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

REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

CREW's attempt to compel, by judicial order, the Office of the Special Counsel (OSC) to prosecute Counselor to the President Kellyanne Conway for Hatch Act violations fails both for jurisdictional reasons and on its merits, as OSC showed in its Motion to Dismiss. Nothing in CREW's response suffices to rescue its Complaint from dismissal.

CREW devotes considerable space attempting to shore up its alleged injury, asserting that OSC's decision to refer Conway's violations to the President rather than prosecute her before the Merit System Protection Board (MSPB) deprives CREW of an "avenue of redress." But CREW has no greater interest in the prosecution of Conway than any other member of the public, and CREW admits that others share its desire for Conway's prosecution and removal. Even assuming for standing purposes that a statutory command to prosecute Conway exists in 5 U.S.C. § 1215(a)(1), "injuries that are shared and generalized—such as the right to have the government act in accordance with the law—are not sufficient to support standing." *Seegars v. Gonzales*, 396 F.3d 1248, 1253 (D.C. Cir. 2005). Thus, as much as CREW tries, however vaguely, to particularize its injury by dubbing it a "programmatic" harm, the allegation is not sufficient to confer jurisdiction on this Court. Nor does CREW's reliance on Circuit precedent confirm its standing here. Although this case may bear superficial jurisdictional similarities to *People for the Ethical Treatment of Animals v. U.S. Department of Agriculture* (*PETA II*), 797 F.3d 1087 (D.C. Cir. 2015), or *Action Alliance of Senior Citizens v. Heckler*, 789 F.2d 931 (D.C. Cir. 1986), a close comparison dispels CREW's argument that those cases control the standing outcome.

Even if this Court accepts CREW's theory of standing, however, CREW has not stated a valid claim to compel OSC to prosecute Conway and its 5 U.S.C. § 706(1) claim must be dismissed under Rule 12(b)(6). Established precedent holds that discretionary enforcement decisions such as the one challenged here are not subject to judicial review. *See Heckler v. Chaney*, 470 U.S.

821, 831 (1985). The Court should not depart from that settled proposition, particularly when CREW has failed to establish a duty to prosecute from the statutory text or structure.

OSC has shown that Congress, by enacting 3 U.S.C. § 105, excluded Presidential appointees in the White House Office (WHO) from section 1215(a)(1), recognizing the President's exclusive control of the terms of their employment. To evade the plain language of section 105(a), CREW first seeks to reframe the analysis as a question of "implied repeal." But the implied repeal framework has no application when Congress employs a *non obstante* clause in the later-enacted statute—such as section 105's "without regard to" clause. *See Nat'l Coal. to Save Our Mall v. Norton*, 269 F.3d 1092, 1095 (D.C. Cir. 2001). Analytical errors aside, CREW admits that section 105 was intended to allow the President "total discretion in the employment, removal, and compensation" of WHO employees, H.R. Rep. No 95-979, at 6 (1978), an intent that is incompatible with CREW's call for the mandatory prosecution of Conway over the President's objection.

Even if section 105 does not curtail the scope of section 1215(a)(1) with respect to WHO employees, OSC has demonstrated that the Special Counsel has discretion as to how to pursue disciplinary action for Hatch Act violations. In response, CREW focuses solely on those parts of the Civil Service Reform Act (CSRA) that fit its theory of the case, reading out of this complex statute critical provisions that, when read together with section 1215(a)(1), confer discretion on OSC in how to proceed upon determining that disciplinary action is warranted for a Hatch Act violation. Even if CREW's proffered reading of section 1215(a)(1) had some appeal, principles of constitutional avoidance would counsel strongly against adopting it. A judicial order requiring the Special Counsel to prosecute a third party would, standing alone, raise serious separation-of-powers questions; such questions would become far graver when the court-ordered prosecution is of one of the President's closest advisors, and undertaken over his express objection.

As for CREW's claim of an OSC policy against prosecuting Presidential appointees, a single sentence in an OSC report on Conway's violations provides no "plausible grounds" for the Court to infer an official agency policy of the sort that may be deemed sufficient to fall under a possible exception to the presumption of unreviewability. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007). That claim too should be dismissed.

ARGUMENT

I. CREW LACKS STANDING TO BRING ITS CLAIMS.

CREW asserts that "OSC's refusal to commence statutorily-mandated MSPB proceedings" against Conway deprived CREW of a "critical 'avenue of redress'" and that it expended resources to counter the alleged deprivation. Pl.'s Mem. in Opp'n to Defs.' Mot. to Dismiss (Opp'n) at 13, ECF No. 12. CREW thus clarifies that its asserted injury is OSC's alleged "foreclos[ure]" of an avenue of redress, *id.*; CREW denies any interest (in this case) in Conway's removal, *id.* at 28.

But CREW's clarification cannot rescue its Complaint from dismissal on standing grounds. The alleged deprivation of an avenue of redress—a proceeding in which OSC prosecutes Conway before the MSPB—is, even accepting CREW's reading of the CSRA, no more than a generic claim that OSC has not acted in accordance with the law. A litigant's alleged injury of this type, which is shared with the greater public, is inadequate for Article III injury. Moreover, CREW was *not* deprived of an avenue of redress since OSC investigated its complaint and made a disciplinary recommendation, which the President in turn considered but rejected. CREW merely dislikes the conclusion the President reached. CREW lacks standing and its Complaint should be dismissed.

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

1. CREW's claim of programmatic injury is no more than a shared and generalized grievance that OSC has not followed the law, which is insufficient to constitute Article III injury.

CREW's alleged interest in seeing OSC prosecute Conway before the MSPB—assuming

for standing purposes that doing so is mandatory—resides equally with all members of the public, and CREW's claim to injury is thus not cognizable under Article III. OSC thoroughly investigated CREW's Hatch Act complaints against Conway and issued detailed reports that she violated the Act multiple times. In its second report, OSC recommended that, based on these violations, the President remove Conway from her employment in the WHO. Thus, while CREW is correct that the CSRA obligates OSC to investigate a Hatch Act complaint submitted to it, *see* 5 U.S.C. § 1216(a), CREW cannot—and does not—assert that OSC failed to meet this obligation. Although a failure by OSC to conduct an adequate inquiry in response to a Hatch Act complaint might be sufficiently particularized for a complainant to sustain injury, the specific injury CREW here alleges lies much further afield. *See Barnhart v. Devine*, 771 F.2d 1515, 1525 (D.C. Cir. 1985).

When it comes to disciplinary action *following* a Hatch Act investigation, CREW has no greater stake in the disciplinary proceeding to which Conway ultimately is, or is not, subject than any other member of the public. CREW cannot stake its claim to Article III injury in this fashion: "injuries that are shared and generalized—such as the right to have the government act in accordance with the law—are not sufficient to support standing" *Seegars*, 396 F.3d at 1253. No "discrete programmatic concern" of CREW's—as opposed to the public's broader interest—could conceivably be impaired by a decision not to pursue a section 1215(a)(1) prosecution, particularly when that proceeding's outcome is unknown and CREW in any event now firmly disavows any interest in the outcome for purposes of this case. *See* Opp'n 28. Just because CREW filed the complaint that led to OSC's finding of Hatch Act violations by Conway does not entitle it, more than any other person or entity or the public generally, to invoke federal court jurisdiction to compel OSC to fulfill what CREW views as a mandatory duty to prosecute. *Seegars*, 396 F.3d at 1253.

