No. 24-865

In the Supreme Court of the United States

JOSEPH A. FORTIN, PETITIONER

v.

LELAND DUDEK,
ACTING COMMISSIONER OF SOCIAL SECURITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

D. JOHN SAUER
Solicitor General
Counsel of Record
YAAKOV M. ROTH
Acting Assistant Attorney General
JOSHUA S. SALZMAN
AMANDA L. MUNDELL
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Under the Federal Vacancies Reform Act of 1998 (FVRA), 5 U.S.C. 3345 *et seq.*, if an office requiring presidential appointment after Senate confirmation becomes vacant due to the death, resignation, or unavailability of the incumbent officeholder, the President may direct certain other officers and employees to temporarily perform the functions and duties of the vacant office in an acting capacity. In 2018, the Social Security Administration's Deputy Commissioner for Operations, Nancy Berryhill, was serving temporarily as the Acting Commissioner of Social Security under the FVRA when she ratified and approved the appointment to office of the administrative law judge (ALJ) who later denied petitioner's application for disability insurance benefits. Petitioner challenged the denial of his application, contending that the ALJ's appointment was invalid on the theory that Berryhill's service as Acting Commissioner was inconsistent with the FVRA and the Appointments Clause, U.S. Const. Art. II, § 2, Cl. 2. The question presented is as follows:

Whether the court of appeals correctly rejected petitioner's statutory and constitutional challenges to Berryhill's service as Acting Commissioner.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 112 F.4th 411. The opinion of the district court (Pet. App. 31a-71a) is available at 2023 WL 3853682.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 2024. A petition for rehearing was denied on November 13, 2024 (Pet. App. 72a-73a). The petition for a writ of certiorari was filed on February 11, 2025. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

* Acting Commissioner Dudek is automatically substituted as a party for his predecessor in office under Rule 35.3 of the Rules of this Court.

STATEMENT

1. Except when Congress has provided otherwise, all "Officers of the United States" are appointed by the President "with the Advice and Consent of the Senate." U.S. Const. Art. II, § 2, Cl. 2. An office whose appointment requires both the President and the Senate is "known as a 'PAS' office." *NLRB* v. *SW General, Inc.*, 580 U.S. 288, 292 (2017).

If a PAS office becomes vacant, Congress has "long * * * authoriz[ed] the President to direct certain officials to temporarily carry out the duties of [the] PAS office in an acting capacity, without Senate confirmation." *SW General*, 580 U.S. at 293. The most recent general enactment along those lines is the Federal Vacancies Reform Act of 1998 (FVRA), 5 U.S.C. 3345 *et seq.* The FVRA provides that, for a PAS office, if the incumbent officeholder "dies, resigns, or is otherwise unable to perform the functions and duties of the office," then the "first assistant to the office * * * shall perform the functions and duties of the office temporarily in an acting capacity." 5 U.S.C. 3345(a)(1). But the FVRA authorizes the President to alter that default rule. Specifically, the President may "direct a person" who already occupies a different PAS office to "perform the functions and duties of the vacant office temporarily in an acting capacity." 5 U.S.C. 3345(a)(2). Or the President may select another officer or employee within the same agency who meets certain criteria. 5 U.S.C. 3345(a)(3). Acting service under any of those provisions of the FVRA is "subject to the time limitations of section 3346." 5 U.S.C. 3345(a)(1)-(3).

2. This case concerns a vacancy in the office of the Commissioner of Social Security. The Commissioner is the head of the Social Security Administration and is

"appointed by the President, by and with the advice and consent of the Senate." 42 U.S.C. 902(a)(1). The second highest ranking position in the agency is the Deputy Commissioner of Social Security, which is also a PAS office. 42 U.S.C. 902(b)(1). By default, the Deputy Commissioner "shall be Acting Commissioner of the Administration during the absence or disability of the Commissioner." 42 U.S.C. 902(b)(4).

