No. 08-861

IN THE

Supreme Court of the United States

FREE ENTERPRISE FUND AND
BECKSTEAD AND WATTS, LLP,

Petitioners,

v.

PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD
AND UNITED STATES OF AMERICA,

Respondents.

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

BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST[1]

Amici curiae are law professors who teach, research, and write about constitutional law. *Amici* have a professional interest in this Court's interpretation of the removal and appointment powers.

SUMMARY OF ARGUMENT

The balancing test announced in *Morrison v. Olson* for determining the constitutionality of a statutory restriction on the President's removal power is inconsistent with the Constitution's text and enactment history, the past 220 years of our nation's practice, and policy considerations. The unworkability of balancing tests and changes in our nation's commitments (reflected in Congress's decision to allow the Ethics in Government Act to lapse after a decade of unsatisfactory experience) support the conclusion that *Morrison* should be overruled.

The manner in which members of the Public Company Accounting Board (PCAOB) are appointed violates the Appointments Clause. Both of the tests for determining whether an officer is an inferior officer—one focusing on the officer's location within the federal hierarchy and the other focusing on the scope of the officer's responsibilities—indicate that

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[1] Counsel for all parties received timely notice and have consented to the filing of this brief. No counsel for any party in this case authored any part of this brief. No person or entity other than *amici* contributed monetarily to its preparation or submission.

PCAOB members must be nominated by the President and subject to the advice and consent of the Senate.

ARGUMENT

I. THE REMOVAL POWER

In *Morrison v. Olson*, the Supreme Court held a statutory limitation on the President's removal power violates the Constitution if it "impermissibly interfere[s] with" the President's ability to supervise the execution of federal law. 487 U.S. 654, 660, 685 (1988).[2] We believe that arguments from the constitutional text, pre-Framing history, practice over the last 220 years, and policy all indicate that *Morrison* ought to be overruled. Instead, this Court should recognize that Presidents have the power to remove at will all persons exercising executive authority on their behalf. While this case can be decided in favor of petitioners without overruling *Morrison*, it provides a welcome opportunity to clarify the law by rejecting *Morrison* as a problematic and flawed precedent.

A. Textual Arguments

The Framers' decision to give the President control over all officials wielding federal executive authority is clearly demonstrated by the

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[2] In other portions of the opinion, the Court asked whether the statutory restriction "unduly trammel[s] on," "impermissibly burdens," "interfere[s] impermissibly with," or impermissibly undermine[s]" the president's authority to oversee the execution of the law. 487 U.S. at 692, 693, 696.

Constitution's text.[3] Article II, section 1, provides, "The executive Power shall be vested in a President of the United States." The leading 18th-century dictionary defines "vest" as "[t]o place in possession of" an individual or entity. 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (6th ed., London, J.F. & C. Rivington et al. 1785) [hereinafter JOHNSON]. It derives from the Latin word "vestis" for outer garment and is related to the word "vestments" (i.e., the robes of church office). THE BARNHART DICTIONARY OF ETYMOLOGY 1201 (Robert K. Barnhart ed., 1988) [hereinafter BARNHART DICTIONARY]. It signifies the "clothing" of an official or of an institution with the general trappings and realities of power. The natural reading of the Article II Vesting Clause is thus as an affirmative grant to the President of the power to execute the laws.

Indeed, this Court has long recognized the Article II Vesting Clause as a grant of the power to oversee the executive branch, including the removal power. For example, in *Myers v. United States*, this Court construed the Article II Vesting Clause as a "grant of the power to execute the laws," which carried with it "the reasonable implication, even in the absence of express words," of the "power of removing those for whom he cannot continue to be responsible." 272 U.S. 52, 117, 163–64 (1926); *see also Buckley v. Valeo*, 424 U.S. 1, 135 (1976) (reaffirming the above-quoted language from *Myers*). Similarly, in *Nixon v. Fitzgerald*, this Court described the Article II Vesting

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[3] For a more complete explication of the textual argument, see Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 559–599 (1994).

Clause as a "grant of authority establish[ing] the President as the chief constitutional officer of the Executive Branch, entrusted with supervisory and policy responsibilities of utmost discretion and sensitivity," including "management of the Executive Branch—a task for which 'imperative reasons requir[e] an unrestricted power [in the President] to remove the most important of his subordinates in their most important duties.'" 457 U.S. 731, 750 (1982) (quoting *Myers*, 272 U.S. at 134–35); *see also Clinton v. Jones*, 520 U.S. 681, 699 n.29 (1997) (reaffirming the above-quoted language from *Fitzgerald*); *id.* at 712 (Breyer, J., concurring) (construing art. II, §1, as a "constitutional delegation" that "makes a single President responsible for the actions of the Executive Branch").

Construing the Vesting Clause in this manner falls far short of recognizing a prerogative power to legislate or to act in the absence of legislation. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587–88 (1952). It need encompass nothing more than the power to oversee the proper execution of the duly enacted laws. Although some have suggested that the Article II Vesting Clause simply specifies the President's title rather than serve as a grant of power, *id.* at 640–41 (Jackson, J., concurring in the judgment), such a construction would not accord with the ordinary meaning of the word "vest," which connotes a conferral of power.

Interpreting the Article II Vesting Clause as a grant of authority to execute the laws is consistent with the way that the word "vest" is used in other clauses of the Constitution. For example, the Necessary and Proper Clause provides, "The

Congress shall have power . . . To make Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all others Powers *vested* by this Constitution in the Government of the United States, or in any Department or officer thereof." U.S. CONST. art. I, §8, cl. 18 (emphasis added).[4] Furthermore, the Appointments Clause provides that "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. Both provisions use the term "vest" as the empowerment of an institution.

