Nos. 19-1434, 19-1452, and 19-1458

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

ARTHREX, INC. ET AL.,
Respondents.

On Writs of Certiorari to the
United States Court of Appeals for the Federal Circuit

BRIEF OF U.S. LUMBER COALITION AS AMICUS CURIAE URGING AFFIRMANCE IN PART AND REVERSAL IN PART, SUPPORTING RESPONDENTS IN NOS. 19-1434 & 19-1452 AND PETITIONER IN NO. 19-1458

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(additional captions on inside cover)

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INTEREST OF THE AMICUS CURIAE[1]

The U.S. Lumber Coalition is a non-profit corporation representing large and small softwood lumber producers from around the country, joined by their employees, and woodland owners, working to address Canada's unfair lumber trade practices. Those practices have led the United States to impose antidumping and countervailing duties on certain Canadian softwood lumber, duties that Canada has challenged pursuant to the dispute resolution provisions of the North American Free Trade Agreement (NAFTA). The Coalition has an interest in the proper interpretation of the Appointments Clause because NAFTA's dispute resolution provisions (which were carried over into the United States-Mexico-Canada Agreement) raise serious Appointments Clause questions. *See Coal. for Fair Lumber Imports v. United States*, 471 F.3d 1329, 1330-31 (D.C. Cir. 2006) (per curiam) (explaining that under NAFTA, a binational panel of private arbitrators can review the United States' compliance with U.S. antidumping and countervailing duty laws and order the relevant U.S. agencies to change or eliminate the duties if the panel decides the agencies misapplied federal law); *id*. at 1332-33 (finding that settlement agreement between United States and Canada revoking such duties rendered particular constitutional challenge to NAFTA dispute resolution provisions nonjusticiable).

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[1] Pursuant to Supreme Court Rule 37.6, amicus affirms that no counsel for a party authored this brief in whole or in part and that no person other than amicus, its members, and its counsel made a monetary contribution to its preparation or submission. All parties have filed blanket consents to the filing of amicus briefs with the Clerk's office.

SUMMARY OF ARGUMENT

I. It is undisputed that in many circumstances, administrative patent judges (APJs) of the Patent and Trademark Office (PTO) have the final word within the Executive Branch on whether a patent will issue or a previously issued patent will be revoked. On any reasonable understanding of the text, history, and purposes of the Appointments Clause, that makes APJs principal officers who must be nominated by the President and confirmed by the Senate.

A. To start, officials whose decisions control a federal agency's execution of federal law are "Officers of the United States" and therefore their appointments are subject to the restrictions of the Appointments Clause. While this Court has sometimes treated individuals who provide temporary, partial assistance in agency decisionmaking as employees or contractors, the Court has never suggested that Congress could delegate an agency's core functions to non-officers and thereby avoid the Constitution's structural protections against arbitrary or abusive exercise of federal power.

B. Nor has this Court ever suggested that someone with the final say in an agency's exercise of such powers would be anything other than a principal officer. As a matter of common understanding, the person who makes the final decisions with respect to an agency's core functions—here, issuing and revoking patents—is a principal officer of that department. Those who must abide by those decisions—including, here, the PTO's Director—are naturally understood to be subordinate to that final authority. A judge whose vote counts no more than her law clerks' is not the principal officer of her chambers.

That view is consistent with historical practice. From the beginning, a unifying feature of inferior officers authorized by Congress was that their decisions were subject to review and revisions by the principal officers of their department. Indeed, even today, the independence of the APJs in the PTO is an aberration.

The traditional arrangement, under which inferior officers' decisions are subject to review and countermand by a principal officer, is exactly what the drafters of the Appointments Clause intended. The Clause is part of a broader constitutional design that protects liberty by ensuring that a popularly elected President has ultimate control—and therefore accountability—for all the operations of the Executive Branch. Because the President cannot realistically review all (or even a small fraction of) the law-enforcing decisions made by federal agencies, it is vital that the principal officers the President has chosen *can* exercise that kind of control. Otherwise, the President could shirk his responsibility to the People by explaining that he and his principal officers lacked the power to change what the federal government has done.