In 2016, President Obama invoked his authority under the FRVA to issue a memorandum specifying an "[o]rder of [s]uccession" for the office of the Commissioner of Social Security in circumstances when both the Commissioner and the Deputy Commissioner "have died, resigned, or become otherwise unable to perform the functions and duties of the office of Commissioner." 81 Fed. Reg. 96,337, 96,337 (Dec. 30, 2016) (emphasis omitted). In the event of a simultaneous vacancy in both offices, the President directed that the "Deputy Commissioner for Operations" would be the first in line to serve as the Acting Commissioner, followed by a succession of other specified officials within the agency. *Ibid.*

When President Trump took office on January 20, 2017, the incumbent Deputy Commissioner of Social Security resigned, and the office of Commissioner was already vacant. See Pet. App. 5a. Consistent with the order of succession described above, then-Deputy Commissioner for Operations Nancy Berryhill "became the new Acting Commissioner." *Ibid.* The FVRA authorized Berryhill to continue to serve as Commissioner in an acting capacity, in the absence of any nomination, until November 16, 2017. *Id.* at 34a; see 5 U.S.C. 3346(a)(1), 3349a(b)(1). President Trump did not nominate anyone to serve as Commissioner during that period. In March 2018, the Government Accountability Office (GAO) re-

ported that, because of the time limit that applied in the absence of a nomination, Berryhill could not lawfully continue to serve as or describe herself as Acting Commissioner under the FVRA. See Pet. App. 34a. Berryhill ceased to do so after the GAO report. *Id.* at 5a, 34a.

In April 2018, the President nominated Andrew Saul to be the Commissioner of Social Security. Pet. App. 34a. Berryhill was still the Deputy Commissioner for Operations at that time, and President Trump had neither revoked nor amended the order of succession. Thus, after President Trump submitted "a first * * * nomination for the office" of Commissioner, 5 U.S.C. 3346(a)(2), Berryhill resumed serving as Acting Commissioner, under the time limit in Section 3346(a)(2), while that nomination was pending before the Senate. See Pet. App. 5a, 34a-35a.

During Berryhill's second period of service as Acting Commissioner, this Court held that "administrative law judges (ALJs) of the Securities and Exchange Commission" are "'Officers'" within the meaning of the Appointments Clause, not mere employees. *Lucia* v. *SEC*, 585 U.S. 237, 241 (2018). Although the Court did not address the status of ALJs within other agencies, the Social Security Administration recognized that *Lucia* "ha[d] the potential to significantly affect [its] hearings and appeals process." 84 Fed. Reg. 9582, 9583 (Mar. 15, 2019). The Social Security Administration "employ[s] more ALJs than all other Federal agencies combined" to adjudicate many of the "millions of applications for benefits" that the agency receives each year. *Ibid.* And those ALJs had historically "been selected by lower level staff rather than appointed by the head of the agency." *Carr* v. *Saul*, 593 U.S. 83, 86 (2021). In July

2018, in order to "preemptively 'address[] any Appointments Clause questions involving Social Security claims,'" Berryhill exercised her authority as Acting Commissioner to ratify and approve the appointment to office of all of the agency's then-serving ALJs. *Ibid.* (quoting 84 Fed. Reg. at 9583).

3. In 2014, petitioner applied for disability insurance benefits under the Social Security Act, 42 U.S.C. 301 *et seq.* Pet. App. 32a; see Gov't C.A. Br. 9. His application was denied by an ALJ within the Social Security Administration in 2016, and he sought judicial review. Pet. App. 32a. After *Lucia*, the court of appeals vacated and remanded with instructions that his application be considered by a different ALJ appointed in conformity with the Appointments Clause. See *Ramsey* v. *Commissioner of Soc. Sec.*, 973 F.3d 537, 547 (6th Cir. 2020), cert. denied, 141 S. Ct. 2699 (2021). On remand, petitioner's application was denied by a different ALJ whose appointment to office had been ratified and approved by Acting Commissioner Berryhill. Pet. App. 6a. Petitioner again sought judicial review. *Ibid.* The district court rejected petitioner's challenges to the ALJ's decision, *id.* at 31a-71a, and the court of appeals unanimously affirmed, *id.* at 1a-30a.

As relevant here, petitioner contended in his second appeal that the ALJ's decision on remand was invalid because Berryhill was not lawfully serving as Acting Commissioner when she ratified and approved the ALJ's appointment to office. Pet. App. 6a. In particular, petitioner maintained that both the FVRA and the Appointments Clause "prevented Berryhill from becoming Acting Commissioner during the Trump administration pursuant to President Obama's succession order." *Id.* at 7a. Petitioner contended that Berryhill had

not been "direct[ed]" to serve as the Acting Commissioner by "the President" within the meaning of the FVRA, 5 U.S.C. 3345(a)(3), where her acting service was the result of an order of succession issued by President Trump's predecessor in office. See Pet. App. 8a. Petitioner also maintained that Berryhill's temporary service as Acting Commissioner required a new appointment to office by "the sitting President" under the Appointments Clause. *Id.* at 12a.