Lastly, construing the Article II Vesting Clause as a grant of the executive authority is consistent with the traditional construction of the Article III Vesting Clause, which similarly provides, "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, §1, cl. 1. This Clause is generally regarded as a grant of judicial power that limits Congress's authority to limit the Court's jurisdiction. *See Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 331 (1816); 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §826, at

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[4] Although the Necessary and Proper Clause gives Congress considerable flexibility in the means to implement its constitutional powers, that flexibility does not authorize any infringement of the President's constitutional powers. *See Buckley*, 424 U.S. at 135–36 (drawing an analogy to the removal cases to hold that the Necessary and Proper Clause does not give Congress the authority to interfere with the President's appointment power).

589 (Boston, Hilliard, Gray & Co. 1833) [hereinafter STORY]. Both of the Article II and III Vesting Clauses stand in stark contrast to the Article I Vesting Clause, which provides, "All legislative Powers *herein granted* shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. CONST. art. I, §1 (emphasis added). The inclusion of "herein granted" in the Article I Vesting Clause has long been understood to limit the powers granted to Congress to those enumerated in Article I, in contrast to the broader language employed in Articles II and III. *Myers*, 272 U.S. at 138; 15 THE PAPERS OF ALEXANDER HAMILTON 39 (Harold C. Syrett ed., 1969) [hereinafter PAPERS OF ALEXANDER HAMILTON].

The Constitution's text thus provides strong support for the President's authority to oversee the execution of the law through the power of removal.

B. Historical Context of the Framing

1. 17th and 18th Century England

17th and 18th century English law, which served as the backdrop for the Framers' understanding the scope of the executive power under the Constitution, recognized that the King of England unquestionably possessed the power to remove judicial and executive officers alike. *See* CATHERINE DRINKER BOWEN, THE LION AND THE THRONE 370–90, 477–504 (1956). In 1701, the Act of Settlement specified that judges would thereafter hold their offices during good behavior. 12 & 13 Will. 3, c. 2, §3 (Eng.). The Act provided no such tenure for executive officials, and English Kings continued to remove executive officers.

Indeed, Parliament did not even ask the King to remove a Prime Minister until 1783. PETER WHITELEY, LORD NORTH: THE PRIME MINISTER WHO LOST AMERICA 201–04 (1996).

2. The National Government Prior to the Framing

The experience under the national government prior to Framing reaffirmed the need for strong centralized control over the executive branch. Between 1776 and to 1787, the Continental Congress performed both the executive and legislative functions of the new government. STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 30–33 (2008) [hereinafter CALABRESI & YOO].

In the absence of a separate executive branch, Congress established hundreds of committees to oversee the execution of the law. History soon showed that plural bodies like Congress are poorly suited to exercising executive power. One leading commentator notes that "[i]t is common knowledge that this system failed, and failed lamentably" and that lodging executive power in a plural body rather than a single executive led to "inefficiency and waste." CHARLES C. THACH, JR., THE CREATION OF THE PRESIDENCY 1775–1789, at 62 (1922) [hereinafter THACH].

Congress's inability to provide supplies for the Continental Army eloquently demonstrated the problems with divided executive authority. George Washington complained bitterly that executive-by-committee reflected a "vital and enherent Principle of

delay incompatible with Military service" and asked that Congress instead place the responsibility for supplying the army in a single Commissary General. 3 THE WRITINGS OF GEORGE WASHINGTON 320, 324 (John C. Fitzpatrick ed., 1931) [hereinafter WRITINGS OF GEORGE WASHINGTON]. Placing executive authority in single officers would promote "Order, Dispatch and Discipline" as well as "a Measure of Oeconomy," in contrast to the "Delay, the Waste, and unpunishable Neglect of Duty arising from these Offices being in commission in several Hands." 3 *id.* at 346, 350; *see also* 5 *id.* at 127, 128; 21 *id.* at 13, 14.

Although the appointment of Joseph Trumbull as Commissary General temporarily improved the procurement of military materials, Congress soon undermined Trumbull by establishing deputy commissaries general who were removable only with congressional consent. 8 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 434–35 (1907). After Trumbull resigned in protest, Congress rejected a resolution that would have given Washington the authority remove commissary officers. 8 *id.* at 620. Trumbull's successor, Jeremiah Wadsworth, refused to take office until Congress passed a resolution recognizing that he had "the full power to appoint and remove every officer in his department." 10 *id.* at 345. *See generally* JOHN MARSHALL, THE LIFE OF GEORGE WASHINGTON 409–10 (Citizen's Guild of Washington's Boyhood Home 1926) (1801); THACH 65–67.

Congress attempted to rectify these shortcomings initially by establishing Boards staffed by commissioners who were not members of Congress and later by creating executive departments headed

by single officers. THACH 62–63; Louis Fisher, *Presidential Tax Discretion and Eighteenth Century Theory*, 23 W. POL. Q. 151, 157–58 (1970). Much of the benefits of these reforms were dissipated by the languor with which Congress's filled these positions. 22 WRITINGS OF GEORGE WASHINGTON 70, 71. And even so, Washington continued to be frustrated by his inability to receive any acknowledgement when he sought guidance or recognition of his authority to proceed. 25 *id.* at 222.

One late-19th century commentator sums up the experience as follows: "It is positively pathetic to follow Congress through its aimless wanderings in search of a system for the satisfactory arrangement of its executive departments." Jay Caesar Guggenheimer, *The Development of the Executive Departments, 1775–1789*, *in* ESSAYS IN THE CONSTITUTIONAL HISTORY OF THE UNITED STATES 116, 148 (J. Franklin Jameson ed., Boston, Houghton Mifflin 1889). A more modern commentator similarly concludes from this experience "that the power to appoint and remove subordinates is essential to control and responsibility on the part of the real head; . . . and that a legislative body should not concern itself with the details of administration." THACH 74.

