24-865

No. _____

In the Supreme Court of the United States

JOSEPH A. FORTIN,

Petitioner,

v.

MICHELLE A. KING,
ACTING COMMISSIONER OF SOCIAL SECURITY,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Appointments Clause of the Constitution 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). Consistent with this rule, the Fifth Circuit and the D.C. Circuit have held that when a person is an officer of the United States, how the person became the officer in question implicates the Appointments Clause—even when Congress does not speak of any *appointment* and instead uses other words to define how the officer role may be assumed. *See Braidwood Mgmt., Inc. v. Becerra,* 104 F.4th 930, 937, 940–47 (5th Cir. 2024), *cert. granted,* No. 24-316 (U.S. Jan. 10, 2025); *Al Bahlul v. United States*, 967 F.3d 858, 867, 870, 873–75 (D.C. Cir. 2020).

The Sixth Circuit took the opposite view here. Despite recognizing that acting officers are officers of the United States—specifically, "inferior officers"—the Sixth Circuit held "the Appointments Clause was not implicated" by Nancy Berryhill's "assumption of the role" of Acting Commissioner of Social Security. *Fortin v. Comm'r,* 112 F.4th 411, 416, 420 (6th Cir. 2024). The Sixth Circuit held the Clause inapplicable because Congress said in the relevant statute that "the President 'may direct' a qualified individual to serve as an acting officer," as opposed to saying that the President "makes any appointment." *Id.*

The circuits being split, the question presented is: whether the Appointments Clause governs how all officers of the United States are to be appointed even when Congress uses words other than "appoint."

PARTIES TO THE PROCEEDING

The parties to this proceeding are identified in the caption of this certiorari petition.

DIRECTLY RELATED PROCEEDINGS

- ***Joseph F. v. Comm'r of Soc. Sec.***—U.S. District Court for the Eastern District of Michigan; Docket No. 2:22-cv-12593-CI; Final Opinion & Order on Cross Motions for Summary Judgment Entered June 6, 2023 (ECF 26); Final Judgment Entered June 6, 2023 (ECF 27).

- ***Fortin v. Comm'r of Soc. Sec.***—U.S. Court of Appeals for the Sixth Circuit; Docket No. 23-1528; Final Opinion & Judgment Entered August 12, 2024 (ECF 45); Order Denying Rehearing Petition Entered November 13, 2024 (ECF 55).

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Joseph A. Fortin respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for Sixth Circuit in this case.

OPINION & ORDERS BELOW

The Sixth Circuit's August 12, 2024 opinion is published at 112 F.4th 411 and reprinted at 1a–30a. The Sixth Circuit's November 13, 2024 order denying rehearing is reproduced at 72a–73a.

The district court's June 6, 2023 final summary-judgment decision is available at 2023 U.S. Dist. LEXIS 98320 and reproduced at 31a–71a.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. §1254(1) based on: (1) the Sixth Circuit's August 12, 2024 final judgment (*see* 1a–30a); and (2) the Sixth Circuit's November 13, 2024 order denying Fortin's timely petition for rehearing (*see* 72a–73a).

CONSTITUTIONAL PROVISION INVOLVED

Article II, section 2, clause 2 of the Constitution states (in relevant part): "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."

STATEMENT

The Constitution deals with substance, not shadows. Its inhibition was leveled at the thing, not the name.

Cummings v. Missouri, 71 U.S. 277, 325 (1867).

Can Congress legislate away the inhibitions of the Appointments Clause of the Constitution, which prescribes how all officers of the United States must be appointed? Yes, according to the Sixth Circuit: Congress just needs to avoid saying 'appoint.' Under this logic, the Appointments Clause does not apply if Congress says: "the Vice President may *direct* any Assistant U.S. Attorney to be Attorney General." The people of the United States must then submit to an Attorney General unaccountable to them through the Clause's key structural safeguards. These safeguards include the rule that all principal officers—like the Attorney General—must be chosen by the President with the advice and consent of the Senate.

In this case, the Sixth Circuit held that Social Security claimant Joseph Fortin had to submit to the actions of an Acting Commissioner of Social Security regardless of the Appointments Clause. In January 2017—shortly after President Trump entered office for the first time—Nancy Berryhill took charge of the Social Security Administration (or SSA). Before then, Berryhill was Deputy Commissioner of Operations for SSA (or DCO). Berryhill received this office from Carolyn Colvin—an acting commissioner who was also SSA's Senate-confirmed second-in-charge. When President Trump took office in 2017, Colvin resigned, leaving SSA's top leadership positions vacant.