Even an "interested third-party" or a "self-appointed representative of the public interest,"

Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 n.1 (1992), as CREW views itself, *see* Compl. ¶ 13, ECF No. 1, "must show that the defendant's conduct has affected [it] in a 'personal and individual way." *Lujan*, 504 U.S. at 560 n.1. And while CREW has a right to file a Hatch Act complaint, and OSC a duty to investigate it, "that is the end of the avenue of redress that [CREW], or anyone else, is entitled to; how those complaints are ultimately resolved is up to" OSC. *United States v. Facebook, Inc.*, --- F. Supp. 3d ---, No. 19-2184, 2020 WL 1978802, at *2 (D.D.C. Apr. 23, 2020).

Other than its general "interest in 'seeing' the law obeyed or a social goal furthered," CREW has not shown how an MSPB prosecution would advance its particular interests—particularly given the unprecedented reports and referrals OSC has already made about Conway. *Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1433 (D.C. Cir. 1995) (citation omitted). Broadly, CREW does not assert that, as a result of OSC's decision not to prosecute, Conway is taking, or will take, official action to CREW's concrete detriment. For example, neither OSC's decision nor Conway's continued employment have limited CREW's ability to file Hatch Act complaints, advocate for reform of ethics legislation, or publicize its activities. Instead, CREW simply dislikes the fact that OSC has not initiated a prosecution of Conway. Opp'n 17. But, even by CREW's admission, its desire for OSC to prosecute Conway and for Conway to resign is far from particularized to that organization. *See* Compl. ¶¶ 44, 53(a), (g) & n.2.

Even granting CREW's framing that OSC has not followed the law, CREW may not "'employ a federal court as a forum in which to air . . . generalized grievances about the conduct of government.'" *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 483 (1982) (ellipsis in original) (quoting *Flast v. Cohen*, 392 U.S. 83, 106 (1968)); *see also Bernstein v. Kerry*, 962 F. Supp. 2d 122, 128 (D.D.C. 2013) (finding that allegation of State Department's noncompliance with statutory requirement governing foreign aid did not constitute actual injury), *aff'd*, 584 F. App'x 7 (D.C. Cir. 2014); *Carik v. HHS*, 4 F. Supp.

3d 41, 57-58 (D.D.C. 2013) (allegation of HHS's failure to enforce a prescription drug regulatory regime was a generalized grievance and "no more than 'an asserted right to have the government act in accordance with the law"' and, thus, insufficient to establish the injury element of standing).

These principles carry particular force here, where CREW seeks to compel the Judiciary to mandate the prosecution of a third party. 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 also Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 37 (1976).

CREW's only response is to deny that it seeks action against a third party—in tension if not outright contradiction with its Complaint, *see, e.g.*, Compl. ¶ 1—and to assert instead a generic, unspecified "programmatic" harm. Opp'n 26. To restate CREW's position, however, shows its inconsistency: CREW says that its "injury is based not in a bare interest in having the Hatch Act enforced against third parties, but in the programmatic harm caused by OSC's failure to take legally-required action in response to CREW's complaints." *Id.* But what is the supposed "programmatic" harm, and how does it differ from OSC's failure, in CREW's estimation, to take necessary steps to "enforce[e] [the Hatch Act] against third parties"? *Id.* While clinging to this vague claim of "programmatic" harm, Opp'n 20, 22, 26, CREW never articulates what the harm is, nor explains how it differs from OSC not prosecuting Hatch Act complaints against third parties.

Finally, while CREW also asserts a "further injury" based on an alleged decrease in "the deterrent effect of the Hatch Act and CREW's complaint," Opp'n 16, a complainant (like any other member of the public) is not entitled to any particular level of deterrence. (Although CREW claims that Hatch Act deterrence has "diminished," there is no support in the record or allegation in the Complaint establishing some prior level of deterrence or resultant decrease.) CREW does not dispute that questions about which Hatch Act cases warrant disciplinary action are not for courts

to decide, but are instead committed to OSC's discretion by Congress.

2. PETA II *and* Action Alliance *do not control the standing inquiry here.*

CREW's argument that *PETA II* and *Action Alliance* compel a finding of Article III injury in this case is misplaced. The factual and legal circumstances here vary considerably from those that led the D.C. Circuit to find organizational injury in each of these cases.

a. First, in *Action Alliance*, the lone injury from a foreclosed "avenue of redress" was the plaintiff's inability to prevail on administrative complaints as a result of HHS's "shield clause," which excepted HHS rules from claims that they were inconsistent with the Age Discrimination Act.[1] *See* 789 F.2d 931. The court found that the plaintiffs had alleged a cognizable injury because HHS had "immuniz[ed]" an entire body of its rules from legal challenge on age-discrimination grounds, leaving the plaintiffs with little, if any, basis to vindicate their core interests and to enforce the recently-passed statutory requirements. *Id.* at 937 ("shield clause may make administrative review a meaningless process"). By operation of the shield clause, the *Action Alliance* plaintiffs were rendered certain to lose any administrative challenge to a HHS contractor's decision based on discrepancies between the agency's rule and the Age Discrimination Act. *Id.* at 935 n.3.

But the shield clause bears little resemblance to OSC's one-off decision not to prosecute Conway. Unlike the *Action Alliance* plaintiffs, whose process was rendered "meaningless," *id.* at 937, CREW's complaint against Conway has *already* been thoroughly investigated and, indeed, *vindicated*, through OSC's determinations that Conway violated the Act and that her violations warrant disciplinary action. Further, just as CREW desired, OSC sought disciplinary action

[1] Both *Action Alliance* and *PETA II* also premised standing on informational injury. CREW advances no similar claim to such injury. *See* Opp'n 15 n.1. At least two courts in this district have held that in both cases, the "*combination* of the two injuries" animated the D.C. Circuit's holdings. *Marino v. NOAA*, No. 18-2750, 2020 WL 1479515, at *5 (D.D.C. Mar. 26, 2020); *Facebook*, 2020 WL 1978802 at *4 (contrasting *PETA II* plaintiff's assertion of "two injuries together" with the intervenor's lack of any "informational aspect to its purported injury").

against Conway, but the President declined the recommendation. Contrary to CREW's argument, then, there was no "impediment" to CREW obtaining fulsome review of its Hatch Act allegations. Opp'n 19. Such review has in fact already occurred, just not in the precise manner CREW desires.

Further, OSC's referral of Conway to the President rather than prosecution before the MSPB in no way renders the CSRA "meaningless" in the way HHS's shield clause nullified a statutory non-discrimination mandate. By filing a complaint, CREW obtained a thorough investigation, which led to findings of multiple violations, the harshest disciplinary recommendation possible under the statutory scheme, and consideration of that recommendation by the President. Nor can CREW contest that the President could well have terminated Conway's employment or imposed a lesser sanction, but instead chose not to take any action.

