations (and the other categories of allegations specifically enumerated in that section). First, section 1212, which, as its heading states, delineates the "Powers and functions of the Office of Special Counsel," references sections 1214 and 1215 in the context of allegations of prohibited personnel practices. *See* 5 U.S.C. § 1212(a)(1) (describing section 1214(a) as granting authority to "protect employees, former employees, and applicants for employment from *prohibited personnel practices*" (emphasis added)); *id.* § 1212(a)(2) (authorizing OSC to "receive and investigate allegations of *prohibited personnel practices*, and, where appropriate—(A) bring petitions for stays, and petitions for corrective action, under section 1214; and (B) file a complaint or make recommendations for disciplinary action under section 1215" (emphasis added)). Notably, subsection (a)(5) of section 1212, which grants OSC the authority to "investigate and, where appropriate, bring actions concerning allegations of violations of" the Hatch Act, makes no mention of sections 1214 or 1215, and instead refers to section 1216. *Id.* § 1212(a)(5).

Second, the headings of sections 1214 and 1215 further support this allocation. Section 1214 is entitled "Investigation of prohibited personnel practices; corrective action," and section 1215 is entitled "Disciplinary action." By its heading, it is clear that section 1214 is primarily concerned with prohibited personnel practices. The inclusion in section 1214 of provisions relating to "corrective action" should be understood to mean that such "corrective action" also primarily relates to prohibited personnel practices. And the parallel construction of

"corrective action" after the semi-colon in the heading of section 1214 and "[d]isciplinary action" in the heading of section 1215 suggests that such "disciplinary action" primarily relates to the same subject to which "corrective action" relates: prohibited personnel practices. Finally, the heading of section 1216 ("Other matters within the jurisdiction of the Office of Special Counsel") makes clear that its focus is matters *other than* prohibited personnel practices. Subsection 1216(a) lists these "other" matters and directs that the Special Counsel's duty to investigate allegations concerning these matters is "[i]n addition to the authority otherwise provided in this chapter." In other words, the Special Counsel's responsibilities for such "other matters" is supplemental to the authority provided in sections 1214 and 1215 to investigate and pursue remedies for prohibited personnel practices. 5 U.S.C. § 1216(a). "While . . . headings are not commanding, they supply cues" of Congress's intent. *Yates v. United States*, 574 U.S. 528, 540 (2015) (plurality opinion); *Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) ("'[T]he title of a statute and the heading of a section' are 'tools available for the resolution of a doubt' about the meaning of a statute." (quoting *Trainmen v. Baltimore & Ohio R. Co.*, 331 U.S. 519, 528-529 (1947))). Here, those headings, taken together with the language of the statutory provisions, are further evidence that Congress intended section 1216, and not section 1215, to serve as the primary grant of authority to the Special Counsel to investigate and prosecute alleged Hatch Act violations.

b. This interpretation is also preferable to CREW's because it gives effect to both subsection 1215(a) and subsection 1216(c). CREW's interpretation, by contrast, not only fails to acknowledge subsection 1216(c), it also proffers an interpretation of subsection 1215(a) that deprives subsection 1216(c) of any meaning. The Supreme Court has repeatedly counseled against just that sort of statutory interpretation. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or

insignificant.'" (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001))); *United Sav. Ass'n of Tex.*, 484 U.S. at 371 ("A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.").

Here, the only way to give effect to both provisions is to understand section 1216 as granting the Special Counsel the option of choosing to follow the procedures delineated in sections 1214 and 1215 when he investigates allegations of Hatch Act violations by federal employees and seeks a disciplinary remedy—even if those procedures are mandatory for allegations of prohibited personnel practices as well as the other categories of allegations listed in subsection 1215(a) that are not enumerated in subsection 1216(c). The Sixth Circuit's reconciliation of the presumptively mandatory language in section 1214 with the discretionary language in subsection 1216(c)—directly analogous to the issue here—is instructive. *See Carson v. Office of Special Counsel*, 633 F.3d 487, 496 (6th Cir. 2011).