With respect to petitioner's statutory argument, the court of appeals agreed with prior decisions by two other courts of appeals rejecting the same argument. Pet. App. 8a-10a; see *Dahle* v. *Kijakazi*, 62 F.4th 424, 429 (8th Cir. 2023), cert. denied, 144 S. Ct. 549 (2024); *Gaiambrone* v. *Commissioner Soc. Sec.*, No. 23-2988, 2024 WL 3518305, at *3 (3d Cir. July 24, 2024). Quoting one of those decisions, the court explained that generally "presidential orders without specific time limitations carry over from administration to administration," and that petitioner had identified "no authority" for treating the 2016 succession order differently. Pet. App. 8a-9a (citation omitted). Accordingly, the court determined that "President Trump did not need to enter a new succession order for Berryhill to become the Acting Commissioner" consistent with the FVRA. *Id.* at 11a.

As for petitioner's constitutional argument, the court of appeals stated that the Appointments Clause "was not implicated" by Berryhill's temporary service as Acting Commissioner. Pet. App. 14a. The court reasoned that, under its precedent, "acting officials . . . are not appointed" to a new office for Appointments Clause purposes when they are temporarily authorized to perform the functions and duties of a vacant office. *Id.* at

12a (quoting *Rop* v. *Federal Hous. Fin. Agency*, 50 F.4th 562, 573 (6th Cir. 2022), cert. denied, 143 S. Ct. 2608 (2023)) (brackets omitted). The court also observed that the FVRA "states that the President 'may direct' a qualified individual to serve as an acting officer" but "does not say he makes any appointment" when he exercises that authority. *Ibid.*

Petitioner sought rehearing en banc, which was denied without any noted dissent. Pet. App. 72a-73a.

ARGUMENT

Petitioner contends (Pet. 5-6, 25-29) that the court of appeals wrongly allowed the language of the FVRA to dictate whether Nancy Berryhill's service as the Acting Commissioner of the Social Security Administration, by virtue of her being the Social Security Administration's Deputy Commissioner for Operations, was consistent with the Appointments Clause. Petitioner further contends (Pet. 21-23) that the decision below is inconsistent with the reasoning of decisions of the Fifth and D.C. Circuits, recognizing that the Appointments Clause may apply even when a statute does not describe the selection of a particular officeholder as an appointment. Those contentions rest on a misreading of the decision below. The court of appeals held that Berryhill's temporary service as Acting Commissioner did not require a new appointment to a new office as a matter of constitutional law—a conclusion confirmed by the language of the FVRA, but not dictated by it. That holding does not conflict with any decision of this Court or another court of appeals, nor does it otherwise warrant further review. This Court has recently denied petitions for writs of certiorari raising FVRA challenges to Berryhill's service as Acting Commissioner. See *Rush* v. *O'Malley*, 144 S. Ct. 999 (2024) (No. 23-243); *Dahle* v. *O'Malley*,

144 S. Ct. 549 (2024) (No. 23-173). The same course is warranted here.

1. Petitioner errs in contending (Pet. 3-5, 21-23, 25-29) that either the Appointments Clause or the FVRA requires a new appointment by the President to enable someone to serve temporarily as an acting officer in a PAS office.

a. As explained above, see p. 2, *supra*, the FVRA states that "the President (and only the President) may direct" certain officers or employees within an executive agency "to perform the functions and duties" of a vacant PAS office "temporarily in an acting capacity." 5 U.S.C. 3345(a)(3). Exercising that authority, President Obama adopted an order of succession for the Social Security Administration designating the agency's Deputy Commissioner for Operations as the official first in line to serve as Acting Commissioner in the event of simultaneous vacancies in the offices of both Commissioner and Deputy Commissioner. Pet. App. 4a-5a. When he entered office in 2017, President Trump left that order of succession in place, and the order remained in force in 2018 when President Trump submitted a first nomination to the Senate for the office of Commissioner, triggering Berryhill's second period of service under the FVRA as the Acting Commissioner. *Id.* at 5a.