Importantly, the People have a right to hold the President—and the President has the right to hold his principal officers—accountable for *every* significant exercise of federal power. It is not enough that the President or an agency head has the power to determine the *general* direction of a department, or how it enforces federal law in the *run of cases*. The President has taken an oath to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. There is no exception for case-specific failures that the

President could not prevent because he and his principal officers lacked final authority over the matter.

Here, however, were the public to decry the PTO's grant or invalidation of an important patent, the President would turn to the Director of the PTO, who could credibly claim that he lacked the power to avoid that result. Indeed, it is entirely possible that the Director would have sat on the panel that issued the decision, but was outvoted by his supposed subordinates.

None of this Court's decisions countenance that result. To the contrary, the Court has repeatedly emphasized that the decisions of those it has deemed inferior officers were subject to review by other principal officers within the Executive Branch. The only possible exception is the independent counsel in *Morrison v. Olson*, 487 U.S. 654 (1988). But that exception proves the rule that such insulation requires an extraordinary justification and significant compensating limitations, none of which is present here.

II. Simply eliminating APJs' tenure protections would not remedy the constitutional problem. Being able to fire (or reassign) APJs at will is far too blunt an instrument to allow the PTO Director to control the outcome of particular cases and, therefore, to be truly accountable for them.

Indeed, the cause of political accountability would be set back, not advanced, by telling the Director that he should direct the outcome of particular cases through behind-the-scenes threats of termination. The coerced result would be portrayed to the world as the fair judgment of apolitical experts, allowing the

Director to evade responsibility for what may (or may not) be his own decision, undertaken for reasons kept secret from the public. Even if Congress would have preferred that result to broader invalidation, the constitutional design cannot endure it.

ARGUMENT

I. APJs Are Principal Officers Because They Make Final Decisions On Behalf Of The Executive Branch On Important Matters Of Federal Law.

The PTO is assigned responsibility for issuing and revoking patents. From the Founding until the middle of the twentieth century, the final responsibility for that exercise of governmental power lay in the hands of officials who were nominated by the President and confirmed by the Senate. *See* No. 19-1434 Pet. App. 21a. Today, the final decision whether to issue or revoke a patent is made by the Patent Trial and Appeal Board (PTAB), a panel of APJs, who are appointed by the Secretary of Commerce without Senate approval. *See ibid*; 35 U.S.C. § 6. A PTAB's decision is not subject to review or revision by any other official in the PTO and, unless reversed by a court, binds all other Executive Branch officials, including the PTO's Senate-confirmed Director. *See* 35 U.S.C. § 318(b).

The question here is whether the Constitution permits Congress to lodge final authority for such decisions in officials who are not nominated by the President or confirmed by the Senate. The answer is no.

The Constitution protects liberty through careful distribution of authority among the officials of the

federal government. *See, e.g.*, *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 501 (2010). The power to enforce the Nation's law is lodged with the Executive. U.S. Const. art. II, § 1, cl. 1. A principal protection against the abuse of that power is the People's right to elect and hold accountable a single Chief Executive who is given exclusive responsibility to "take Care that the Laws be faithfully executed." *Id.* art. II, § 3; *see, e.g.*, *Free Enter. Fund*, 561 U.S. at 492-93. To empower the President to fulfill that obligation, and to provide an additional check on the potential for abuse, the Appointments Clause requires that the President nominate, and the Senate confirm, all "Officers of the United States," with the exception that "Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. art. II, § 2, cl. 2.

This Court has not "set forth an exclusive criterion for distinguishing between principal and inferior officers for Appointments Clause purposes." *Edmond v. United States*, 520 U.S. 651, 661 (1997). But the Court has never before condoned Congress assigning the principal functions of a government department to inferior officers whose decisions are shielded from review or revision by any other Executive Branch official. The text, purposes, and history of the Appointments Clause precludes that effort here.

