No. 23-939

IN THE

Supreme Court of the United States

DONALD J. TRUMP,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF AMICUS CURIAE CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether and if so to what extent does a former President enjoy presidential immunity from criminal prosecution for conduct alleged to involve official acts during his tenure in office.

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE*[1]

Citizens for Responsibility and Ethics in Washington (CREW) is a nonpartisan, nonprofit organization that advocates for a government that is ethical, accountable, and open. CREW has an interest in ensuring that our legal system adequately defends itself against criminal attempts to disrupt and overthrow our democratic institutions, including by imposing accountability on those who illegally subvert the lawful transfer of presidential power.

SUMMARY OF ARGUMENT

Amici for Petitioner Trump ask this Court to reach an issue not presented by the parties below and find Special Counsel Jack Smith's appointment invalid. This Court lacks jurisdiction to consider that issue now and reaching it prematurely would compromise foundational public interests. Further, the Special Counsel's appointment is clearly valid.

1. This Court lacks jurisdiction to address the unlitigated claim of improper appointment now. The issue falls within neither the collateral order doctrine nor the pendent jurisdiction of the court of appeals. Principles of judicial restraint and discretion would also counsel strongly against reaching the issue prematurely. Petitioner Trump's attempt to thwart the will of the people and the prerogatives of Congress, by allegedly conspiring and exploiting violence to

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[1] This brief was not authored in whole or in part by counsel for any party, and no person or entity other than amicus curiae or its counsel has made a monetary contribution toward the brief's preparation or submission.

disrupt the peaceful transfer of presidential power, struck at the fundamental links between the Constitution, the people, and their government. Considering the strong public interest in the prosecution, this Court should refrain from addressing the issue before the parties litigate it in the lower courts.

2. If this Court reaches the issue, it should find Special Counsel Smith's appointment valid. First, 28 U.S.C. §§ 509, 510, 515, and 533 authorized the Attorney General to appoint Special Counsel Smith. *United States v. Nixon*, 418 U.S. 683 (1974) recognized the Attorney General's statutory authority to do so and reflects a 154-year-old universal understanding, shared among every branch of government, that such authority exists. Second, the Special Counsel is an "inferior officer" under the Constitution's Appointments Clause, and thus does not require appointment by the President with advice and consent of the Senate. Special Counsel Smith is subject to supervision and at-will removal of the Attorney General. He thus satisfies this Court's tests in both *Morrison v. Olson*, 487 U.S. 654 (1988), and *Edmond v. United States*, 520 U.S. 651 (1997), for "inferior officers." Special Counsel Smith's appointment is thus clearly within the authority of the Attorney General.

ARGUMENT

I. This Court lacks jurisdiction to address the validity of the Special Counsel's appointment at this stage and should not consider this unlitigated question.

A. The Court lacks jurisdiction under both the collateral order and pendent jurisdiction doctrines.

This Court lacks jurisdiction over the validity of Special Counsel Smith's appointment. If a lower court lacks jurisdiction, this Court has jurisdiction "not of the merits" but only to correct any erroneous assumption of jurisdiction. *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986); *see also United States v. Nixon*, 418 U.S. 683, 690-92 (1974) (finding appealability under 28 U.S.C. § 1291 before concluding this Court has jurisdiction under 28 U.S.C. § 1254). Here, the court of appeals correctly concluded that it does not have appellate jurisdiction of the appointment objection, and this Court therefore lacks jurisdiction over the merits thereof.

Amici Meese et al. ("*Amici*") suggest that this Court can review the appointment objection now, because it is a "nonjurisdictional structural constitutional objection[] that could be considered on appeal whether or not they were ruled upon below[.]" Br. Former Att'ys Gen. Edwin Meese III et al. as Amici Curiae Supporting Pet'r at 6-7 ("Br. Meese Amici") (quoting *Freytag v. Comm'r*, 501 U.S. 868, 878-79 (1991)). But *Freytag v. Commissioner* only excused forfeiture of claims not raised below, 501 U.S. 868, 878-79 (1991); it does not create appellate jurisdiction

where there is none. Whereas *Freytag* involved appeal of a final judgment, *id.* at 871-72, this case involves an interlocutory appeal under the collateral order doctrine. *Freytag* is inapposite.

"Section 1291 of the Judicial Code confines appeals as of right to those from 'final decisions of the district courts,'" ordinarily decisions that "end[] the litigation on the merits and leave[] nothing more for the court to do but execute the judgment." *Digital Equip. Corp. v. Desktop Direct Inc.*, 511 U.S. 863, 865, 867 (1994). The collateral order doctrine is a narrow exception to the normal rule of litigation-ending decisions. It permits immediate appellate jurisdiction over "decisions that do not terminate the litigation, but must, in the interest of 'achieving a healthy legal system,' nonetheless be treated as 'final.'" *Id.* at 867. "The conditions are 'stringent,' and unless they are kept so, the underlying doctrine will overpower the substantial finality interests § 1291 is meant to further." *Will v. Hallock*, 546 U.S. 345, 349-50 (2006). And the conditions are interpreted "'with the utmost strictness' in criminal cases." *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 799 (1989).

The court of appeals correctly found that, while the issue of immunity falls within the collateral order doctrine, the appointment objection does not. Joint Appendix ("JA") 10, 61 n.16. That doctrine requires an order to "[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Will,* 546 U.S. at 349 (internal quotation marks omitted). Because the appointment objection "was neither presented to nor decided by the district

court, there is no order on the issue that could even arguably constitute a collateral order for [the court of appeals] to review." JA 61 n.16. Trying to apply the conditions here would be nonsensical—there must have been a decision for the question to have been "conclusively determine[d]" or the issue to have been "resolve[d]."

