Nos. 19-1434, 19-1452, 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 AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENT ARTHREX, INC., IN NOS. 19-1434 & 19-1452

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(Additional captions listed on inside cover)

SMITH & NEPHEW, INC., ET AL.,

Petitioners,

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Founded in 1973, PACIFIC LEGAL FOUNDATION is a nonprofit, tax-exempt, California corporation established for the purpose of litigating matters affecting the public interest. PLF provides a voice in the courts for Americans who believe in limited constitutional government, private property rights, and individual freedom.

PLF is the most experienced public-interest legal organization defending the constitutional principle of separation of powers in the arena of administrative law. PLF's attorneys have participated as lead counsel or counsel for amici in several cases involving the role of the Judicial Branch as an independent check on the Executive and Legislative branches under the Constitution's Separation of Powers. *See, e.g.*, *Lucia v. SEC*, 138 S. Ct. 2044 (2018) (SEC administrative-law judge is "officer of the United States" under the Appointments Clause); *U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 136 S. Ct. 1807 (2016) (judicial review of agency interpretation of Clean Water Act); *Sackett v. EPA*, 566 U.S. 120 (2012) (same); *Rapanos v. United States*, 547 U.S. 715 (2006) (agency regulations defining "waters of the United States").

This case raises important questions concerning the exercise of the "executive Power" of the United

[1] Pursuant to this Court's Rule 37.3(a), Counsel for all parties provided blanket consent to the filing of amicus briefs. Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

States. PLF offers a discussion of first principles that should illuminate the Court's review.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court should hold that administrative patent judges (APJs) on the Patent Trial and Appeal Board are non-inferior officers who must be appointed by the President, by and with the advice and consent of the Senate. This is so because APJs exercise substantial, discretionary, and final decision-making power in *inter partes* and post-grant reviews—authority comparable to that exercised by federal district court judges, who are universally recognized to be non-inferior officers.

This proposed holding would conform to the Constitution's original text and meaning, and to well-established historical practice: first, the Appointments Clause recognizes more than just two simple categories of "inferior Officers" and non-inferior officers; and second, distinctions among federal officers have depended on the nature and scope of their authority. Amicus submits that the Appointments Clause contemplates three types of officers: **principal officers** (chiefly the Heads of Departments, who exercise immense power, including broad discretion to (help the President) establish policy and set priorities); **superior officers** (who exercise important powers but who are subordinate to their respective department's principal officer); and **inferior officers** (who perform less-important governmental responsibilities and who may be appointed by principal officers). In this taxonomy, APJs, like district court judges, are superior officers who require Presidential appointment with Senate confirmation (PAS appointment).

These distinctions among federal officials, if not the terminology, are hardly novel. *See Morrison v. Olson*, 487 U.S. 654, 722 (1988) (Scalia, J., dissenting) ("Even an officer who is subordinate to a department head can be a principal officer."). But they do call for the Court to refine the direction-and-supervision standard set forth in *Edmond v. United States*, 520 U.S. 651 (1997). There, the Court acknowledged that judges of the Coast Guard's Court of Criminal Appeals (like the APJs here) exercised "significant" authority. But it held that the exercise of "'significant authority pursuant to the laws of the United States' marks, not the line between principal and inferior officer," but rather, "the line between officer and nonofficer." *Id.* at 662 (quoting *Buckley v. Valeo*, 424 U.S. 1, 126 (1976)). The judges' exercise of "significant" authority meant that they were officers; but, the Court held, because their work was "directed and supervised at some level by other[officers] who were appointed by Presidential nomination with the advice and consent of the Senate," they were *inferior* officers. *Id.* at 663.

But if mere direction and supervision are sufficient to render an officer "inferior," then a vast array of officials who wield substantial governmental authority and who have long been recognized as officers requiring PAS appointment—*e.g.*, the Assistant Attorney General for the Civil Rights Division, Ambassadors, United States Attorneys, judges of the "inferior Courts," the FDA Commissioner, the PTO Director here—would be deemed inferior officers. Under the taxonomy offered above, these officers should be called "superior" officers, a species of non-inferior officer.

This principal-superior-inferior ordering not only conforms to historical practice, it also follows from the

authentic meaning of officer. Originally, the term "Officers of the United States" most likely encompassed "all federal officials who perform an ongoing, statutory duty—*no matter how important or significant the duty*." *Lucia v. SEC*, 138 S. Ct. 2044, 2056 (2018) (Thomas, J., concurring) (emphasis added) (citing Jennifer L. Mascott, *Who Are "Officers of the United States"?*, 70 Stan. L. Rev. 443, 454 (2018)). While this definition appears to conflict with *Edmond* and *Buckley*, neither opinion defined "significant." As explained below, the term "significant" in this context should be understood to mean *sovereign*, *i.e.*, all "Officers of the United States" exercise "[sovereign] authority" or carry out a sovereign duty. *Buckley*, 424 U.S. at 126. This definition faithfully tracks the authorities cited in *Buckley*.

In sum, officers like APJs who exercise particularly important sovereign authority, but who are nonetheless subordinate to Heads of Departments and perhaps other high-level officers, are neither "principal" nor "inferior" officers—they are "superior" officers requiring PAS appointment.

ARGUMENT

I. ALL "OFFICERS OF THE UNITED STATES" EXERCISE SOVEREIGN AUTHORITY

The Appointments Clause provides:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which

> shall be established by Law: but the 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. The Clause expressly contemplates several types of officers—including the President and Members of Congress ("all other Officers of the United States" whose appointments are elsewhere provided for), Heads of Departments, this Court's Chief and Associate Justices, Courts of Law, and "inferior Officers"—all of whom exercise different kinds and varying levels of sovereign authority.