A. APJs Are "Officers Of The United States" Because Their Decisions Control A Federal Agency's Execution Of Federal Law.

As an initial matter, APJs are "Officers of the United States," as opposed to mere employees, because

they exercise "significant authority pursuant to the laws of the United States." *Edmond*, 520 U.S. at 662 (citation omitted).[2] Indeed, the PTAB exercises not only significant, but *ultimate* authority over the principal governmental function of the PTO, issuing final decisions for the office on whether to issue or revoke patents.

To be sure, this Court has occasionally held that individuals who provide partial, temporary assistance to an agency's decisionmakers can be employees or contractors rather than officers. For example, in *United States v. Germaine*, 99 U.S. 508 (1879), the Court held that a surgeon hired to conduct physical examinations to assist the Government in making pension benefit determinations was not an officer, but merely a contractor, because the surgeon's "duties are not continuing and permanent," but "occasional and intermittent." *Id*. at 512 (emphasis omitted); *see also Auffmordt v. Hedden*, 137 U.S. 310, 326-27 (1890) (same for "merchant appraiser" contracted to assist agency in resolving import duty disputes).

Those cases are distinguishable, of course, because the APJ's duties are continuing and permanent. *See* 35 U.S.C. § 6. But more importantly, the Court has never suggested that Congress can assign employees or contractors even temporary authority to make final decisions on behalf of a federal agency regarding its enforcement of federal law. *See,*

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[2] *See also Buckley v. Valeo*, 424 U.S. 1, 131 (1976) (per curiam) (constitutional term "Officers of the United States" was "taken by all concerned to embrace all appointed officials exercising responsibility under the public laws of the Nation"); *id*. at 132 ("No class or type of officer is excluded because of its special functions.").

e.g., *Morrison v. Olson*, 487 U.S. 654, 671-72 (1988) (special counsel given responsibility for deciding whether to bring a criminal prosecution on behalf of the United States is an officer, despite significant limits on the counsel's jurisdiction and tenure); *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 575 U.S. 43, 63 (2015) (Alito, J., concurring) (reading a statute to permit private arbitrators to resolve disputes over the content of federal regulations would "raise serious questions under the Appointments Clause"); *id.* at 87-88 (Thomas, J., concurring in the judgment) ("Although no provision of the Constitution expressly forbids the exercise of governmental power by a private entity, our so-called 'private nondelegation doctrine' flows logically from the three Vesting Clauses.").

Because APJs dictate the PTO's exercise of some of its most important and basic law enforcement responsibilities, they are undoubtedly Officers of the United States, subject to the Appointments Clause.

B. APJs Are Principal Officers Because Their Decisions Are Not Subject To Review By Any Other Executive Branch Official.

Because they are officers, APJs must either be nominated by the President and confirmed by the Senate (which they are not) or qualify as "inferior officers" within the meaning of the Appointments Clause. While the Court has eschewed bright-line rules for distinguishing between principal and inferior officers, a critical consideration should be whether the official has the "power to render a final decision on behalf of the United States" in particular cases. *Edmond*, 520 U.S. at 665. Where, as here, an official's case-specific exercise of Executive authority is not

subject to review and reversal by any other Executive Branch official, the official should be considered a principal officer absent some unusual justification that is absent here. That conclusion flows naturally from the text, history, and purposes of the Appointments Clause, as well as this Court's decisions.

Text. The Constitution does not define the term "inferior officer," but its ordinary meaning denotes subordination to a superior. *See Edmond*, 520 U.S. at 662 ("Whether one is an 'inferior' officer depends on whether he has a superior."); *Inferior* (def. 4), Noah Webster, *An American Dictionary of the English Language* 450 (3d ed. 1830) ("Subordinate; of less importance"); *Inferiour*, Thomas Sheridan, *A Complete Dictionary of the English Language* (2d ed. 1789) ("Lower in place; lower in [s]tation or rank of life; lower in value or excellency; [s]ubordinate"). And being a subordinate ordinarily entails having one's significant decisions subject to review and revision by a superior. *See, e.g.*, *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2199 n.3 (2020) (inferior officer is one whose "work is directed and supervised by a principal officer") (internal quotation marks omitted); *Ass'n of Am. R.Rs.*, 575 U.S. at 63 (Alito, J., concurring) ("[A]n officer who acts without supervision must be a principal officer.") (citing *Edmond*, 520 U.S. at 663).