Whether OSC makes a disciplinary recommendation to the MSPB or to the President also does not "raise the cost and difficulty" to CREW of filing Hatch Act complaints. 789 F.2d at 937. CREW's cost to prepare a complaint remains the same, regardless of which entity has ultimate disciplinary authority. And, unlike the *Action Alliance* plaintiffs, who were active participants in the administrative processes rendered null by the shield clause, CREW has no role whatsoever in an MSPB proceeding (or in any process by the President, for that matter), so declining to proceed before the MSPB could not possibly "raise" CREW's cost or difficulty.

b. CREW fares no better relying on *PETA II*. That plaintiff alleged that it had been deprived of "a means by which to seek redress for bird abuse." 797 F.3d at 1095. USDA had not applied the Animal Welfare Act (AWA) to birds, and it thus would not investigate any bird-abuse complaints submitted by the plaintiff or others. *Id.* at 1090-91. The court found Article III injury based on the plaintiff's inability to "bring AWA violations to the attention of the agency charged with preventing avian cruelty and continue to educate the public." *Id.* at 1095. OSC's decision to recommend disciplinary action to the President, rather than seek it before the MSPB, imposes no

such disability on CREW. CREW can freely bring allegations of Hatch Act violations to OSC's attention, and OSC must (and does) investigate those allegations, as the Conway reports show. Unlike in *PETA II*, CREW's complaints have not been categorically rejected from the outset. Nor can CREW claim that OSC's decision has impeded its ability to educate the public: CREW has made the Conway reports the subject of sustained public campaigns. Compl. ¶¶ 43, 46, 53.

CREW's alleged resource expenditures, *see* Opp'n 23-26; Compl. ¶ 53, likewise demonstrate no obstacle to CREW bringing Hatch Act violations to OSC's attention. Moreover, while CREW asserts that it undertook these expenditures in response to OSC's decision not to prosecute Conway, Opp'n 24, they were plainly part of CREW's overall effort to force Conway's removal or resignation (in which it now disavows any interest). The bulk of these efforts were not to counteract OSC's non-prosecution decision, but to "call[] for Conway's resignation," to identify new Hatch Act violations by Conway, to get Conway kicked off of Twitter, and to advocate for Conway's firing in media appearances. Compl. ¶ 53(a)-(d), (g). At most, CREW made several comments on MSPB enforcement at a congressional hearing about the Hatch Act more broadly, *id.* ¶ 53(e), and sent OSC a letter concerning enforcement, *id.* ¶ 53(f). But again, these two minimal activities, *see* Mem. in Supp. of Defs.' Mot. to Dismiss (Mot.) at 13-14, ECF No. 10-1, are no different from the efforts CREW alleges it undertakes in the ordinary course, *see* Compl. ¶ 13, even assuming that whatever resources it devoted to them would qualify under Article III.

PETA II's standing holding would better analogize here had OSC failed to take *any* action in response to CREW's complaints about Conway. CREW might then have been deprived of "a means by which to seek redress" for alleged Hatch Act violations. *PETA II*, 797 F.3d at 1095. However, just as with its errant analysis of *Action Alliance*, CREW conflates, on the one hand, a robust investigation with detailed findings that simply did not conclude to its liking with, on the other, a lack of any process at all. The two things are not "materially identical" as CREW contends.

Opp'n 15. While the latter can provide a basis for Article III injury, the former is far afield from what the courts in either *Action Alliance* or *PETA II* found sufficient.

CREW's asserted injury much more closely resembles that which a court in this district recently rejected. *United States v. Facebook, Inc.*, 2020 WL 1978802, at *2. In *Facebook*, an intervenor sought to contest a proposed government settlement with Facebook. *Id.* at *1. The intervenor asserted injury because the settlement would moot its prior and potential future complaints against Facebook's business practices, and thereby deprive it of an "avenue of redress." *Id.* at *2. The court denied standing, reasoning that notwithstanding the settlement the intervenor maintained every right to file complaints with the Federal Trade Commission, and that its claimed "avenue of redress" did not extend to how complaints were "ultimately resolved." *Id.* at *1-3. The court distinguished *PETA II*, explaining that the intervenor had confused "its dissatisfaction with the FTC's chosen redress, with being denied an avenue of redress in the first place." *Id.* at *4. CREW suffers the same confusion here and, just like the intervenor in *Facebook*, it lacks standing.

B. CREW's Argument That It Has Pleaded Causation and Redressability Underscores That It Has Not Suffered an Article III Injury.

OSC's causation and redressability argument relied on its understanding that the cause of CREW's complained-of injury was the non-removal of Conway. Mot. 18-21. But Conway's non-removal was not caused by OSC's referral decision, and a court could not order removal here. *Id.* While CREW has now clarified that its asserted injury is based on its alleged "deprivation of an avenue of redress," Opp'n 27-28, this, too, cannot support standing because CREW has already been afforded the redress it seeks.

Relying on *PETA v. U.S. Department of Agriculture* (*PETA I*), 7 F. Supp. 3d 1 (D.D.C. 2013), CREW asserts that its deprivation is both caused by OSC and redressable by this Court. Opp'n 27. But in *PETA I*, it was "clear that the injuries complained of—USDA's refusal to take

enforcement action in response to PETA's complaints . . . [were] caused by the agency." 7 F. Supp. 3d at 9. Quoting this same language, CREW asserts that its injury—"'[OSC's] refusal to take enforcement action in response to [CREW's] complaints,'" Opp'n 27 (alteration in original)—equally satisfies the causation requirement. When the *PETA I* plaintiff filed bird-abuse complaints, however, instead of undertaking any enforcement action, USDA "repeatedly responded . . . by claiming either that [the subject of such complaints] are not regulated by USDA or that they do not fall under USDA jurisdiction." 7 F. Supp. 3d at 6; *see also Facebook*, 2020 WL 1978802 at *4 (injury asserted in *PETA I* was "alleged failure to *accept* complaints" (emphasis added)). OSC, by contrast, *did* take enforcement action in response to CREW's complaints. *See supra* at 7-8; Mot. 8-9. *PETA I*, on which CREW exclusively relies, lends no support for CREW's claim to causation, and in fact demonstrates that CREW has not been injured.

Nor does *PETA I* aid CREW's effort to establish redressability. The remedy CREW seeks is "an order . . . compelling [OSC] to apply the CSRA's enforcement scheme to non-Senate-confirmed presidential appointees," Opp'n 27, and CREW argues that this remedy is equivalent to that sought in *PETA I*—"an order compelling USDA to enforce the AWA with respect to birds and to promulgate more protective, bird-specific regulations," 7 F. Supp. 3d at 9. While these remedies at first blush sound similar, the difference is manifest when understood in context. In *PETA I*, the requested order would have required USDA simply to accept and investigate complaints (and to issue regulations). Here OSC *already* accepted and investigated CREW's complaints—and made findings and a disciplinary recommendation. Thus, the only "appl[ication of] the CSRA's enforcement scheme" that CREW could seek is for OSC to pursue a particular enforcement action, that is, prosecute Conway before the MSPB. Opp'n 27. But "the Court cannot order an agency to bring an enforcement action." *Facebook*, 2020 WL 1978802, at *4.