Even if there was a decision, the appointment objection is not, like the issue of immunity, "effectively unreviewable" on appeal from a final judgment. "[A]lmost every pretrial or trial order might be called 'effectively unreviewable' in the sense that relief from error can never extend to rewriting history," *Digital Equip.*, 511 U.S. at 872, but the collateral order doctrine protects only those rights involving a "statutory or constitutional guarantee that trial will not occur"—not even rights "whose remedy requires the dismissal of charges." *Midland Asphalt*, 489 U.S. at 801. This Court's reasoning in *Freytag*, excusing the failure to raise an appointment objection "at trial," 501 U.S. at 879, is proof that the appointment objection does not provide a right to *avoid* trial.

Nor does the pendent jurisdiction doctrine apply. That doctrine allows review of "related rulings that are not themselves independently appealable." *Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 50-51 (1995). Here, the appointment objection is not "inextricably intertwined with" the issue of immunity, nor is such review "necessary to ensure meaningful review of" the question presented, and does not warrant exercise of pendent jurisdiction. *Id.* at 51; JA 61-62 n.16.

The fact that Petitioner Trump is a presidential candidate does not change the principles of appellate

jurisdiction. *Digital Equip.*, 511 U.S. at 868 (appealability depends on the category of claim and not particular facts). Petitioner Trump can surely appeal any adverse ruling on his appointment objection after a final judgment—but not now.

B. This Court should not stray from its precedent to reach unlitigated issues implicating fundamental public interests.

This Court has authority to "say what the law is" only when it "must of necessity expound and interpret [the] rule" at issue. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). There is no nexus between the question presented here and the validity of Special Counsel Smith's appointment. Even if there were, the public's paramount interests in preserving representative government and the separation of powers counsel against considering this unlitigated issue. *See Epic Systems Corp. v. Lewis*, 584 U.S. 497, 511 (2018) ("[R]espect for the separation of powers counsels restraint."); *see also, e.g.*, *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 473-74 (1982) (counseling judicial restraint because "[t]he exercise of judicial power also affects relationships between the coequal arms of the National Government.").[2]

This prosecution seeks accountability for an attack on the basic links between the Presidency and

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[2] Even *Amici* urged this Court, prior to its grant of *certiorari*, to stay these proceedings so that this issue could be litigated below. *See* Br. Former Att'ys Gen. Edwin Meese III et al. as Amici Curiae in Support of Applicant at 7-8.

the people's right to self-government. After losing a presidential election, Petitioner Trump led a conspiracy of public deception, corrupt pressure on government officials, fraud, and calls for and exploitations of violence, with the singular end of preventing the transfer of power to the person of the people's choosing. *See generally* JA 180-236 (indictment). Worse, he did so while attempting to cloak himself in—and expand—the considerable authority of the Presidency, which "owe[s its] existence and functions to the united voice of the whole . . . of the people." *Trump v. Anderson*, No. 23-719, slip op. at 6-7 (Mar. 4, 2024) (per curiam) (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 803-04 (1995)).

In the aftermath, the Attorney General exercised his authority bestowed by Congress and Department of Justice regulations that, in such grave circumstances, attempt to "strike a balance between independence and accountability in certain sensitive investigations," where the investigation "would present a conflict of interest for the Department or other extraordinary circumstances," Office of Special Counsel, 64 Fed. Reg. 37038, 37038 (July 9, 1999), and appointed Special Counsel Smith to investigate and prosecute crimes related to this and other potentially unlawful conduct, *see* Appointment of John L. Smith as Special Counsel, Order No. 5559-2022 (2022).[3]

Petitioner Trump's conduct was a bald attempt to permanently subordinate multiple public interests in the exercise of the people's sovereign power.

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[3] https://www.justice.gov/d9/press-releases/attachments/2022/11/18/2022.11.18_order_5559-2022.pdf.

Petitioner Trump attempted to place himself beyond the reach of elections and Congress by thwarting the constitutionally-mandated congressional proceedings that determine in whom executive authority vests, *see* U.S. Const. art. II, § 1; 3 U.S.C. §§ 6, 15, and thereby "sever the direct link [established by elections] that the Framers found so critical between the National Government and the people," *Anderson*, No. 23-719 at 12 (citing *Term Limits*, 514 U.S. at 822), and permanently destroy the "broad public interest[]" in the "proper balance" of the separation of powers, *see Nixon v. Fitzgerald*, 457 U.S. 731, 754 (1982); *see also United States v. Mississippi*, 364 U.S. 520, 562 (1961) ("[A] democracy is effective only if the people have faith in those who govern, and that faith is bound to be shattered when high officials . . . engage in activities which arouse suspicions of malfeasance and corruption.").

The public interests threatened by Petitioner Trump's efforts to seize power align with the public interests in holding our elected officials accountable for misconduct, particularly when that misconduct is criminal. *See, e.g.*, *Gravel v. United States*, 408 U.S. 606, 615 (1972) ("[I]mplicit in the narrow scope of the privilege of freedom from arrest [for members of Congress] is . . . the judgment that legislators ought not to stand above the law they create but ought generally to be bound by it as are ordinary persons.") (*citing* T. Jefferson, Manual of Parliamentary Practice, S. Doc. No. 92-1, p.437 (1971)); *Nixon*, 418 U.S. at 708-09 (This Court's "historic commitment to the rule of law . . . [is] nowhere more profoundly manifest than in our view that 'the twofold aim (of criminal justice) is that guilt shall not escape or

innocence suffer.'") (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)).