A. Officers of the United States exercise "significant" authority—properly defined

According to *Edmond*, the "exercise of 'significant authority pursuant to the laws of the United States' marks, not the line between principal and inferior officer," but rather, "the line between officer and nonofficer," 520 U.S. at 662 (quoting *Buckley*, 424 U.S. at 126). *Buckley* declared that the term "Officers of the United States" is "intended to have substantive meaning[,]" and that its "fair import is that any appointee exercising significant authority pursuant to the laws of the United States" is an "Officer of the United States." 424 U.S. at 126. But *Buckley* neither defined "significant authority" nor discussed its content.[2] Since then, the Court has suggested that "significant"

[2] As in *Edmond*, the Court in *Freytag v. Commissioner* quoted this language from *Buckley* but did not define "significant." *See* 501 U.S. 868, 881 (1991) (quoting *Buckley*, 424 U.S. at 126). And in *Lucia*, the Court declined the invitation to elaborate on its meaning. 138 S. Ct. at 2051–52.

involves something more than ministerial. *See, e.g.*, *Edmond*, 520 U.S. at 662 (not disputing that military appellate judges, who review court-martial proceedings and may independently weigh evidence, exercise "significant authority on behalf of the United States"); *Freytag*, 501 U.S. at 881 (stating that "special trial judges" in the U.S. Tax Court perform "more than ministerial tasks"). Respectfully, this understanding calls for refinement.

The term "Officers of the United States," originally understood, encompasses all federal employees who have "an ongoing, statutory duty—*no matter how important or significant the duty*." *Lucia*, 138 S. Ct. at 2056 (Thomas, J., concurring) (emphasis added) (citing Mascott, *supra*, at 454). *See also United States v. Hartwell*, 73 U.S. (6 Wall.) 385, 393 (1867) ("An office is a public station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties. The employment of the defendant was in the public service of the United States. He was appointed pursuant to law, and his compensation was fixed by law. Vacating the office of his superior would not have affected the tenure of his place. His duties were continuing and permanent, not occasional or temporary.").

This original understanding of "officer" is consistent with cases cited in *Buckley*. There, the Court relied on *Auffmordt v. Hedden*, 137 U.S. 310, 327 (1890), and *United States v. Germaine*, 99 U.S. (9 Otto) 508 (1878), for the proposition that non-officer employees are "lesser functionaries subordinate to officers of the United States." *Buckley*, 424 U.S. at 126

n.162.[3] But neither *Auffmordt* nor *Germaine* held that government officials exercising apparently insignificant power must be non-officers.

In *Germaine*, the Court explained that the term "office" "embraces the ideas of tenure, duration, emolument, and duties, and that the latter were continuing and permanent, not occasional or temporary." 99 U.S. at 511–12. The Court held that a surgeon was not an officer because his "duties [were] *not* continuing and permanent, and they [*were*] occasional and intermittent[;]" he acted "only . . . when called on by the Commissioner of Pensions in some special case[;]" he was "required to keep no place of business for the public use[;]" and "[n]o regular appropriation [was] made to pay his compensation." *Id.* The surgeon's association with the government, in other words, was akin to a contractual relationship.

Similarly, *Auffmordt* held that a "merchant appraiser" was not an officer because he was not a full-time functionary; he was "selected for the special case[,]" and he had "no general functions, nor any employment which ha[d] any duration as to time, or which extend[ed] over any case further than as he [was] selected to act in that particular case." 137 U.S. at 326–27. His position was "without tenure, duration, continuing emolument, or continuous duties, and he act[ed] only occasionally and temporarily." *Id.* at 327.

Auffmordt itself cited several decisions which likewise demonstrate that the "significance" of an employee's duties does not determine whether the employee is an officer. *See* 137 U.S. at 327 (citing *United*

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[3] Neither *Buckley*, nor *Freytag*, which quoted this passage from *Buckley*, defined "lesser functionary." *See Freytag*, 501 U.S. at 880 (quoting *Buckley*, 424 U.S. at 126 n.162).

States v. Maurice, 26 F. Cas. 1211, 1214 (Va. Cir. Ct. 1823); *Hartwell*, 73 U.S. at 393 (holding that clerk to assistant treasurer in Boston was an officer); *Germaine*, 99 U.S. at 510, 511; *Hall v. Wisconsin*, 103 U.S. (13 Otto) 5, 8 (1880) (The term "office" "embraces the ideas of tenure, duration, emolument, and duties, and … the latter were continuing and permanent, not occasional or temporary.")).[4] In *Maurice*, Chief Justice Marshall, riding circuit, described an officer as one who has a "continuing" duty "defined by rules prescribed by the government, and not by contract," and who has (non-contractual) duties that "continue, though the person be changed." 26 F. Cas. at 1214.

