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No. 24-865

In the Supreme Court of the United States

JOSEPH A. FORTIN,

Petitioner,

v.

LELAND DUDEK,
ACTING COMMISSIONER OF SOCIAL SECURITY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

The lives and well-being of countless Americans hinge on the actions of executive officers—temporary (or acting) department heads included. Shortly after Joseph Fortin filed his petition for certiorari, Leland Dudek took over as Acting Commissioner of Social Security. In his 78 days on the job (to date), Acting Commissioner Dudek has declared plans to fire 7,000 agency employees and to close 64 agency offices.[1] Dudek also threatened to end agency phone service[2] (on which many seniors depend) and to shut down the agency following an adverse court order.[3]

Whether one agrees or disagrees with these actions, the Framers recognized that accountability for the actions of all executive officers (acting or full-time) requires a clear appointments process—one leaving the people "at no loss to determine" who hired the decisionmakers regulating their lives.[4] For this reason, the Constitution's Appointments Clause governs how "*all* officers of the United States are to be appointed." *Buckley v. Valeo*, 424 U.S. 1, 132-33 (1976) (italics-in-original). "No class or type of officer is excluded because of its special functions." *Id.*

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1 *See* Wm. Morton, *Social Security Administration (SSA): Announced Restructuring & Other Changes*, CONG. RESEARCH SERV., Mar. 17, 2025, at 2, https://tinyurl.com/27z9tsfy.

2 *See* Hannah Natanson, *Social Security Abandons DOGE-led Phone Service Cuts Amid Chaos, Backlash*, WASH. POST, Apr. 9, 2025, https://tinyurl.com/3wxmceur.

3 *See* Benjamin Siegel, *Acting Social Security Chief Now Says He Won't Shut Down Agency After DOGE Ruling*, ABC NEWS, Mar. 21, 2025, https://tinyurl.com/putnv6tm.

4 THE FEDERALIST NO. 77 (A. Hamilton), as reproduced by Yale's Avalon Project, https://tinyurl.com/ufmyx29j.

Yet in Petitioner's case, the Sixth Circuit held that "the Appointments Clause was not implicated" by Nancy Berryhill's assumption of the role of Acting Commissioner of Social Security. Pet.App.14a. The Sixth Circuit reached this conclusion because the statute behind Berryhill's elevation "does not" speak of "appointment." *Id.* Then, to explain how someone with no appointment may lead 57,000 employees and the distribution of $1.5 trillion on which 73 million people depend, the Sixth Circuit deemed Berryhill's old agency job to have "simply expanded." *Id.*

The Sixth Circuit thus reduces the structural safeguards of the Appointments Clause to a trifle—a switch that Congress may turn on and off though selective use of the word 'appoint.' *See* Pet.25-29. The Fifth Circuit and D.C. Circuit, on the other hand, each recognize that "Congress need not use explicit language to vest an appointment." *See Al Bahlul v. United States*, 967 F.3d 858, 873-74 (D.C. Cir. 2020); *see also Braidwood Mgmt., Inc. v. Becerra*, 104 F.4th 930, 936-37 & n.7 (5th Cir. 2024) (finding Congress's use of "shall convene" vested an appointment).

The present Acting Commissioner (the agency) insists that Petitioner "misread[s]" the Sixth Circuit. BIO.7. But the agency's reading creates more issues. If Berryhill's acting service was *not* "an appointment to office for constitutional purposes"—as the agency argues—then Congress may give *anyone* the power to designate acting heads like Berryhill. BIO.9. Gone is the key "limit on the diffusion of appointment power that the Constitution demands," cementing why the Sixth Circuit's decision needs and deserves review. *Freytag v. Comm'r*, 501 U.S. 868, 892 (1991).

A. Presuming the correctness of the question presented, the agency does not dispute the existence of a circuit split meriting review or the case's propriety as a vehicle.

The agency contends that "Petitioner's claimed circuit conflict ... rests on ... [a] misreading of the [Sixth Circuit's] decision." BIO.13. The agency does not dispute, however, that if Petitioner's reading of the Sixth Circuit's decision is correct, then a circuit split exists on the question presented: "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. The agency also does not dispute the importance of the question presented or that Petitioner's case affords an ideal vehicle for resolving this recurring question. *Compare* BIO.7-14 *with* Pet.2-7, 16-20, 23-24.

