No. 24-316

IN THE
Supreme Court of the United States

ROBERT F. KENNEDY, JR., ET AL.,
Petitioners,
v.
BRAIDWOOD MANAGEMENT, INC., ET AL.,
Respondents.

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

BRIEF OF MANHATTAN INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

The Manhattan Institute for Policy Research ("MI") is a nonpartisan public policy research foundation whose mission is to develop and disseminate ideas that foster greater economic choice and individual responsibility. MI's constitutional studies program aims to advance the Constitution's original public meaning, including how constitutional structure secures our freedom. MI scholars and affiliates are sought-after experts on administrative law, governmental reform, the judicial process, and legal history. This case interests MI because of its particular focus on transparent and politically accountable government.

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[1] No counsel for any party has authored this brief in whole or in part, and no entity or person made any monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

In its certiorari petition and in its briefing at the Fifth Circuit, the government's lead argument was that an officer is inherently "inferior" if he can be removed by another officer. In its merits brief before this Court, however, the government backs away from that position, telling the Court it need not reach it, although the government never repudiates the point and occasionally smuggles it back into its principal/inferior-officer analysis. Pet.Br.23.

The government's argument, to the extent it still makes it, is wrong. This Court has never said removability by another officer is alone sufficient to render an officer "inferior." Rather, the Court has consistently noted that the removal power and the power to direct the officer in his actions are *both* relevant factors for determining inferior status.

The government's view is also contrary to the original understanding of Article II, which viewed the powers to direct and to remove officers as sequential: principal officers could direct inferior officers in their tasks, and if the inferior officers refused or were incompetent, they could be removed.

Further, given that the touchstone is Article II's mandate that the President take care that the laws be faithfully executed, the power to direct officers in the execution of their duties would, if anything, be more important than the removal power, which does not necessarily remedy prior actions.

The Court should reject the government's contrary view, to the extent it still proffers it.

ARGUMENT

I. To Ensure the Laws Be Faithfully Executed, Article II Establishes a Clear Chain of Command from the President to Principal Officers to Inferior Officers.

Article II requires the President to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. The passive formulation ("be faithfully executed") reflects the understanding that the President himself could never personally execute all the laws, even in the early days of the Republic. *See Seila Law LLC v. CFPB*, 591 U.S. 197, 213 (2020) ("[I]t would be 'impossib[le]' for 'one man' to 'perform all the great business of the State,' [so] the Constitution assumes that lesser executive officers will 'assist the supreme Magistrate in discharging the duties of his trust.'"). (quoting 30 *The Writings of George Washington* 334 (J. Fitzpatrick ed. 1939)). Thus, the clause confirms that the President "takes care that [the laws] be executed—by others." Michael W. McConnell, *The President Who Would Not Be King* 345 (2020).

Several other provisions in Article II operate in conjunction to create the clear chain of command necessary to ensure that the President can comply with the Take Care Clause and thus "bear[] responsibility for the actions of the many departments and agencies within the Executive Branch." *Trump v. United States*, 603 U.S. 593, 607 (2024).

First, the Opinions Clause states the President "may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective

Offices." U.S. Const. art. II, § 2. The "power of the Executive" was "subdivi[ded] … into departments, for the more convenient exercise of that power." *United States v. Germaine*, 99 U.S. 508, 510 (1878). And the Opinions Clause means each department has a head that reports to the President. The provision thus "is the linchpin of the President's exercise of supervisory authority" over Executive officers. McConnell, *supra*, at 78. "Without it, he might have no way to monitor the activities of the departments until they have taken final action, when it might be too late. With it, he could find out what the departments intended to do and reach his own judgment." *Id.* The President has the ability to request an opinion in writing "precisely so he will be able to issue binding orders to his subordinates." Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 Yale L.J. 541, 584 (1994). "Notions of hierarchy and of the unitary Executive are thus implicit in the Opinions Clause." *Id.*

Second, the Appointments Clause dictates there are two types of officers in the Executive Branch: principal and inferior. U.S. Const. art. II, § 2. This "very clearly divides all … officers into two classes," creating a chain of command for those executive officials beneath the President. *Germaine*, 99 U.S. at 509. Congress can also vest by law the power of appointment of inferior officers in the heads of departments, again establishing a clear hierarchy. *See Myers v. United States*, 272 U.S. 52, 117 (1926) ("[T]he reasonable implication … was that as part of his executive power he should select those who were

to act for him under his direction in the execution of the laws.").