These and other early cases thus support the original meaning of "officer" as a federal functionary with ongoing, statutory duties. *See Myers v. United States*, 272 U.S. 52 (1926) (postmaster first-class); *Williams v. United States*, 168 U.S. 382 (1897) ("Chinese inspector" appointed by treasury department to assist enforcement of Chinese-exclusion laws); *United States v. Perkins*, 116 U.S. 483 484–85 (1886) ("cadet engineer" appointed by Secretary of the Navy); *Germaine*, 99 U.S. at 511 (describing as officers, "thousands of clerks in the Departments of the Treasury, Interior, and the othe[r]" departments); *United States v. Moore*, 95 U.S. (5 Otto) 760, 762 (1877) ("assistant-surgeon"); *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 256–58 (1839) (clerk of court). *See also* 1 William Blackstone, *Commentaries on the Laws of England* *328 (1765)

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[4] *Auffmordt* also cited *United States v. Smith*, 124 U.S. 525, 532 (1888), and *United States v. Mouat*, 124 U.S. 303, 307 (1888), but these cases did not address the nature of an "office." Rather, they held that a person not appointed under the Appointments Clause cannot be an officer.

("[M]agistrates and officers" include "sheriffs; coroners; justices of the peace; constables; surveyors of highways; and overseers of the poor.").

It "is primarily" this Court's "late twentieth century … opinions, and some court of appeals decisions applying and extending those opinions, that seem to diverge from the eighteenth century duty standard." Mascott, *supra*, at 464 (footnote omitted).

B. "Significant" authority denotes *sovereign* authority—of varying levels of importance

To cohere with the Constitution's structural plan for the federal government and the original meaning of "Officers of the United States," the term "significant authority" should be understood as *some portion of the government's sovereign powers*.

The necessary delegation of executive power contemplated by the Constitution supports this definition. "The" executive power of the United States is vested in "a" President. U.S. Const. art. II, § 1. This President "shall take Care that the Laws be faithfully executed[.]" *Id.*, art. II, § 3. The President is thus "both empowered and obliged" to do so. Akhil Reed Amar, *Some Opinions on the Opinion Clause*, 82 Va. L. Rev. 647, 658 (1996). But the President cannot, of course, *personally* execute all of the laws; he must "take Care" that they be executed. Accordingly, he "must execute them by the assistance of subordinates." *Myers*, 272 U.S. at 117. These executive assistants, therefore, are delegated the power to exercise—on the President's behalf—some portion of the executive power. *See* 30 Writings of George Washington 334 (John C. Fitzpatrick ed. 1939) (Because it is "'impossib[le] that one man should be able to perform all the great business

of the State,' the Constitution provides for executive officers to 'assist the supreme Magistrate in discharging the duties of his trust.'"), *as quoted in Free Enterprise Fund v. PCAOB*, 561 U.S. 477, 483 (2010).

Therefore, as the Office of Legal Counsel has explained, "a position, however labeled, is in fact a federal office if (1) it is invested by legal authority with a *portion* of the *sovereign* powers of the federal Government, and (2) it is 'continuing.'" Officers of the U.S. Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 73, 73–74 (2007) (emphasis added). *See also The Federalist No. 72*, at 487 (Hamilton) (J. Cooke ed. 1961) (The "persons . . . to whose immediate management these different [executive] matters are committed, ought to be considered as the assistants or deputies of the chief magistrate."); Kevin Sholette, Note, *The American Czars*, 20 Cornell J.L. Pub. Pol'y 219, 230 (2010) (arguing that *Buckley* "did not intend to depart from the historical understanding of what constitutes a public office" and, therefore, that "the phrase 'significant authority' is best understood as expressing the idea that exercising any 'sovereign authority' is a significant duty") (footnote omitted).

This understanding—that authority is "significant" simply if it involves the exercise of the sovereign power of government—also comports with pre-revolutionary English appointment practice. For example, in *King v. Burnell*, Carth. 478 (K.B. 1700), the Court of King's Bench concluded that a Censor (examiner) of the College of Physicians was a public officer because an "officer" is one "who hath *any* Part of the King's publick care delegated to him by the King." *Id*. (emphasis added). Thus, "every Man is a publick Officer who hath *any Duty* concerning the Publick;" and "he is not the less a publick Officer where his Authority is

confined to narrow Limits, because 'tis *the Duty of his Office*, and the *Nature* of that Duty, which makes him a publick Officer, and *not the Extent* of his Authority." *Id*. at 479 (emphasis added). *See also* Edward S. Corwin, *The President: Office and Powers 1789–1984*, at 85 (5th Rev. ed. 1984) ("Etymologically, an 'office' is an *officium*, a duty; and an 'officer' was simply one whom the King had charged with a duty.").

Finally, this definition of "significant" authority as sovereign authority supports the Framers' goal of ensuring accountability for appointments. Given that the modern administrative state "'wields vast power and touches almost every aspect of daily life,'" the Framers' concern for accountability is, if anything, even more relevant than it was when the Constitution was adopted. *City of Arlington v. FCC*, 569 U.S. 290, 313 (2013) (Roberts, C.J., dissenting) (quoting *Free Enterprise Fund*, 561 U.S. at 499). Indeed, the "federal government, in exercising authority over private parties, inherently wields so much power that, arguably, anyone carrying out a statutory duty necessarily exercises 'significant authority' in some sense." Mascott, *supra*, at 464 (footnote omitted).[5]

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[5] The proper definition of "officer" means that "many employees of the modern administrative state currently considered to hold nonofficer positions should more properly be classified as 'Officers of the United States' subject to Art. II." Mascott, *supra*, at 454. But that result would create no *constitutional* difficulty, because the efficiency, convenience, and utility of a law, "'standing alone, will not save it if it is contrary to the Constitution,'" for "'[c]onvenience and efficiency are not the primary objectives—or the hallmarks—of democratic government.'" *Free Enterprise*, 561 U.S. at 499 (citations omitted). *See also INS v. Chadha*, 462 U.S. 919, 959 (1983) (explaining that there is "no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays often encountered in complying

II. THE DISTINCTIONS AMONG OFFICERS DEPEND ON THE IMPORTANCE AND SCOPE OF THEIR AUTHORITY

If "significant" is understood to mean *sovereign*, then the *Buckley-Edmond* rule fully comports with the original meaning of "Officers of the United States." But, as a result, something other than the exercise of "significant"/sovereign authority must mark the line between non-inferior and "inferior" officers. As explained below, that "something else" is, as revealed in the Constitution's text and related sources, and confirmed through long-established practice, the importance and scope of an officer's responsibilities.