Berryhill stepped into this SSA power vacuum. Berryhill claimed the office of acting commissioner based on the presumed automatic (blind) effect of an order-of-succession for SSA that President Obama issued before leaving office. President Trump neither ratified this order nor did he ever personally affirm a single minute of Berryhill's subsequent 2.5 years as acting commissioner. Berryhill thus took over one of the nation's most important agencies without the sitting President's vetting or approval. Berryhill also lacked any previous President-and-Senate (or PAS) appointment, making Berryhill a complete unknown (for purposes of the Appointments Clause) within the halls of both the White House and the Senate.

Berryhill's service as acting SSA commissioner became even more problematic after November 16, 2017. The Federal Vacancies Reform Act (or FVRA) ended Berryhill's service as acting commissioner because President Trump had yet to nominate a full-time commissioner. *See* 5 U.S.C §§3346(a), 3348(b). Berryhill announced that she would return to her former Deputy Commissioner of Operations post. But SSA lacked any constitutionally-proper department head who could reappoint Berryhill to the inferior-officer position of DCO—or who could remove Mary Horne, the acting DCO at the time. *See* 42 U.S.C. §904(a)(1); *NTEU v. Reagan*, 663 F.2d 239, 247 (D.C. Cir. 1981) ("The only one authorized to revoke an appointment is one authorized to make it.").

Another obstacle to Berryhill retaking her DCO job was the position's existence within the Senior Executive Service (or SES). SES members "appointed by the President to any civil service position outside

the [SES]" cannot return to the SES without first applying to the Office of Personnel Management (or OPM) for reinstatement. *See* 5 U.S.C. §3593(b). Civil service positions outside the SES include "[p]ositions to which appointments are made by the President without confirmation by the Senate." *See* 5 C.F.R. §213.3102(c). Yet, after the FVRA ended Berryhill's initial service as acting SSA commissioner—a role that the President appoints without Senate consent —Berryhill never sought SES reinstatement.

Berryhill nevertheless reclaimed her DCO post. And then, upon President Trump's nomination of Andrew Saul as commissioner, Berryhill reclaimed the title of acting commissioner. A few months later, Berryhill appointed the administrative law judge (or ALJ) who would deny Fortin's claim for benefits. Fortin raised an Appointments Clause challenge to Berryhill's service as acting commissioner—service that ultimately subjected Fortin to the ALJ at issue. Fortin thus built on this Court's recognition that "the claims of [ordinary] individuals . . . have been the principal source of judicial decisions concerning separation of powers and checks and balances." *Bond v. United States*, 564 U.S. 211, 222–23 (2011).

Fortin asserted that Berryhill's acting service violated the Appointments Clause in two ways:

First, Berryhill could not assume the role of acting commissioner during President Trump's first term without President Trump's personal approval. The text of the Appointments Clause dictates this result, allowing Congress to vest the appointment of inferior officers (like acting officers) "in *the* President

alone." The Clause does not say "in the *Office of* President" or "in the President *in such manner as the President may thereof direct*"—text that might allow an appointment to occur through blind operation of a former president's executive order after a change in administration. The ordinary founding-era meaning of "the President" and "alone" confirm this analysis. So does Chief Justice Marshall's treatment of his own service as acting secretary of state following the tumultuous presidential election of 1800.[1]

Second, once the FVRA terminated Berryhill's initial service as acting SSA commissioner, Berryhill improperly retook her DCO job, foreclosing her later return as acting commissioner. The Appointments Clause enables "Heads of Departments" to exercise the power to appoint inferior officers (like DCOs). But Berryhill was no head-of-department when she tacitly reappointed herself as DCO. At this moment in time, the FVRA strictly mandated that the SSA commissioner's office had to "remain vacant." *See* 5 U.S.C. §3348(b)(1). Meanwhile, §3593(b)'s SES reinstatement rule affirms that Berryhill vacated her DCO role in becoming acting commissioner, making reappointment essential to her return as DCO.

The Sixth Circuit rejected both arguments on the ground that "the Appointments Clause was not implicated" by Berryhill's assumption of the acting-commissioner position. 14a, 25a. The panel's logic for this conclusion was as follows. The FVRA "does not say" that the President "makes any appointment."

