[ORAL ARGUMENT SCHEDULED FOR NOVEMBER 8, 2018]

No. 18-3052

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

IN RE: GRAND JURY INVESTIGATION

ANDREW MILLER,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court for the District of Columbia (No. 18-gj-34-BAH) (Hon. Beryl A. Howell)

BRIEF *AMICI CURIAE* OF CONSTITUTIONAL AND ADMINISTRATIVE LAW SCHOLARS IN SUPPORT OF APPELLEE UNITED STATES OF AMERICA

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STATEMENT REGARDING CONSENT TO FILE AND SEPARATE BRIEFING

Pursuant to D.C. Circuit Rule 29(b), undersigned counsel for *amici curiae* constitutional and administrative law scholars represents that counsel for all parties has been sent notice of the filing of this brief and have consented to the filing.[1]

Pursuant to D.C. Circuit Rule 29(d), undersigned counsel for *amici curiae* certifies that a separate brief is necessary. *Amici* are constitutional and administrative law scholars with expertise in the Appointments Clause question presented by this case and are, by virtue of this expertise, particularly well situated to provide the Court with insight into why Special Counsel Robert Mueller is an inferior Officer whose appointment by the Acting Attorney General was consistent with the requirements of the Appointments Clause.

[1] Pursuant to Fed. R. App. P. 29(c), *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici curiae* state that no party to this brief is a publicly-held corporation, issues stock, or has a parent corporation.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

I. PARTIES AND AMICI

Except for *amici* constitutional and administrative law scholars and any other *amici* who had not yet entered an appearance in this case as of the filing of Appellee's brief, all parties, intervenors, and *amici* appearing before the district court and in this Court are listed in the Brief for the United States.

II. RULINGS UNDER REVIEW

Reference to the ruling under review appears in the Brief for the United States.

III. RELATED CASES

Reference to any related cases pending before this Court appears in the Brief for the United States.

Dated: October 5, 2018 By: /s/ Elizabeth B. Wydra
Counsel for Amici Curiae

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STATUTES AND REGULATIONS

The pertinent statutes and regulations are set forth in the addendum to the Brief for the United States filed with this Court on September 28, 2018.

INTEREST OF *AMICI CURIAE*

Amici are law professors who teach or have taught courses in constitutional and administrative law and whose scholarship has devoted significant attention to the separation of powers, including the Constitution's Appointments Clause. By virtue of this experience, *amici* are particularly well situated to provide the Court with insight into why Special Counsel Robert Mueller is an inferior Officer whose appointment by the Acting Attorney General was consistent with the requirements of the Appointments Clause. A full listing of *amici* appears in the Appendix.

SUMMARY OF ARGUMENT

On May 17, 2017, Acting Attorney General Rod Rosenstein appointed Robert Mueller to serve as Special Counsel for the United States Department of Justice with responsibility for overseeing an ongoing FBI investigation into possible "links and/or coordination between the Russian government and individuals associated with the campaign of President Donald Trump," "any matters that arose or may arise directly from the investigation," and any federal crimes committed with the intent to interfere with the Special Counsel's investigation, such as obstruction of justice. Rod J. Rosenstein, Acting Att'y Gen., Appointment of Special Counsel To Investigate Russian Interference with the 2016 Presidential Election and Related Matters, Order No. 3915-2017 (May 17, 2017) (hereinafter "Appointment Order"); *see* 28 C.F.R. § 600.4(a).

Pursuant to that order, Special Counsel Mueller issued subpoenas seeking testimony and documents relevant to the investigation. A subject of those subpoenas moved to quash them, arguing that Mueller's appointment violates the Constitution's Appointments Clause. That Clause provides that "Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States" must be appointed by the President "with the Advice and Consent of the Senate," but that "Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. art. II, § 2, cl. 2. Because Mueller was appointed Special Counsel by the Acting Attorney General—that is, the Head of a Department—his appointment is constitutional if he is an "inferior Officer" within the meaning of the Clause. He is.

As the Supreme Court has emphasized, the Appointments Clause "is among the significant structural safeguards of the constitutional scheme," *Edmond v. United States*, 520 U.S. 651, 659 (1997), guarding against "congressional encroachment" and "ensur[ing] public accountability," *id.* at 659-60, by "preventing the diffusion of the appointment power," *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 878 (1991). Yet at the same time the Framers sought to accomplish these goals, they also sought to ensure that Congress would have flexibility in crafting the structure of the government and who works within it. *See* U.S. Const. art. I, § 8, cl. 18. This

flexibility is apparent in the Appointments Clause's text. The Clause generally requires Officers to be nominated by the President and confirmed by the Senate, but it also grants Congress power to "vest the Appointment of . . . inferior Officers . . . in the President alone, in the Courts of Law, or in the Heads of Departments," as Congress "think[s] proper." *Id*. art. II, § 2, cl. 2.