A. The Constitution recognizes that "Officers of the United States" exercise varying levels of sovereign authority

The Appointments Clause references several officers. It specifically mentions ambassadors, other public ministers and consuls, and the Justices of this Court. U.S. Const. art. II, § 2, cl. 2. It recognizes "all other Officers of the United States, whose Appointments are not herein otherwise provided for," *id.*, such as the President and officers of the Legislature, *id.*, art. I, § 2, cl. 1 (election of Representatives); art. I, § 3, cl. 1 (selection of Senators); art. II, § 1, cl. 2–3 (election of President). And it identifies Heads of Departments and Courts of Law which, along with the President, may be vested with authority to appoint "inferior Officers." *Id.*, art. II, § 2, cl. 2. Thus, the Appointments

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with explicit Constitutional standards may be avoided, either by the Congress or by the President").

Clause contemplates several kinds of officers who exercise different kinds and varying levels of governmental authority.

More specifically, the Appointments Clause contemplates, along with **inferior officers** (who fill in policy details delegated to them and supervise career employees' execution of administration policy), two types of non-inferior executive officers: **principal officers** (Heads of Departments who set priorities for their agencies and enforce those priorities directed by the White House and supervise and manage the policy formation in the department; together with superior offices, they make the decisions on major department-policy initiatives); and **superior officers** (responsible for major policy decisions within their bureaus and divisions, detailed in statutes creating their divisions and delegated by their superiors). *See* Steven G. Calabresi & Gary Lawson, *Why Robert Mueller's Appointment as Special Counsel Was Unlawful*, 95 Notre Dame L. Rev. 87, 135–38 (2019).

Although this taxonomy of different officers may be unfamiliar, the divisions that it reflects are not. First, the term "principal Officer" is found in the Opinions Clause, which provides that 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, cl. 1 (emphasis added). The definite article shows that each Executive Branch department has a single principal Officer. But this text does not suggest—nor does text anywhere else in the Constitution suggest—that each department is limited to a single non-inferior officer.

This understanding is consistent with the Framers'. During the Constitutional debates, Madison objected to what became the Appointments Clause because it did not allow Congress to vest appointment powers in certain non-inferior, "Superior Officers *below* Heads of Departments." 2 Records of the Federal Convention of 1787, at 539 (M. Farrand ed. 1911) (emphasis added). *See* Calabresi & Lawson, *supra*, at 137. The Federalist Papers, too, contemplate more than two kinds of officers. *See id.* at 137–38 (summarizing discussions in the Federalist Papers). No one at the Convention suggested that each department would have only one non-inferior officer.

The Anti-Federalist "Federal Farmer" criticized the extent of the Constitution's appointing power, noting "the vast numbers of officers necessary to execute a national system in this extensive country," including officers on the supreme and inferior courts, admirals and generals, "and subordinate officers in the army and navy, ministers, consuls &c. sent to foreign countries; officers in the federal city, in the revenue, post office departments, &c. &c.," who "must, probably, amount to several thousands, without taking into view the *very inferior ones*." Anti-Federalist Nos. 76–77, An Anti-Federalist View of the Appointing Power Under the Constitution (Federal Farmer XIII) (Jan. 14, 1788) (emphasis added) *in* 2 Complete Anti-Federalist, at 302 (Storing 1981).

Early commentators, too, recognized several types of "officers." *See, e.g.*, 3 J. Story, Commentaries on the Constitution, § 1526, at 378 (1833) ("It will be, principally, with regard to high officers, such as ambassadors, judges, heads of departments, and *other appointments of great public importance*, that the senate will interpose to prevent an unsuitable choice.") (emphasis

added); *id.* § 1530, at 387 (criticizing the "great anomaly" of patronage by the Postmaster General, whom Congress vested with the power to appoint all "deputy post-masters," later described as "high executive appointments").

B. Long-settled practice confirms that superior officers—although not Heads of Departments—exercise important power and wield substantial discretion

Since the very first Congress, the government has staffed executive departments with both inferior and superior officers below the Heads of Departments. Superior officers were empowered with substantial authority and, as a result, Congress has required PAS appointment—a "long settled and established practice" entitled to "great weight in a proper interpretation of constitutional provisions." *NLRB v. Noel Canning*, 573 U.S. 513, 524 (2014) (cleaned up).