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[1] Letter from John Marshall to President-elect Jefferson (Mar. 2, 1801), https://tinyurl.com/2sp4uzww.

12a. The FVRA says that the President "may direct" a person to be an acting officer. *Id.* This "linguistic distinction" places all acting officers (like Berryhill) beyond the reach of the Appointments Clause. *Id.* And since Berryhill was "never 'appointed'" to be an acting commissioner, Berryhill fell outside the SES reinstatement rule, which by its terms concerns SES members "appointed" to non-SES roles. 25a.

This stunning analysis defies nearly 150 years of Supreme Court jurisprudence establishing that "[t]he Appointments Clause prescribes the exclusive process by which the President may appoint 'officers of the United States.'" *NLRB v. SW Gen., Inc.*, 580 U.S. 288, 311–12 (Thomas, J., concurring) (collecting cases). "[A]ll officers of the United States are to be appointed in accordance with the Clause. **No class or type of officer is excluded** because of its special functions." *Buckley v. Valeo*, 424 U.S. 1, 132 (1976) (per curiam) (bold added). Put another way, there are no "linguistic distinctions" by which Congress may put an officer of the United States—even an "acting" one—beyond the Appointments Clause. 12a.

In line with these principles, the Fifth Circuit recently enforced the Appointments Clause against the U.S. Preventative Services Task Force even though the statute organizing the Task Force says that "[m]embers of the Task Force are '**convened**,'" instead of saying members are appointed. *Braidwood Mgmt., Inc. v. Becerra*, 104 F.4th 930, 937, 940–47 (5th Cir. 2024) (bold added) (addressing 42 U.S.C. §299b-4(a)(1)). The D.C. Circuit has similarly found that the Appointments Clause covers (and validates) the 2006 Military Commissions Act even though the

relevant provision speaks of an "officer or official . . . **designated by** the Secretary," rather than speaking of an appointment. *Al Bahlul v. United States*, 967 F.3d 858, 867, 870, 873–75 (D.C. Cir. 2020) (bold added) (addressing 10 U.S.C. §948h (2006)).

Taken together, these decisions make clear the Sixth Circuit's mistake in Fortin's case: "once a court deems an official a federal officer, the Constitution unambiguously imposes the requirements" by which that officer role may be filled. *New Eng. Fishermen's Stewardship Ass'n v. Raimondo*, No. 2:23-cv-00339, 2024 U.S. Dist. LEXIS 233786, at *148 (D. Me. Dec. 30, 2024). The Sixth Circuit concedes that "acting officers" are "inferior [federal] officers." 3a. The Sixth Circuit nevertheless concludes that these officers fall outside the Appointments Clause so long as Congress fails to say 'appoint'—a "tyranny of labels" that the Fifth Circuit and D.C. Circuit squarely reject. *Snyder v. Massachusetts*, 291 U.S. 97, 114–15 (1934).

This circuit split warrants review. The Framers understood that "by limiting the appointment power, they could ensure that those who wielded [the power] were accountable to [the people]." *Freytag v. Comm'r*, 501 U.S. 868, 884 (1991). The Sixth Circuit reduces this essential protection to a parchment barrier—an "inhibition [that] can be evaded by the form of [an] enactment," making the Framers' innovation of the Appointments Clause "a vain and futile proceeding." *See Cummings*, 71 U.S. at 325. When a government-structuring provision of this magnitude is at stake, this Court "does not defer"—it says "what the law is." *See NLRB v. Noel Canning*, 573 U.S. 513, 571–72 (2014) (Scalia, J., concurring-in-the-judgment).

A. Legal Overview

1. This case is about the Appointments Clause. To understand the Clause, one must begin at the beginning. "[M]anipulation of official appointments" was "one of the American revolutionary generation's greatest grievances." *Freytag*, 501 U.S. at 883–84. The Declaration of Independence emphasized this grievance, condemning King George III for creating a "multitude of New Offices" and sending "swarms of Officers" to harass the American colonies. "And when the colonies' best men sought appointments" to these offices, "the king and his governors passed them over for royal favorites." *Rop v. FHFA*, 50 F.4th 562, 579 (6th Cir. 2022) (Thapar, J., dissenting-in-part).