The agency complains that Petitioner "identifies no reason to conclude that [his] case would have come out any differently" in the Fifth Circuit or the D.C. Circuit. *See* BIO.14. *Braidwood* and *Al Bahlul* establish that the Appointments Clause applies even when Congress uses words other than 'appoint' (like 'convene'). Pet.21-23. By contrast, the Sixth Circuit determined here that the Clause is "not implicated" when Congress makes "[t]he deliberate choice ... to say 'directs' ... instead of 'appoint[s].'" Pet.App.14a. So while *Braidwood* and *Al Bahlul* did not involve "service as an acting officer" (BIO.14), both show that the Fifth and D.C. Circuit would have reached the merits of Petitioner's Appointments Clause claims—not held (like the Sixth Circuit) that these claims "stumble[] out of the gate." *See* Pet.App.12a.

B. The agency's efforts to salvage the Sixth Circuit's erroneous decision only amplify the need for Supreme Court review.

The agency's objection to review boils down to the repeated contention that Petitioner misreads the Sixth Circuit's decision. The agency is wrong. Worse still, the agency neglects how its own reading of the decision below generates a constitutional problem of equal magnitude, affirming the need for review.

1. The agency insists the Sixth Circuit "did not hold that Congress's language is controlling on ... whether the Constitution prescribes a mandatory method of appointment for a particular office." *See* BIO.14. That is exactly what the Sixth Circuit held, as a plain reading of its opinion illustrates.

The Sixth Circuit opens its analysis by saying: "[a]cting officials are not appointed." *See* Pet.App.12a (cleaned up). Why? To underscore that the Federal Vacancies Reform Act (FVRA) states "the President 'may direct' a qualified individual to serve as an acting officer—[Congress] does not say he makes any appointment." *Id.* The Sixth Circuit then culminates this analysis by saying: "[t]he deliberate choice in the [FVRA] to say that the President 'directs' a qualified individual to become an acting officer instead of 'appointing' ... was purposeful. **So Berryhill was not 'appointed' ... and the Appointments Clause [is] not implicated**." Pet.App.14a (bold added). The plain meaning of these sentences is that Congress's language controls the Appointments Clause in regard to acting officers. When Congress says 'directs' rather than 'appoints,' the Clause does not apply. *Id.*

In reaching these conclusions, the Sixth Circuit cites *Rop v. FHFA*, 50 F.4th 562 (6th Cir. 2022). *See* Pet.App.12a. The Sixth Circuit relied on the same literalistic logic in *Rop* to conclude that the Recess Appointments Clause shed no constitutional light on the proper tenure of acting officers: "[a]cting officials ... are not 'appointed.'" *Rop*, 50 F.4th at 573. When a court of appeals repeats itself like this, showing that the court "mean[s] what it says," the Supreme Court takes the lower court at its word. *Spears v. United States*, 551 U.S. 261, 266 (2009). No Marx Brothers routine by the agency may overcome this reality[5]—especially since the Appointments Clause is "more than a matter of 'etiquette or protocol.'" *Edmond v. United States*, 520 U.S. 651, 658-59 (1997).

Finally, as amici The Cato Institute and Pacific Legal Foundation observe, any lingering doubt about the Sixth Circuit's holding only supports review. *See* Amici Br.2-5. The Sixth Circuit's decision "may well be read by lower courts in the Sixth Circuit to completely exempt the FVRA from Appointments Clause analysis." Amici Br.5. A grant-vacate-remand (GVR) would avoid this danger—and illuminate the merits of review—by requiring the Sixth Circuit "to show its work and clarify the scope of its holding." *Id.*; *see, e.g., Lombardo v. City of St. Louis*, 594 U.S. 464, 467 (2021) (GVR based on the Eighth Circuit's rejection of a constitutional claim that left "unclear" whether the Eighth Circuit had applied a "*per se* rule" that abridged Supreme Court precedent).

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[5] In the Marx Brothers film *Duck Soup*, Chico Marx utters the famous line: "well, who are you going to believe—me or your own eyes?" *See* DUCK SOUP (Paramount Pictures 1933).

2. The agency maintains: "[P]etitioner fails to establish that Berryhill's temporary service as the Acting Commissioner constituted an appointment to office for constitutional purposes." BIO.9. In reality, Petitioner has repeatedly established that Berryhill's acting service was an appointment for constitutional purposes. *See* Pet.28-29; No. 23-1528 (6th Cir.), Doc. 25 at 14-27 & Doc. 35 at 1-8. The Sixth Circuit never reached Petitioner's argument, erroneously rejecting the Appointments Clause's applicability at the start. *See* Pet.App.12a to 14a. The agency, in turn, has no answer to the copious text, history, or precedent that supports Petitioner's argument. *See* BIO.7-14.

a. The role of acting department head is a separate office for constitutional purposes. As the Court of Claims explained over 150 years ago: "[t]he office of Secretary *ad interim* ... [is] a distinct and independent office in itself, when it is conferred on the chief clerk ... because the President, in the exercise of his discretion, sees fit to appoint him." *In re Boyle*, 3 U.S. Cong. Rep. C.C. 44, 1857 U.S. Ct. Cl. LEXIS 215, at *12 (Ct. Cl. 1857); *cf. United States v. White*, 28 F. Cas. 586, 587 (C.C.D.Md. 1851) (navy-agent held "two offices at the same time" so long as the navy-agent was serving as "acting purser").