To the extent that petitioner continues to challenge the statutory basis for Berryhill's acting service (cf. Pet. 3-5), the court of appeals correctly rejected his challenge. Among other things, the court explained that the FVRA's reference to a designation by "the President," 5 U.S.C. 3345(a)(3), encompasses the circumstances of this case, where one President leaves in place an order of succession designated by a prior Pres-

ident. As the court recognized, "[t]he general rule is that presidential orders without specific time limitations carry over from administration to administration" and retain their legal force. Pet. App. 8a (citation omitted). Petitioner identified "no authority" below for the suggestion that "succession orders" expire upon a change in Administration. *Id.* at 9a (citation omitted). Nor did petitioner identify any sound basis for reading the FVRA's references to "the President" to imply that the incumbent President must issue a new "succession order" for each agency and may not rely on an existing order of succession designated by a prior President. *Id.* at 12a; see *id.* at 14a-26a (rejecting petitioner's additional statutory challenges to Berryhill's acting service under the FVRA).

b. Petitioner also contended below "that Berryhill never properly served as Acting Commissioner because only the sitting President can 'appoint' an acting officer under the Appointments Clause." Pet. App. 12a. To the extent that petitioner renews that argument in this Court (cf. Pet. 4), the argument lacks merit and does not warrant further review. It is true that only the sitting President is vested by Article II with the authority to "appoint * * * Officers of the United States" with the advice and consent of the Senate, subject to Congress's authority to lodge the appointment of inferior officers "in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. Art. II, § 2, Cl. 2. But petitioner fails to establish that Berryhill's temporary service as the Acting Commissioner constituted an appointment to office for constitutional purposes.

Accepting the apparent premise of that argument would have sweeping implications for the FVRA and for numerous other statutes that permit temporary acting

service. If it were true that temporarily discharging the functions and duties of a vacant PAS office on an acting basis necessarily constitutes entry into a new office, requiring a new appointment consistent with the Appointments Clause, then it is unclear how the first assistant to a vacant PAS office could serve in an acting role under the default rule in Section 3345(a)(1). Any such acting service occurs by operation of law, without any additional action by the President (or the Department Head) to designate or appoint the first assistant to the acting role. See 5 U.S.C. 3345(a)(1) (providing that "the first assistant to" a vacant PAS office "shall perform the functions and duties of the office temporarily in an acting capacity").

Numerous office-specific statutes likewise contemplate that a specified official will temporarily assume the duties of a PAS office in the event of a vacancy—without any additional appointment to that acting role. See, *e.g.*, 42 U.S.C. 902(b)(4) (stating that the "Deputy Commissioner" of the Social Security Administration "shall be Acting Commissioner * * * in the event of a vacancy in the office of the Commissioner," unless the President "designates another officer of the Government as Acting Commissioner"); Gov't C.A. Br. 20 (additional examples). Petitioner does not explain how his constitutional argument could be squared with those provisions, or with the longstanding and shared understanding of the Executive and Legislative Branches that temporary acting service may permissibly occur by operation of law. Cf. *NLRB* v. *Noel Canning*, 573 U.S. 513, 600 (2014) (Scalia, J., concurring in the judgment) (observing that "Congress can authorize 'acting' officers to perform the duties associated with a temporarily

vacant office—and has done that, in one form or another, since 1792," and citing examples).

Moreover, in many applications of the FVRA and analogous agency-specific statutes, the person who temporarily discharges the functions and duties of a vacant PAS office has already been appointed to a different office in conformity with the Appointments Clause. Within the Social Security Administration, for example, the office of Deputy Commissioner is itself a PAS office. 42 U.S.C. 902(b)(1). When the Deputy Commissioner temporarily serves as the Acting Commissioner during a vacancy, the additional functions and duties that the Deputy Commissioner temporarily performs are consistent with the principle that "an officer's powers and duties [may] expand without the need for a separate appointment," at least where the additional functions and duties are germane to the office to which the person was already appointed. Pet. App. 12a (citing *Weiss* v. *United States*, 510 U.S. 163, 170-174 (1994), and *Shoemaker* v. *United States*, 147 U.S. 282, 301 (1893)).

The same is true under the FVRA when a first assistant who has already been appointed as an "Officer[] of the United States," U.S. Const. Art. II, § 2, Cl. 2, assumes additional powers and duties temporarily under Section 3345(a)(1). And this Court has long recognized than an inferior officer who is temporarily "charged with the performance of the duty" of a principal officer is not "thereby transformed" into a principal officer requiring a new appointment. *United States* v. *Eaton*, 169 U.S. 331, 343 (1898); see *United States* v. *Arthrex, Inc.*, 594 U.S. 1, 22 (2021); *Edmond* v. *United States*, 520 U.S. 651, 661 (1997). The logic of petitioner's position would make any such prior appointment irrelevant. If temporarily discharging the functions and duties of a vacant

PAS office requires a new appointment to a distinct office, then the FVRA would be unconstitutional in its principal application to first assistants who, unless they are displaced by the President's selection of someone else, will automatically serve in an acting capacity by operation of law—even those already appointed in conformity with the Appointments Clause. The court of appeals correctly rejected any such view.