Given the primacy of each of the public interests implicated here, this Court should not prematurely reach the unlitigated question of Special Counsel Smith's authority.

II. If this Court addresses the issue, it should find Special Counsel Smith's appointment valid.

A. Multiple statutes authorize the appointment of the Special Counsel.

Precedent forecloses any argument that the Attorney General lacked statutory authority under 28 U.S.C. §§ 509, 510, 515, and 533 to appoint Special Counsel Smith. *See* Order No. 5559-2022. This Court ruled 50 years ago in *Nixon* that these provisions "vested in [the Attorney General] the power to appoint subordinate officers to assist him in the discharge of his duties," including his statutorily-conferred "power to conduct the criminal litigation of the United States," and that by appointing a special counsel "pursuant to those statutes, the Attorney General has delegated the authority to represent the United States in [particular matters determined by the Attorney General] to a Special Prosecutor with unique authority and tenure." *Nixon*, 418 U.S. at 694 (citing 28 U.S.C. §§ 509, 510, 515, 533).[4]

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[4] *Amici* ask this Court to "repudiate certain dictum" in *Nixon*. Br. Meese Amici at 32. But *Nixon*'s determination of the Attorney General's authority is not dictum because the Court made it as a necessary predicate to resolving the primary issue in the case: that the Special Prosecutor could challenge the

Stare decisis has "special force" on *Nixon*'s statutory interpretation because Congress has declined to "alter what [this Court has] done," *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 139 (2008) (citations omitted), and it comports with both a long tradition of special counsel appointments and subsequent decisions, s*ee Gamble v. United States*, 587 U.S. 678, 691 (2019) ("[T]he strength of the case for adhering to [previous] decisions grows in proportion to their 'antiquity.'") (citations omitted).

The D.C. Circuit in *In re Sealed Case*, 829 F.2d 50, 55 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 1027 (1988) confirmed the same statutes, without reliance on 28 U.S.C. § 533, validated the appointment of independent counsel to conduct criminal investigations and prosecutions springing from the Iran/Contra affair, even when that counsel was, unlike Special Counsel Smith, "virtually free of ongoing supervision." *Id.* The D.C. Circuit reaffirmed the Attorney General's statutory authority in *In re Grand Jury Investigation*, 916 F.3d 1047, 1053-54

President's invocation of privilege and a justiciable controversy existed. 418 U.S. at 694-95; *see In re Grand Jury Investigation*, 916 F.3d 1047, 1053 (D.C. Cir. 2019) (discussing the Court's analysis in *Nixon*). This Court's choice not to provide an in-depth analysis of § 533 is of no import when it cited it among the statutory provisions that "vested in [the Attorney General] the power to appoint subordinate officers to assist him in the discharge of his duties." *Nixon*, 418 U.S. at 694-95. Nor does *Amici's* argument account for the fact that *Nixon* is consistent with 154 years of practice, *see infra* at 13-15, or this Court's denial of *certiorari* after the D.C. Circuit's reaffirmation of *Nixon* in *In re Sealed Case*, 829 F.2d 50, 55 & n.30 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 1027 (1988), 11 years after *Buckley v. Valeo*, 424 U.S. 1 (1976). Br. Meese Amici at 32.

(D.C. Cir. 2019), rejecting a challenge to a Special Counsel's appointment similar to the one raised by *Amici*—including the argument that *Nixon*'s determination of the Attorney General's authority was dictum. Br. Meese Amici at 32-33.

Nixon and its progenies are sound. While no single section of Title 28 explicitly authorizes the appointment of a "Special Counsel," *Nixon* recognized that the text of multiple sections grants such authority to the Attorney General. *See Nixon*, 418 U.S. at 694-96; *In re Sealed Case*, 829 F.2d at 55 n.30; *In re Grand Jury*, 916 F.3d at 1054. This is neither surprising nor unusual, as this Court has unanimously held that "the plain language" of a "default statute" grants authority to appoint inferior officers even when "the statute does not specifically mention" them. *See Edmond v. United States*, 520 U.S. 651, 656, 666 (1997) (holding that the Secretary of Transportation is empowered to appoint Coast Guard judges).

The Attorney General's authority rests not on a "default statute," but on independent grants of authority in 28 U.S.C. §§ 515 and 533. Section 515(b) authorizes the Attorney General to "commision[]" attorneys who are "specially retained *under authority of the Department of Justice*[.]" (emphasis added). The "authority of the Department of Justice" has been vested by Congress in the singular office of the Attorney General, who thus necessarily retains attorneys like the Special Counsel under § 515(b). *See* 28 U.S.C. § 503 ("The Attorney General is the head of the Department of Justice"), § 509 ("All functions of other officers of the Department of Justice and all functions of agencies and employees of the Department of Justice are vested in the Attorney

General[.]") (inapplicable exceptions omitted); § 510 ("The Attorney General may . . . make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General.").

Congress in § 515(b) also directed the manner in which the Attorney General may retain such attorneys by requiring each to be "commissioned" as either a "special assistant to the Attorney General" or as a "special attorney." The statute's use of "commissioned" is not incidental. The "signature of the commission" is the act by which one vested with the constitutional power of appointment executes an appointment, thereby granting authority to another. *See Marbury*, 1 Cranch at 157; *see also, e.g.*, *Black's Law Dictionary* (11th ed. 2019) (defining "commission" as "[a] warrant or authority, from the government or a court, that empowers the person named to execute official acts").