A 2018 Office of Legal Counsel (OLC) memo seconds this point. *Designating an Acting Attorney General*, 2018 OLC LEXIS 9 (Nov. 14, 2018). Making the case for why "an inferior officer may temporarily perform the duties of a principal officer without Senate confirmation," OLC cites the above precedent. *Id.* at *30-32, 44. The Executive Branch thus shares the Judicial Branch's recognition that being "deemed

[an] Acting Secretary" (or similar acting department head) means assuming a distinct office—"not simply performing additional duties." *Id.* at *31. This leads OLC to affirm that "the President's designation of an acting officer under the [FVRA] should be regarded as an appointment." *Id.* at *48-49. Berryhill fits this bill, implicating the Appointments Clause.

b. Text, history, and precedent establish that Berryhill's service as acting commissioner was an appointment for constitutional purposes.

Start with text. The Appointments Clause (as relevant here) provides: "Congress may by Law vest **the Appointment** of such inferior Officers, as they think proper, in the President alone." U.S. CONST. art. II, §2, cl. 2. When the Constitution was ratified, "appointment" meant "designation to office." 1 N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828); *see* 1 S. JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1785) ("[d]irection; order"). The text of the Appointments Clause then establishes that Berryhill's acting service was an appointment to office for constitutional purposes. "When the President 'directs' someone to serve as an officer pursuant to the FVRA, he is 'appointing' that person ... within the meaning of the Appointments Clause." *NLRB v. SW Gen., Inc.*, 580 U.S. 288, 313 (2017) (Thomas, J., concurring) (cleaned up).

History reinforces this conclusion. Following the election of 1800, President Adams directed Chief Justice Marshall to serve as acting secretary of state. Pet.12. President-elect Jefferson needed Marshall to serve as acting secretary of state on Jefferson's first

day in office (March 4). Pet.13. Addressing Marshall as "the person **appointed** to perform the duties of secretary of state," Jefferson asked Marshall whether a "**reappointment** to be dated the 4th. of March would be necessary."[6] Marshall answered that a reappointment was "**indispensably necessary** to give validity to any act" that might "be done" by the acting secretary of state "on the 4th. of March."[7] Jefferson issued the reappointment.[8] That a single day of service as acting secretary of state under President-elect Jefferson required an appointment for constitutional purposes eliminates any doubt that Berryhill's 2+ years of service as acting commissioner was an appointment for constitutional purposes.

Finally, precedent. *United States v. Eaton*, 169 U.S. 331 (1898) brought to the Supreme Court the question of: "[whether] Congress was without power to vest in the President the appointment of a subordinate officer called a vice-consul, to be charged with the duty of temporarily performing the [head] functions of the consular office." *Id.* at 343. The Court did not hold (like the Sixth Circuit here) that acting officers "are not appointed." Pet.App.12a. Nor did the Court hold that "the Appointments Clause was not implicated" by Lewis Eaton's assumption of the role of acting consul in Siam. Pet.App.14a.

The Court held the opposite: "[t]he appointment of such an officer is within the [constitutional] grant

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6 Letter from President-elect Jefferson to John Marshall (Mar. 2, 1801) (bold added), https://tinyurl.com/355sa8bs.

7 Letter from John Marshall to President-elect Jefferson (Mar. 2, 1801) (bold added), https://tinyurl.com/2sp4uzww.

8 *Id.* (footnote-below-text).

of power ... saying 'but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone ....'" *Eaton,* 169 U.S. at 343. The appointment of acting department heads *within* this grant of authority then made it possible for the Court to conclude that such acting heads were not "transformed into the superior and permanent official." *Id.* Carrying this lesson forward, *Eaton* dictates that Berryhill's service as acting commissioner absolutely had to be "an appointment to office for constitutional purposes." BIO.9.

c. No conflict exists between recognizing that Berryhill's acting service was an appointment for constitutional purposes and recognizing that acting service may "occur by operation of law." *See* BIO.10. Congress "satisfies the Appointments Clause" upon vesting the selection of inferior officeholders (like acting officers) in one of the three entities that the Clause allows for this purpose: "the President alone"; "the Courts of Law"; or "the Heads of Departments." *Weiss v. United States*, 510 U.S. 163, 169, 176 (1994). Congress may alternatively satisfy the Appointments Clause by annexing an inferior office to an existing office so long as: (1) the existing office is appointed by the President with Senate consent (a PAS appointee); and (2) the annexation is germane to the existing office. *Id.* at 172-76. The Appointments Clause allows both routes because neither "expand[s] the universe of actors eligible to receive the appointment power" under the Clause. *Freytag*, 501 U.S. at 892.