Thus, by the time of the Framing, leading thinkers from across the political spectrum saw the need for a more independent and energetic executive. *See, e.g.*, 4 THE WORKS OF JOHN ADAMS 196 (Books for Libraries Press 1969) (1851); 2 PAPERS OF ALEXANDER HAMILTON 404–05; 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 223 (photo reprint 1970) (1891); 4 THE WRITINGS OF THOMAS JEFFERSON 390,

424-25 (Paul Leicester Ford ed., New York, G.P. Putnam's Sons 1897) [hereinafter WRITINGS OF THOMAS JEFFERSON]; 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 132 (Max Farrand ed., 1911) [hereinafter FARRAND]; 3 LETTERS OF MEMBERS OF THE CONTINENTAL CONGRESS 260 (Peter Smith 1963) (1926) (Gouverneur Morris).

3. State Constitutions Prior to the Framing

The move toward the centralization of executive authority is also reflected in the state constitutions adopted prior to the Framing. Immediately after the Declaration of Independence, the antipathy toward strong executive power engendered by the despotism of King George III and the royal governors led our earliest post-1776 state constitutions to embrace legislative supremacy as the touchstone of democracy and to ignore the separation of powers. *See* CALABRESI & YOO 30–32. These post-1776 state constitutions further limited executive power by dividing it among more than one person. JACK N. RAKOVE, ORIGINAL MEANINGS 252 (1996).

The thirteen newly independent states soon discovered the dangers of making the executive subordinate to the legislative branch. Thomas Jefferson called vesting all power in the legislature "precisely the definition of despotic government. It will be no alleviation that these powers will be exercised by a plurality of hands, and not by a single one. 173 despots would surely be as oppressive as one." 3 THE WRITINGS OF THOMAS JEFFERSON 85, 223; *see also* 1 LETTERS AND OTHER WRITINGS OF JAMES MADISON 325–26 (Phila., J.B. Lippincott & Co. 1867) [hereinafter LETTERS OF JAMES MADISON].

In addition to the problems posed by unadulterated legislative supremacy, contemporary commentators bemoaned the problems associated with divided executive authority. Madison regarded the executive branch established in Virginia to be "the worst part of a bad Constitution." Not only was it too subordinate to the legislature; the members of the executive branch were "too numerous and expensive, their organization vague & perplexed" to be effective. 1 *id.* at 179. It was thus no accident that later state constitutions, particularly the New York Constitution of 1777 and the Massachusetts Constitution of 1780, created a state chief executive who was less dependent on the legislature, an arrangement the Framers cited with approval during the Constitutional Convention.

Thus, when the Framers gathered on May 25, 1787, to revise the Articles of Confederation into the Constitution, the general antipathy toward executive power that dominated the period immediately following independence had given way to a consensus in favor of an executive that was more independent and energetic. THACH 51–53; GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 435–37, 471–74, 521, 551–52 (1969).

4. The Constitutional Convention

The issue of the presidential control over the executive branch arose repeatedly during the Constitutional Convention. On June 1, 1787, James Wilson moved that the executive consist of a single person based on his belief that "a single magistrate" would "giv[e] most energy dispatch and responsibility to the office." A plural executive, in contrast, would

lead to "nothing but uncontrouled, continued & violent animosities" that would "interrupt the public administration" and poison politics at all levels. The Convention approved Wilson's motion by a vote of seven states to three, rejecting Edmund Randolph's counterproposal that executive authority be divided among three officials and Elbridge Gerry and Roger Sherman's suggestion that the President be supplemented with an executive council. 1 FARRAND 65–66, 96–97.

Similar proposals by Oliver Ellsworth, Charles Pinckney, and Gouverneur Morris to supplement the President with an executive council were referred to the Committee of Detail. 2 *id.* at 329, 342–44. Although the Committee's initial draft of August 22 included a "privy council" of the type suggested by these proposals, the final version reported on September 4 abandoned any mention of an executive council, substituting language recognizing the president's authority to require written opinions from the principal officers of the executive departments. 2 *id.* at 367, 495. On September 7, the Convention rejected George Mason's attempt to revive the idea of a council of state. 2 *id.* at 538–39, 541–43. As Madison noted, "On the question whether [the executive] should consist of a single person, or a plurality of co-ordinate members, . . . tedious and reiterated discussions took place. The plurality of co-ordinate members had finally but few advocates." 3 *id.* at 132.

C. Arguments from Practice

This Court has also recognized that sustained historical practices "can be treated as a 'gloss on

"Executive Power" vested in the President by §1 of art. II.'" *Medellin v. Texas*, 128 S. Ct. 1346, 1371 (2008) (quoting *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981)); *accord Youngstown*, 343 U.S. at 610–11 (Frankfurter, J., concurring). A review of our nation's practices reveals a longstanding tradition recognizing the President's constitutional power to remove.

The question of whether the President had the removal power arose immediately after the commencement of the government in 1789.[5] The initial draft of the bills creating the State Department included language recognizing that the secretary was "to be removable from office by the President of the United States." Representative Egbert Benson was concerned that this language might imply that the power to remove the secretary was conferred by statute rather than by Article II of the Constitution. To forestall this implication, Representative Benson proposed an amendment to delete the above-quoted provision. 1 ANNALS OF CONG. 578–79 (1789).

Benson's proposal touched off one of the most famous debates in congressional history, during which its members offered a variety of constitutional interpretations of the removal power. Madison supported Benson, arguing, "The [removal] question now resolves itself into this, Is the power of displacing, an executive power? I conceive that if any power whatsoever in its nature is executive, it is the

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[5] *See* CALABRESI & YOO 35–36; JAMES HART, THE AMERICAN PRESIDENCY IN ACTION, 1789, at 155–248 (1948); THACH 141–65.

power of appointing, overseeing, and controlling those who execute the laws." *Id.* at 463.

In the end, Benson's amendment carried, making clear that a majority of both houses of the First Congress thought that Article II placed the removal power in the President. *Id.* at 585. Congress similarly amended the framework statutes creating the War Department, *id.* at 592, and the Treasury Department, although the latter amendment engendered considerable conflict between the House and passed the Senate only by the casting vote of Vice President John Adams, *id.* at 55, 71–72, 674, 676, 688–89, 778, 782, 786. *See generally* Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021, 1063–67 (2006).