To ensure that the public can identify who should be held accountable for governmental decisions, while at the same time allowing Congress sufficient flexibility to shape the federal government as circumstances require, the Supreme Court has recognized that Officers may qualify as "inferior"—and thus may be appointed by the President, the Head of a Department, or a Court of Law—if their "work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." *Edmond*, 520 U.S. at 663; *see id.* at 662, 663 (noting that "in the context of a Clause designed to preserve political accountability relative to important Government assignments," "[i]t is not enough that other officers may be identified who formally maintain a higher rank"); *United States v. Germaine*, 99 U.S. 508, 509-10 (1878) (the Founders "fores[aw] that when offices became numerous, and sudden removals necessary, this mode [of presidential nomination and Senate confirmation] might be inconvenient" for inferior officers).

The Special Counsel plainly meets this standard because federal law affords the Attorney General virtually plenary authority over the Special Counsel and his activities, and the Attorney General retains the authority to remove the Special Counsel. Although the Department of Justice regulations governing Special Counsels ostensibly provide them with for-cause removal protection and other forms of independence, those regulations are revocable by the Attorney General. Moreover, the regulations themselves afford the Attorney General wide latitude to supervise and direct the Special Counsel, and permit the Attorney General to fire the Special Counsel for "misconduct, dereliction of duty, incapacity, conflict of interest, or for other good cause, including violation of Departmental policies," 28 C.F.R. § 600.7(d).

Significantly, the Special Counsel is subject to at least as much supervision as United States Attorneys—and has far fewer duties, narrower jurisdiction, and shorter tenure. And United States Attorneys are plainly inferior Officers because the Attorney General can closely supervise their activities. Congress, the Executive Branch, and the Supreme Court have long presumed that United States Attorneys are inferior Officers, and lower courts have squarely so held. If United States Attorneys—some of whom supervise hundreds of attorneys and have the power to prosecute a vast array of federal crimes—are inferior Officers, then the Special Counsel—who

oversees far fewer individuals, has a far narrower jurisdictional scope, and is subject to no less supervision—must be an inferior Officer as well.

ARGUMENT

THE SPECIAL COUNSEL IS AN INFERIOR OFFICER AND WAS THEREFORE APPOINTED IN CONFORMITY WITH THE APPOINTMENTS CLAUSE.

The Appointments Clause provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all . . . Officers of the United States," but also 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. Thus, the Special Counsel's appointment by the Acting Attorney General—the "Head[]" of the "Department[]" of Justice for purposes of the Special Counsel's investigation—is constitutional so long as the Special Counsel is an inferior Officer.[2]

The Special Counsel is an inferior Officer under either of the tests articulated by the Supreme Court: under *Edmond*, he is an inferior Officer because his work is

[2] Acting Attorney General Rosenstein is a "Head of Department" for purposes of the Special Counsel appointment because Attorney General Jeff Sessions recused himself from the Russia investigation. Appellant argues otherwise, Appellant's Br. 32, but the district court correctly held that the Deputy Attorney General may serve as Acting Attorney General under 28 U.S.C. § 508(a), which provides that "[i]n case of a vacancy in the office of Attorney General, or of his absence or disability, the Deputy Attorney General may exercise all the duties of the office." Mem. Op. 83-90; *see id.* (recusal constitutes a "disability").

"directed and supervised at some level by" a principal Officer, 520 U.S. at 663—the Acting Attorney General. Indeed, the Acting Attorney General wields virtually plenary authority over the Special Counsel and can remove him from office. Alternatively, under *Morrison v. Olson*, he is an inferior Officer because he is removable by a higher official, he has limited duties, he has limited jurisdiction, and he has a limited tenure. 487 U.S. 654, 671-72 (1988). Furthermore, the Special Counsel is supervised at least as closely, and has far less significant duties and jurisdiction, than United States Attorneys, who are themselves inferior Officers.

I. Under *Edmond v. United States*, the Special Counsel Is an Inferior Officer Because He Is an Officer Whose Work Is Directed and Supervised by a Principal Officer.

In *Edmond v. United States*, the Supreme Court explained 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. With this requirement, the Appointments Clause ensures that those who are wielding "significant authority pursuant to the laws of the United States," *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (per curiam), do so subject to those who are directly appointed by the President with the advice and consent of the Senate. This fact, in turn, ensures the political accountability that is central to the Appointments Clause.