In *Carson*, the plaintiff had filed with OSC several "prohibited activity" complaints, *see* 5 U.S.C. § 1216(a)(4), and argued that OSC was obligated to follow the procedural requirements of section 1214. Despite section 1214's reference to "shall," the court rejected the plaintiff's argument. "[B]ecause [plaintiff's complaint] is a prohibited activity complaint, the procedural requirements of section 1214 do not apply to it." 633 F.3d at 496. Rather, section 1216, "which governs prohibited activity complaints, provides that 'if the Special Counsel receives an allegation concerning activities prohibited by any civil service law, rule, or regulation, the Special Counsel *may* investigate and seek corrective action under section 1214 and disciplinary action under section 1215 in the same way as if a prohibited personnel practice were involved.'" *Id.* at 495-96 (quoting 5 U.S.C. § 1216(c) (emphasis added)). The statute's plain text, the Court concluded, "suggests that the Office of Special Counsel is not required to provide status reports regarding prohibited

activity allegations [which are otherwise required under section 1214(a)(1)(D)], but rather has this discretionary power." *Id.*

Like subsection 1215(a), section 1214 uses "shall" rather than "may," *see* 5 U.S.C. § 1214(a)(1)(D) ("[T]he Special Counsel shall provide a written status report to the person who made the allegation . . . ."). The relationship between sections 1214 and 1216(c)—such as that asserted in *Carson*—is therefore the same as the relationship between sections 1215(a) and 1216(c) described above. Thus, the reasoning of *Carson* is equally applicable here: section 1216(c) grants the Special Counsel discretion to choose to follow the procedures for pursuing disciplinary action set forth in section 1215 as to the categories of allegations delineated in subsection 1216(c), including federal Hatch Act violations, but the Special Counsel has no mandatory duty to do so. *See Carson*, 633 F.3d at 496 (concluding that "the Office of Special Counsel's decision whether to follow section 1214's procedural requirements was discretionary").

This manner of reconciling the presumptively mandatory language in section 1215 with the discretionary language in subsection 1216(c) makes even more sense when section 1216 is considered as a whole. The relevant phrase granting this discretion reads: "If the Special Counsel receives an allegation concerning any matter under paragraph (1), (3), (4), or (5) of subsection (a), *the Special Counsel may investigate and seek corrective action under section 1214 and disciplinary action under section 1215 in the same way as if a prohibited personnel practice were involved*." 5 U.S.C. § 1216(c) (emphasis added). Importantly, subsection 1216(a) uses mandatory language in directing the Special Counsel to *investigate* the five listed categories of allegations. *Id.* § 1216(a) (providing that "the Special Counsel *shall* . . . conduct an investigation of any allegation" in one of the listed categories (emphasis added)). Thus, the term "may" in subsection 1216(c) cannot mean that the Special Counsel simply has discretion to investigate "an allegation concerning any matter under paragraph (1), (3), (4), or (5) of subsection (a)," because

the same section already provides that the Special Counsel has a mandatory duty to investigate. The only way to reconcile the "shall" in subsection 1216(a) and the "may" in subsection 1216(c) is to understand the latter as affording the Special Counsel discretion as to *how* he both conducts the mandatory investigation and seeks remedial action, if he finds the latter warranted.