Congress in § 515(a) established the scope of the authority that the Attorney General may grant to these attorneys through appointments once they are retained by commission. It empowers the Attorney General to "specifically direct" "any attorney specially appointed . . . under law" to "conduct any kind of legal proceeding . . . including grand jury proceedings . . . which United States attorneys are authorized by law to conduct[.]" § 515(a). Taken together, §§ 515(b) and 515(a) establish the authority and process by which the Attorney General can, through commission, specially retain attorneys under the authority of the Department of Justice, vested in the Attorney General, 28 U.S.C. §§ 503, 509, 515, and that those

attorneys, who were "specially appointed under law," can be specifically directed by the Attorney General to conduct the same legal proceedings as "United States Attorneys," 28 U.S.C. § 515(a).

Amici misread § 515(b) to apply only to previously-employed Department of Justice attorneys and relegate § 515(a) to an "allocative provision" that permits the Attorney General to "appoint" them exclusively. Br. Meese Amici at 13-15. But § 515(b)'s use of the past-participle "specially retained"—a part of speech "routinely used as [an] adjective[] to describe the present state of a thing" and which "can occur in what is technically a present . . . tense," *Henson v. Santander Consumer USA Inc.*, 582 U.S. 79, 84 (2017)—naturally includes both attorneys who are specially retained by operation of the statute and attorneys who were previously specially retained. *See In re Grand Jury Investigation*, 315 F. Supp. 3d 602, 654 (D.D.C. 2018).

The correct interpretation reflects the common understanding of the Attorney General, Congress, and the Judiciary. *See infra* at 13-15; *supra* at 9-10 n.4. Further, *Sealed Case* rejected the argument that only attorneys who were already retained by the Attorney General could be appointed as special counsel. *See* 829 F.2d at 55-56, 62 (explaining that validity of independent counsel's appointment and authority was based on the Attorney General's authority, not the appointed independent counsel's appointment to a different position under the Ethics in Government Act).

The genesis and history of § 515 confirm the Attorney General's long-standing authority. Over the last 154 years, Congress has enacted dozens of laws to

protect and facilitate the Attorney General's authority to appoint special counsels under § 515. Section 515(b)'s precursor was enacted when Congress created the Department of Justice in 1870 and formalized—in response to issues in the *pre-existing* practice of appointing special counsel—the circumstances under which they could be paid, but left untouched the Attorney General's underlying authority "to determine whether the public interests required the employment of Special Counsel." *United States v. Crosthwaite*, 168 U.S. 375, 379-80 (1897); *see* An Act to establish the Department of Justice, ch. 150 §§ 3, 16, 17 Stat. 162, 162, 164-65 (1870); *see also In re Persico*, 522 F.2d 41, 57-58 (2d Cir. 1975); *United States v. Winston*, 170 U.S. 522, 524-25 (1898).

Congress left the Attorney General's authority untouched until 1906 when it enacted what is now § 515(a) with the "express purpose" of *overruling* a district court opinion *limiting the Attorney General's authority*, clarifying that special counsels could conduct grand jury proceedings, and ensuring that the Attorney General could "employ special counsel in special cases." H.R. Rep. No. 59-2901, at 2 (1906); *see In re Persico*, 522 F.2d at 59-61 (discussing purpose of 1906 enactment to overrule *United States v. Rosenthal*, 121 F. 862 (C.C.S.D.N.Y 1903)). Congress recodified § 515(b) in 1930 to clarify the Attorney General's authority to designate "special attorneys" in addition to "special assistants to the Attorney General," *see* Act of Apr. 17, 1930, ch. 174, Pub. L. No. 71-133, 46 Stat. 170, and in 1948 simplified its text without disrupting the Attorney General's authority, *see* Act of June 25, 1948, Pub. L. No. 80-773, § 3, 62 Stat. 869, 985-86. The last revision to § 515 before

Nixon was in 1966 and updated code provisions regarding government organization and employees, including § 533 discussed *infra* at 16-18, "to restate in comprehensive form, without substantive change," pre-existing law. H.R. Rep. No. 89-901, at 1, 186, 189-90 (1965).

"Armed with these provisions, Attorneys General made extensive use of special attorneys. They employed them in grand jury proceedings as well as trials." *In re Persico*, 522 F.2d at 54 (citing House Judiciary Comm., Report on H.R. 17714, H.R. Rep. No. 2901, 59th Cong., 1st Sess. at 1 (1906)); *see also, e.g.*, Donald Smaltz, *On the Need for Independent Counsel to Conduct Investigations*, 47 U. Kan. L. Rev. 573, 574, 577-78 (1999) (discussing appointments during the Grant, Garfield, T. Roosevelt, Coolidge, Truman, Nixon, Carter, Reagan, H.W. Bush, and Clinton administrations); Cong. Rsch. Serv., R43112, *Independent Counsels, Special Prosecutors, Special Counsels, and the Role of Congress* 2, 5 (2013) (describing appointment during the W. Bush administration). Congress further routinely appropriated funds to accommodate that "extensive use." *See, e.g.*, Act of Aug. 30, 1890, ch. 837, 26 Stat. 371, 409-10; Act of Mar. 3, 1891, ch. 542, 26 Stat. 948, 986; Act of Mar. 3, 1901, ch. 853, 31 Stat. 1133, 1181-82; Act of Feb. 24, 1903, Pub. L. No. 57-114, 32 Stat. 854, 903; Act of Mar. 4, 1921, Pub. L. No. 66-388, 41 Stat. 1367, 1412; Act of June 3, 1948, Pub. L. 80-596, 62 Stat. 305, 317. At no point in that long history of the appointment of special counsels did Congress purport to curtail the Attorney General's statutory authority.