In applying the standard set out in *Edmond*, this Court has considered whether

an Officer is (1) "subject to . . . substantial supervision and oversight," (2) "removable . . . without cause," and (3) subject to "another executive branch entity['s] . . . power to reverse the [officer's] decisions," *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1338 (D.C. Cir. 2012), such that the officer has "'no power to render a final decision on behalf of the United States unless permitted to do so by other Executive Officers,'" *id.* (quoting *Edmond*, 520 U.S. at 664-65). Under the statutes that govern the relationship between the Acting Attorney General and the Special Counsel, the Special Counsel plainly meets these criteria.

1. The three statutory provisions the Acting Attorney General cited in appointing the Special Counsel grant the Attorney General broad—if not plenary—authority to supervise and oversee the Special Counsel's activities. *See* Appointment Order (citing 28 U.S.C. §§ 509, 510, & 515). Under these provisions, "[a]ll functions of other officers of the Department of Justice . . . are vested in the Attorney General," 28 U.S.C. § 509, and "[t]he Attorney General may from time to time make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General," *id.* § 510. Most importantly, "[t]he Attorney General or any other officer of the Department of Justice, *or any attorney specially appointed by the Attorney General under law*, may, *when specifically directed by the Attorney General*, conduct any kind of legal proceeding, civil or criminal, . . . which United States

attorneys are authorized by law to conduct." *Id.* § 515(a) (emphasis added). None of these provisions limit, in any way whatsoever, the Attorney General's authority over the Special Counsel and his investigation. Indeed, taken together, these provisions grant the Attorney General "virtually plenary authority" to oversee the Special Counsel. Mem. Op. 32. The "functions of" the Special Counsel "are vested" in the Attorney General, 28 U.S.C. § 509, it is the Attorney General who "authoriz[es] the performance" of such functions in the Special Counsel, *id.* § 510, and the Attorney General may "specifically direct[]" the Special Counsel to "conduct any kind of legal proceeding," *id.* § 515(a).

Notably, under these statutory provisions, the Special Counsel is much more closely supervised and accountable than the Court of Criminal Appeals judges that the Supreme Court held were inferior Officers in *Edmond*. Those judges were supervised by the Judge Advocate General, who prescribed rules of procedure and formulated policies in regard to review of court-martial cases but who—critically—was not permitted to influence the outcome of individual proceedings. *Edmond*, 520 U.S. at 664 (the Judge Advocate General "may not attempt to influence (by threat or removal or otherwise) the outcome of individual proceedings, . . . and has no power to reverse decisions of the court"). There are no such limitations on the Attorney General's oversight of the Special Counsel.

The supervision of the Special Counsel also differs significantly from the supervision of Copyright Royalty Judges, which this Court has held would have been principal Officers had they not been made removable at will. *See Intercollegiate Broad. Sys., Inc.*, 684 F.3d at 1338-41. The Copyright Royalty Judges are "supervised in some respects by the Librarian and by the Register of Copyrights," but none of the statutory provisions governing the relationship between the Librarian and the Copyright Royalty Judges "afford[ed] the Librarian room to play an influential role in the CRJs' substantive decisions." *Id.* at 1338; *id.* at 1339 (noting that the Judges enjoy "vast discretion over the rates and terms").

Appellant argues that the Justice Department regulations governing Special Counsels do not provide the Attorney General with sufficient control over the Special Counsel's activities. *See* Appellant's Br. 19-23. But "[t]he Special Counsel was appointed pursuant to, and his powers flow from, the Attorney General's statutory authority, not the regulations." Mem. Op. 29 n.12; *see United States v. Manafort*, 2018 WL 3126380, at *11 (E.D. Va. June 26, 2018) ("The Special Counsel's legal authority is not grounded in the procedural regulations . . . , but in the Constitution and in the statutes that vest the authority to conduct criminal litigation in the Attorney General and authorize the Attorney General to delegate these functions when necessary."). Indeed, the Attorney General has the power to rescind these Special Counsel regulations immediately and without notice or comment. *See* Office of

Special Counsel, 64 Fed. Reg. 37,038, 37,041 (July 9, 1999) ("This rule relates to matters of agency management or personnel, and is therefore exempt from the usual requirements of prior notice and comment and a 30-day delay in effective date.").[3] Thus, those regulations—which the Attorney General may rescind at any time—are not determinative of whether the Special Counsel is subject to sufficient supervision to make him an inferior Officer under the Appointments Clause.