Petitioners do not deny that the PTO's Director lacks the authority to review and countermand particular PTAB decisions. They claim instead that no such power is necessary for the PTAB to be inferior to the Director. *See* U.S. Br. 37; S&N Br. 35-36. But that position cannot be squared with any common understanding of what it means to be an "inferior"

officer. A principal officer's power of direction and supervision necessarily includes the power to direct how the inferior will exercise government power in particular instances. An army general is surely entitled to review, revise, and countermand an inferior officer's particular battle plans, not just to dictate a broader strategy for the conflict. If control over such essential military functions were vested in majors rather than generals, we would understand the major to be the principal officer and the general to be the subordinate, inferior officer.

It is particularly difficult to reconcile petitioners' view of an "inferior" officer in the context of an adjudicative body. A magistrate judge whose reports and recommendations bind a district court would not be described as the "inferior" officer in that relationship. A judge whose decisions are controlled by a vote of her law clerks is not the principal officer of her chambers. And the reason the Constitution describes the lower federal courts as "inferior Courts" is precisely because their decisions are subject to review by this Court, not because this Court hires or fires lower court judges (responsibilities reserved for Congress and the President). U.S. Const. art. III, § 1.[3]

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[3] While the Constitution permits Congress to control this Court's appellate jurisdiction over the lower courts, the Framers would not have described those courts as "inferior" if no appellate review at all had been permitted or contemplated. *Cf.* Steven G. Calabresi & Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the* Hamdan *Opinions: A Textualist Response to Justice Scalia*, 107 Colum. L. Rev. 1002 (2007) (noting serious constitutional questions that would arise if Congress attempted to make some categories of lower court decisions unreviewable by this Court). In this case, the PTAB's decisions are *never* subject to review or countermand by any other Executive Branch official.

Indeed, it is nearly impossible to construct an English sentence describing someone as having "inferior" status in a hierarchy when that person wields the ultimate, unreviewable authority to make the organization's most important decisions.[4]

In this case, it is all but definitional that the person who has the final say about whether the PTO will issue or revoke a patent is a *principal* officer of the Patent Office. And to say that the rest of the Office is bound to adhere to that decision is to say that the others are subordinate to the PTAB with respect to the Office's essential responsibilities.

History. Petitioners' position also runs headlong into history. *See Seila Law*, 140 S. Ct. at 2201 ("'Perhaps the most telling indication of a severe constitutional problem with an executive entity is a lack of historical precedent' to support it.") (citation omitted and cleaned up); *Printz v. United States*, 521 U.S. 898, 905 (1997) ("[C]ontemporaneous legislative exposition of the Constitution . . ., acquiesced in for a long term of years, fixes the construction to be given its provisions.") (quoting *Myers v. United States*, 272 U.S. 52, 175 (1926)) (ellipses in original).

As the Court explained in *Edmond*, the First Congress subjected early inferior officers to the plenary control of principal officers. For example, in

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[4] At best, a person might have principal authority for some category of responsibilities and a subordinate position with respect to others. But giving a principal officer additional inferior responsibilities does not eliminate the need for presidential appointment and Senate confirmation. *Cf. Freytag v. Comm'r*, 501 U.S. 868, 882 (1991) ("Special trial judges are not inferior officers for purposes of some of their duties under § 7443A, but mere employees with respect to other responsibilities.").

establishing the office of the "Chief Clerk" of the Department of Foreign Affairs and the Department of War, Congress provided that this "inferior officer" should be "employed" as the principal officer "shall deem proper." 520 U.S. at 663-64 (citations omitted). Congress provided the same unrestricted authority over inferior officers in the Post Office and Navy. *See* Act of Feb. 20, 1792, ch. 7, § 3, 1 Stat. 232, 234 (Deputy Postmaster subject to "such regulations" "as may be found necessary" by the Postmaster General); Act of Apr. 30, 1798, ch. 35, §§ 1-2, 1 Stat. 553, 553-54 (Principal Clerk in Department of the Navy to be "employed in such manner as [Secretary of the Navy] shall deem most expedient").