1. The Department of Justice

The first Congress created the office of Attorney General and required him to "give his advice and opinion upon questions of law when required by the President." An Act to Establish the Judicial Courts of the United States, ch. 20, § 35, 1 Stat. 73, 93 (1789) (Judiciary Act). Congress also established an "attorney for the United States" for each of the newly created districts. *Id.*, 1 Stat. at 92. Later, Congress created the Department of Justice and made the Attorney General its head. An Act to Establish the Department of Justice, ch. 150, § 1, 16 Stat. 162, 162 (1870). This law established another "officer," the Solicitor General, to assist the Attorney General, and "two other officers" to assist both the Attorney General and the Solicitor

General. *Id.* § 2. This law, like the Judiciary Act, recognized that departments, each of which had a head, also included superior and inferior officers: the Solicitor General, and all solicitors and assistant solicitors "mentioned in this act," were appointed by the President by and with the advice and consent of the Senate, while all "other officers, clerks, and employees" in the department were appointed (and removable) by the Attorney General. *Id.* § 9, 16 Stat. at 163.

Today, the Attorney General remains head of the Justice Department, 28 U.S.C. § 503, and is assisted by a Deputy Attorney General, an Associate Attorney General, the Solicitor General, and eleven Assistant Attorneys General, *id.* §§ 504–506. These officers exercise significant power. For example, certain district courts must summon grand juries upon a written certificate of necessity therefor from the Attorney General, the Deputy Attorney General, the Associate Attorney General, or a designated Assistant Attorney General. 18 U.S.C. § 3331(a). And the government may not "further prosecute" certain sentencing appeals "without the personal approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General." *Id.* § 3742(b).

Consider, more specifically, the Assistant Attorney General for Civil Rights. This officer oversees eleven separate sections (appellate, criminal, employment, housing, etc.)[6] that enforce "all Federal statutes affecting civil rights" (with certain exceptions left to the criminal division), including the Civil Rights Act of 1964 (42 U.S.C. § 2000d, *et seq.*), the Americans with

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[6] *See* https://www.justice.gov/crt/about-division (last visited Dec. 18, 2020).

Disabilities Act (Titles I-111, 42 U.S.C. § 12101), and the Rehabilitation Act of 1973 (29 U.S.C. § 701, *et seq*.). *See also* 38 U.S.C. § 4301, *et seq*. (job protections for employees absent because of military service), 20 U.S.C. § 1701 (equal-educational opportunity), 20 U.S.C. § 33, *et seq*. (ensuring educational opportunities for students with disabilities), 20 U.S.C. § 1681, *et seq*. (prohibiting sex discrimination by educational institutions receiving federal funds), 42 U.S.C. § 45 (fair housing), 15 U.S.C. § 1691 (prohibiting credit discrimination). This officer is also obligated to coordinate with the DOJ on "all matters" affecting civil rights, and to consult with and assist federal, state, and local departments and agencies on matters affecting civil rights. 28 C.F.R. § 0.50. *See generally* 28 C.F.R., Subpart J. According to the DOJ's Justice Manual, the Civil Rights Division "retains the final authority" to determine whether to open a civil-rights investigation, file a complaint, or settle a matter. Justice Manual § 8-2.100.[7]

Similarly, each judicial district still has a United States Attorney, an "officer" in the Justice Department. 28 U.S.C. § 541(a), (b). Among other responsibilities, U.S. Attorneys prosecute for all offenses of the United States and prosecute or defend, for the government, all civil suits. *Id*. § 547(1), (2). U.S. Attorneys are, of course, subject to the direction of the Attorney General.[8] But, as the DOJ's Justice Manual explains,

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[7] Available here: https://www.justice.gov/jm/justice-manual (updated Apr. 2018) (last visited Dec. 4, 2020).

[8] *See, e.g.*, 28 U.S.C. § 516 ("Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General."); § 519

a U.S. Attorneys' "statutory duty to prosecute for all offenses against the United States (28 U.S.C. § 547) carries with it the authority necessary to perform this duty. The USA is invested *by statute* and delegation from the Attorney General with the *broadest discretion* in the exercise of such authority." *Id.* § 9-2.001 (emphasis added). *See id.* (noting U.S. Attorney, "within his/her district, has plenary authority with regard to federal criminal matters[,] … exercised under the supervision and direction of the Attorney General and his/her delegates").

All of these officers have ongoing, statutory duties through which they wield a broad range of powers, exercise wide discretion, and help the Attorney General and the President set government policy. Accordingly, even though they are subordinate to the Attorney General, they cannot be merely inferior officers. And, consistent with long-standing practice, these officers require PAS appointment. 28 U.S.C. §§ 504–506, 541(a).

Finally, the Attorney General is authorized to appoint inferior officers. *See* 18 U.S.C. § 542(a) (assistant U.S. Attorneys); § 4041 (officers in Bureau of Prisons). That is important because it shows that Congress knows how to vest such power when it wants to. Hence, Congress's decision to require PAS appointment for many officer positions below that of the Attorney General is best understood as the recognition of their superior-officer status.

("Except as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party, and shall direct all United States attorneys, assistant United States attorneys, and special attorneys … in the discharge of their respective duties.").

2. Health and Human Services

The Executive Branch is, of course, much larger than it was at the Founding. *Cf. Free Enterprise Fund*, 561 U.S. at 520–21 (Breyer, J., dissenting) (describing range of government powers and identifying delegations of these powers to "many different kinds of administrative structures," including independent commissions, bureaus, offices, divisions, and agencies). And, as Congress creates more superior officers, it continues to require PAS appointment.[9]

Consider Health and Human Services, headed by a Secretary and consisting of numerous offices and divisions.[10] 20 U.S.C. § 3508; 42 U.S.C. § 3501. Among its divisions is the Food and Drug Administration, charged with, among other responsibilities, "reviewing clinical research and taking appropriate action on the marketing of regulated products in a timely manner." 21 U.S.C. § 393(b)(1). The FDA must "ensure" that "foods are safe, wholesome, sanitary, and properly labeled" and that "human and veterinary drugs are safe and effective." *Id.* § 393(b)(2)(A), (B). The FDA is headed by a Commissioner, through whom the Secretary "shall be responsible for executing [the Federal Food, Drug, and Cosmetic Act]" and for "providing overall direction" to the FDA and "establishing and implementing general policies respecting

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[9] As this case reveals, Congress does not always require PAS appointments for superior officers. But this anomalous practice by Congress—allowing the President alone, Heads of Departments, or Courts of Law to appoint officers who exercise substantial powers—represents an exception to the long-standing practice required by the Constitution.