Moreover, even if the regulations could not be rescinded immediately, the Special Counsel would nonetheless be an inferior Officer because the regulations allow the Attorney General a great deal of supervision and oversight authority over the Special Counsel. Under the regulations, "[t]he jurisdiction of a Special Counsel will be established by the Attorney General," and the Attorney General shall "determine whether to include . . . additional matters within the Special Counsel's jurisdiction or assign them elsewhere." 28 C.F.R. § 600.4(a) & (b). The regulations also permit the Attorney General to "request that the Special Counsel provide an explanation for any investigative or prosecutorial step, and may after review conclude that the action is so inappropriate or unwarranted under established Departmental

[3] In promulgating these regulations, the Department of Justice also noted that they are rules of agency organization, procedure, or practice, 5 U.S.C. § 553(b)(A), are not substantive rules, *id.* § 553(d), and in any event that there was "good cause" for issuing the rule without prior notice and comment given that the Independent Counsel Reauthorization Act of 1994 was set to expire on June 30, 1999, *id.* § 553(b)(B) & (d)(3). *See* 64 Fed. Reg. at 37,041.

practices that it should not be pursued." *Id.* § 600.7(b). The Special Counsel is also "subject to disciplinary action for misconduct and breach of ethical duties under the same standards and to the same extent as are other employees of the Department of Justice." *Id.* § 600.7(c). Notably, the Special Counsel is removable under the regulations "for misconduct, dereliction of duty, incapacity, conflict of interest, or for other good cause, including violation of Departmental policies." *Id.* § 600.7(d); *see Morrison*, 487 U.S. at 692 (good-cause removal provision leaves "ample authority to assure that [an officer] is competently performing his or her statutory responsibilities"); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 509 (2010) ("good-cause tenure" leaves officers "subject . . . to Presidential oversight"); *cf. PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75, 79 (D.C. Cir. 2018) (en banc) ("Armed with the power to terminate such an 'independent' official for cause, the President retains 'ample authority to assure' that the official 'is competently performing his or her statutory responsibilities.'" (quoting *Morrison*, 487 U.S. at 692)). Finally, before the start of each fiscal year, in determining the Special Counsel's budget, the Attorney General "shall determine whether the investigation should continue" or should terminate. 28 C.F.R. § 600.8(a)(2).

The "background" section of the regulations goes even further, explaining that while the regulations afford the Special Counsel "independent prosecutorial discretion," "it is intended that ultimate responsibility for the matter and how it is handled

will continue to rest with the Attorney General (or the Acting Attorney General if the Attorney General is personally recused in the matter); thus, the regulations explicitly acknowledge the possibility of review of specific decisions reached by the Special Counsel." 64 Fed. Reg. at 37,038.[4]

Given all this, the regulations afford the Attorney General a wide degree of control over the Special Counsel. Indeed, the Special Counsel is far more accountable than the independent counsel that the Court concluded was an inferior Officer in *Morrison v. Olson*, 487 U.S. at 671-72. Though the independent counsel was required to adhere to Justice Department policies on matters of criminal prosecution, 28 U.S.C. § 594(f), the independent counsel had "full power and independent authority to exercise all investigative and prosecutorial functions of the Department of Justice," *Morrison*, 487 U.S. at 723 (Scalia, J., dissenting) (quoting 28 U.S.C. § 594(a) (1982 ed. Supp. V)) (emphasis omitted), and the governing statute required "the Attorney General, and all other officers and employees of the Department of Justice [to] suspend all investigations and proceedings regarding" matters the

[4] Notably, in recent testimony to a congressional committee, the Acting Attorney General specifically testified that he "know[s] what [Mueller is] doing," and that he is "properly exercising [his] oversight responsibilities." Eric Tucker & Chad Day, *Manafort Sues To Challenge Mueller's Mandate in Russia Probe*, Associated Press (Jan. 4, 2018), https://www.apnews.com/b4a6a4c4541f461b921f771d4d816713; *see* Oversight Hearing with Deputy Attorney General Rod Rosenstein (Sept. 28, 2018), https://judiciary.house.gov/hearing/oversight-hearing-deputy-attorney-general-rod-rosenstein/.

Independent Counsel was investigating, 28 U.S.C. § 597(a). Indeed, the statute governing the Independent Counsel made clear that the only exception to its broad grant of authority to the Independent Counsel was that the Attorney General "shall exercise direction or control as to those matters that specifically require the Attorney General's personal action under [18 U.S.C. § 2516]," which at the time required the Attorney General to authorize certain wiretapping applications. *Id.* § 594(a). By contrast, the Special Counsel regulations provide the Acting Attorney General with the authority to "request that the Special Counsel provide an explanation for any investigative or prosecutorial step, and may after review conclude that the action is so inappropriate or unwarranted under established Departmental practices that it should not be pursued." 28 C.F.R. § 600.7(b).