Likewise, in *United States v. Allred*, 155 U.S. 591 (1895), this Court explained that commissioners of the federal courts—who performed some of the functions of modern magistrates, including issuing warrants—were inferior officers who had long been understood to be "subject to the orders and directions of the court appointing them." *Id.* at 595; *see also Griffin v. Thompson*, 43 U.S. (2 How.) 244, 257 (1844) ("There is inherent in every court a power to supervise the conduct of its officers, and the execution of its judgments and process.").

The first Patent Act similarly assigned final responsibility for issuing patents to principal officers, namely a commission comprised of the Secretary of State, the Secretary of War, and the Attorney General. *See* Act of Apr. 10, 1790, ch. 7, 1 Stat. 109, 109-10. Congress continued the pattern after it transferred that authority to the Patent Office, generally subjecting the decisions of patent examiners to review by the presidentially appointed and Senate-confirmed

Commissioner of Patents. *See, e.g.*, *Kappos v. Hyatt*, 566 U.S. 431, 440 (2012) ("Under the 1870 Act, an applicant denied a patent by the primary examiner could appeal first to a three-member board of examiners-in-chief, then to the Commissioner for Patents, and finally to an en banc sitting of the Supreme Court of the District of Columbia.").[5]

Critically, petitioners and their numerous amici are unable cite any Founding-era pattern of Congress giving an inferior officer statutory authority to make important decisions on behalf of a department while immune from case-specific review by a principal officer. Indeed, petitioners are able to cite only a smattering of allegedly similar statutes in the entire history of the country. *See* S&N Br. 38-42 (citing Copyright Royalty Board (established in 2004),[6] Board

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[5] For a period of less than three years, between July of 1836 and March of 1839, certain decisions of the Commissioner were subject to revision by a three-person board of examiners appointed by the Secretary of State. *See* P.J. Federico, *Evolution of Patent Office Appeals*, 22 J. Pat. Off. Soc'y 838, 839-41, 842-43 (1940) (discussing Act of July 4, 1836, ch. 357, § 7, 5 Stat. 117, 119-20, *superseded by* Act of Mar. 3, 1839, ch. 88, § 11, 5 Stat. 353, 354-55). The 1836 statute did not directly address whether the Secretary of State could review and revise the board's decisions. *Compare* § 7, 5 Stat. at 120 (the board's opinion "being certified to the Commissioner, he shall be governed thereby in further proceedings to be had on such application"), *with id*. § 1, 5 Stat. at 118 (Commissioner shall perform duties "under the direction of the Secretary of State"). The issue apparently never came up, perhaps because the board of examiners heard a total of nine cases under this regime. *See* Federico at 841.

[6] *See Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd*., 684 F.3d 1332, 1334-35 (D.C. Cir. 2012) (describing Board's origins, but holding that its members are principal officers).

of Veterans' Appeals (established in 1994),[7] and the Departmental Appeals Board of the Department of Health and Human Services (established in the 1970s)[8]). But examples "of such recent vintage . . . are no more probative than the statute before us of a constitutional tradition that lends meaning to the text." *Printz*, 521 U.S. at 918. Indeed, petitioners' handful of examples illustrates that even today, insulating administrative adjudications from review by principal officers is an aberration. *See also, e.g.*, 5 U.S.C. § 557(b) (provision of Administrative Procedure Act providing for agency review of decisions by administrative law judges); Arthrex Br. 30.

Purposes. The ordinary meaning of the constitutional text, as illuminated by historical tradition, is strongly reinforced by the Appointments Clause's purposes.