2. Petitioner does not squarely ask this Court to address whether Berryhill's second period of temporary service as Acting Commissioner was consistent with the Appointments Clause or the FVRA—questions that are not the subject of any conflict in the courts of appeals and that do not otherwise warrant this Court's further review. The only question that petitioner seeks to present is instead "whether the Appointments Clause governs how all officers of the United States are to be appointed even when Congress uses words other than 'appoint.'" Pet. i. Petitioner contends (Pet. 21-23, 25-29) that the Sixth Circuit wrongly held the Appointments Clause inapplicable here based on the language of the FVRA and that its decision conflicts in that respect with prior decisions of the Fifth and D.C. Circuits.

Those contentions rest on a misreading of the decision below. In response to petitioner's argument that "only the sitting President can 'appoint' an acting officer under the Appointments Clause," the court of appeals explained that the argument "stumbles out of the gate" because Berryhill's temporary service as Acting Commissioner did not require "a separate appointment" under the Constitution. Pet. App. 12a. The court also explained that the FVRA itself does not require the President to "make[] any appointment," instead using the term "'direct.'" *Ibid.* The court went on to explain

that the "linguistic distinction was deliberate," and that Congress could easily have "state[d] that a separate appointment is required for the Acting Commissioner" had it wished to impose any such requirement. *Id.* at 12a-13a. The court did not hold, however, that Congress could place a particular office or officer "beyond the Appointments Clause." Pet. 6. Read in context, the court was merely explaining that neither the Constitution *nor the FVRA* imposed any requirement that President Trump appoint Berryhill as Acting Commissioner in order for her to lawfully serve in that role.

Petitioner does not identify any error in that reasoning, let alone any error warranting further review. The Appointments Clause prescribes the mandatory procedures for appointing all "Officers of the United States" whose method of appointment is not "otherwise provided for" in the Constitution itself. U.S. Const. Art. II, § 2, Cl. 2. But the Appointments Clause does not necessarily forbid Congress from imposing requirements beyond the constitutional minimum—for example, by requiring appointment by a Department Head for some positions in the Executive Branch that might qualify as "non-officer employees" for constitutional purposes. *Lucia* v. *SEC*, 585 U.S. 237, 245 (2018); cf. Pet. 25 (recognizing that Congress may "of its own accord require[] a person to be appointed, even if nothing in the Constitution requires this"). It was therefore logical for the court of appeals to consider both the requirements of the Appointments Clause and also the language of the FVRA—neither of which supports petitioner's position.

Petitioner's claimed circuit conflict (Pet. 21-23) rests on the same misreading of the decision below. Petitioner states (Pet. 21) that the Fifth and D.C. Circuits have both found the Appointments Clause applicable in

circumstances in which the relevant statute establishing a position in the Executive Branch "uses words other than 'appoint' to describe how the position may be assumed." See *Braidwood Mgmt., Inc.* v. *Becerra*, 104 F.4th 930, 940-949 (5th Cir. 2024) (concluding that members of the United States Preventive Services Task Force "convened" under 42 U.S.C. 299b-4(a)(1) are principal officers), cert. denied, No. 24-475, and cert. granted, No. 24-316 (oral argument scheduled for Apr. 21, 2025); *Al Bahlul* v. *United States*, 967 F.3d 858, 873-875 (D.C. Cir. 2020) (concluding that Congress lawfully exercised its authority under the Appointments Clause to vest the appointment of an inferior officer in the Secretary of Defense, as Head of a Department, by authorizing the Secretary to "designate" the convening authority for military commissions), cert. denied, 142 S. Ct. 621 (2021).

Again, the Sixth Circuit in the decision below did not hold that Congress's language is controlling on the question whether the Constitution prescribes a mandatory method of appointment for a particular office. Absent that mistaken premise, petitioner identifies no conflict between the decision below and the D.C. and Fifth Circuit decisions on which he relies. Petitioner also identifies no reason to conclude that this case would have come out any differently in those circuits. Neither of the decisions that petitioner invokes addressed whether the Appointments Clause is implicated by a person's temporary service as an acting officer under the FVRA. No further review is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

D. JOHN SAUER
Solicitor General
YAAKOV M. ROTH
Acting Assistant Attorney General
JOSHUA S. SALZMAN
AMANDA L. MUNDELL
Attorneys

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