[10] The HHS organizational chart may be found here: https://www.hhs.gov/about/agencies/orgchart/index.html (last visited Nov. 24, 2020).

the [FDA's] management and operation of programs and activities." *Id*. § 393(d)(1), (2)(A). The FDA Commissioner is not a mere "inferior" officer. And Congress properly requires PAS appointment to fill that office, *id*. § 393(d)(1), as well as other superior offices in HHS, *see, e.g.*, 42 U.S.C. § 192 (Chief of Children's Bureau); § 205 (Surgeon General); § 282(a) (Director of National Institutes for Health (NIH)); § 1317(a) (Administrator of the Centers for Medicare & Medicaid Services).

In contrast to the PAS appointment required for superior officers in HHS, Congress authorized the HHS Secretary to appoint, among others, an Assistant Chief of the Children's Bureau, 42 U.S.C. § 193, "officers and employees … as may be necessary for carrying out" the Secretary's functions with respect to Social Security, *id*. § 913, and health-care professionals at NIH, *id*. § 282(b)(22). Again, as with DOJ, Congress's practice of vesting the department head with power to appoint some sub-head (inferior) officers while reserving PAS appointment for other sub-head (superior) positions, reflects Congress's recognition of the superior-officer category.

3. The "inferior Courts"

Through the Judiciary Act, the first Congress established thirteen United States "districts" and, for each, created a District Court, "to consist of one judge, who shall reside in the district for which he is appointed." Judiciary Act, ch. 20, § 3, 1 Stat. at 73. Today, there are 94 district courts with over 600 district court judges—all still PAS officers. 28 U.S.C. §§ 132–133.

District court judges are authorized to hear all manner of disputes, including all cases involving federal questions; civil-rights claims; most actions for the recovery or enforcement of fines, penalties, and forfeitures incurred under federal law; as well as supplemental jurisdiction over all other sufficiently related state claims. 28 U.S.C. §§ 1331, 1355, 1367. District courts also have original jurisdiction, "exclusive of the courts of the states, of all offenses against the laws of the United States." 18 U.S.C. § 3231. And they have the inherent power to manage their dockets for the orderly and expeditious disposition of cases. *See Dietz v. Bouldin*, 136 S. Ct. 1885, 1891 (2016). Most importantly here, the Framers "crafted [Article III] with an expressed understanding that it gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218–19 (1995). A court's "judgment conclusively resolves the case because a 'judicial Power' is one to render dispositive judgments." *Id.* at 219 (quoting Frank H. Easterbrook, *Presidential Review*, 40 Case W. Res. L. Rev. 905, 926 (1990)) (some quotation marks omitted).

Circuit court judges, too, wield vast powers. They have appellate jurisdiction over final decisions of the district courts (except for matters appealable directly to this Court), 28 U.S.C. § 1291, and they may review final administrative decisions, *id.* § 1296. Panel decisions become "law-of-the-circuit," binding future panels and subordinate district courts. *LaShawn A. v. Barry*, 87 F.3d 1389, 1395 (D.C. Cir. 1996) (en banc).

Accordingly, "from the early days of the Republic, '[t]he practical construction has uniformly been that

[judges of the inferior courts] are not … inferior officers.'" *Weiss v. United States*, 510 U.S. 163, 191 n.7 (1994) (Souter, J., concurring) (quoting 3 J. Story, Commentaries on the Constitution 456 n.1 (1833)).

Finally, the Courts of Law, since the original Judiciary Act, have been authorized to appoint inferior officers. *See* Judiciary Act, ch. 20, § 7, 1 Stat. at 76 (authorizing this Court and district courts to appoint clerks); 28 U.S.C. §§ 671–674 (authorizing this Court to appoint clerks, marshal, reporter, librarian); §§ 711, 713 (authorizing courts of appeals to appoint clerks and librarians); 751 (authorizing district courts to appoint clerks). Again, these authorizations reflect Congress's understanding that the above-discussed PAS judicial officers are non-inferior.[11]

C. *Edmond*'s direction-and-supervision standard is inadequate to distinguish between inferior and non-inferior officers

The brief discussion above barely scratches the surface of the federal government's approximately four million functionaries. Office of Management and Budget, Analytical Perspectives, Budget of the U.S. Government, Fiscal Year 2020, 73 (2019); Comm. on Homeland Security & Gov. Affs., *Policy and Supporting Positions* (2016) (Plum Book). The discussion nonetheless reveals that the government has always

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[11] While, as noted above (*see* fn. 5), many employees of the modern administrative state should be classified as inferior officers rather than employees, the examples here show that many employees would remain classified as employees. For instance, this Court's clerk and librarian—both inferior officers—oversee staffs of non-officer employees.

been staffed with many officers who, although subordinate to their respective Heads of Departments, exercise important powers and therefore require PAS appointment.