To be sure, the Special Counsel regulations provide that "[t]he Special Counsel shall not be subject to the day-to-day supervision of any official of the Department," *id*., but that is hardly sufficient to make the Special Counsel a principal Officer. Just last Term, the Supreme Court held that Securities and Exchange Commission Administrative Law Judges—who preside over administrative hearings and issue initial decisions on their own—are inferior Officers. *See Lucia v. SEC*, 138 S. Ct. 2044, 2049-50 (2018). Indeed, if day-to-day supervision by a principal Officer were a requirement of inferior-Officer status, many individuals throughout the federal government who are now viewed as inferior Officers would, in fact, be principal

Officers who must be nominated by the President and confirmed by the Senate. It would also contravene *Edmond* and *Morrison*, neither of which required that inferior Officers be supervised on a day-to-day basis by principal Officers.

2. The Special Counsel is subject to the Attorney General's "power to reverse the [officer's] decisions," *Intercollegiate Broad. Sys., Inc.*, 684 F.3d at 1338. The Attorney General may "as he considers appropriate" rescind the authorization to pursue any action that was granted under 28 U.S.C. § 510, or may direct the Special Counsel to act otherwise pursuant to 28 U.S.C. § 515. As the district court reasoned, "[t]he Attorney General's powers to define altogether the scope of a Special Counsel's authority and rescind such authority at will give the Attorney General the effective power to oversee, supervise, and countermand a Special Counsel in exercising such authority." Mem. Op. 32; *see Go-Bart Importing Co. v. United States*, 282 U.S. 344, 354 (1931) (United States commissioners were inferior officers because they were "mere[ly] officer[s] of the district court in proceedings of which that court had authority to take control at any time").

This level of supervision is far more significant than what is imposed on Court of Criminal Appeals judges, whom the Supreme Court held were inferior Officers in *Edmond*. As *Edmond* noted, the Court of Appeals for the Armed Forces is required to affirm a judge's decision "so long as there is some competent evidence in the record to establish each element of the offense beyond a reasonable doubt." 520

U.S. at 665. By contrast, the Attorney General exercises virtually plenary authority over Special Counsels. Moreover, the Special Counsel is unlike the Copyright Royalty Judges that this Court held were principal Officers because those Judges' "rate determinations are not reversible or correctable by any other officer or entity within the executive branch," *Intercollegiate Broad. Sys., Inc.*, 684 F.3d at 1340. Nor are they like arbitrators at the Surface Transportation Board, who this Court held have power to promulgate metrics and standards and therefore were principal officers. *Ass'n of Am. Railroads v. U.S. Dep't of Transp.*, 821 F.3d 19, 38-39 (D.C. Cir. 2016).

3. Finally, the Attorney General retains the power to remove the Special Counsel. Though no provision of federal law specifically authorizes removal, "[u]nder the traditional default rule, removal is incident to the power of appointment." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. at 509; *see Myers v. United States*, 272 U.S. 52, 119 (1926) ("[T]hose in charge of and responsible for administering functions of government, who select their executive subordinates, need in meeting their responsibility to have the power to remove those whom they appoint."); *In re Hennen*, 38 U.S. (13 Pet.) 230, 259 (1839) ("In the absence of all constitutional provision, or statutory regulation, it would seem to be a sound and necessary rule, to consider the power of removal [as] incident to the power of appointment.").

Moreover, as explained above, while the regulations permit removal only "for misconduct, dereliction of duty, incapacity, conflict of interest, or for other good cause, including violation of Departmental policies," 28 C.F.R. § 600.7(d), the Attorney General has the power to rescind these regulations immediately and without notice or comment, *see* 64 Fed. Reg. at 37,041; *cf. Morrison*, 487 U.S. at 721 (Scalia, J., dissenting) (noting that the Watergate Special Prosecutor could have been removed "at any time, if by no other means than amending or revoking the regulation defining his authority").

In any event, this removal provision still affords the Attorney General "ample authority to assure" that the Special Counsel "is competently performing his or her statutory responsibilities," *Morrison*, 487 U.S. at 692 (majority opinion). Although this Court concluded that the for-cause removal provision governing the Copyright Judges supported the conclusion that they were principal officers, the Court also acknowledged that "the presence of a 'good cause' restriction in *Morrison* did not prevent a finding of inferior officer status," especially where the independent counsel "'performed only limited duties, . . . her jurisdiction was narrow, and . . . her tenure was limited.'" *Intercollegiate Broad. Sys.*, 684 F.3d at 1340 (quoting *Edmond*, 520 U.S. at 661). Moreover, the for-cause removal provision governing the Copyright Judges permitted removal only for "misconduct or neglect of duty," *id.*, while the Special Counsel regulations allow for removal for "misconduct, dereliction

of duty, incapacity, conflict of interest, or for other good cause, including violation of Departmental policies," 28 C.F.R. § 600.7(d).