While CREW relies principally on *PETA I*, the other cases it cites lay bare the inconsistency

of CREW's assertions of injury. CREW cites *Larson v. Valente* for the proposition that a plaintiff "need not show that a favorable decision will relieve his *every* injury," 456 U.S. 228, 243 n.15 (1982), and *Duberry v. District of Columbia* for the proposition that redressability may be established where the relief sought will "constitute a 'necessary first step on a path that could ultimately lead to relief fully redressing the [claimant's] injury,'" 924 F.3d 570, 583 (D.C. Cir. 2019). But if, as CREW maintains, its complained-of injury is the deprivation of an avenue of redress, then an order directing OSC to prosecute Conway before the MSPB *would* "fully" redress its "every" injury. Reliance on *Larson* and *Duberry* makes sense only if merely prosecuting Conway (accessing the avenue of redress) would not fully remediate CREW's injury. CREW thus retreats back to the true injury it purports to disavow—Conway's non-removal.

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

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).

The central premise of CREW's case—that the CSRA requires OSC to prosecute Conway—is flawed for several reasons. First, the later-enacted 3 U.S.C. § 105 exempts WHO employees from the reach of Hatch Act disciplinary procedures under section 1215(a)(1). Second, under traditional rules of statutory construction, the CSRA does not impose on OSC the mandatory obligation that CREW alleges, and section 1215(a)(1) instead supplies an option for how OSC can exercise its discretion. Third, even if the Court were inclined to accept CREW's reading of section 1215(a)(1), the separation-of-powers concerns that interpretation would generate counsel against adopting it.

1. Section 105(a) curtails OSC's ability to pursue disciplinary action against Conway through any entity other than the President.

As OSC showed, CREW's claims cannot proceed because Congress in 3 U.S.C. § 105 recognized the President's exclusive authority to control the terms of Conway's employment, and

prosecuting her at the MSPB would contravene that authority. Mot. 23-28. CREW responds that section 105 did not "repeal" section 1215, and that section 105 therefore has no effect on OSC's claimed duty to prosecute. Opp'n 29-30. But the implied repeal framework is not applicable here.

As the D.C. Circuit explained in *National Coalition to Save Our Mall v. Norton*, the purpose of a *non obstante* clause—such as the "without regard to" clause in section 105—is "to prevent courts from struggling to harmonize a statute with prior ones in the name of the presumption against implied repeal." 269 F.3d at 1095. Put differently, when a *non obstante* clause exists, analysis of any putative implied repeal is misplaced. It is thus not surprising that in none of the cases OSC cited, *see* Mot. 24, did a court conclude that the later-enacted provision at issue—each of which included a *non obstante* clause—amounted to an implied repeal.[2] *See Friends of Animals v. Jewell*, 824 F.3d 1033, 1045 (D.C. Cir. 2016); *Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1053-54 (D.C. Cir. 1987). Indeed, in *Alliance for the Wild Rockies v. Salazar*, the Ninth Circuit explicitly considered whether Congress's directive to an agency to issue a rule "without regard to" the Endangered Species Act (ESA) was a repeal of the ESA. 672 F.3d 1170, 1174-75 (9th Cir. 2012). No, it concluded; instead, by using "without regard to" language, "Congress effectively provided that no statute, and this must include the ESA, would apply to the 2009 rule." *Id.* at 1175. Thus, "Congress did not repeal any part of the ESA," but rather "amended the law applicable to the agency action." *Id.* at 1174-75.

CREW's claim of "implied repeal" founders in the face of this case law. By providing 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," 3 U.S.C. § 105(a)(1) (emphasis added), Congress did not

[2] None of the cases CREW relies on, by contrast, appear to involve a *non obstante* clause, nor does CREW contend that any of them do. Opp'n 30.

repeal section 1215(a)(1), but amended its reach, insofar as it could otherwise be read to compel prosecution of WHO employees before the MSPB.

CREW also argues, incorrectly, that section 105(a)(1) can be "readily harmonized" with section 1215(a)(1). Opp'n 30-31. If OSC is compelled to initiate MSPB prosecution of Presidential appointees in the WHO, rather than refer violations to the President for discipline, it would encroach on the President's authority to "appoint and fix the pay of [WHO] employees." 3 U.S.C. § 105(a)(1). CREW's musings that OSC can seek a penalty short of removal, *e.g.*, a monetary penalty or reprimand, Opp'n 31-32, are of no moment: OSC *has* determined that removal is the appropriate disciplinary action and recommended that specific action to the President. Had OSC pursued Conway's removal through section 1215(a)(1) as CREW demands, the President's power to appoint Conway and fix her pay would have been significantly curtailed; a statutory scheme that permits such erosion of presidential authority is contrary to what Congress intended in section 105(a)(1). There can be little doubt—and CREW tellingly does not argue otherwise—that a removal would "directly conflict" with the President's section 105(a)(1) authority to appoint advisors of his choosing. Opp'n 31 (CREW conceding that section 105(a)(1) "overrides other statutes *only insofar as* they directly conflict with the President's authority 'to appoint and fix the pay' of WHO employees"); *see generally Myers v. United States*, 272 U.S. 52 (1926).

Next, CREW contends that section 105(a)(1) should be construed narrowly, so as to limit the President's authority over WHO employees. *Id.* at 32. But the provision's legislative history, on which CREW itself relies, *id.* at 32-33, undermines that contention. As CREW acknowledges, any law that impedes the President's control over the employment, removal, or compensation of a WHO employee is displaced by section 105(a)(1). *Id.* (citing H.R. Rep. No. 95-979, at 6; S. Rep. No. 95-868, at 7 (1978)). CREW's characterization in fact understates the breadth of the authority Congress conferred on the President: section 105(a)(1) was "inten[ded] to permit the President

total discretion in the employment, removal, and compensation (within the limits established by this bill) of all employees in the [WHO]." H.R. Rep. No 95-979, at 6 (emphasis added).

CREW's lengthy footnote invoking various statutes pursuant to which officials paid fines or penalties, *see* Opp'n 33 n.5, has no bearing on OSC's Motion. This case in no way calls upon the Court to decide the full scope of section 105(a)(1) as it relates to statutes not at issue here. Moreover, it does not follow that just because certain cases were brought or settled, section 105(a)(1)—had it been asserted as a defense—would not have precluded those outcomes.

Meanwhile, CREW's attempt to distinguish the cases OSC cited also fails. For instance, while CREW posits that *American Hospital Association* is "very different from this case," Opp'n 34, the decision is very much analogous. The court found that the "without regard to" clause conferring discretion on HHS to make contracts "exempt[ed]" the agency from "the vast corpus of laws establishing rules regarding the procurement of contracts from the government." 834 F.2d at 1054. So too here, where section 105's *non obstante* clause and recognition of exclusive authority in the President exempt WHO employees from external imposition of Hatch Act disciplinary action. And OSC argues not that section 105(a)(1) "occup[ies] the entire field," Opp'n 34, but rather that it supersedes section 1215(a)(1)'s application to WHO employees, which otherwise would clearly interfere with the President's authority to select and control his closest advisors.

Tellingly, CREW has no response to *Crowley Caribbean Transport, Inc. v. United States*, in which the D.C. Circuit, considering a later-enacted statute containing a *non obstante* clause, noted that a "clearer statement [of Congress's intent to exempt an earlier statute] is difficult to imagine." 865 F.2d 1281, 1283 (D.C. Cir. 1989). The court stressed that when Congress enacts a statute, it acts "with full knowledge that [an earlier statute] was on the books." *Id.* Congressional awareness is especially acute when, as here, the *same* Congress enacted both statutes.