This series of congressional constructions of the Constitution, which came to be known as the "Decision of 1789," was regarded as settling that the Constitution vested the removal power in the President. *See Bowsher v. Synar*, 478 U.S. 714, 723–24 (1986); *Myers v. United States*, 272 U.S. at 174–75; *Parsons v. United States*, 167 U.S. 324, 328–30 (1897); *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 259 (1839).[6]

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[6] Even Hamilton, who indicated some ambivalence about presidential removal in *The Federalist No. 77*, regarded the Decision of 1789 as settling the matter. *See* 4 PAPERS OF ALEXANDER HAMILTON 638 n.3 (reprinting the 1804 version of *The Federalist Papers* personally edited by Hamilton, which noted that "it is now settled in practice, that the power of displacing belongs exclusively to the president"). *But see* Seth Barrett Tillman, *The Puzzle of Hamilton's* Federalist No. 77, 33 HARV. J.L. & PUB. POL'Y (forthcoming 2010) (available at http://ssrn.com/abstract=1331664) (questioning whether

Presidents George Washington, John Adams, Thomas Jefferson, James Madison, James Monroe, and John Quincy Adams all removed executive officers without incident and without anyone questioning their power to do so. Jefferson in particular removed a number of Federalists simply because they were Federalists, including all of the district attorneys, as U.S. Attorneys were then called. CALABRESI & YOO 42, 61, 68–69, 79–81, 85–86, 92–93.[7] The presidency of Andrew Jackson saw extensive debate over the President's removal power. Jackson made more removals than his six predecessors because of his policy of encouraging rotation in office. *Id.* at 99–101. Jackson also removed Treasury Secretary William Duane as part of his war against the Bank of the United States. Jackson's political foes in the Senate reacted by censuring Jackson for removing Duane. After Jackson took his battle to the country and won the midterm elections, the removal stood, while the censure resolution was formally expunged from the records of the Senate. *Id.* at 108–19.

(continued…)

Federalist No. 77 signals ambivalence about the president's power to remove).

[7] Although some have purported to find early practices to the contrary, *see* Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 12–78 (1994), the historical record is actually consistent with strong presidential control over the administration, *see* CALABRESI & YOO 34, 38, 43–53, 60–61, 67–68, 88, 103; Calabresi & Prakash, 104 YALE L.J. at 584–85, 626–61.

By this time, the leading constitutional authorities, including those who might have reached a different conclusion if presented with the question as a matter of first impression, universally regarded it as unequivocally settled. *See* 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW, lecture 16, at 289–90 (New York, O. Halsted 1826); STORY §§799–800, at 572; 11 REG. DEB. 470 (1835) (statements of Daniel Webster); 4 LETTERS OF JAMES MADISON 368; CALABRESI & YOO 119–22. All presidents from Jackson until the advent of the civil service in the 1880s removed executive officials who did not share their partisan loyalties. *Id.* at 125–26, 131–32, 135, 137–38, 141–42, 145–46, 150–51, 153–54, 157–58, 171–72, 176–77, 199–201, 212–13.

The next serious challenge to the President's removal power did not arise until the 1860s, when Andrew Johnson, a southern Democrat added to the Republican ticket to broaden its appeal, became president following Abraham Lincoln's assassination. Despite his lack of political support, Johnson opposed the Republican Congress's civil rights and Reconstruction policies with nearly reckless abandon. Exasperated by Johnson's stubbornness, Congress passed the Tenure of Office Act, which prevented the President from removing executive officers without senatorial consent. Ch. 154, §§1, 2, 9, 14 Stat. 430, 430, 432 (1867). When Johnson challenged the constitutionality of this law by defying it, he was impeached by the House, only to be acquitted by the Senate in part because senators believed that the Tenure of Office Act was unconstitutional. CALABRESI & YOO 179–87.

Johnson's successors Grant, Hayes, Garfield, Arthur, and Cleveland all attacked the Tenure of Office Act as unconstitutional and contrary to the Decision of 1789. The Act was watered down at the start of Grant's presidency and was finally repealed altogether during Grover Cleveland's first term. *Id.* at 190–92, 203–04, 207–13. Once again, leading commentators recognized that practice settled that the Constitution vested unlimited removal power over executive officials in the President. *Id.* at 215–16.

Between the 1880s and the Supreme Court's 1926 decision in *Myers*, several agencies were created that we today think are independent, including the Interstate Commerce Commission, the Federal Trade Commission (FTC), and the Federal Reserve Board. Strikingly, the governing precedent at the time held that a statute limiting removal to inefficiency, neglect, or malfeasance in office only provided the removed official a right to a hearing without placing any substantive limits on the President's power to remove. *See Shurtleff v. United States*, 189 U.S. 311, 314–16 (1903). Thus, none of these agencies was properly considered independent. CALABRESI & YOO 213–14, 233–35, 257–60, 262, 267–69, 299–300, 423–24.

Civil service laws were also passed during this period to provide for merit appointment of federal administrative officials, but contrary to the popular wisdom, did not include any limits on presidential power to remove. *Id.* at 207–08, 220–21, 300, 422–23. In 1926, the Supreme Court issued *Myers*, its most important removal decision ever, affirming that the

Constitution gives the President the removal power. *Id.* at 267–69, 299–300, 423–24.

Nine years later, during the tumultuous presidency of Franklin D. Roosevelt, the Supreme Court unexpectedly created an exception to *Myers* in the famous case *Humphrey's Executor v. United States*, which arose after FDR removed the head of the FTC. *Shurtleff* established that FDR had the statutory authority to remove Humphrey, while *Myers* recognized that he had the constitutional authority as well. Nonetheless, consistent with its practice prior to the "switch in time that saved nine," the Court opposed FDR by holding that removal limits were constitutional for so-called independent agencies that exercised quasi-legislative and quasi-judicial functions. 295 U.S. 602, 624, 628–29 (1935). FDR denounced *Humphrey's Executor* as wrongly decided, and he unsuccessfully sought legislation to overrule it, as did many of his successors. CALABRESI & YOO 284–88, 300, 425. *Humphrey's Executor* was ultimately scrapped by *Morrison*, which established the current test for evaluating limits on the removal power. 487 U.S. at 680–90.