In short, at every turn, the statutes governing the Special Counsel make clear that he is an "officer[] whose work is directed and supervised at some level" by the Acting Attorney General. *Edmond*, 520 U.S. at 663.

II. Alternatively, under *Morrison v. Olson*, the Special Counsel Is Also an Inferior Officer Because He Is Subject to Removal, Has Limited Duties, Has Limited Jurisdiction, and Has Limited Tenure.

In *Morrison v. Olson*, the Supreme Court described factors that can affect whether an Officer is inferior: whether he is subject to removal by a higher official, has limited duties, has a limited jurisdiction, and is limited in tenure. 487 U.S. at 671-72. Though there is some controversy as to how these factors relate to the test enunciated in *Edmond*, *compare NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 947 n.2 (2017) (Thomas, J., concurring) ("[I]t is difficult to see how *Morrison*'s nebulous approach survived our opinion in *Edmond*."), *with Edmond*, 520 U.S. at 668-69 (Souter, J., concurring in part and concurring in the judgement) (applying the *Morrison* factors),[5] the Special Counsel easily meets these additional criteria. Thus, to

[5] In *Free Enterprise Fund*, the Court said that in *Edmond*, it "held" that "'[w]hether one is an "inferior" officer depends on whether he has a superior,' and that '"inferior officers" are officers whose work is directed and supervised at some level' by other officers appointed by the President with the Senate's consent." 561 U.S. at 510. At no point in *Edmond* or *Free Enterprise Fund*, however, did the Court expressly overrule *Morrison*.

the extent these criteria remain relevant, the Special Counsel is an inferior officer.[6]

First, as explained above, incident to the Attorney General's power to appoint the Special Counsel is the Attorney General's power to remove him. *See supra* at 15-16. Moreover, even though the Special Counsel regulations—which the Attorney General may at any time revoke—limit removal to "misconduct, dereliction of duty, incapacity, conflict of interest, or for other good cause, including violation of Departmental policies," 28 C.F.R. § 600.7(d), the Independent Counsel at issue in *Morrison* was also insulated—in that case, by statute—from removal except for "good cause," *Morrison*, 487 U.S. at 663 (quoting 28 U.S.C. § 596(a)(1), and the Supreme Court nonetheless confirmed that she was an inferior Officer.

Second, like the Independent Counsel in *Morrison*, the Special Counsel has limited duties. The Special Counsel's "role is restricted primarily to investigation and, if appropriate, prosecution for certain federal crimes," and the Special Counsel's "grant of authority does not include any authority to formulate policy for the Government or the Executive Branch." *Morrison*, 487 U.S. at 671. In fact, under the regulations, the Special Counsel is required to abide by Department of Justice

[6] Importantly, even under the *Morrison* dissent, the Special Counsel would qualify as an inferior Officer because he sits squarely in the Executive Branch, and is "subordinate to [another] officer in the Executive Branch," 487 U.S. at 719 (Scalia, J., dissenting) (emphasis omitted)—the Attorney General. Indeed, the Special Counsel regulations are remarkably similar to the regulations governing the Watergate Special Prosecutor, which Justice Scalia cited favorably in his *Morrison* dissent. *See id.* at 721.

policies promulgated by the Attorney General, and a "violation of Departmental policies" is grounds for dismissal. 28 C.F.R. § 600.7(d). To be sure, the Special Counsel has great power and therefore likely wields "significant authority pursuant to the laws of the United States," *Freytag*, 501 U.S. at 881. But that means only that the Special Counsel is an Officer of the United States, not that he is a *principal* officer. *Edmond*, 520 U.S. at 662 ("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").

Third, like the Independent Counsel in *Morrison*, the Special Counsel has limited jurisdiction. He "can only act within the scope of the jurisdiction that has been granted by" the Attorney General. 487 U.S. at 672. For example, here, that jurisdiction is limited to conducting "the investigation confirmed by then-FBI Director James B. Comey in testimony before the House Permanent Select Committee on Intelligence on March 20, 2017, including . . . any links and/or coordination between the Russian government and individuals associated with the campaign of President Donald Trump" and any matters that arise from that investigation. Appointment Order. Appellant points out that the Independent Counsel in *Morrison* was focused only on one person, who was out of government at the time. Appellant's Br. 18. However, as the district court noted, "*Morrison* . . . determined that the Independent Counsel's jurisdiction was limited solely by assessing the scope of the Independent

Counsel's formal investigatory and prosecutorial powers, not who or how many targets the Independent Counsel investigated." Mem. Op. 54.