Court decisions exempting White House personnel from generally applicable provisions of

Title 5 further indicate the hesitancy that both Congress and the courts have shown toward regulation of Presidential advisors. *See* Mot. 25-26 (citing cases). CREW does not seriously contest this proposition, observing only that the cited cases "turned on the particularities of the statutes at issue." Opp'n 35. But OSC is not claiming some general exemption for WHO employees from federal law. OSC's narrow argument, rather, is that a Title 5 provision—section 1215(a)(1)—cannot be applied to Conway by virtue of section 105(a)(1). That is consistent with precedents finding Title 5 provisions to have less expansive reach when it comes to Presidential personnel, both by courts when they construe those provisions, and by Congress when it enacts dedicated legislation, such as section 105(a)(1), that exempts such personnel.

Finally, CREW contends that section 1215(b)'s treatment of officials nominated by the President and confirmed by the Senate somehow precludes OSC's section 105 argument. Opp'n 35-36. According to CREW, Congress would not have exempted such employees unless it understood that section 1215(a)(1) would otherwise apply to them, and by extension to all other employees. That may be true, but Congress *thereafter* chose to pass section 105(a), which limits section 1215(a)(1)'s application to WHO appointees. CREW also ignores the many *other* Presidential appointees who fall outside the scope of both section 1215(b) and section 105, and who are therefore fully subject to section 1215(a)(1) disciplinary action by OSC. CREW's resort, in a discursive footnote, to the CSRA's legislative history is of little value when the statute in question is not the CSRA, but the later-enacted section 105. *See* Opp'n 36 n.8.

2. The CSRA, as a whole, commits the Special Counsel's decisions regarding Hatch Act prosecution and enforcement to his discretion.

It is well-established that an agency's enforcement decisions are presumptively not reviewable under section 706(1) of the APA. Mot. 28-29. As CREW notes, the presumption of unreviewability may be rebutted when a statute "'provide[s] guidelines for the agency to follow in

exercising its enforcement powers,'" and thereby "requir[es] the agency to 'file suit if certain "clearly defined" factors were present.'" Opp'n 38-39 (quoting *Chaney*, 470 U.S. at 833-34). Nevertheless, the presumption holds in this case because, in responding to allegations of Hatch Act violations by federal employees, the CSRA grants OSC discretion whether to pursue disciplinary action under section 1215's procedures, under some other process, or not at all. *See* 5 U.S.C. § 1216(c) (providing that OSC "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"). In addition, the CSRA offers no criteria by which the Court can evaluate OSC's exercise of this discretion. *See id.*

While CREW faults OSC for suggesting that section 1215(a)(1) must be read in the context of the surrounding provisions, the Supreme Court has made clear that "[s]tatutory construction . . . is a holistic endeavor." *United Sav. Ass'n v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988). And in undertaking that endeavor, one may not, as CREW does, cherry-pick only those provisions, subparts, or even isolated clauses that aid a particular interpretation. The CSRA is codified such that specific subjects—like the Hatch Act and its enforcement—are addressed throughout scattered sections, or even chapters, in the Code. CREW's narrow focus on section 1215 alone cannot yield a proper construction of a statutory scheme with multiple pertinent provisions codified elsewhere. Rather, section 1215 must be considered together with *all* of the CSRA's other relevant provisions, including section 1212 and the complete text of section 1216. Properly understood in this context, OSC maintains discretion whether to apply section 1215(a)(1) to alleged Hatch Act violations. CREW's efforts to overcome the *Chaney* presumption fail.

a. First, CREW's attempt to overcome the *Chaney* presumption rests exclusively on the language of section 1215(a)(1) itself and ignores entirely the critical language of section 1216(c), which explicitly applies to allegations of Hatch Act violations by federal employees.

Broadly, section 1215(a) applies to federal employees who are neither covered by 3 U.S.C § 105(a)(1) nor "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," 5 U.S.C. § 1215(b). And the statute provides that OSC "shall" present a complaint to the MSPB when it has determined (1) that such an employee has committed a prohibited personnel practice (PPP), *see* § 1215(a)(1)(A), or "knowingly and willfully refused or failed to comply with an order of the [MSPB]," *see* § 1215(a)(1)(C), and (2) that disciplinary action should be taken against that employee. Therefore, as to these categories of allegations—PPPs and non-compliance with MSPB orders—the presumption of unreviewability could be rebutted because the CSRA evinces a "clear[] withdr[awal of] discretion from the agency and . . . guidelines for exercise of its enforcement power." *Chaney*, 470 U.S. at 834. But the same conclusion does not follow for other categories of allegations, because while Congress may withdraw enforcement discretion from OSC in some aspects of the CSRA, it may still afford OSC discretion elsewhere to render *those* determinations unreviewable. *See Nat'l Wildlife Fed'n v. EPA*, 980 F.2d 765, 771 (D.C. Cir. 1992); *see also Cook v. FDA*, 733 F.3d 1, 7 (D.C. Cir. 2013) (citing cases holding that "shall" "normally" or "generally" imposes a non-discretionary obligation).

A close review of section 1216(c) shows that Congress did not clearly withdraw discretion from OSC as to the four categories of allegations to which that subsection applies—one of which is Hatch Act violations. The language of section 1215(a)(1) on its face appears to require OSC to "prepare a written complaint . . . and present the complaint. . . [to] the Board" if "the Special Counsel determines that disciplinary action should be taken against any employee for having" engaged in certain violative activities. 5 U.S.C. § 1215(a)(1). But section 1216(c) goes on to identify four categories of alleged conduct which, while they "shall" be investigated, *id.* § 1216(a), "may" be enforced pursuant to section 1215(a)(1), but are not *required* to be so enforced. Section

1215(a)(1) cannot be read in isolation, divorced from this language in section 1216(c).

That Congress intended the categories of allegations listed in section 1216(c) to be treated differently than PPPs and non-compliance with MSPB orders for the purposes of section 1215(a)(1) is further evidenced by the structure of 1215(a)(1) itself. In section 1215(a)(1), Congress divided into three distinct categories the impermissible employee actions for which OSC may determine that disciplinary action is appropriate: (A) commission of a PPP; (B) violation of "any law, rule, or regulation, or engag[ing] in any other conduct within the jurisdiction of the Special Counsel as described in section 1216"; and (C) failure to comply with an MSPB order.

CREW ignores this careful categorization. Instead, CREW highlights only the "any law" phrase in subpart (B) to argue that section 1215(a)(1) applies equally and identically to *all* types of allegations it references. *See, e.g.*, Opp'n 41 (asserting that "section 1215 comprehensively sets forth the 'disciplinary actions' employees face for violating 'any law' within OSC's jurisdiction"). The way CREW uses the phrase, "any law" in section 1215(a)(1)(B) would include PPPs. *See id.* But this reading not only lacks any basis in section 1215(a)(1), it in fact conflicts with it. The "any law" phrase appears only in subpart B of subsection 1215(a)(1), and is modified by the phrase "within the jurisdiction of the Special Counsel as described in section 1216" at the end of that subpart. Moreover, were "any law" not modified by "within the jurisdiction of the Special Counsel as described in section 1216," section 1215(a)(1)(B) would (under CREW's reading of the remainder of section 1215(a)(1)) impose on OSC a mandatory duty to file an MSPB complaint if "the Special Counsel determine[d] that disciplinary action should be taken against any employee" for having violated *any law*, without limitation. "[A]ny law" in section 1215(a)(1)(B) is not a signal of the provision's uniform reach, but a reference to the fact that section 1216 authorizes OSC to investigate several disparate categories of allegations.

b. Second, CREW reads the phrase "and disciplinary action under section 1215" out

of section 1216(c). Such a reading violates the rule against surplusage.