To be sure, "[h]aving a superior officer is necessary for inferior officer status," but it is "not sufficient to establish it." *Edmond*, 520 U.S. at 667 (Souter, J., concurring in part and concurring in the judgment) (citing *Morrison*, 487 U.S. at 722 (1988) (Scalia, J., dissenting)). Indeed, *Edmond*'s "supervision and oversight" factor ignores the fact that *all* officers are supervised and subject to oversight. As Madison explained, the Framers wanted to ensure that "those who are employed in the execution of the law will be in their proper situation, and the chain of dependence 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., at 499 (June 17, 1789) (J. Madison). Thus, the people supervise and oversee the President; the President directly supervises and oversees the department heads; and, finally, the department heads supervise and oversee superior and inferior (or "middle" and "lowest") officers.

Emblematic of the misdirection inherent in *Edmond*'s direction-and-supervision standard is its focus on removability. While removal authority is certainly "a powerful tool for control," *Edmond*, 520 U.S. at 663–64 (citations omitted), it says nothing about whether a removable officer is inferior. In fact, the more removable an officer, the more likely she is a principal or superior officer. Cabinet members, the highest-ranking officers in the Executive Branch below the President—and, as Heads of Departments,

principal officers—may be removed at will. *Cf. Morrison*, 487 U.S. at 716 (Scalia, J., dissenting) ("[M]ost (if not all) *principal* officers in the Executive Branch may be removed by the President *at will*."). Indeed, this Court recently emphasized that some executive officers exercise such important power that statutory limitations on their removal are invalid. *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2211 (2020) ("While we have previously upheld limits on the President's removal authority in certain contexts, we decline to do so when it comes to principal officers who, acting alone, wield significant executive power."). Thus, removability—like the direction-and-supervision standard generally—is a poor guide to distinguish inferior from non-inferior officers. *See* Akhil Reed Amar, *Intratextualism*, 112 Harv. L. Rev. 747, 805 (1999) ("If removability is the test (or even a prong of the test), then Cabinet members would be more 'inferior' than Independent Counsels. Yet surely heads of departments are not 'inferior' within the meaning of the Constitution.").

In sum, if having a superior were sufficient to establish one as an inferior officer, all officers below a Head of Department—which is to say all but a single officer in each of the major federal departments—would necessarily be "inferior" officers. That is a particularly untoward result, given that many such officers exercise substantial, discretionary, and policymaking powers—authority that this Court has recognized is fittingly subject to the heightened political accountability of PAS appointment.

D. The key distinction between superior and inferior officers is the nature and scope of their authority

To be consistent with the original meaning of "Officers of the United States" and the Nation's "long settled and established practice," *Noel Canning*, 573 U.S. at 524 (cleaned up), the line separating superior and inferior officers should be, not direction and supervision, but the nature and scope of an officer's (ongoing, statutory) authority. Two factors are particularly apposite: (1) the power to issue final decisions; and (2) the authority to exercise substantial discretion in carrying out responsibilities of high importance.

1. The power to issue final decisions on behalf of the government may be exercised only by superior and principal officers

The most obvious "significant" authority exercised by superior (and principal) officers is the power to make final decisions within an Executive Branch department.

This Court has recognized that superior officers, and not just the Heads of Departments, may issue final, binding decisions. In *Edmond*, the Court noted that the Court of Appeals for the Armed Forces could review and reverse decisions made by the Coast Guard's Court of Criminal Appeals and concluded that, as a result of this "supervision and direction," the Coast Guard judges were inferior officers. 520 U.S. at 664–65. But the Armed Forces court itself is within the Defense Department, *id.* at 664 n.2, and the head of that department is the Secretary of Defense, 10 U.S.C. § 113(a). Therefore, even according to *Edmond*, superior officers, although subordinate to Heads of

Departments, may be empowered to issue final decisions for the Executive Branch. 520 U.S. at 665.

Similarly, final rule-making power—which is, ultimately, the power to bind both the government and individuals—is also reserved for superior officers. *Cf. Buckley*, 424 U.S. at 140–41 ("[R]ulemaking ... represents the performance of a significant governmental duty exercised pursuant to a public law .... [This function] may therefore be exercised only by persons who are 'Officers of the United States.'"); *see also Ass'n of Am. R.R. v. Dep't of Transp.*, 821 F.3d 19, 39 (D.C. Cir. 2016) (a non-head-of-department arbitrator empowered to determine metrics and standards "through binding arbitration" is a non-inferior officer).

2. The authority to exercise substantial discretion in carrying out responsibilities of high importance may be exercised only by superior and principal officers

Many officers in the federal government, although their decisions are subject to direction and supervision by the heads of their respective departments, nonetheless exercise broad powers with substantial discretion on behalf of the federal government.

As discussed above, the Attorney General is head of the Justice Department and is assisted by several high-ranking officials who are empowered with significant discretion to assist the Attorney General—the Deputy Attorney General, an Associate Attorney General, the Solicitor General, and eleven Assistant Attorneys General. *See* 28 U.S.C. §§ 503–506 (offices); 18 U.S.C. §§ 3331(a), 3742(b) (examples of superior officers' substantial powers). Similarly, United States Attorneys make decisions whether to initiate criminal

investigations, conduct grand juries, and commence criminal prosecutions. 28 U.S.C. § 547; Fed. R. Crim. P. 6(d); Justice Manual §§ 9-2.001, 9-2.030, 9-11.241. Thus, U.S. Attorneys are "inferior" only in the sense that they are directed and supervised "at some level" by PAS officers. *Edmond*, 520 U.S. at 663.