Fourth and finally, like the Independent Counsel in *Morrison*, the Special Counsel has a limited tenure. Though there is "no time limit on the appointment of a particular counsel," the office of the Special Counsel "is 'temporary' in the sense that [he] is appointed essentially to accomplish a single task, and when that task is over the office is terminated, either by the counsel [him]self or by [the Attorney General]." *Morrison*, 487 U.S. at 672. In short, even applying the *Morrison* test, the Special Counsel is in every way an inferior Officer under the Appointments Clause, and his appointment by the Acting Attorney General was therefore constitutional.

III. The Special Counsel Is Less Powerful Than—and Is Subject to As Much Accountability As—United States Attorneys, Who Themselves Are Inferior Officers.

That the Special Counsel is an inferior Officer is confirmed by comparing that position with United States Attorneys. While Appellant suggests that United States Attorneys are principal officers, Appellant's Br. 14-16, this is plainly wrong. In fact, United States Attorneys are themselves inferior Officers, as all three branches of government have recognized, and United States Attorneys are subject to no more supervision than—and enjoy greater powers than—the Special Counsel.

United States Attorneys are inferior Officers because federal law gives the

Attorney General close control over their litigation decisions. It provides that "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 appointed under section 543 of this title in the discharge of their respective duties." 28 U.S.C. § 519 (emphasis added). It further provides that "[w]hen the Attorney General considers it in the interests of the United States, he may personally conduct and argue any case in a court of the United States in which the United States is interested, or he may direct the Solicitor General or any officer of the Department of Justice to do so." *Id.* § 518(b). In other words, the Attorney General has the authority to remove a case from any United States Attorney and to assign any other officer of the United States to conduct and argue it. Moreover, the Attorney General "is empowered to determine the location of a United States Attorney's offices, . . . to direct that he file reports, . . . to fix his salary, . . . to authorize his office expenses, . . . and to approve his staffing decisions." *United States v. Hilario*, 218 F.3d 19, 25 (1st. Cir. 2000). In short, the Attorney General has "plenary authority over United States attorneys." *Id.* at 25.

Significantly, all three branches of government have reached the same conclusion. First, the Supreme Court assumed as much in *Myers v. United States*, explicitly stating that "a United States attorney" is "an inferior officer," 272 U.S. at 159, and both the First and Ninth Circuits have been squarely presented with the

issue and have concluded that United States Attorneys are inferior Officers, *see Hilario*, 218 F.3d at 25 (noting a "pervasive . . . supervisory regime" in which the Attorney General can control every aspect of a United States Attorney's decisions); *United States v. Gantt*, 194 F.3d 987, 999 (9th Cir. 1999) (noting that United States Attorneys are "subject to closer supervision by a superior than the judges of the Coast Guard Court of Criminal Appeals" from *Edmond* and that "[t]he Attorney General has unfettered discretion to reassign cases from United States Attorneys").

Second, the Executive Branch has itself concluded that United States Attorneys are inferior Officers. In 1978, the Justice Department's Office of Legal Counsel was asked whether a legislative proposal to allow the Attorney General to appoint and remove United States Attorneys was constitutional under the Appointments Clause. The Office said it was, concluding that "U.S. Attorneys can be considered to be inferior Officers, since 28 U.S.C. § 519 authorizes the Attorney General to direct all U.S. Attorneys in the discharge of their duties." United States Attorneys—Suggested Appointment Power of the Attorney General—Constitutional Law (Article 2, § 2, cl. 2), 2 Op. O.L.C. 58, 59 (Feb. 28, 1978).

Third, for more than 150 years, Congress has presumed that United States Attorneys are inferior Officers because it has permitted their appointment by "Courts of Law." *Cf. NLRB v. Noel Canning*, 134 S. Ct. 2550, 2559 (2014) (placing "significant weight upon historical practice" in separation of powers cases (emphasis

omitted)); *see generally Cannon v. Univ. of Chi.*, 441 U.S. 677, 697 (1979) (Congress is presumed to "know the law."). For example, an 1863 statute provided that "[i]n case of a vacancy in the office of marshal or district attorney in any circuit, the judge of such circuit may fill such vacancy, and the person so appointed shall serve until an appointment shall be made by the President, and the appointee has duly qualified, and no longer." An Act to give greater Efficiency to the Judicial System of the United States, ch. 93, § 2, 12 Stat. 768 (1863). Similarly today, when a United States Attorney's office is vacant, federal law permits the Attorney General to appoint a United States attorney for 120 days, 28 U.S.C. §§ 546(a) & 546(c), and after 120 days "the district court for such district may appoint a United States attorney to serve until the vacancy is filled," *id.* § 546(d). Significantly, attorneys appointed under section 546(d) are "fully-empowered United States Attorneys," *Gantt*, 194 F.3d at 999 n.5, and they often serve for years, *see, e.g.*, *Hilario*, 218 F.3d at 23 (judge-appointed United States Attorney served for six years); *cf.* 5 U.S.C. §§ 3345 & 3346 (permitting officials to perform the duties of a vacant office in an "acting" capacity only, subject to rigid time limits).