Congress also empowered the Attorney General to appoint the Special Counsel in 28 U.S.C. § 533(a), which authorizes him to "appoint officials" to "detect and prosecute crimes against the United States." The Attorney General's order appointing Special Counsel Smith did precisely that, authorizing him to "conduct the ongoing investigation into . . . efforts to interfere with the lawful transfer of power following the 2020 presidential election or the certification of the Electoral College vote held on or about January 6, 2021," to "conduct the ongoing investigation" into the retention of "Highly Classified Records" that included "Top Secret," "Sensitive Compartmented Information, and Special Access Program materials" and efforts to obstruct their lawful recovery, and to "prosecute federal crimes arising from" those investigations except for prosecutions currently pending in the District of Columbia and those of "individuals for offenses they committed while physically present on the Capitol grounds" on January 6. Order No. 5559-2022; U.S. Resp. Mot. Judicial Oversight & Additional Relief at 5-13, Trump v. United States, No. 22-cv-81294 (S.D. Fla. Aug. 30, 2022) (ECF No. 48) (describing Trump's retention of classified materials and efforts to obstruct justice).

Amici argue that this appointment is invalid under § 533 because its reference to the appointment of "officials" precludes "officers" as used in the Constitution. Br. Meese Amici at 18-20. But this Court has explained that even as used in the Appointments Clause, "Officers" are "a class of government officials[.]" *Lucia v. SEC*, 585 US. 237, 241-42 (2018).

Amici also argue that Title 28's structure trumps the plain text of § 533 because it resides in

Chapter 33, titled "Federal Bureau of Investigation," and other chapters within Title 28 refer to constituent parts of the Department of Justice. Br. Meese Amici at 19-20. But § 533 unambiguously applies outside the context of the FBI, and the mere "title of a statute . . . cannot limit the plain meaning of the text." *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998) (quoting *Trainmen v. Baltimore & Ohio R. Co.*, 331 U.S. 519, 528-529 (1947)).

First, § 533 cannot apply only to the appointment of FBI personnel because the FBI does not "*prosecute* crimes against the United States" and the statutory authority to prosecute lies elsewhere. *See In re Grand Jury*, 315 F. Supp. 3d at 653. Further, where Chapter 33 contemplates action specifically by FBI personnel, it says so. *See, e.g.*, 28 U.S.C. §§ 535, 538, 539, 540, 540A(a), 540B(a) (collectively, stating that certain FBI personnel may investigate crimes by government officials and employees, shall investigate aircraft piracy, may use funds for counterintelligence, etc.).

It is also logical for § 533 to reference the prosecuting attorneys who work *alongside* the FBI to bring cases, particularly because certain "aspects of the prosecutor's responsibility . . . cast him in the role of an administrator or investigative officer rather than that of advocate." *Imbler v. Pachtman*, 424 U.S. 409, 430-31 (1976). Even within the context of non-prosecuting officials, courts have construed § 533's plain text to "of course" authorize appointments outside of the FBI, rebutting the claim that Chapter 33 pertains solely to the FBI or that the overall structure of Title 28 and its chapter headings should render the text ambiguous. *United States v. Hasan*,

846 F. Supp. 2d 541, 546 n. 7 (E.D. Va. 2012) (validating grant of authority under § 533 to Bureau of Alcohol, Tobacco, and Firearms agents), *aff'd*, 718 F.3d 338 (4th Cir. 2013).

Second, the text of Title 28 is clear in those instances where it curtails the Attorney General's otherwise broad statutory authority. *See, e.g.,* 28 U.S.C. § 509 (vesting "[a]ll functions" of other officers, agencies, and employees of the Department of Justice in the Attorney General "except the functions (1) vested . . . in administrative law judges employed by the Department of Justice; (2) of the Federal Prison Industries, Inc.; and (3) of the Board of Directors and officers of the Federal Prison Industries, Inc."); § 524 (granting authority to delegate approval of expenditures related to the Controlled Substances Act to anyone, but only to agency heads when payment is $100,000 or more); § 562(a) (granting authority to designate persons to fill vacancies among United States marshals, except those who have been appointed by the President for that office but not approved by the Senate). Title 28 does not resort to defining the Attorney General's vested authority over the Department of Justice by reference to chapter titles instead of clear statutory text.

Finally, *Amici*'s argument that 28 U.S.C. § 519's reference to § 543 limits the Attorney General's authority to appointing special counsel only to "assist United States attorneys" proves too much. Br. Meese Amici at 16-17. A provision about supervising litigation should not be read to limit the Attorney General's appointment powers. Assuming it does, § 519 applies only to supervision that is not "otherwise authorized by law." As discussed *infra* at 26-27, the

statutes and regulations under which Special Counsel Smith was appointed establish the scope of supervision, despite his not holding a position listed in § 519. And even applying § 519, the section provides that "the Attorney General shall supervise all litigation to which the United States . . . is a party," which would include the current prosecution conducted by the Special Counsel.

Further, neither § 543 nor its precursors, since their first enactment in 1916, *see* H.R. Rep. No. 89-901, at 192 (1965), have ever been construed to limit the Attorney General's authority to appoint special counsels, and this Court has referred to § 543 as an *alternative* grant of authority available to him, *see United States v. Sells Eng'g*, 463 U.S. 418, 429 n. 12, 436 n. 21 (1983) (referring to § 515 and § 543 as alternative means for attorneys to be "authorized to conduct grand jury proceedings" and "specially retained").