One of the major obstacles to ending this abuse was a destructive lack of transparency. Alexander Hamilton highlighted this obstacle through his fierce rebuke of the "[s]candalous appointments" generated by New York's appointments process.[2] New York's governor made the controversial appointments in league with an executive council—a process that left the public "at a loss to determine by whose influence their interests ha[d] been committed to hands so unqualified."[3] The governor pointed the finger at the council, and the council blamed the governor.[4] Such "multiplication of the Executive" served "to clothe the circumstances with so much ambiguity" as to "render it uncertain" who the people should blame.[5]

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2 THE FEDERALIST NO. 70 (A. Hamilton), as reproduced by Yale's Avalon Project, https://tinyurl.com/277s79d2.

3 *Id.*

4 *See id.*

5 *Id.*

So when the time came to replace the Articles of Confederation with a more durable system of federal government, the Framers paid close attention to the subject of appointments. They sought to ensure that the "circumstances attending an appointment, from the mode of conducting it, would naturally become matters of notoriety."[6] The people would then be "at no loss to determine what part had been performed by the different actors."[7] In short, the people would always know "where the appointment buck stops." *Bandimere v. SEC*, 844 F.3d 1168, 1181 (10th Cir. 2016). The Framers' labor ultimately "bore fruit" in the enactment of "the Appointments Clause." *Rop*, 50 F.4th at 579 (Thapar, J., dissenting-in-part).

2. Situated under Article II of the Constitution, the Appointments Clause provides: "[the President] shall nominate, and by and with the advice and consent of the Senate, shall appoint . . . [the] Officers of the United States." U.S. CONST. art. II, §2, cl. 2. The Clause also states: "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." *Id.*

Through this text, the Appointments Clause engenders "public accountability" in two important ways. *Edmond v. United States*, 520 U.S. 651, 660 (1997). First, the Clause makes clear who is to blame for any given appointment by placing the President at the center of the appointments process. "Assigning the nomination power to the President guarantees

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

7 *Id.*

accountability" by making the President "singly and absolutely" to "blame" for "a bad nomination." *United States v. Arthrex*, 594 U.S. 1, 12 (2021). The Clause reinforces this norm by requiring nominees to be confirmed by the Senate. The "possibility of [Senate] rejection"—or even a "[Senate] confirmation hearing gone awry"—operates as an "excellent check" against presidential submission of "unfit" nominees.[8] *Rop*, 50 F.4th at 579 (Thapar, J., dissenting-in-part).

Second, the Appointments Clause "prevent[s] the diffusion of the appointment power" by allowing only Congress to establish officer positions and then "limiting the actors in whom Congress may vest the power to appoint." *Freytag*, 501 U.S. at 878, 885. The Clause limits Congress to three options when vesting the appointment of inferior officers: "the President, his heads of departments, and the courts of law." *Id.* at 884. And the Clause imposes a further restriction if Congress selects the President in this context: only "the President *alone*" may exercise the vested power. The Clause thus ensures that the President remains "singly and absolutely"[9] liable for his appointees, versus the kind of "multiplication of the Executive" that allowed New York's governor to freely "render it uncertain" who the people should blame.[10]

All of this makes the Appointments Clause one of the most "significant structural safeguards of the constitutional scheme." *Edmond*, 520 U.S. at 659. "The people do not vote for the 'Officers of the United

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8 THE FEDERALIST NO. 76 (A. Hamilton), as reproduced by Yale's Avalon Project, https://tinyurl.com/2tkhpvvd.

9 FEDERALIST NO. 77, *supra* note 6.

10 FEDERALIST NO. 70, *supra* note 2.

States'"—they instead "look to the President." *Free Enter. Fund v. PCAOB,* 561 U.S. 477, 497–98 (2010). The Appointments Clause vindicates this gaze: the President "must pick his assistants wisely" or else the people may "punish [him] at the election booth." *Rop*, 50 F.4th at 579 (Thapar, J., dissenting-in-part); *Arthrex*, 594 U.S. at 11 ("chain of command").

For this reason, the Court has time and again refused to "cast aside" the Appointments Clause's limits "for the sake of administrative convenience or efficiency." *SW Gen.*, 580 U.S. at 311–12 (Thomas, J., concurring). The Court has stressed that government compliance with the Clause is "more than a matter of 'etiquette or protocol.'" *Edmond*, 520 U.S. at 659. Because the Clause is meant "to preserve political accountability relative to important government assignments," *id.* at 664, "*all* officers of the United States are to be appointed in accordance with the Clause." *Buckley*, 424 U.S. at 132 (italics-in-original). "No class or type of officer is excluded because of its special functions." *Id.* Not even 'acting officers.'