Morrison upheld the constitutionality of the Ethics in Government Act, which provided for a set of court-appointed independent counsels, who were removable only for cause, to investigate and prosecute high-level wrongdoing in the executive branch. *Id.* at 691–96. The period between *Morrison* and the expiration of the Ethics in Government Act in 1999 provided the nation with a painful lesson in the abuses that can occur when the President lacks the tools needed to oversee the execution of federal law. President George H.W. Bush had to share the

power to oversee the prosecution of the law with Iran Contra special prosecutor Lawrence Walsh, while President Bill Clinton had to share the same power with special prosecutor Kenneth Starr. The widespread dissatisfaction with this situation caused political support for the Ethics in Government Act to evaporate. When the statute came up for renewal in 1999, Congress allowed it to sunset out of existence. CALABRESI & YOO 390, 400–04, 426–27. The rise and fall of the Ethics in Government Act, like the rise and fall of the Tenure of Office Act, thus marked a reaffirmation of the previous 220 years of practice recognizing that the removal power is vested in the President. Indeed, the history shows that the overwhelming majority of our Presidents have defended and asserted unlimited presidential removal powers.

D. Policy Arguments

The textual and historical arguments supporting the President's constitutional power to remove are also supported by policy considerations.[8] First, ensuring that the President can exercise control over the entire executive branch promotes energy in the executive, a quality widely regarded as essential to good government. *See also Clinton v. Jones*, 520 U.S. at 712 (Breyer, J., concurring) (noting how placing the all executive authority "in the hands of a single, constitutionally indispensable, individual"

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[8] *See generally* Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 37–55 (1995); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2331–46 (2001).

"encourage[s] energetic, vigorous, decisive, and speedy execution of the laws"); KENT 253–54 (concluding that the virtues of "promptitude, decision, and force" are "most likely to exist when the executive authority is limited to a single person, moving by the unity of a single will"); THE FEDERALIST NO. 70, at 471 (Jacob E. Cooke ed., 1961).

Second, giving the President responsibility for all aspects of executing federal law enhances political accountability by making clear precisely who is responsible for the executive branch's performance. *Clinton v. Jones*, 520 U.S. at 712 (Breyer, J., concurring) (noting how "consciously deciding to vest Executive authority in one person rather than several" tends to "focus, rather than to spread, Executive responsibility thereby facilitating accountability"); KENT 254 ("Unity increases not only the efficacy, but the responsibility of the executive power. Every act can be immediately traced and brought home to the proper agent."); THE FEDERALIST NO. 70, at 475–79 (observing that dividing executive authority "tends to conceal faults, and destroy responsibility"). Moreover, dividing executive authority increases information costs, which inevitably decreases the public's ability to hold executive officials accountable. The existence of multiple executive entities also increases bargaining costs and can create debilitating collective action problems. Steven G. Calabresi & Nicholas Terrell, *The Fatally Flawed Theory of the Unbundled Executive*, 93 MINN. L. REV. 1696, 1705–12, 1717–21, 1730–33 (2009).

Finally, the more executive branch officials become independent of the President, the more they

fall under the control of congressional committees. Such committees are dominated by Chairs who are responsive to the needs of a small congressional district or a single state and thus are more likely to be influenced by special interests than the President, who represents a diffuse national majority and is necessarily harder to capture. *See* Calabresi, 48 ARK. L. REV. at 51–55.

Thus, permitting Congress to place limits on the President's removal power threatens to upset the Madisonian conception of the separation of powers, which envisions all three branches constantly engaged in a state of dynamic tension. THE FEDERALIST NO. 51 (James Madison). By reducing the President's role in this balance, limitations on the removal power inevitably tip the balance in Congress's favor. In fact, this Court recognized the dangers of changing the balance of constitutional powers in *Clinton v. City of New York*, in which Congress attempted to delegate to the President the unilateral authority to rewrite appropriations statutes. This Court invalidated the attempt because such a change would have removed one branch from the multibranch interaction envisioned by the Constitution. 524 U.S. 417, 439–40 (1988). Even though Congress was voluntarily surrendering its own power and acted out of the laudable desire to eliminate pork barrel politics and reduce government spending, the change would still have taken that branch out of the process of the dynamic tension that the Framers regarded as the best safeguard for liberty. Although the Court declined to address whether the structural change effected by the line-item veto "impermissibly disrupts the balance of

powers among the three branches of government," *id.* at 447–48 (internal quotation marks omitted), Justice Kennedy's concurrence explicitly warned of the dangers of allowing the branches to readjust the balance of power and reminded us that constitutional values must be more enduring, *id.* at 449–52 (Kennedy, J., concurring). Continuing to sanction congressionally imposed limits on the President's removal power would create precisely the same dangers.

E. Why *Morrison v. Olson* Must Be Overruled

As this Court has often noted, the mere fact that a precedent was incorrectly decided is insufficient basis to justify overruling it. Stare decisis is generally the preferred course because "in most matters it is more important that the applicable rule of law be settled than that it be settled right." *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

The Court has identified considerations that justify overruling a precedent. For example, this Court has long exhibited greater willingness to reconsider its constitutional precedents, because "correction through legislative action is practically impossible." *Id.* at 407. Thus, the fact that *Morrison* addressed a constitutional issue means that, under this Court's precedents, stare decisis applies with lesser force.

In addition, this Court has more readily overruled precedents that have proven unworkable, such as when a balancing test is so amorphous as to defy predictable application. *See Crawford v. Washington*, 541 U.S. 36, 63 (2004). The test for

limits on presidential removal power set forth in *Morrison* represents precisely the type of standardless balancing test incapable of principled implementation that this Court has overturned in the past.