The Appointments Clause is part of a constitutional design intended to consolidate Executive power in a single, nationally elected President charged with the ultimate responsibility to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3; *see, e.g.*, *Seila Law*, 140 S. Ct. at 2203. Under this plan, "individual executive officials

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[7] The Board was established in the 1930s. *See* Dep't of Veterans Affairs, *VA History in Brief* 12, https://www.va.gov/opa/publications/archives/docs/history_in_brief.pdf. In 1994, Congress directed that the Board's members other than the Chairman would be appointed by the Secretary of the Department of Veterans Affairs without Senate confirmation. *See* Veterans' Benefits Improvement Act of 1994, Pub. L. No. 103-446, tit. II, § 201(a)(1), 108 Stat. 4645, 4655.

[8] *See Pennsylvania v. U.S. Dep't of Health & Human Servs.*, 80 F.3d 796, 800 (3d Cir. 1996) (describing history).

will still wield significant authority, but that authority remains subject to the ongoing supervision and control of the elected President." 140 S. Ct. at 2203. "Through the President's oversight, 'the chain of dependence [is] preserved,' so that 'the lowest officers, the middle grade, and the highest' all 'depend, as they ought, on the President, and the President on the community." *Ibid.* (quoting 1 Annals of Cong. 499 (J. Madison)) (alteration in original).

The Appointments Clause ensures this chain of dependance and accountability. *See, e.g.*, *Edmond*, 520 U.S. at 663. The President cannot fulfil his obligation to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, unless the President can effectively direct how subordinates in the Government actually execute the laws. *See, e.g.*, *Free Enter. Fund*, 561 U.S. at 484. Accordingly, the Constitution vests in the President the power not only of "appointing" but also "*overseeing*, and *controlling* those who execute the laws." *Id.* at 492 (citation omitted, emphasis added).

Of course, given the size of the federal government, the President cannot direct official's exercise of executive power in every instance. The President must rely on principal officers. But principal officers can perform *their* function, and maintain the constitutional lines of political accountability, only if principal officers have actual, effective control over their agencies' exercise of governmental power.

Importantly, it is not enough that a principal officer has some power to influence the way in which subordinates exercise power *generally*; the principal officer must also have the authority to direct the

outcome in particular cases. The President has the responsibility to ensure the faithful execution of the law in *every* instance, and the public may rightfully complain *whenever* a federal agency fails in its execution of its legal powers. That is why the People are given a constitutional right to petition their Government, including the Executive Branch, for redress of *any* kind of grievance, including complaints about *particular* government decisions in individual cases. *See* U.S. Const. amend. I. Indeed, such case-specific complaints are predictably far more common than generalized grievances about how federal agencies conduct themselves in the run of cases.

But the President, and his principal officers, cannot be held responsible for individual outcomes they lack the power to control. The PTAB is a perfect illustration. Suppose that the PTAB wrongly invalidates (or sustains) a patent that is vital to an important national industry. To whom should those dissatisfied with the result complain? The President would turn to the PTO's Director, but the Director would rightly claim that he lacked the power to avoid the result. Indeed, it is entirely possible that the Director would have sat on the panel but was outvoted by his putative subordinates. *See* U.S. Br. 6-7. Left with principal officers who are powerless to direct how their agencies execute their most important duties, the President cannot "be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else." *Free Enter. Fund*, 561 U.S. at 514.

This Court's Precedents. It is not so strange, then, that petitioners are also unable to cite any comparable case in which this Court has held that an

official given unreviewable authority to direct an agency's exercise of federal powers was an inferior officer under the Appointments Clause.

For example, petitioners rely significantly on *Edmond*, in which the Court held that civilian members of the Coast Guard Court of Criminal Appeals were inferior officers. *See* U.S. Br. 25-26; S&N Br. 19-20. In that case, the Court described the various ways in which the Coast Guard's Judge Advocate General (JAG)—like the PTO Director in this case—could affect the work of the court indirectly and in general, while lacking the power to directly review and reverse particular decisions. *See Edmond*, 520 U.S. at 664 (JAG could "formulate policies and procedures in regard to review of court-martial cases" and remove judges from judicial assignments without cause) (citation omitted). But the Court did not find that this was sufficient to render the judges inferior officers. To the contrary, after noting the JAG's lack of "power to reverse decisions of the court," this Court went on to explain that this "latter power does reside, however, in another Executive Branch entity, the Court of Appeals for the Armed Forces." *Ibid*. What was constitutionally "significant," the Court explained, "is that the judges of the Court of Criminal Appeals have no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers." *Id*. at 665.