That reading is further supported by precedents in a variety of contexts concluding that the phrase "may investigate," such as appears in subsection 1216(c), "expressly confirms" an agency's "enforcement discretion." *Baltimore Gas & Elec. Co. v. FERC*, 252 F.3d 456, 461 (D.C. Cir. 2001) (*BG&E*) (finding Natural Gas Act's provision that the Commission "'*may* investigate' any possible violations" "expressly confirms the breadth of the Commission's enforcement discretion"); *see also Wightman-Cervantes v. Mueller*, 750 F. Supp. 2d 76, 81 (D.D.C. 2010) ("Several courts have held that the FBI's decision to investigate" under 28 U.S.C. § 535(a), which provides that the FBI "may investigate" certain crimes involving a Government official or employee, "is a discretionary act, not a mandatory one" (citing cases)).

c. For all of these reasons, when read together with other pertinent CSRA provisions under the whole act rule, 5 U.S.C. § 1215(a) does not, as CREW asserts, impose a "non-discretionary statutory duty to file a complaint in the [MSPB] against . . . Conway," Compl. ¶ 1. Nor has CREW identified any other mandatory statutory obligation of OSC to take the action that CREW complains it declined to take. And even if there were doubt, that would only prove that CREW has not overcome *Chaney*'s presumption of unreviewability of agency enforcement decisions by failing to show that Congress "clearly withdrew" discretion from the Special Counsel. Accordingly, CREW cannot maintain a claim under 5 U.S.C. § 706(1); it must be dismissed. *See SUWA*, 542 U.S. at 64.

Because CREW's section 706(2)(A) claim relies on this same erroneous premise—that OSC has a "mandatory and non-discretionary" "duty" to file a complaint with the MSPB as to

Conway, *see* Compl. ¶¶ 60, 65—OSC's decision cannot be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" and that claim too must be dismissed.

3. CREW's interpretation of section 1215(a), if accepted, would raise serious separation of powers concerns.

Finally, even if this Court were to find some appeal in CREW's interpretation of the CSRA, it should reject that interpretation in light of the substantial constitutional concerns that construction would raise. As the Supreme Court has explained, federal courts not only "have the power to adopt narrowing constructions of federal legislation," they also "have the duty to avoid constitutional difficulties by doing so if such a construction is fairly possible." *Boos*, 485 U.S. at 330-31. This obligation to avoid "constitutional issues is especially great where, as here, they concern the relative powers of coordinate branches of government." *Public Citizen v. Dep't of Justice*, 491 U.S. 440, 466 (1989); *see also Judicial Watch, Inc. v. U.S. Secret Serv.*, 726 F.3d 208, 231 (D.C. Cir. 2013) (construing the statutory term "agency records" not to include records possessed by the Secret Service concerning visitor entry to the White House complex, in order to "avoid substantial separation-of-powers questions"). Here, CREW's interpretation of the CSRA would raise just such "constitutional difficulties" by empowering the Special Counsel and the members of the MSPB—officers within the Executive Branch—to overrule the President's choice of which individuals he should be permitted to rely upon for advice and counsel in the closest quarters of the White House Office.

Interpreting the CSRA to permit the President's subordinates in the Executive Branch to prosecute and remove a Counselor to the President in the White House Office, without his concurrence or even over his objection, would undermine the Constitution's mandate that "the executive Power shall be vested in a President of the United States of America." *See* U.S. Const., Art. II, § 1, cl. 1. To deny the President his choice of who should serve, and continue to serve, in

the White House Office, and instead subject those employees—whom the President has appointed—to the implicit supervision of other Executive Branch officials, would deprive the President of the fulsome exercise of "the executive Power" and would jeopardize his obligation to "take care that the laws be faithfully executed." *Id.*, Art. II, § 3.