Indeed, ad hoc balancing is particularly dangerous in the context of the Constitution's structural protections, because such an approach "pits an interest the benefits of which are immediate, concrete, and easily understood against one, the benefits of which are almost entirely prophylactic, and thus often seem remote and not worth the cost in any single case." *CFTC v. Schor*, 478 U.S. 833, 863 (1986) (Brennan, J., dissenting). As Justice Kennedy has noted, "The Constitution's structure requires a stability which transcends the convenience of the moment." *Clinton v. City of New York*, 524 U.S. at 449 (Kennedy, J., concurring). It is for this reason that this Court has consistently rejected calls to allow political exigencies to justify overriding the structural protections embodied in the Constitution. *See id.* at 447; *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise*, 501 U.S. 252, 276–77 (1991); *Bowsher v. Synar*, 478 U.S. at 736; *INS v. Chadha*, 462 U.S. 919, 944–46 (1983); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 73 (1982); *Pub. Citizen v. U.S. Dept. of Justice*, 491 U.S. 440, 486 (1989) (Kennedy, J., concurring); *see also Printz v. United States*, 521 U.S. 898, 932–33 (1997) (drawing a parallel conclusion in the context of federalism); *New York v. United States*, 505 U.S. 144, 187 (1992) (same).[9]

[9] Although some have suggested that balancing tests are only problematic in separation of powers disputes involving explicit

In addition, this Court has long embraced Justice Brandeis's recognition that precedents should also be overruled when the underlying facts have changed or when the previous decision reflect "views as to economic or social policy which have since been abandoned." *Burnet*, 285 U.S. at 412 (Brandeis, J., concurring). The nation's history following *Morrison* eloquently demonstrates just how much our fundamental beliefs and commitments about the optimal governmental structure have changed. The manner in which independent counsels were able to impair the presidencies of George H.W. Bush and Bill Clinton created such a backlash that the Ethics in Government Act was allowed to expire without reauthorization in 1999.

Thus, just as *Myers* recognized in 1926 that the previously repealed Tenure of Office Act was unconstitutional, so should this Court recognize that *Morrison*'s decision to uphold the constitutionality of the Ethics in Government Act is inconsistent with the text of the Constitution, the original meaning of the Constitution's Framers, the practice of the last 220 years, and with good public policy. *Morrison* should now be overruled.

(continued…)

constitutional provisions, *see Pub. Citizen*, 491 U.S. at 486 (Kennedy, J., concurring), the fact that the removal power is a nontextual, implicit executive power has not stopped this Court from protecting it against legislative incursions. *Bowsher*, 478 U.S. at 723–32. The fact that the Court has cited precedents from the context of the nontextual removal power as a basis for invalidating legislative incursion into the president's textual appointment power, *see Buckley*, 424 U.S. at 135–36, counsels against such a distinction.

II. THE APPOINTMENT POWER

All parties in this case concede that the members of the PCAOB exercise "significant authority pursuant to the laws of the United States," *Buckley*, 424 U.S. at 126, and are therefore "Officers of the United States" who must be appointed in conformance with the Constitution's Appointments Clause. The Appointments Clause specifies that 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. Under the terms of the Sarbanes-Oxley Act, the members of the PCAOB are appointed by the Securities and Exchange Commission (SEC). 15 U.S.C. §7211(e)(4). This mode of appointment, which involves neither the President nor the Senate, is permissible *only* if the members of the PCAOB are "inferior Officers" within the meaning of the Appointments Clause.[10]

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[10] Even if the members of the PCAOB are inferior officers, their appointments are invalid if the SEC, as a collective body, cannot serve as a "Head[] of Department[]" under the Appointments Clause. Without downplaying the seriousness of this question,

The Constitution does not directly define who counts as an "inferior Officer." Nor has the Court set forth a mechanistic test for establishing an officer's status as principal or inferior. *See Edmond v. United States*, 520 U.S. 651, 660 (1997) ("Our cases have not set forth an exclusive criterion for distinguishing between principal and inferior officers for Appointment Clause purposes.").

In *Edmond*, the Court emphasized the hierarchical position of an officer within the executive department, explaining that "[g]enerally speaking, the term 'inferior officer' connotes a relationship with some higher ranking officer or officers below the President," *id.* at 662, and concluding 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," *id.* at 663.

In *Morrison*, the Court looked at a range of factors involving the officer's duties, jurisdiction, term of office, and removability in deciding that the special prosecutor was an inferior officer. 487 U.S. at 671–72.

The members of PCAOB are clearly principal officers under either approach. First, many functions

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(continued…)

we do not address it here because we think it clear that the members of the PCAOB are principal rather than inferior officers. For the same reasons, we do not discuss whether the various restrictions on the qualifications of the members of the PCAOB, *see* 15 U.S.C. §7211(e)(1), (e)(2), (e)(5)(B), unconstitutionally constrain the power of the appropriate appointing authorities.

of the PCAOB, including the specific functions at issue in this case, are not subject to appropriate control and direction by other principal officers. Second, apart from the lack of control and supervision by superiors, the sheer scope of the responsibilities of the PCAOB mandates that its members be considered principal officers.

A. *Edmond*'s Hierarchy Test

The standard, and therefore presumptive, 18th-century meaning of the term "inferior" describes a hierarchical relationship. The leading 18th-century dictionary defined "inferiour" as "1. Lower in place. 2. Lower in station or rank of life. 3. Lower in value or excellence. 4. Subordinate." JOHNSON. This is consistent with the Latin root "inferus," which means "below or beneath." BARNHART DICTIONARY 1095. Given the prevalence of knowledge of Latin among the educated members of the founding generation,[11] a reasonable reader of the Constitution would construe the Appointments Clause to require an inferior officer to be subordinate to some other officer.