Petitioners latch on to *Edmond*'s statement that an inferior officer is one "whose work is directed and supervised *at some level* by" a principal officer. 520 U.S. at 663 (emphasis added); *see* U.S. Br. 34; S&N Br. 20. That suggests that a principal officer need not be able to review every detail of the way in which inferior

officers reach their decisions on how to enforce federal law. But the Court's application of its test in *Edmond* itself—particularly its reliance on the ability of the Court of Appeals for the Armed Forces to engage in case-specific review of the inferior officers' decisions—belies any claim that an inferior officer's ultimate law-enforcing decisions can be immune from review by a principal officer, at least in the absence of some extraordinary justification.

Petitioners can find no support in *Freytag v. Commissioner*, 501 U.S. 868 (1991), either. There, the Court treated the special trial judges of the Tax Court as inferior officers.[9] But the Court explained that the judges generally "lack[ed] authority to enter a final decision" for the court. *Id*. at 881.[10] And to the extent there were a handful of minor exceptions, *id*. at 882, the delegated authority to issue decisions on behalf of the Tax Court was "subject to such conditions and review as the [Tax] court may provide," 26 U.S.C. § 7443A(c). Even if the Tax Court may have elected to give special trial judges significantly independent authority in some cases, what matters for Appointments Clause purposes is that the principal officers of the Tax Court had the *authority* to supervise the decisions in particular cases, and therefore could

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[9] The question in *Freytag* was whether special trial judges were officers at all, not whether they were principal or inferior officers. *See* 501 U.S. at 880. Accordingly, the Court had no occasion to decide whether the special trial judges were sufficiently supervised to qualify as inferior officers.

[10] The Tax Court's members were appointed by "the President, by and with the advice and consent of the Senate." 501 U.S. at 871 (citing 26 U.S.C. § 7443).

be held politically accountable for the results they chose to leave unreviewed.

Indeed, to amicus's knowledge, there is only one case in which this Court has ever treated an official as an inferior officer even though no principal officer had the statutory authority to review the official's case-specific decisions. In *Morrison*, the Court held that a special counsel appointed to criminally investigate, and potentially prosecute, certain high-level government officials was an inferior officer, even though the counsel's prosecutorial decisions were largely insulated from the Attorney General's review. *See* 487 U.S. at 671-73.

The decision in *Morrison* turned on special circumstances that do not arise in this case, including the counsel's limited jurisdiction and duties. *See* 487 U.S. at 671-72. Of particular importance, there was a special need in *Morrison* to insulate the special counsel given the nature of her responsibilities. *See Seila Law*, 140 S. Ct. at 2200 (explaining that the power of the special counsel "was trained inward to high-ranking Governmental actors identified by others, and was confined to a specified matter in which the Department of Justice had a potential conflict of interest"). Petitioners can identify no comparable special justification here. To the contrary, the PTAB's work is not materially different from that performed by numerous adjudicative bodies in other federal agencies where the decisions of administrative law

judges are subject to appeal to the agency's politically accountable director or board. *See supra* pp. 14-15.[11]

II. The Constitutional Problem Cannot Be Remedied By Simply Invalidating APJs' Tenure Protections.

The constitutional flaws in the PTAB's structure cannot be remedied by simply removing APJ tenure protection while continuing to deprive the PTO Director of any power to review and reverse PTAB decisions.

1. To be sure, this Court has recognized that the "power to remove officers . . . is a powerful tool for control." *Edmond*, 520 U.S. at 664. For that reason, limitations on the President's power to remove principal officers raises serious constitutional questions. *Seila Law*, 140 S. Ct. at 2191-92. But giving unfettered removal authority to the PTO Director is an inadequate remedy in this case for two reasons.