Amici's overbroad reading of § 543 would also lead to absurd results by removing the Attorney General's ability to appoint any of the hundreds of Department of Justice trial attorneys who do not assist United States Attorneys and whose roles are not specifically identified by statute. *See In re Grand Jury*, 315 F. Supp. 3d at 651 n.34. Section 543 is not a limiting provision that everyone has overlooked; it is an alternative grant of authority separate and apart from the ones authorizing special counsel appointments.

B. The Appointments Clause does not require Presidential nomination and Senate confirmation of Special Counsels because they are inferior officers.

This Court's precedent compels the conclusion that Special Counsel Smith is an inferior officer and can be appointed by the Attorney General pursuant to his statutory authority.

"[T]he Constitution for purposes of appointment . . . divides all its officers into two classes. . . . [P]rincipal officers are selected by the President with the advice and consent of the Senate. Inferior officers Congress may allow to be appointed by the President alone, by the heads of departments, or by the Judiciary." *Morrison v. Olson*, 487 U.S. 654, 670 (1988) (citation omitted). With regard to inferior officers, Congress has the constitutional prerogative to vest appointment power "as they think proper." U.S. Const., art. II, § 2, cl. 2; *see United States v. Germaine*, 99 U.S. 508, 510 (1879) ("[F]oreseeing that when offices became numerous, and sudden removals necessary . . . Congress might by law vest [inferior officers'] appointment in . . . the heads of departments.").

Amici conclude that Special Counsel Smith is a "superior" officer and ask this Court to remove Congress's ability to vest the power to appoint him in the Attorney General. They premise their conclusion on the significance of the investigation that Special Counsel Smith has been authorized to undertake, highlighting that he is prosecuting a "former President" who is "the presumptive [presidential] nominee of the opposition party" and concluding that

such prosecutions are "the hallmark of a superior officer." Br. Meese Amici at 30-31. They are wrong. Status and prominence of the criminal defendant has no relevance to the constitutional validity of the prosecution. More fundamentally, *amici* misunderstand what distinguishes an inferior officer from a principal officer.[5]

As this Court made clear in *Edmond*, inferior and principal officers are not distinguished by the significance of their duties. In holding that military appellate judges are inferior officers, this Court acknowledged that they "are charged with exercising significant authority on behalf of the United States," but noted the same "is also true of offices that we have held were 'inferior' within the meaning of the Appointments Clause." 520 U.S. at 662 (noting that in *Freytag*, special trial judges having "significan[t] . . . duties and discretion" are inferior officers). The exercise of "significant authority pursuant to the laws of the United States" marks "the line between officer and nonofficer," and not "the line between principal and inferior officer." *Id.*

The distinction between principal and inferior officers depends on the officer's placement in the structural hierarchy of the executive branch. Under either test this Court has applied to examine that placement, Special Counsel Smith is an inferior officer.

1. *Morrison* held that the independent counsel investigating certain officials in the Reagan administration, who was subject to much less

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[5] While *amici* used the term "superior" officer, this Court uses "principal" officer, and so does this brief.

supervision and control than Special Counsel Smith, was an inferior officer. Under *either* the majority *or* the dissent's standard in *Morrison*, Special Counsel Smith is an inferior officer as well.[6]

The independent counsel in *Morrison* was appointed under the Ethics in Government Act, now expired under 28 U.S.C. § 599, which "allow[ed] for the appointment of an 'independent counsel' to investigate and, if appropriate, prosecute certain high-ranking Government officials for violations of federal criminal laws." *Morrison*, 487 U.S. at 660. The EIGA required a special division of the D.C. Circuit, upon application of the Attorney General, to "appoint an appropriate independent counsel and shall define that independent counsel's prosecutorial jurisdiction." *Id.* at 661.

The independent counsel had considerable power and independence under the EIGA, including "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice" on matters within her jurisdiction, "full authority to dismiss matters within [her] prosecutorial jurisdiction" if consistent with Department of Justice policy, and exclusive authority over any matter that had been referred to her such that "the Attorney General and the Justice Department [were] required to suspend all

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[6] *Morrison* remains good law on the appointment of independent counsel. Even if it is not, as discussed *infra* at 26-29, Special Counsel Smith is an inferior officer under Justice Scalia's opinion in *Edmond*.

investigations and proceedings regarding the matter." *Id.* at 662-63.

Even with such power and independence, this Court concluded that, based on the application of four factors to evaluate the independent counsel's role, "[w]e need not attempt here to decide exactly where the line falls between the two types of officers, because in our view [the independent counsel] clearly falls on the 'inferior officer' side of that line[.]" *Id.* at 671. All of those factors indicate, and more forcefully than in *Morrison*, that Special Counsel Smith is an inferior officer.

The first factor is whether he is "subject to removal by a higher Executive Branch official." *Id.* That the EIGA permitted the independent counsel in *Morrison* to be removed by the Attorney General for cause "indicate[d] that she [was] to some degree 'inferior' in rank and authority." *Id.* at 663, 671. Special Counsel Smith, by contrast, enjoys no such statutory protection and can be removed by the Attorney General *at will*. While 28 C.F.R. § 600.7(d) provides for-cause removal of the Special Counsel, the Attorney General can remove Special Counsel Smith by (1) rescinding Order No. 5559-2022, which provided for his appointment and the applicability of regulations including 28 C.F.R. § 600.7 to him; or (2) revising or rescinding 28 C.F.R. § 600.7, which as "a matter relating to agency management or personnel" the Attorney General can do at will. *See* 5 U.S.C. § 553; *see also* Office of Special Counsel, 64 Fed. Reg. 37038, 37038 (July 9, 1999) ("[I]t is intended that ultimate responsibility for the matter [brought by Special Counsel] and how it is handled will continue to rest with the Attorney General.").