According to CREW, the sole purpose of section 1216(c) is to "make[] clear that the PPP procedures detailed in section 1214, while mandatory for PPP complaints, are optional for section 1216 complaints." Opp'n 42. But this argument relies on reading section 1216(c) as follows: "[i]f 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 . . . in the same way as if a prohibited personnel practice were involved." While CREW charges that OSC's reading of 1216(c) "fails to give meaning to the clause 'in the same way as if a prohibited personnel practice were involved,'" *id.*, in fact, CREW's reading of section 1216(c) entirely omits the phrase "and disciplinary action under section 1215."

The only way to give effect to the entirety of 1216(c) is to understand the phrase "in the same way as if a prohibited personnel practice were involved" as modifying *all* of the language preceding it in the clause—"the Special Counsel may investigate and seek corrective action under section 1214 and disciplinary action under section 1215." (Although CREW nominally concedes that "the clause 'in the same way as if a prohibited personnel practice were involved,' . . . logically modifies the entire provision," Opp'n 42—its argument reflects a failure to understand its implications.) Breaking this language down, section 1216(c) provides that, as to the listed categories of allegations, OSC *may* (1) investigate them under section 1214, (2) seek corrective action under section 1214, and (3) seek disciplinary action under section 1215; OSC *may* undertake each of those three actions "in the same way as if a [PPP] were involved"; or OSC *may* choose to pursue investigation and, if necessary, enforcement in a manner different from these three courses of action. This reading is not "incompatible" with section 1216(a)'s imposition on OSC of a duty to "investigate" Hatch Act complaints as CREW contends, *id.*, but merely states that when OSC undertakes a required investigation, it has the discretion whether to conduct that investigation

according to the procedures provided in section 1214, or by some other process.

Carson v. Office of Special Counsel clarifies this interpretation of section 1216(c). 633 F.3d 487, 495-96 (6th Cir. 2011). The Sixth Circuit held that section 1216(c) gave OSC discretion as to whether to follow the procedures of section 1214 when handling a "prohibited activity" complaint under section 1216(a)(4). *Id.* CREW contends that this holding hinged on the fact that nothing in the language of section 1214 makes that section applicable to "prohibited activity" complaints. Opp'n 43. But nowhere in *Carson* did the court suggest, as CREW argues, that the absence of such a reference in section 1214 was integral to its holding that "under section 1216, the Office of Special Counsel's decision whether to follow section 1214's procedural requirements was discretionary." 633 F.3d at 496. CREW makes no effort to ground this supposedly dispositive distinction in *Carson* itself, and there is no basis for reading the holding there so narrowly. To the contrary, *Carson*'s holding that section 1216(c) affords OSC discretion whether to follow the procedures of section 1214 for the delineated categories of allegations, and its emphasis on section 1216(c)'s use of the word "*may*," *id.*, are equally instructive here.

Section 1216(c)'s use of the word "may" is all the more significant given that earlier in that section, Congress used the word "shall." *Compare* 5 U.S.C. § 1216(c) *with id.* § 1216(a). Despite this clear congressional intent, CREW argues that the "may" in section 1216(c) should not be understood to "categorically commit [OSC's] actions to agency discretion." Opp'n 45 (citing *Amador Cty., Cal. v. Salazar*, 640 F.3d 373, 381 (D.C. Cir. 2011), and *Dickson v. Sec'y of Def.*, 68 F.3d 1396, 1402 n.7 (D.C. Cir. 1995)). But the cases CREW cites highlight why section 1216(c) *does* commit to OSC's discretion decisions about how to conduct Hatch Act investigations and pursue any discipline. In both *Amador County* and *Dickson*, the statutory "may" is qualified, creating a limited exception to an otherwise generally-applicable duty. *See Amador Cty.*, 640 F.3d at 380-81 (the Secretary "*may* disapprove a compact . . . *only if* such compact violates" certain

laws or obligations of the United States (second emphasis added)); *Dickson*, 68 F.3d at 1399 (the Board "*may* excuse a failure to file . . . *if* it finds it to be in the interest of justice" (emphases added)). Section 1216(c)'s "may" creates no exception to a general duty, and it should be accorded the discretion-conferring meaning the term typically connotes.

c. Third, CREW all but ignores section 1212, relegating its cursory dismissal of this important provision to a footnote. Opp'n 45 n.12. Section 1212 sets out OSC's responsibilities and provides important insight into the relationship between the CSRA provisions that follow it.

Section 1212 delineates the "Powers and functions of the Office of Special Counsel," and tracks succeeding sections of the CSRA by dividing the Special Counsel's "powers" into five categories which largely map onto sections 1213 through 1216. *See* 5 U.S.C. § 1212(a). Significantly, section 1212 references both sections 1214 and 1215 only in the context of PPPs. *See id.* § 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)). By contrast, where section 1212 discusses OSC's authority to "investigate and, where appropriate, bring actions concerning allegations of violations of" the Hatch Act, it refers only to section 1216, and makes no mention of section 1214 or 1215. *Id.* § 1212(a)(5). Insofar as section 1215 applies to Hatch Act violations, then, it only does so by section 1216(c)'s reference back to section 1215.

CREW's reading of sections 1214 through 1216 is not consistent with how section 1212 outlines the CSRA's structure. According to CREW, section 1214 concerns only PPPs, section 1216 describes matters other than PPPs within OSC's jurisdiction, and section 1215 concerns

violations of "'any law' within OSC's jurisdiction," treating all violations equally in prescribing how disciplinary action may be sought. Opp'n 41. While section 1215(a)(1) does refer to violations other than PPPs, section 1212(a)'s description of sections 1214 and 1215 makes clear that section 1215 primarily concerns the same subject as section 1214 concerns: PPPs. *Accord* Mot. 32-33. That section 1215(a)(1) references the laws "within the jurisdiction of the Special Counsel as described in section 1216" in addition to its reference to PPPs and non-compliance with MSPB orders, does not mean that Congress intended section 1215 to override any conflicting provision of section 1216. Rather, the better reading, based on section 1212(a) and the structure of the CSRA generally, is 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, with section 1215(a)(1) subordinate to section 1216.

d. Fourth, CREW's efforts to reconcile any conflict between sections 1215(a)(1) and 1216(c) fail. CREW agrees that such a conflict "can be resolved using the canon of construction 'that the specific governs the general.'" Opp'n 43-44. But CREW's assertion that the canon compels its reading of these provisions because "[w]hat matters is the breadth of the agency functions contemplated by the respective provisions," *id.* at 44, lacks any support.