3. "[A]n acting officer is an inferior officer who is temporarily filling in for a principal officer, despite being unconfirmed to the office." *Rop*, 50 F.4th at 580 (Thapar, J., dissenting). Without acting officers, top federal positions "requiring Presidential appointment and Senate confirmation—known as a 'PAS' office—[might] go unperformed if a vacancy arises and the President and Senate cannot promptly agree on a replacement." *SW Gen.*, 580 U.S. at 292–93, And so, "[s]ince President Washington's first term," Congress has provided by law that the President may appoint acting officers to fill vacant PAS offices. *Id.*

To this end, in 1795, Congress enacted a statute governing vacant PAS offices in the State, Treasury, and War Departments. The 1795 statute declared: "it shall be lawful for the President . . . to authorize any person or persons . . . to perform the duties of said respective offices, until a successor be appointed, or such vacancy shall be filled." 1 Stat. 415. Congress allowed the acting officers appointed under this law to serve for no more than "six months." *Id.*

The 1795 statute played a critical role following the tumultuous election of 1800, in which Thomas Jefferson defeated incumbent President John Adams. On January 20, 1801—two months before Jefferson entered office on March 4, 1801—President Adams named Secretary of State John Marshall to be Chief Justice of the United States. The Senate confirmed Marshall on January 27, 1801 and President Adams signed Marshall's commission on January 31.[11]

Marshall declared: "I shall enter immediately on the duties of the office [of Chief Justice]."[12] But President Adams had different plans for Marshall. On February 4, 1801, President Adams invoked his power under the 1795 statute and "[a]uthoriz[ed]" Marshall to "continue to discharge all the Duties of Secretary of State, until ulterior Arrangements can be made."[13] From this point forward, Marshall was chief justice *and* acting secretary of state.

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[11] *See* S. CT. HISTORICAL SOC'Y, *John Marshall* (1801-1835), https://tinyurl.com/yu5x4w42 (last visited Feb. 10, 2025).

[12] Letter from John Marshall to President Adams (Feb. 4, 1801), https://tinyurl.com/5cyummcr.

[13] Letter from President Adams to John Marshall (Feb. 4, 1801), https://tinyurl.com/4hvwsb4r.

In the meantime, President-elect Jefferson was eager to sign certain official documents as president "to be dated on or after [March] 4th"—documents that also needed the secretary of state's signature.[14] On March 2, 1801, Jefferson wrote Marshall, asking Marshall to sign "as the person appointed to perform the duties of Secretary of [S]tate."[15] Jefferson asked if a "reappointment" of Marshall as acting secretary "dated the 4th. of March would be necessary."[16]

Marshall informed Jefferson that it would be "indispensably necessary" for Jefferson to reappoint Marshall as acting secretary to "give validity to any act" that Marshall might perform in that capacity "on the 4th. of March."[17] This indispensible necessity stemmed from Marshall's present service as acting secretary of state being "at the request" of President Adams.[18] So Jefferson issued a letter consistent with the 1795 statute directing Marshall "to perform the duties of the Secretary of State" on March 4.[19]

This exchange between Marshall and Jefferson exemplifies the Framers' shared understanding that every President had to approve the officers who filled vacant PAS offices under his administration, be they full-time officers or acting officers. And founding-era

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

15 *Id.*

16 *Id.*

17 *Id.*

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

19 *Id.* (footnote-below-text). Marshall replied he would "with great pleasure obey" Jefferson's letter request. *Id.*

presidents did just this by letter[20] and commission.[21] *See* U.S. CONST. art. II, §3 ("[the President] shall Commission all the Officers of the United States"); *see also DOT v. Ass'n of Am. R.R.*, 575 U.S. 43, 57–58 (2015) (Alito, J., concurring) ("[T]o be an officer, the person should . . . possess a commission.").