The D.C. Circuit reached the same conclusion in *Grand Jury*, with respect to Special Counsel Robert S. Mueller, III, where there was an additional question of whether the Acting Attorney General could have rescinded regulations. *See* 916 F.3d at 1052. Here, the Attorney General himself made the appointment and could no doubt rescind both the appointment and the regulations.

Justice Scalia's dissent in *Morrison* reinforces this conclusion. Contesting the relevance of for-cause removability, he wrote, "most (if not all) principal officers in the Executive Branch may be removed by the President at will. I fail to see how the fact that appellant is more difficult to remove than most principal officers helps to establish that she is an inferior officer." *Morrison*, 487 U.S. at 716 (Scalia, J., dissenting). He contrasted the independent counsel with the Watergate Special Prosecutor—appointed before the EIGA and pursuant to the same statutory authority here—whom "the President or the Attorney General could have removed . . . at any time, if by no other means than amending or revoking the regulation defining his authority," and whom he considered an inferior officer. *Id.* at 721 (citing *United States v. Nixon*, 418 U.S. 683, 696 (1974)). Even in Justice Scalia's view, Special Counsel Smith's removability indicates that he is an inferior officer.

As to the remaining factors, Special Counsel Smith has more limited duties, jurisdiction, and tenure than the independent counsel evaluated in *Morrison*. The independent counsel had not only the "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice," *id.*, 487 U.S. at 671, but

also, Justice Scalia noted, a power "not even the Attorney General possesses: to 'contes[t] in court . . . any claim of privilege or attempt to withhold evidence on grounds of national security.'" *Id.* at 717 (Scalia, J., dissenting).

The regulations setting the scope of Special Counsel Smith's appointment grant him only the "authority to exercise all investigative and prosecutorial functions of any United States Attorney." 28 C.F.R. § 600.6. Further, Special Counsel Smith, like the independent counsel, "can only act within the scope of the jurisdiction that has been granted," and "is appointed essentially to accomplish a single task, and when that task is over the office is terminated." *Morrison*, 487 U.S. at 672.

Pursuant to these regulations, the Attorney General authorized Special Counsel Smith only to investigate "whether any person or entity violated the law in connection with efforts to interfere with the lawful transfer of power following the 2020 presidential election or the certification of the Electoral College vote held on or about January 6, 2021," and to "conduct the ongoing investigation referenced and described in the United States' Response to Motion for Judicial Oversight and Additional Relief, *Donald J Trump v. United States*," as well as criminal conduct that arises in those investigations. Order No. 5559-2022. The order also specifically excludes certain related prosecutions from his jurisdiction. *Id.*

Under both the *Morrison* majority and dissent, Special Counsel Smith is an inferior officer.

2. Justice Scalia wrote the majority opinion in *Edmond*. Under *Edmond*, Special Counsel Smith is still an inferior officer.

Justice Scalia wrote in *Edmond* that "'inferior officers' are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." 520 U.S. at 663. He concluded that Article I Judges on the Coast Guard Court of Criminal Appeals were directed and supervised as inferior officers using a three-pronged analysis. First, "[t]he Judge Advocate General exercises administrative oversight over the Court of Criminal Appeals." *Id.* at 664. Second, "the Judge Advocate General may," using "a powerful tool for control," "also remove a Court of Criminal Appeals judge from his judicial assignment without cause." *Id.* Third, "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" because the Court of Appeals for the Armed Forces can reverse their decisions. *Id.* at 664-65.

Here, the first *Edmond* prong is satisfied because the Attorney General retains supervisory authority over the Special Counsel. Federal law permits the Attorney General, "[w]hen [he] considers it in the interests of the United States, [to] personally conduct and argue any case . . . in which the United States is interested, or [to] direct . . . any officer of the Department of Justice to do so." 28 U.S.C. § 518(b). And "[e]xcept as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States . . . is a party." 28 U.S.C. § 519.

Regulations further empower the Attorney General to "request that the Special Counsel provide an explanation for *any* investigative or prosecutorial step." 28 C.F.R. § 600.7(b) (emphasis added). A statute further permits the Attorney General to rescind at will the provision that "the Special Counsel shall not be subject to the day-to-day supervision of any official of the Department," *see* 5 U.S.C. § 553; *see also* Office of Special Counsel, 64 Fed. Reg. 37038, 37038 (July 9, 1999) ("[T]he regulations explicitly acknowledge the possibility of review of specific decisions reached by the Special Counsel."). This is no less robust authority for oversight than in *Edmond*, where the Judge Advocate General "prescribe[s] uniform rules of procedure" for the military appellate judges, and "formulate policies and procedure in regard to review of court-martial cases." 520 U.S. at 664.

Amici complains that "Attorney General Garland does not supervise or direct" Special Counsel Smith. Br. Meese Amici at 31. Putting aside that the Attorney General has said merely that Special Counsel Smith is not "subject to the *day-to-day* supervision of any official of the Department,"[7] the Appointments Clause is a "significant structural safeguard[] of the constitutional scheme" to "prevent[] congressional encroachment upon the Executive and Judicial Branches," and "to ensure public accountability" for political appointments, *Edmond*, 520 U.S. at 659-60; it does not allow intrusions into executive decisions over the minutiae of supervision.