First, the Court's prior decisions invalidating tenure provisions to remedy separation-of-powers violations all concerned congressional interference with the President's authority over principal officers.

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[11] The Court's decision in *Morrison* has been subject to substantial criticism over the years, including by members of the Court. *See, e.g.*, *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 947 n.2 (2017) (Thomas, J., concurring) ("Although we did not explicitly overrule *Morrison* in *Edmond*, it is difficult to see how *Morrison*'s nebulous approach survived our opinion in *Edmond*."); Lee S. Liberman, Morrison v. Olson*: A Formalistic Perspective on Why the Court Was Wrong*, 38 Am. U. L. Rev. 313 (1989). At best, the special counsel statute lies at the outer limits of what the Appointments Clause permits. The statutes structuring the PTAB fall on the other side of the line.

See Seila Law, 140 S. Ct. at 2209; *Free Enter. Fund*, 561 U.S. at 508. But the President is able to supervise the work of federal agencies through his power to select and remove principal officers only because *those officers* have far greater control and responsibility over the day-to-day operations of their departments. Indeed, there would be little point in the President firing a principal officer over a particular agency action if the principal officer lacked the power to direct that agency decision.

To exercise the necessary degree of control, principal officers need the authority to review and countermand particular decisions by their subordinates. In this case, for example, it implausible for petitioners to claim that the PTO Director would be able to use the power of at-will removal to correct errors in particular PTAB decisions. Petitioners cite no evidence that the Director has ever removed an APJ from judicial duties simply because the Director believed the APJ voted wrongly in a single case. Particularly when APJs confront difficult questions for which there is no clear right answer, the Director's disciplinary powers are a blunt and largely useless instrument for supervising the PTAB's execution of patent law in particular instances.

Indeed, expecting the Director to control the outcome of cases by threatening to fire APJs would dramatically undermine political accountability. The result would be a decision that is portrayed to the world as the genuine views of a board of independent expert APJs when, in fact, the outcome may (or may not) have been attributable to decisions the PTO Director made in secret, for reasons that will never be disclosed.

The system petitioners propose thus bears no resemblance to the kinds of administrative adjudications Congress has traditionally established, in which neutral administrative law judges make decisions insulated from political influence, but their decisions are subject to review by politically accountable principal officers who must publicly acknowledge that they are overturning the decision of their internal experts and take responsibility for that action.

2. Petitioners suggest that the Director's removal power would be supplemented by his ability to issue policy guidance and to gerrymander assignment of APJs to particular cases. *See* U.S. Br. 27-29; S&N Br. 25-26, 35. But the power to issue policy guidance is no substitute for the right to review and reverse actual PTAB decisions. Even setting aside that the Director's policies cannot possibly resolve every significant question an APJ will confront, it is also inevitable that APJs will sometimes fail to follow the directions that *are* given (just as it is inevitable that patent examiners will sometimes fail to follow the instructions that *they* were given, which is the entire reason for having a PTAB in the first place). And when APJs fail to correctly implement PTO policy, or otherwise err in applying federal law, the PTO Director has no power to correct the mistake, and hence, cannot be held responsible for the result.

As for the Director's ability to control panel assignments, it is unlikely the Director could effectively use that power to dictate the results of many cases, and doing so would undermine political accountability even if he could. That is, it is expecting a lot to ask the Director to not only decide the right

outcome of a case prior to assigning a panel, but also to identify and assign to the case particular APJs who will share his views on the matter. It is asking even more to expect the public to understand that even though the Director lacks the power to openly reverse a bad PTAB decision, he should nonetheless be held accountable for it because he supposedly could have avoided it by a more effective use of his assignment powers.

CONCLUSION

For the foregoing reasons, the judgment of the Federal Circuit should be affirmed insofar as it held the PTAB's structure unconstitutional, but reversed with respect to the proper remedy for that constitutional violation.

Respectfully submitted,

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