OSC has explained why sections 1215(a)(1) and 1216(c) can be readily harmonized. However, if CREW is correct that the plain language of section 1215(a)(1) imposes a mandatory duty on OSC to file a complaint with the MSPB when OSC determines that a Hatch Act violation warrants disciplinary action, that mandatory duty would irreconcilably conflict with section 1216(c)'s grant of discretionary authority to OSC as to how to investigate a Hatch Act complaint and, if warranted, proceed following that investigation. Section 1216(c) is, plainly, more specific in its application than section 1215(a)(1), in that it applies to fewer categories of allegations than does section 1215(a)(1). Mot. 31-32. Because "'the specific governs the general,' . . . where two

statutes irreconcilably conflict," *Howard v. Pritzker*, 775 F.3d 430, 438 (D.C. Cir. 2015) (citation omitted), if such conflict exists here, then section 1216(c) governs over section 1215(a).

CREW asserts that section 1215(a)(1) is more "specific" because it is "limited to a discrete point in the 'disciplinary' phase of OSC's enforcement process." Opp'n 45. But CREW points to no case supporting its "breadth of agency functions" gloss on the specific-general canon. *Id.* at 44-45. Nor does CREW identify any case holding that, where one statutory provision concerns a broad spectrum of agency authority, and another, contradictory provision concerns a narrower subset of that authority, the provision concerning the broader spectrum governs. *Id.* The one case CREW cites supports OSC's argument, rather than CREW's. In *Mittelman v. Postal Regulatory Commission*, 757 F.3d 300 (D.C. Cir. 2014), the court considered two statutes governing Postal Regulatory Commission decisions. One provision precluded APA review of Commission decisions regarding post office closures and consolidations, while another provided that final orders or decisions of the Commission may be challenged in the D.C. Circuit under the APA. *Id.* at 305-06. Despite the rule subjecting Commission decisions to APA review, the court held that review was displaced for decisions regarding closures and consolidations. Analogously here, while section 1215(a)(1) might appear to require OSC to file MSPB complaints where it determines that disciplinary action is warranted for a violation of one of several laws, the more specific section 1216(c) displaces any mandate for the specific subset of laws delineated therein.

For all of these reasons, when read together with other pertinent CSRA provisions under the whole-act rule, section 1215(a)(1) does not impose a "non-discretionary statutory duty to file a complaint in the [MSPB] against . . . Conway." Compl. ¶ 1. And even if there were doubt, that would only prove that CREW has not overcome the *Chaney* presumption by failing to show that Congress "clearly withdrew" discretion from the Special Counsel.

e. Finally, OSC showed that CREW's section 706(2)(A) claim (in Count I) must be

dismissed because CREW's argument that OSC's decision is unlawful relies exclusively on CREW's erroneous inference that the CSRA imposes on OSC a "mandatory and non-discretionary" "duty" to file a complaint with the MSPB as to Conway. Mot. 36-37; *see also* Compl. ¶¶ 60, 65. CREW makes no response other than its flawed interpretation of 5 U.S.C. § 1215(a)(1). Accordingly, if the Court disagrees with CREW's interpretation of section 1215(a)(1), CREW's section 706(2)(A) claim should likewise be dismissed with prejudice.

3. CREW cannot dispel the constitutional concerns that its proffered interpretation of section 1215(a) would inevitably raise.

If the Court is inclined toward CREW's reading of section 1215(a)(1), it should nonetheless reject that interpretation in light of the Court's "duty to avoid constitutional difficulties" by "adopt[ing] narrowing constructions of federal legislation." *Boos v. Barry*, 485 U.S. 312, 330-31 (1988). CREW unduly minimizes the significant separation-of-powers problems that its reading of the statute would generate.

CREW mistakenly contends that its requested relief—an order requiring OSC to prosecute Conway before the MSPB—would have "no impact" on Conway's employment or the President's Article II authority. Opp'n 46. This is wrong. OSC determined that Conway's violations warrant removal from her position; if this Court compelled OSC to prosecute her before the MSPB, OSC's compliance with that order could certainly affect her employment. While CREW attempts to downplay its requested relief as "mere commencement" of a prosecution, a prosecution inevitably leads to some outcome, and removal is what OSC has already determined is the appropriate remedy. *Id.* Nor would it be possible for this Court to order no more than the "mere commencement" of an MSPB prosecution, while eliding the burdens—let alone any outcome—that a prosecution inevitably imposes. Meanwhile, CREW's suggestion that this Court simply ignore the constitutional questions and defer them to the MSPB—a non-Article III forum no less—

would distort the Court's obligation to construe a statute in a manner that avoids those questions in the first place. And, moreover, as OSC has explained, the constitutional harm would accrue upon the initiation of OSC's prosecution; merely being "able to assert [separation-of-powers concerns] before the MSPB" *id.*, does not dispel the constitutional problems that warrant applying the avoidance canon in the first place.

In any event, CREW's suggestion that OSC seek a remedy other than removal tacitly acknowledges that OSC's recommendation to remove Conway, if fulfilled through a prosecution, would impinge the President's Article II authority. *Id.* ("OSC is free to seek discipline . . . such as monetary penalties or a reprimand . . . ."). But even if OSC were to seek a lesser remedy against such a close Presidential advisor, that proceeding would nonetheless interfere with the President's exercise of the "executive power" conferred by Article II. U.S. Const., art. II, § 1, cl. 1. CREW's proposal that the Court compel OSC to prosecute WHO employees like Conway, but simultaneously prohibit it from seeking remedies that affect "continued employment or compensation," Opp'n 47, fails to overcome the constitutional problem for at least four reasons.

First, the Court would need to set aside the evident pitfalls of the Judiciary not only compelling an Executive officer to prosecute a specific individual, but also prescribing a particular disciplinary remedy that officer must seek. *See* Mot. 38-39 (citing *Cmty. for Creative Non-Violence v. Pierce* (*CCNV*), 786 F.2d 1199, 1201 (D.C. Cir. 1986) ("judicial authority" is "at its most limited" when courts review the Executive's investigative and prosecutorial decisions)).

Second, no matter what outcome OSC seeks, a WHO employee prosecuted before the MSPB must mount a defense and attend proceedings, rather than focus on the tasks the President hired her to perform. *See* 3 U.S.C. § 105(a)(1) (WHO employees "shall perform such official duties as the President may prescribe"). And even if OSC were to seek a "lesser" remedy, the MSPB is not bound by that choice and has authority to impose *any* of the enumerated disciplinary

actions, including removal. *See* 5 U.S.C. §§ 1204(a), 1215(a)(3), 1215(b); 5 C.F.R. § 734.102(b). Further, a WHO employee's expending time and resources tending to a prosecution—all against the President's express wishes—also threatens the President's ability to "take [c]are that the [l]aws be faithfully executed," U.S. Const., art. II., § 3, by diverting the advisor's attentions from Presidential priorities, and by diluting the President's direct authority over that advisor.