Taken together, these provisions ensure the President receives information from and directs principal officers, who in turn then direct inferior officers. This chain of command ensures one thing above all else: the President can direct the execution of the laws and thereby satisfy his constitutional duty to take care that the laws be faithfully executed.

James Madison extolled this "great principle of unity and responsibility in the Executive department," which ensures that "the chain of dependence [will] be preserved; the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community." 1 Annals of Cong. 499 (1789) (Joseph Gales ed., 1834). And that dependence is all the more important "[t]oday," when "thousands of officers wield executive power on behalf of the President in the name of the United States." *United States v. Arthrex, Inc.*, 594 U.S. 1, 11 (2021). "That power acquires its legitimacy and accountability to the public through 'a clear and effective chain of command' down from the President" to principal officers, then to inferior officers. *Id.*

"The obvious purpose of this scheme is to make sure that all the business of the Executive will be conducted under the supervision of officers appointed by the President with Senate approval." *Freytag v. C.I.R.*, 501 U.S. 868, 919 (1991) (Scalia J., concurring in part and concurring in the judgment).

II. Precedent and Original Understanding Confirm the Power to Direct Is at Least As Important As the Power to Remove.

The government contends—or at least previously contended—that the Secretary's supposed power to remove Task Force members alone renders them inferior officers.[2] The government argued to the Fifth Circuit that "Task Force members … are removable at will and are therefore inferior officers," Op.Br.CA5.Fed.Resp.24, and in its certiorari petition that "because the Secretary (a principal officer) has 'the power to remove [Task Force] members' at will, the Court should 'have no hesitation in concluding' that those members are inferior officers," Cert.Pet.18 (quoting *Free Enter. Fund v. Pub. Co. Acct. Bd.*, 561 U.S. 477, 510 (2010)); *see also id.* at 15 (arguing that the ability to remove an officer was "likely dispositive evidence" of that officer's "inferior-officer status").

The government further criticized the Fifth Circuit for "identif[ying] no authority for the proposition that at-will removal is a constitutionally insufficient method through which a principal officer may supervise an inferior officer." Cert.Pet.19. The government even went so far as to ask this Court to "reject that unprecedented and illogical outcome." *Id.*

In its merits brief, however, the government backs down from that demand. It now claims the Court "need not resolve th[e] question" of whether "at-will removability by a superior … alone suffice[s] to make

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[2] To be clear, Respondents dispute the Secretary can remove Task Force members at will. Resp.Br.14–22.

someone an inferior officer." Pet. Br. 23. But the government does not entirely abandon its prior view. It again criticizes the Fifth Circuit for "not identify[ing] any instance in which at-will removability was held to be constitutionally insufficient to render an officer inferior." *Id.* And the government slips back into old habits by arguing that the "Secretary's ability to remove Task Force members at will ensures that they cannot exercise significant power 'free from control by a superior,'" and thus are inferior officers. *Id.* at 27 (quoting *Arthrex*, 594 U.S. at 17).

That argument is contrary to this Court's holdings and the historical understanding of Article II's chain of responsibility for ensuring faithful execution of the laws.