The constitutional considerations flowing from CREW's interpretation of the CSRA are especially heightened here, where they jeopardize the continued employment of members of the White House Office. The purpose of the employees who compose the WHO is "to serve the President in an intimate capacity in the performance of the many detailed activities incident to his immediate office." Executive Order No. 8,248, 4 Fed. Reg. at 3,864. As the D.C. Circuit has observed, WHO employees are part of the President's "immediate personal staff" whose "proximity" to the President is greater than any other executive officials. *Meyer*, 981 F.2d at 1293-94 & n.3. Courts have been duly reluctant to infer that Congress, acting in similar contexts, sought to extend the reach of certain federal laws so as to regulate the close internal operations of the Executive, and this Court should not deviate from those precedents here. *See Kissinger*, 445 U.S. at 156 (describing how the FOIA exempts White House personnel "whose sole function is to advise and assist the President" and denying access to records whose disclosure "threatened the internal secrecy of White House policymaking"); *Ass'n of Am. Physicians & Surgeons, Inc.*, 997 F.2d at 909 (noting that "Article II . . . gives [the President] the flexibility to organize his advisers and seek advice from them as he wishes" and concluding that particular Federal Advisory Committee Act requirement in Title 5 would not apply where it would "restrict the President's ability to seek advice from whom and in the fashion he chooses"); *cf. Franklin*, 505 U.S. at 800-01 ("Out of respect for the separation of powers and the unique constitutional position of the President, we find that textual silence is not enough to subject the President to the provisions of the APA.").

Finally, the judicial remedy CREW requests would raise substantial separation-of-powers

concerns of yet a different nature. "The power to decide when to investigate, and when to prosecute, lies at the core of the Executive's duty to see to the faithful execution of the laws; when reviewing the exercise of that power, the judicial authority is, therefore, at its most limited." *CCNV*, 786 F.2d at 1201; *see also In re Sealed Case*, 838 F.2d 476, 488 (D.C. Cir. 1988) ("The Executive has 'exclusive authority and absolute discretion to decide whether to prosecute a case.'" (quoting *United States v. Nixon*, 418 U.S. 683, 693 (1974))), *rev'd on other grounds sub nom. Morrison v. Olson*, 487 U.S. 654 (1988). For the Judicial Branch to order the Special Counsel to prosecute Conway, as CREW requests, *see* Compl., Prayer for Relief ¶ 2, would intrude into "the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to 'take Care that the Laws be faithfully executed.'" *Chaney*, 470 U.S. at 832 (quoting U.S. Const., Art. II, § 3). Faithful to that principle, the D.C. Circuit has found judicial authority "non-existent" in cases, like this one, that involve a decision whether to prosecute a third-party, "because 'a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another.'" *CCNV*, 786 F.2d at 1201 (quoting *Linda R.S.*, 410 U.S. at 619); *see BG&E*, 252 F.3d at 459 ("When the judiciary orders an executive agency to enforce the law it risks arrogating to itself a power that the Constitution commits to the executive branch.").

Given the weighty constitutional issues that would be implicated were the Court to accept CREW's interpretation of the CSRA, and the fact that OSC's interpretation of section 1215 is, at minimum, "fairly possible," the Court is obligated to adopt the latter and dismiss CREW's Complaint. *See Boos*, 485 U.S. at 330-31.

B. CREW Has Not Adequately Alleged That OSC Has a Policy of Categorically Not Filing MSPB Complaints Against Non-Senate-Confirmed Presidential Appointees (Count II).

Perhaps recognizing that "an agency's decision not to bring a *specific* enforcement action is generally presumed to be unreviewable under *Chaney*," *PETA I*, 7 F. Supp. 3d at 11, in Count

II, CREW asserts a challenge to an alleged "policy of categorically not filing MSPB complaints against non-Senate-confirmed presidential appointees," Compl. ¶ 70. In *PETA I*, this Court concluded that the D.C. Circuit had recognized an exception to *Chaney*'s presumption of unreviewability of agency enforcement decisions where the plaintiff sought judicial review of "an agency's '*general enforcement policy*.'" *PETA I*, 7 F. Supp. 3d at 11 (citations omitted). But even if such an exception to *Chaney* were available,[3] a plaintiff would have to "cite to some kind of official, concrete statement of the agency's general enforcement policy" to invoke it, and CREW has not done so. *Id.* at 13; *cf. Del Monte Fresh Produce N.A., Inc. v. United States*, 706 F. Supp. 2d 116, 119 (D.D.C. 2010) (holding that plaintiff may not "bring[] a 'pattern and practice' claim [under the APA] rather than seek[] relief from particular agency actions" because "[t]he Supreme Court has made explicit that a court may only review an agency's failure to act, or unreasonable delay in acting, if the action not taken, or taken too late, is discrete" (citing *SUWA*, 542 U.S. at 64)). CREW identifies no official statement of policy regarding enforcement of alleged Hatch Act violations by non-Senate-confirmed presidential appointees. CREW alleges that "it has become clear that OSC's non-enforcement decision was made pursuant to an internal policy of categorically not filing MSPB complaints against non-Senate-confirmed presidential appointees in accordance with § 1215," Compl. ¶ 8, but does not explain how the facts alleged "ha[ve] become