This conclusion is reinforced by the Constitution's other explicit and implicit uses of the term "inferior." The Appointments Clause distinguishes inferior from (without using the term) principal officers, and the Article III Vesting Clause distinguishes the "supreme Court" from "inferior Courts." U.S. CONST. art. III, §1; *see also id.* art. I, §8, cl. 9 (giving Congress power "to constitute Tribunals inferior to the supreme

[11] *See* Robert G. Natelson, *Federal Land Retention and the Constitution's Property Clause: The Original Understanding*, 76 U. COLO. L. REV. 327, 334 n.28 (2005).

Court"). Lower federal courts are "inferior" to the Supreme Court because they are subject to the supervision and direction of the Supreme Court. If lower courts could decide cases free from Supreme Court supervision, they would be "coordinate" rather than "inferior" courts. In sum, the Constitution primarily uses terms like "inferior" and "supreme" to describe hierarchical relationships.

In the context of Article II, if an officer is not subject to control and supervision by a superior officer, the officer cannot be an inferior officer. The Court in *Edmond* was exactly right 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. No other conclusion accounts for the primarily hierarchical meaning of the term "inferior."

We do not understand anyone in this case to challenge the crucial role of hierarchy in determining inferior officer status (nor could they do so without directly challenging *Edmond*). The dispute, rather, is about whether the PCAOB members are in fact adequately supervised and directed by principal officers. The D.C. Circuit in this case described the SEC's authority over the PCAOB as "explicit and comprehensive" and "extraordinary." Pet. App. 7a. There is no doubt that the SEC has a considerable measure of ultimate control over many of the PCAOB's functions. As the D.C. Circuit noted:

> the Commission approves all Board rules, 15 U.S.C. §§7211(g), 7217(b)(2), and may abrogate, delete, or add to them, *id.*

> §7217(b)(5). All Board sanctions are subject to plenary review by the Commission, *id.* §7217(c)(2); and the Commission "may enhance, modify, cancel, reduce, or require the remission of a sanction imposed by the Board," *id.* §7217(c)(3) . . . . The Commission both appoints and removes Board members, *id.* §§7211(e)(4)(A), (e)(6). It also may impose limitations upon Board activities, *id.* §7217(d)(2), and relieve the Board of its enforcement authority altogether, *id.* §7217(d)(1).

Pet. App. 12a–13a. All of this is true, but it does not yield the conclusion that PCAOB members are inferior officers. The SEC has the power to review the PCAOB's rules and sanctions, but it has no specific statutory power to direct, supervise, or review the PCAOB's investigative and enforcement decisions, which are precisely the decisions of the PCAOB to which petitioners have been subjected. The ability to review *subsequent* actions, such as reports, sanctions, or rules, that *result* from investigative and enforcement actions simply is not the power to supervise and direct *the investigative and enforcement actions themselves*—just as (to borrow an example from Judge Kavanaugh) a federal court's ability to review the *results* of a U.S. Attorney's investigative and prosecutorial efforts is not the power to supervise the investigative and prosecutorial activities themselves. Pet. App. 92a. To be sure, if the SEC could remove at will the members of the PCAOB, that plenary removal power might suffice to give the SEC adequate supervisory

power over all aspects of the PCAOB's work. But the SEC may only remove a PCAOB member "for good cause shown before the expiration of the term of that member." 15 U.S.C. §7211(e)(6); *see also id.* §7217(d)(3) (narrowly limiting the grounds for removal for cause). Accordingly, in the absence of at-will removal power, the SEC's supervisory authority must come from more specific statutory provisions, and with respect to the investigative and enforcement decisions illustrated by this case, there are none.

A principal officer does not become inferior simply by being given additional authority over which other officers exercise control. The Attorney General is clearly a principal officer, with considerable authority that is subject to control and direction only by the President and by no other principal officer. If Congress gave the Attorney General statutory decisionmaking power over all functions now entrusted to the various Cabinet agencies, but subject to the direct control and direction of the heads of those agencies, it would not turn the Attorney General into an inferior officer simply because he or she now had considerable authority subject to the control and direction of other officers. The key consideration in determining principal officer status is not the percentage or amount of an officer's authority that is subject to the control or direction of some other officer, but the significance of the authority that is not so subject. Similarly, even if many of the functions of the PCAOB are subject to the control and direction of other officers, the PCAOB members are still principal rather than inferior officers so long as there are significant functions for

which no such supervision and direction is provided—and the PCAOB's investigative, examining, and enforcement functions are not controlled and supervised by the SEC.

B. *Morrison*'s Scope-of-Responsibility Test

An officer who is not subject to the control and direction of a principal officer is of necessity a principal officer. But an officer who *is* subject to such control and direction can nonetheless be a principal officer if the officer's responsibilities are sufficiently broad. Those responsibilities might either make the officer a "Head[] of [a] Department[]" or directly preclude categorization as inferior. In either case, such an officer must be appointed by the President with the advice and consent of the Senate. Such is clearly the case with the members of the PCAOB.

The Appointments Clause permits appointment of inferior officers by the President, the courts of law, or the heads of departments. The natural inference from this enumeration is that all courts of law and heads of departments must be principal officers. *See* Steven G. Calabresi & Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the* Hamdan *Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002, 1019 (2007). The conclusion that heads of departments are principal officers is confirmed by the 18th-century dictionary definition of "head" as "Chief; principal person; one to whom the rest are subordinate; leader; commander." JOHNSON. If someone is the head of a department, he or she must be appointed by the President with the advice and consent of the Senate.

A "department" is a "separate allotment; province or business assigned to a particular person." JOHNSON; *see also* 1 NOAH WEBSTER, AMERICAN DICTIONARY 58 (New York, S. Converse 1828) (defining a department as a "separate allotment or part of business; a distinct province, in which a class of duties are allotted to a particular person"); *Freytag v. Comm'r*, 501 U.S. 868, 920 (1991) (Scalia, J., concurring) (noting that "the Founders . . . chose the word 'Departmen[t],' . . . not to connote size or function (much less Cabinet status), but separate organization"). An executive department is thus any unit that has a significant degree of organizational identity and responsibility. Anyone at the apex of such an organization is a department head and therefore a principal officer who must be appointed by the President with the advice and consent of the Senate.