A. The Court Has Long Held that Removal and Directive Powers Are Both Relevant.

This Court has repeatedly held that the powers to direct officers and to remove them are *both* important to the analysis of whether an officer is inferior. In *Morrison v. Olson*, 487 U.S. 654 (1988), the Court noted that removal was just one of "[s]everal factors" the Court considers in the principal/inferior-officer analysis, *id.* at 671. Similarly, in *Edmond v. United States*, 520 U.S. 651 (1997), the Court highlighted both that the Judge Advocate General could remove judges of the Coast Guard Court of Criminal Appeals "without cause" *and* that their decisions could be "reverse[d]" by "another Executive Branch entity, the Court of Appeals for the Armed Forces," *id.* at 664,

666. The Court noted that the "power to remove officers … is a powerful tool for control," but this control "is, to be sure, not complete." *Id.* at 664. In *Free Enterprise Fund*, this Court stressed that SEC Commissioners could both "remove" members of the Public Company Accounting Oversight Board (once their removal protections were invalidated) *and* "amend Board sanctions," 561 U.S. at 504.

And recently in *Arthrex*, as Justice Gorsuch emphasized, an inferior officer "must be both '*subordinate*' … and 'under the direct control'" of an officer who answers directly to the President. 594 U.S. at 29 (Gorsuch, J., concurring in part) (quoting *Morrison*, 487 U.S. at 720–21 (Scalia, J., dissenting)). "[A]dequate supervision"—the touchstone for inferior status—"entails review of decisions issued by inferior officers." *Id.* at 19. A principal officer "must have power to adjudge the question of accuracy" of the inferior officer's work—and if not, then the seemingly inferior officer isn't actually inferior. *Id.*

This Court further recognized that having the power to fire and "re-pick[]" officers is not dispositive to the principal/inferior determination because that power would still allow the principal officer to avoid "tak[ing] responsibility for the ultimate decision." *Id.* at 16.

Accordingly, even if it were true that "'in reality officers removable at will generally understand that they answer to the [principal's] direction,'" Gov.Br.21 n.4 (quoting Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 Ala. L. Rev. 1205, 1222 (2014)), that is legally irrelevant because

"such machinations blur the lines of accountability demanded by" the Constitution, *Arthrex*, 594 U.S. at 16.

In other words, Article II demands clear lines of legal authority and responsibility, not winks and nods about who is actually calling the shots. The government is therefore incorrect to contend—if indeed it still does—that no precedent supports the Fifth Circuit's holding that Task Force members are inferior only if the Secretary can both remove the members and direct or review their actions. This Court's precedent says exactly what the Fifth Circuit held.[3]

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[3] Then-Judge Kavanaugh once noted that "ordinarily" "[r]emovability at will carries with it the inherent power to direct and supervise," *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 537 F.3d 667, 707 (D.C. Cir. 2008) (Kavanaugh, J., dissenting), but he elsewhere noted the importance of the fact that the SEC lacked the "power to prevent and affirmatively command, and to manage the ongoing conduct of, [the Public Company Accounting Oversight] Board inspections, investigations, and enforcement actions," *id.* at 709, which confirms the importance of the directive powers. Judge Kavanaugh's statement about removability could be read to mean only that there is a presumption that the power to remove *also* implicitly includes the separate power to direct/review in the event that the relevant statute is silent on the matter, but that would certainly not support a claim that removal power, shorn from directive power, would somehow be sufficient on its own. And even if there were such a presumption, it cannot apply where the statute purports to shield officers' decisions from direction or review by a principal officer, as is the case here. *See* 42 U.S.C. § 299b-4(a)(6).

B. The Historical Understanding Confirms the Importance of the Power to Direct Officers.

The framers also viewed the directive and removal powers together—not just one alone—as critically important. Principal officers must be able to direct inferior officers, and if the latter refused or did a poor job, then the principal officer could remove them. "[S]uperiors have authority to instruct [inferiors] in how to exercise their discretion, and enforce those instructions by removal" if necessary. McConnell, *supra*, at 349. An "officer is subject to the supervision and instructions of his superiors—presumably all the way up to the President. This was necessary to ensure 'uniformity and system in the execution of the laws.'" McConnell, *supra*, at 347.

For example, Fisher Ames explained that the President must have his choice of "assistants" whom he would "superintend, control, inspect, and check," but whom he could then remove if he concludes "the qualifications which induced their appointment [have] cease[d] to exist." 1 Annals of Cong. 492–93. The same logic applies to principal officers' oversight of inferior officers. Thus, "[s]ince the founding, principal officers have directed the decisions of inferior officers on matters of law as well as policy." *Arthrex*, 594 U.S. at 18.