The FVRA's establishment of acting service by operation-of-law follows these precepts. Upon a PAS office vacancy, 5 U.S.C. §3345(a)(1) automatically

annexes the role of acting officer to the vacant office's "first assistant." First assistants are themselves PAS appointees who are "intended ... to be a complete substitute" for the offices they assist, making the annexation germane. *United States v. Pellicci*, 504 F.2d 1106, 1107 (1st Cir. 1974). Other agency-specific vacancy statutes work the same way. For example, the Social Security Act annexes the inferior office of "Acting Commissioner" to the PAS-appointed role of Deputy Commissioner of Social Security. 42 U.S.C. §§902(b)(1), (b)(4). At the same time, the Act allows "the President [to] designate[] another officer ... as Acting Commissioner"—language consistent with the limited constitutional universe of actors eligible to appoint inferior officers. *See id.* at §902(b)(4).

Constitutional problems emerge only when the appointment of an acting officer exceeds both routes. That is the problem here: Berryhill assumed the role of acting commissioner despite *not* being a PAS appointee (so no annexation) and *not* being selected by any constitutionally-eligible actor—in particular, "the President *alone*" at the time. The agency insists that the Constitution cannot be read to have imposed "any requirement that President Trump appoint Berryhill" as acting commissioner. BIO.13. But as detailed below, the agency's rationale for this view "would multiply indefinitely the number of actors eligible to appoint." *Freytag*, 501 U.S. at 885.

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3. The agency interprets the Sixth Circuit as merely holding that: "Berryhill's temporary service as Acting Commissioner did not require 'a separate appointment' under the Constitution." BIO.12. But this no-separate-appointment principle applies only to

persons who have "already been appointed by the President with the advice and consent of the Senate." *See Weiss*, 510 U.S. at 170. In such cases, "Congress may increase the power and duties of an existing office without thereby rendering it necessary that the incumbent [officer] should be again nominated and appointed." *Shoemaker v. United States*, 147 U.S. 262, 300-01 (1893). Berryhill, however, had no PAS appointment when she became acting commissioner. And the agency does not dispute this point.

The agency's view of the Sixth Circuit's decision thus extends the no-separate-appointment rule to all acting officers without distinction. Now imagine Congress says: "the **Vice President** may **direct** any Assistant U.S. Attorney (or AUSA) to be the Acting Attorney General." The agency's view embraces this hypothetical law, even though AUSAs lack any PAS appointment and the Vice President does not fall within the "[limited] universe of actors eligible to receive the appointment power." *Freytag*, 501 U.S. at 885; *see* 28 U.S.C. §542 (AGs appoint AUSAs).

By the agency's own logic: an AUSA's service as acting AG does not require 'a separate appointment,' eliminating any constitutional limit on who may 'direct' such service. An indefinite multiplication of "the numbers of actors eligible to appoint" follows. *Freytag*, 501 U.S. at 885. That is a constitutional problem no less troubling than the Sixth Circuit's light-switch treatment of the Appointments Clause: a systematic undermining of Article II and its creation of "a single President responsible for the actions of the Executive Branch." *See Clinton v. Jones*, 520 U.S. 681, 712-13 (1997) (Breyer, J., concurring).

C. At a minimum, the Court should hold this petition pending the Court's forthcoming decision in *Kennedy v. Braidwood.*

On April 21, 2025, the Court heard argument in *Kennedy v. Braidwood Management, Inc.*, No. 24-316 (U.S.)—one of the cases underlying the circuit split that Petitioner raises. Several members of the Court asked about the wording of the statutes underlying the appointments-in-dispute. *See* Oral Arg. Tr. 5-8, 13, 33-34, 62-66, 68-71. After the argument, the Court requested further briefing on whether Congress had by law vested the HHS Secretary with the power to make the appointments-in-dispute. *See Kennedy,* No. 24-316, 2025 U.S. LEXIS 1644 (U.S. Apr. 25, 2025). These developments establish a strong likelihood that the Court's ultimate decision in *Braidwood* will bear upon the proper disposition of this petition. The Court should treat this petition accordingly.

CONCLUSION

The Court should grant Fortin's petition.

Respectfully submitted,

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