[3] The government respectfully submits that *Chaney*'s presumption of unreviewability permits of no exception for challenges to general enforcement policies. *See NAACP v. Trump*, 298 F. Supp. 3d 209, 231 (D.D.C. 2018) (rejecting the argument that "*any* general enforcement policy is exempt from *Chaney*'s presumption of unreviewability," finding it "in substantial tension with *Chaney* itself"). Indeed, *Chaney* concerned the programmatic determination whether to enforce the Food, Drug, and Cosmetic Act with respect to drugs used to administer the death penalty, not the particular circumstances of any individual case. *See* 470 U.S. at 824-25; *see also NAACP*, 298 F. Supp. 3d at 231 ("[T]he FDA's refusal to act in that case was more than just a one-off nonenforcement decision."). The Supreme Court is considering the issue this Term. *See* U.S. Br. at 21-22, *DHS v. Regents of the University of California* (Nos. 18-857 et al.), 2019 WL 3942900.

clear." Further, CREW concedes that "OSC . . . has not provided a public explanation for its failure to file an MSPB complaint against Conway." *Id.* ¶ 44; *see also id.* (noting that OSC did not "explain[] the basis for its decision to the public")\.

CREW's allegations are even weaker than the evidence found insufficient in *PETA I*, where the plaintiff organization sought to challenge the USDA's non-enforcement of animal-welfare laws against bird abusers. 7 F. Supp. 3d at 4. There, the plaintiff, in a declaration, "cite[d] to a slew of incidents" in which agency officials made statements indicating that birds were not covered by the existing animal-welfare statute and regulations. *Id.* at 12. Nevertheless, this Court found that the plaintiff could not prevail on its challenge to the alleged policy "because it cannot identify any concrete statement from USDA announcing a general policy not to regulate birds under the [animal-welfare law]." *Id.*

Here, CREW has not only failed to "identify any concrete statement from [OSC] announcing a general [enforcement] policy," *id.*, but it also offers only one example—the decision regarding Conway—of OSC supposedly "invok[ing]" any such policy, Compl. ¶ 70. The law is clear that CREW's allegations do not suffice to support this challenge. *See PETA*, 7 F. Supp. 3d at 12-13 ("[I]n every D.C. Circuit case that PETA has cited where a plaintiff challenged an agency's general enforcement policy, the agency had somehow formally expressed that policy through some kind of official pronouncement." (citing cases)). And although this Court has noted that "in rare instances, 'a document announcing a particular non-enforcement decision' might 'lay out a general policy delineating the boundary between enforcement and non-enforcement and purport to speak to a broad class of parties' such that it could be challenged as a statement of the agency's general enforcement policy," *id.* at 13, CREW does not allege that OSC's March 2018 and June 2019 reports concerning Conway—which CREW references, *see, e.g.*, Compl. ¶ 4—go beyond those particular decisions and establish an official OSC policy. Absent any such allegation

in the Complaint, CREW cannot avail itself of what is, assuming it exists, a "rare" exception to *Chaney*. Accordingly, because CREW "has not identified any concrete statement of [OSC's alleged] policy for the Court to review," *PETA I*, 7 F. Supp. 3d at 13, Count II must be dismissed.

CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss should be granted and CREW's Complaint should be dismissed with prejudice.

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