Third, CREW has no persuasive response to the second separation-of-powers concern OSC raised concerning judicial intervention in prosecution decisions. Mot. 38-39. CREW sees no concern with this Court entering an order contrary to the Executive Branch's recognized "power to decide when to investigate, and when to prosecute," which "lies at the core of the Executive's duty to see to the faithful execution of the laws." *CCNV*, 786 F.2d at 1201. And while CREW suggests that *Chaney* licenses courts to order the prosecution of a third-party, Opp'n 47, that decision did no such thing. *Chaney* did not involve an individual prosecution, but rather a more typical administrative law question whether the FDA must regulate certain drugs. 470 U.S. at 823.

Fourth and finally, CREW again attempts to equate a Hatch Act investigation with a Hatch Act prosecution, Opp'n 47, but the two are plainly different in both kind and degree. The lesser burdens of an investigation have no comparable effect (if they have any effect at all) on a WHO's employee's continued service of the President's prerogatives, nor does an investigation compromise the President's ability to select and rely on the advisors of his exclusive choosing.

At bottom, even were the Court inclined to accept CREW's reading of section 1215(a)(1), it should avoid doing so in light of the serious constitutional concerns that would follow.

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

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*,'" and "cite[d] to some kind of official, concrete statement of the agency's general enforcement policy." 7 F. Supp. 3d at 11, 13 (citation omitted). And although this Court 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, nowhere in the Complaint does CREW allege that either Conway report goes beyond its particular decision to establish an official OSC policy. It is hardly surprising then that CREW all but concedes that Count II was "deficiently pleaded." Opp'n 50 n.14.

CREW nonetheless attempts to save its claim by contending that a single sentence from the first Conway report constitutes "an 'official, concrete statement of the agency's general enforcement policy.'" Opp'n 48 (quoting *PETA I*, 7 F. Supp. 3d at 13). According to CREW, OSC set forth an "official, concrete statement" of policy when it stated: "The U.S. Constitution confers on the President authority to appoint senior officers of the United States, such as Ms. Conway. *Considering the President's constitutional authority, the proper course of action, in the case of violations of the Hatch Act by such officers, is to refer the violations to the President.*" Opp'n 48 (quoting Compl. Ex. 1 at 10) (emphasis added by CREW).

Any "general policy" exception to *Chaney*'s presumption—assuming one exists at all, *see* Mot. 40 n.3—would not be triggered by the single sentence CREW identifies. That sentence in no way constitutes an "official, concrete statement of the agency's general enforcement policy" as CREW asserts. First, even if that sentence announces any purported policy at all, it neither reflects the policy CREW asserts nor "provide[s] a focus for judicial review." *Chaney*, 470 U.S. at 832. While the sentence refers to "senior officers of the United States," that term, which is left undefined, carries no apparent independent legal or constitutional significance. Further, while the

sentence describes Conway as such a "senior officer," it provides no basis on which to ascertain who else might fall into that category, let alone whether that category is equivalent to "non-Senate-confirmed presidential appointees," as CREW claims. Opp'n 48. Rather than announcing any concrete agency-wide policy, the sentence CREW highlights merely reflects and restates OSC's decision with respect to Conway.

Furthermore, as another court in this district recently concluded, under Circuit precedent, an enforcement decision is only exempt from the presumption if *both* "(1) it is expressed as a general enforcement policy; *and* (2) it relies solely on the agency's view of what the law requires." *NAACP v. Trump*, 298 F. Supp. 3d 209, 234 (D.D.C. 2018) (emphasis added) (citing *OSG Bulk Ships, Inc., v. United States*, 132 F.3d 808, 812 (D.C. Cir. 1998), and *Crowley Carib. Transp. Inc. v. Pena*, 37 F.3d 671, 676-77 (D.C. Cir. 1994)), *aff'd and remanded by Dep't of Homeland Sec'y v. Regents of Univ. of Cal.*, --- S. Ct. ----, No. 18-587, 2020 WL 3271746, at *17 (Jun. 18, 2020). As that court stated, this conjunctive rule "not only accords with the applicable case law, but . . . also preserves the judiciary's role as the ultimate arbiter of statutory meaning while at the same time affording agencies breathing space to adopt enforcement policies for discretionary reasons." *Id.* Here, while CREW asserts in its brief that the first Conway report includes "an 'official, concrete statement of the agency's general enforcement policy,'" Opp'n 48, CREW nowhere suggests that this statement "relies solely on the agency's view of what the law requires." *NAACP*, 298 F. Supp. 3d at 234. To the contrary, CREW argues that OSC "fail[ed] to adequately explain the legal basis for its non-enforcement decision." Opp'n 49 n. 13 (citing Compl. ¶¶ 43-44).

Nor could this sentence reasonably be read to "rel[y] solely on the agency's view of what the law requires." *NAACP*, 298 F. Supp. 3d at 234. While OSC referenced the Constitution in the memo, the specific language used—describing its course of action as "proper" rather than, for example, "required"—suggests that comity concerns influenced OSC's decision. And while a

decision motivated by comity might consider legal factors, it necessarily does not "rel[y] *solely* on the agency's view of what the law *requires*." *Id.* (emphases added), *contra NAACP v. Trump*, 315 F. Supp. 3d 457, 468 (D.D.C. 2018) (holding, on reconsideration, that *Chaney* presumption did not apply to agency's new enforcement policy document because "at bottom, it involves an enforcement policy that is predicated on the agency's view of what the law requires"). And the D.C. Circuit has, in any event, "'reject[ed] the notion of carving reviewable legal rulings out from the middle of non-reviewable actions,'" such as OSC's non-prosecution decision regarding Conway. *CREW v. FEC*, 892 F.3d 434, 442 (D.C. Cir. 2018) (quoting *Crowley*, 37 F.3d at 676).

A final, minor point: CREW twice suggests that legal arguments advanced by the Department of Justice in this case should be construed as "all but confirm[ing]" the existence of the purported OSC policy CREW would like to challenge. Opp'n 48, 50 (citing section 105 argument at Mot. 23-28). But the arguments in Defendants' opening brief regarding 3 U.S.C. § 105(a)(1) do not confirm, nor could they qualify as, an "official, concrete statement of *the agency's* general enforcement policy." *PETA I*, 7 F. Supp. 3d at 13 (emphasis added). Moreover, the first Conway report, which CREW contends "lays out OSC's 'general policy,'" Opp'n 49, nowhere even mentions section 105. When this Court in *PETA I* catalogued instances where the agency had "formally expressed [a] policy through some kind of official pronouncement," all of those instances were by the agency itself, and none were by counsel in litigation. 7 F. Supp. 3d at 12-13 (citing cases). Pointing to DOJ's legal brief is not enough to sustain CREW's claim.

CONCLUSION

For the foregoing reasons and for those stated in Defendants' opening memorandum, the Motion to Dismiss should be granted and the Complaint should be dismissed with prejudice.

Dated: June 22, 2020 Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

DAVID M. MORRELL
Deputy Assistant Attorney General

JENNIFER D. RICKETTS
Director
Federal Programs Branch

CHRISTOPHER R. HALL
Assistant Director
Federal Programs Branch

/s/ Julie Straus Harris
JULIE STRAUS HARRIS (DC Bar No. 1021928)
M. ANDREW ZEE (CA Bar No. 272510)
Trial Attorneys
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L Street NW, Room 11514
Washington, D.C. 20005
Tel: (202) 353-7633
Fax: (202) 616-8470
E-mail: julie.strausharris@usdoj.gov

Counsel for Defendants