The government appears to dispute this view and cites (Gov.Br.21 n.4) Aditya Bamzai and Sai Prakash's article *The Executive Power of Removal*, 136 Harv. L. Rev. 1756, 1770–71 (2023). But the quoted portion refers to a quickly rejected proposal that

would have let Congress remove the President at will, which says little if anything about whether an executive officer is principal or inferior. But the article does note that among the framers, "[m]any suggested that the President could direct executives," and there was a sentiment that "'deputies' are obliged to honor instructions on pain of dismissal." *Id.* at 1773. This provides further evidence that the founders viewed the directive and removal powers as sequential.

The issue of principals' control over inferior officers came to a head early in the Washington Administration, when disputes arose about how best to collect customs duties. *See* McConnell, *supra*, at 347. "Some customs collectors … took the view that they should follow their own best judgment of what the law required, and not that of Treasury officials higher in the chain of command." *Id.* Alexander Hamilton wrote a "famous letter addressing these concerns." *Id.* In it, Hamilton said the "power to superintend must imply a right to judge and direct." 3 *The Works of Alexander Hamilton* 559 (J. Hamilton ed. 1850). Thus, "an officer of the customs executes his duty according to law, when … he conforms his conduct to the construction which is given to the law by that officer, who, by law, is constituted the general superintendent of the collection of the revenue." *Id.*

The Hamilton example established the principal since long recognized by this Court: "[A]dequate supervision entails review of decisions issued by inferior officers," either through directives by principal officers ordering certain actions, or via appeal to the principal officers themselves. *Arthrex*, 594 U.S. at 18–19. That "authority to review flow[s]

from the necessity of supervision and control, vested in the [principal officer] acting under the direction of the President." *Id.* (cleaned up).

C. The Power to Direct Is Critical to the Duty to Take Care.

If anything, the power to direct an officer is *more* important than the power to remove him. Recall from Part I above that the touchstone is the President's obligation to ensure that the laws be faithfully executed. What could be more critical to that obligation than the power to direct officers in the execution of the laws? As James Madison explained: "[I]f any power whatsoever is in its nature executive, it is the power of appointing, overseeing, and *controlling* those who execute the laws." 1 Annals of Cong. 481 (emphasis added).

This Court's decision in *Arthrex* recognized this point by holding that inferior officers' "work … must be *directed and supervised* by an officer who has been" "nominated by [the President] and confirmed by the Senate." *Arthrex*, 594 U.S. at 6 (emphasis added). Stated another way, an inferior officer "must" be "'under the direct control of the President' through a 'chain of command'" involving principal officers. *Id.* at 29 (Gorsuch, J. concurring in part and dissenting in part) (quoting *Morrison*, 487 U.S. at 720–21); *see, e.g.*, Gary S. Lawson, *The Rise and Rise of the Administrative State*, 107 Harv. L. Rev. 1231, 1244 (1994) (arguing that if an officer's decisions cannot be directed or overturned, he "will have effectively exercised executive power contrary to the President's

wishes, which contravenes the vesting of that power in the President").

By comparison, removal is only a *post hoc* power. By the time an officer is removed, he may already have taken actions that cannot be undone by the executive branch. Again, this Court explained the point in *Arthrex* when it held that the power to remove or reassign an officer after he takes unacceptable actions "gives [the principal officer] no means of countermanding the final decision already on the books." 594 U.S. at 16. At that point, the law has already been *unfaithfully* executed. Without the power to direct actions in the first place or at least on review, officers could be empowered to "take[] final action, when it might be too late" for superiors to intervene or countermand. McConnell, *supra*, at 78.

* * *

Precedent, historical understanding, and the text of Article II itself all demonstrate the government is wrong to contend that mere removability inherently renders an officer "inferior."

CONCLUSION

For the foregoing reasons, *amicus* urges the Court to affirm.

Respectfully submitted,

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