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[7] Press Release, Department of Justice, Appointment of a Special Counsel (Nov. 18, 2022), https://www.justice.gov/opa/pr/appointment-special-counsel-0 (emphasis added).

Principal officers "need not review every decision" of inferior officers; what matters is that they "have the discretion to review decisions rendered by" them. *United States v. Arthrex, Inc.*, 594 U.S. 1, 27 (2021). Special Counsels are "*subject to* the supervision of the Attorney General. Whether they were in fact supervised is beside the point," and is simply a prerogative of the Attorney General. *United States v. Donziger*, 38 F.4th 290, 301 (2d Cir. 2022) (emphasis added).

The second *Edmond* prong is satisfied because the Attorney General can remove Special Counsel Smith at will by (1) rescinding the appointment of Special Counsel Smith or (2) revising or rescinding regulations. *See supra* at 23-24.

Lastly, the third *Edmond* prong is satisfied because the Attorney General holds the final authority with respect to the Special Counsel's decisions. In addition to statutory authority for the Attorney General to "personally conduct and argue any case . . . in which the United States is interested" and to "direct . . . any officer of the Department of Justice to do so," 28 U.S.C. § 518(b), regulations empower the Attorney General to "after review conclude that the action [by the Special Counsel] is so inappropriate or unwarranted under established Departmental practices that it should not be pursued." 28 C.F.R. § 600.7(b).

That the Attorney General grants a measure of deference to the views of the Special Counsel under § 600.7(b) does not change the analysis. Similar deference was also given to the military appellate judges who were held to be inferior officers in *Edmond*, and deference to his views does not

undermine the fact that Special Counsel Smith "has no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers." 520 U.S. at 664-65. What matters is not whether the Attorney General vetoes the Special Counsel, but that he has the discretion to do so. *Arthrex*, 594 U.S. at 27.

3. *Amici* argue that the Special Counsel's appointment is only supported by a "wild overreading of the Court's decisions" in *Morrison* and *Edmond*. Br. Meese Amici at 29. But the *Edmond* test described *supra* at 26-28 was reaffirmed in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 561 U.S. 477, 510 (2010), where this Court found members of the Public Company Accounting Oversight Board to be inferior officers under *Edmond*; and in *Arthrex*, 594 U.S. at 27, where this Court found members of the Patent Trial and Appeal Board to be principal officers under *Edmond* because their decisions are not reviewable by superior executive officers. *Amici* have not explained the "correct" reading of *Morrison* and *Edmond*, or what to make of this Court's repeated affirmance of *Edmond*, or how they would read language that they argue "some lower courts" have misconstrued. Br. Meese Amici at 29-30.

Amici further argue that it would contradict the original meaning of the Constitution to conclude that "anyone who had a superior on an agency organization chart must be an 'inferior' officer." *Id.* That is a strawman. As *Arthrex* itself makes clear, *Edmond* does not render "*anyone* who had a superior on an agency organization chart" an inferior officer. *Id.* (emphasis added). At issue in *Arthrex* were "administrative patent judges who sit at the bottom of

an organizational chart, nestled under at least two levels of authority." 594 U.S. at 44-45 (Thomas, J., dissenting). This Court found them to fail the *Edmond* test for inferior officers because "the unchecked exercise of executive power by an officer buried many layers beneath the President poses more, not less, of a constitutional problem." *Id.* at 18. Special Counsel Smith, by contrast, is both nominally inferior and *in fact* subject to *direct* control and supervision.

Amici also resort to an irrelevant slippery slope argument, questioning whether Congress could "let the Attorney General unilaterally appoint the Deputy Attorney General, Solicitor General or FBI Director[.]" Br. Meese Amici at 30. But those officers are vastly different in authority, tenure, and removability than Special Counsel Smith, and this Court need not grapple with whether Congress could vest their appointment with the Attorney General, as those offices are currently constituted. That is not to say that Congress could not do so if it first decreased their authority and tenure and increased the supervision over them to render them inferior officers.

Nor does *Amici*'s comparison of the Special Counsel to United States Attorneys hold water. The applicable regulations, of course, give the Special Counsel "full power and independent authority to exercise all investigative and prosecutorial functions of any United States Attorney." 28 C.F.R. § 600.6. But, as described *supra* at 24-28, such authority is given on an as-needed basis, temporarily, with limited scope, under increased supervisory authority, and subject to at-will removal by the Attorney General. This is a far cry from the manner in which United States Attorneys have exercised, and continue to exercise, their

authority. The United States Attorneys, for example, are appointed for a term of four years and continue until their successor is "appointed and qualifies"; they are also only subject to removal by the President. 28 U.S.C. § 541.

Amici's emphasis on the importance of presidential appointment and Senate confirmation for United States Attorneys, Br. Meese Amici at 23-25, is likewise irrelevant to the question of whether the Special Counsel's appointment—to a different office with different authority—is valid as a matter of constitutional law. The significance of duties is not the measure that distinguishes between inferior and principal officers; what matters is their relative position within the executive. *See supra* at 20-21. The Special Counsel, subject to at-will supervision and removal of the Attorney General, is no doubt an inferior officer.

CONCLUSION

The Court should affirm the Court of Appeal's judgment without addressing the validity of Special Counsel Smith's appointment, or in the alternative, should affirm the Court of Appeal's judgment by finding the appointment valid.

Respectfully submitted,

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