Nothing in the 18th-century definition of a "department" makes reference to a hierarchical relationship between a department and other institutions. A federal entity can be a constitutional "department" even if it is part of a larger organizational unit—just as an entity can be an "agency" under the Administrative Procedure Act "whether or not it is within or subject to review by another agency." 5 U.S.C. §551(1). An entity must have a certain degree and kind of identity and authority in order to qualify as a constitutional "department" and thus require its head to be appointed by the President with Senate advice and consent. The questions are: what degree and what kind?

The path to an answer is disclosed by founding era usage of the term "inferior." We have already seen that the primary meaning of "inferior," both in general and in the specific context of Article II, involves a hierarchical relationship of subordination and control. That is not, however, the only way in which the term "inferior" was used during the founding era—and in particular not the only way in which it was used in connection with governmental authority.

In the late 18th century, a court whose decisions were not subject to review by any other court could nonetheless sometimes be called an "inferior court" if its jurisdiction or geographic scope was limited in some important respect. Indeed, a number of states during the founding era had nonhierarchical court systems, in which the label "supreme" did not necessarily connote ultimate decisional authority and the label "inferior" did not necessarily connote decisional subordination, but instead described scope of authority. *See* David E. Engdahl, *What's in a Name? The Constitutionality of Multiple "Supreme" Courts*, 66 IND. L.J. 457, 466–72 (1991). An early draft of Article III proposed creating "one or more supreme tribunals," 1 FARRAND 21, which makes sense only if "supreme," and therefore "inferior," can sometimes have a nonhierarchical meaning.

Several of this brief's authors have argued at great length that, notwithstanding these founding-era usages, the best understanding of Article III is that the Supreme Court must be supreme in the hierarchical sense and therefore must have final decisional authority on all matters within the jurisdiction of the federal courts. *See* Calabresi &

Lawson, 107 COLUM. L. REV. at 1016–25. For present purposes, the important point is not to resolve that question, but to emphasize the fact that the term "inferior," in the context of governmental organization, has two dimensions: one focused on decisional and operational subordination and the other focused on scope of jurisdiction or authority. Given both the primary meaning of "inferior" and the structural and contextual features of the Constitution, hierarchy is a necessary element of any inquiry into constitutional inferiority: an officer who is not subordinate is not inferior. But given the alternative account of inferiority prevalent in the founding era, it is also evident that an officer whose powers and jurisdiction are not comparatively lesser or limited is not inferior.

The same considerations play into the determination whether an executive unit is a "department." It is a necessary but not sufficient condition for departmental status that a governmental unit have an organizational identity. Units with organizational identity and decisional autonomy are clearly departments. Units with organizational identity, without decisional autonomy, but with powers that cannot be dismissed as lesser or lower are departments as well. And the head of any such unit is a head of department under the Appointments Clause and therefore a principal officer.

The PCAOB is important enough to be considered a department. The PCAOB's organizational identity is more than established by its authority to appear in court with its own counsel, 15 U.S.C. §7211(f)(1), to conduct operations in any state, *id.* §7211(f)(2), to

appoint employees, *id.* §7211(f)(4), to enter into contracts, *id.* §7211(f)(6), and (perhaps most tellingly) "to allocate, assess, and collect accounting support fees established pursuant to section 109, for the Board, and other fees and charges imposed under this title," *id.* §7211(f)(5). The PCAOB's powers are broad enough in scope to make it a constitutional "Department[]." All public auditors must register with and provide information to the PCAOB, *id.* §7212(a)–(d), and the PCAOB "shall assess and collect a registration fee and an annual fee from each registered public accounting firm, in amounts that are sufficient to recover the costs of processing and reviewing applications and annual reports." *Id.* §7212(f). *See also id.* §7219(d)–(g) (describing the PCAOB's authority to impose, allocate, and collect fees). The PCAOB has authority to promulgate rules establishing "such auditing and related attestation standards, such quality control standards, and such ethics standards to be used by registered public accounting firms in the preparation and issuance of audit reports, as required by this Act or the rules of the Commission, or as may be necessary or appropriate in the public interest or for the protection of investors." *Id.* §7213(a)(1).

The PCAOB, in other words, has authority to regulate virtually every aspect of the public auditing process. The PCAOB is further empowered to inspect, investigate, and discipline all registered public accounting firms. *Id.* §§7214–15. The power to discipline includes the power to impose substantial civil fines. *Id.* §7215(c)(4)(D). These powers extend to the entirety of the public auditing process, throughout the country and across all businesses.

For purposes of determining whether the PCAOB is a "Department[]," it does not matter whether any of these powers is subject to review by another authority. The powers themselves are sufficiently extensive in substantive and geographical scope to mandate classifying the PCAOB as a department. Accordingly, the head of the PCAOB (whether that be the Chairperson or the entire PCAOB we do not say) is the department head and necessarily a principal officer.

Alternatively, one could simply say that PCAOB members exercise sufficient authority pursuant to the laws of the United States so that they are not merely officers but principal officers. Either formulation is supported by the same considerations.

The Court was thus correct in *Morrison* to examine the scope of the special counsel's authority and jurisdiction. The Court held that the special counsel was an inferior officer in light of the fact that the special counsel had strictly limited jurisdiction, a limited temporal existence, and authority over a very narrow range of cases (however sweeping that authority might have been within its compass). 487 U.S. at 671–72. The PCAOB, by contrast, is a continuing body with broad jurisdiction over all public companies and the entire accounting profession. There is nothing geographically, temporally, or jurisdictionally limited about the PCAOB's responsibilities. Accordingly, the members of the PCAOB must be considered principal officers, and their appointments under the Sarbanes-Oxley Act were therefore unlawful.

CONCLUSION

For these reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX

Amici Curiae Constitutional Law Professors

This Appendix provides *amici*'s titles and institutional affixations for identification purposes only and not to imply any endorsement of the views expressed herein by *amici*'s institutions.

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