Principal and superior officers in the government also have the power to impose fines and penalties, subject to judicial review. *See, e.g.*, 15 U.S.C. § 717t-1 (authorizing Securities and Exchange Commission to impose civil penalties); 22 U.S.C. § 6761 (authorizing ALJ to impose fine for willful failure to allow inspection related to chemical weapons).

Superior officials in many departments, subordinate to the department heads, are tasked with broad portfolios, which often include helping to set government policy. *See, e.g.*, 12 U.S.C. § 1(a) (Comptroller of the Currency, within Treasury Department, charged with "assuring the safety and soundness of, and compliance with laws and regulations, fair access to financial services, and fair treatment of customers by, the institutions and other persons subject to [the office's] jurisdiction"); 21 U.S.C. § 393(d)(2)(A) (FDA Commissioner, through whom HHS Secretary is responsible for "establishing and implementing general policies respecting the [FDA's] management and operation of programs and activities"); 22 U.S.C. § 2651a(b)(2) (Under Secretary of State for Arms Control and International Security); 35 U.S.C. § 3(a)(1) (PTO Director); *see also* Ross E. Wiener, *Inter-Branch Appointments After the Independent Counsel: Court Appointment of United States Attorneys*, 86 Minn. L. Rev. 363, 383–84 (2001) ("In their capacity as the chief federal law enforcement officer in each judicial district, U.S. Attorneys exercise significant and largely independent

prosecutorial discretion on behalf of the federal government.").

All of these examples reflect instances where Congress has invested officers with substantial (although not always final) authority and, thus, appropriately required PAS appointment, even though they are beneath their respective department ("principal") heads.

III. ADMINISTRATIVE PATENT JUDGES ARE SUPERIOR OFFICERS

The nature and scope of the APJs' authority, together with the broad discretion they exercise, support the conclusion that APJs are superior officers under the Appointments Clause.

APJs, as members of the Patent Trial and Appeal Board, review adverse decisions on patent applications and appeals of reexaminations, and conduct derivation proceedings, *inter partes* reviews, and post-grant reviews. 35 U.S.C. § 6(b). *Inter partes* review may be initiated by anyone, who is not the owner of a patent, through a petition to the PTO Director. *Id.* § 311(a). If the Director grants the petition, the dispute is resolved by a panel of at least three members of the Board. *Id.* §§ 6, 314, 316(c). The panel conducts an adversarial proceeding and then issues a written decision on the patentability of the challenged claims. *Id.* § 318(a). Disappointed parties may ask the Board (alone) for reconsideration, *id.* § 6(c), or file an appeal with the United States Court of Appeals for the Federal Circuit, *id.* §§ 141(c), 319.

Based on the factors identified above, it appears that APJs are superior and not mere inferior officers. First, APJs (as members of the Board) have the authority to issue final decisions on behalf of the Executive Branch. Neither the PTO Director, nor any other

officer in the Commerce Department (or anywhere else in the Executive Branch) may reverse an *inter partes* review decision. 35 U.S.C. §§ 141(c), 319.

Further, the power to issue these decisions in the first place is sufficiently important, and the exercise of discretion is sufficiently broad, that APJs should be considered superior officers. APJs hear adversarial proceedings and issue thousands of decisions a year, Patent Trial and Appeal Board, *Standard Operating Procedure 2 (Revision 10)* at 3 (Sept. 20, 2018),[12] binding private parties who appear before them. And, as several amici point out, the matters under dispute have enormous impacts on the world's economy. APJs' duties are, in short, hardly the less-significant routine matters reserved for inferior officers.

Rather, the APJs' powers are comparable to the powers of district court judges; both types of officer may "determine actual controversies arising between adverse litigants …." *Muskrat v. United States*, 219 U.S. 346, 361 (1911). Indeed, the *inter partes* hearings have "many of the usual trappings of litigation," *e.g.*, the "parties conduct discovery and join issue in briefing and at an oral hearing." *SAS Institute Inc. v. Iancu*, 138 S. Ct. 1348, 1354 (2018) (citations omitted). "[T]he role of the modern federal hearing examiner or administrative law judge within this framework is 'functionally comparable' to that of a judge." *Butz v. Economou*, 438 U.S. 478, 513 (1978). "His powers are often, if not generally, comparable to those of a trial judge: He may issue subpoenas, rule on proffers of evidence, regulate the course of the hearing, and make or recommend decisions." *Id.* (citation omitted). *See also Federal Maritime Comm'n v. S. Carolina State*

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[12] *See* https://go.usa.gov/xwXem (last visited Dec. 7, 2020).

Ports Auth., 535 U.S. 743, 756 (2002) (noting "the numerous common features shared by administrative adjudications and judicial proceedings") (discussing *Butz*).

These powers must be reserved for superior officers.

CONCLUSION

The Constitution establishes a three-tiered system of officers: principals, superiors, and inferiors. The mark of all such officials is that they execute ongoing, statutory duties on behalf of the government. But the distinguishing mark of principal and superior officers, as non-inferior officers, is that they wield important sovereign power. Thus, whether administrative patent judges must be appointed by the President following Senate confirmation should not depend on whether and to what extent they are supervised and directed in the executive hierarchy but, rather, on whether, taking into account any such constraints, the power they do exercise is nonetheless substantial. Because their power is substantial, APJs are superior officers.

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Respectfully submitted,

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