In short, Congress has assumed since the Civil War that it is permissible for a district court to appoint a United States Attorney in the event of a vacancy, and has placed no explicit time limit on that individual's service. This mechanism for appointment is permissible only if United States Attorneys are inferior Officers. *See*

U.S. Const. art. II, § 2, cl. 2 (principal Officers must be appointed by the President "with the Advice and Consent of the Senate).[7]

[7] Appellant places great weight on the fact that Congress has required United States Attorneys to be nominated by the President and confirmed by the Senate. *See* Appellant's Br. 14-16; 28 U.S.C. § 541(a). However, Congress can always "decline[] to adopt the less onerous appointment process available for inferior officers" and instead require them to be "appointed in the manner of principal officers." *Weiss v. United States*, 510 U.S. 163, 182 (1994) (Souter, J., concurring); *see* 3 Joseph Story, *Commentaries on the Constitution of the United States*, § 1529, at 386 (1833) ("In one age the appointment might be most proper in the president; and in another age, in a department."); *see also* Anne Joseph O'Connell, *Shortening Agency and Judicial Vacancies Through Filibuster Reform? An Examination of Confirmation Rates and Delays from 1981 to 2014*, 64 Duke L.J. 1645, 1695-96 (2015) (discussing reasons why Congress might require Senate confirmation for inferior Officers). For example, although most of the more than 240,000 active military officers are inferior Officers under the Appointments Clause, they are appointed in the manner of principal officers because Congress concluded that such appointment was preferable as a policy matter. *Weiss*, 510 U.S. at 182 (Souter, J., concurring).

Appellant also correctly notes that although the Judiciary Act of 1789 did not specify how United States Attorneys (then called district attorneys) would be appointed, "[t]he President nevertheless immediately assumed that responsibility [and] went to the Senate for advice and consent." Susan L. Bloch, *The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There Was Pragmatism*, 1989 Duke L.J. 561, 567 n.24. However, those early district attorneys were far more independent than today's United States Attorneys. In fact, "[u]ntil 1861, . . . these district attorneys did not report to the Attorney General, and were not in any clear way answerable to him," operating "without any clear organizational structure or hierarchy." Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 Colum. L. Rev. 1, 17 (1994). It was not until 1861 that Congress specified that the Attorney General was "charged with the general superintendence and direction of the attorneys and marshals of all the districts . . . as to the manner of discharging their respected duties; and the said district attorneys and marshals are hereby required to report to the Attorney-General an account of their official proceedings . . . in such time and manner as the Attorney-General may direct." An Act Concerning the Attorney-General and the Attorneys and Marshals of the several

If United States Attorneys are inferior Officers, then the Special Counsel is too. After all, the Special Counsel has fewer duties and a narrower jurisdiction than the typical United States Attorney. The Special Counsel has a small team of a few dozen FBI agents and Justice Department attorneys, *see* Alex Hosenball, Mike Levine & Pierre Thomas, *Special Counsel Robert Mueller Has Assembled a Team of 16 Seasoned Prosecutors*, ABC News (Sept. 29, 2017, 5:18 PM ET), https://abcnews.go.com/Politics/special-counsel-robert-mueller-assembled-team-16-seasoned/story?id=50186443, and he is investigating one specific issue—"links and/or coordination between the Russian government and individuals associated with the campaign of President Donald Trump"—along with any matters that "may arise directly from the investigation," Appointment Order. By contrast, the United States Attorney for the Southern District of New York, for example, supervises 220 attorneys and "handle[s] a high volume of important cases, including domestic and international terrorism, white collar crime, securities and commodities fraud, public corruption, cybercrime, narcotics and arms trafficking, gang violence, organized crime, and civil rights violations." *Meet the U.S. Attorney*, The United States Attorney's Office, Southern District of New York (last updated Jan. 5, 2018), https://www.justice.gov/usao-sdny/meet-us-attorney. The fact that United States

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Districts, ch. 37, § 1, 12 Stat. 285 (1861). Only thereafter did Congress see fit to permit Courts of Law to appoint these district attorneys.

Attorneys are inferior Officers only confirms what the Supreme Court's case law makes clear: the Special Counsel is an inferior Officer who was therefore appointed in conformity with the Appointments Clause.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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APPENDIX

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,472 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that the attached *amicus* brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 14-point Times New Roman font.

Executed this 5th day of October, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system on October 5, 2018.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Executed this 5th day of October, 2018.

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