Chief Justice Marshall later cemented this point in *Marbury v. Madison*, 5 U.S. 137 (1803). Writing for the Court, Marshall held that William Marbury held a valid appointment to be a justice-of-the-peace because the appointment was "evidenced by an open, unequivocal act": President Adams's signature. *See id. at* 156. Marshall explained that "when a [officer's] commission has been signed by the [P]resident, the appointment is made." *Id.* at 161–62. And through this analysis, Marshall left no doubt that when a law authorizes the President to make an appointment, "the [C]onstitution" requires the appointment "to be made by the [P]resident personally." *Id.* at 158.

4. In 1998, Congress enacted the Federal Vacancies Reform Act, Pub. L. No. 105-277, div. C, tit. I, §151, 112 Stat. 2681–611 (codified at 5 U.S.C. §§3345 *et seq.*). The FVRA closed a gap left open by previous acting-officer statutes which, in referencing the President's "discretion," potentially allowed the President to delegate appointment of acting officers, diffusing accountability for these appointments.[22] *See*

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[20] *E.g.*, Letter from President Adams to Timothy Pickering (June 12, 1798), https://tinyurl.com/mvdm3596.

[21] *E.g.*, President Madison Comm'n to Acting Sec'y Samuel Smith (Sept. 30, 1814), https://tinyurl.com/3fb23nth.

[22] In 1966, Congress reduced the Vacancies Act's vesting of appointment power to the words "the President may direct,"

15 Stat. 168; 1 Stat. 415. The FVRA stated that "the President (**and only the President**) may direct" a person to be an acting officer. 5 U.S.C. §3345(a)(2), (a)(3); *see* S. REP. NO. 105-250, at 12, 105th Cong. (1998) ("Under this legislation . . . only the President may designate an acting officer . . . ."). The FVRA also made itself the "exclusive means" for appointing acting officers to fill PAS offices, aside from various agency-specific statutes that already deposited this power in the President. *See* 5 U.S.C. §3347(a).

5. In 2008, President George W. Bush issued an executive order directing every federal agency to draft an "order of succession" for presidential review and approval. 73 F.R. 53353 (E.O. 13472) (Sept. 11, 2008). The order was to consist of "a list of officials by position who shall act as . . . head of the agency" in the event of dual vacancies in the agency head and first-assistant officer positions. *Id.* at §2(b).

During the 1930s and 1940s, presidents started using orders-of-succession to facilitate the automatic appointment of acting officers.[23] But statutory limits cabined these orders in ways that ensured political accountability. For example, a statutory 30-day limit on acting service prevented orders-of-succession from long displacing the sitting President's constitutional duty to make a nomination. *See SW Gen.*, 580 U.S. at

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folding into this text the Act's grant of presidential "discretion." *See* 5 U.S.C. §3347 (1997) (historical & revision notes).

[23] In 1948, for example, President Truman issued an order-of-succession for the Labor Department. E.O. 9968 (June 17, 1948). He "direct[ed] the Assistant Secretaries of Labor" in "order of the date of their commissions" to be Acting Secretary upon dual vacancies in the Department's lead offices. *Id.*

294. And a statutory limit requiring acting officers to be existing PAS appointees ensured that orders-of-succession elevated only persons for whom the White House could already be held accountable. *Id.*

The agency orders-of-succession that President Bush solicited were of a different breed. Operating under the FVRA's 210-day limit on acting service, *see* 5 U.S.C. §3346(a)(1), the Bush-solicited orders-of-succession allowed acting officers to pop up and run agencies for months on end without any guarantee of prompt intervention by the sitting President. The Bush-solicited orders-of-succession also exploited the FVRA's novel allowance of acting service by persons who lacked any pre-existing PAS appointment. *Id.* §3345(a)(3). The Bush-solicited orders-of-succession consisted of the President approving a list of agency inferior-officer positions (not persons) to succeed as acting head while the PAS-appointed head continued to decide who filled the listed positions at any given moment. *See* 73 F.R. 53353. Under this arrangement, *no* presidential vetting or approval was required for a person to take over an agency upon a vacancy in the agency's lead posts. And this is how Nancy Berryhill became Acting Commissioner of Social Security.

B. Facts & Procedural Background

1. The Social Security Administration (SSA) is "an independent agency" in the Executive Branch. 42 U.S.C. §901(a). SSA affords benefits under programs known as Title II and Title XVI to remedy poverty caused by age, unemployment, and disability. *Smith v. Berryhill*, 587 U.S. 474–75 (2019). In this capacity, SSA's work affects virtually every American.

2. SSA's department head is the "Commissioner of Social Security"—a PAS office with a 6-year term that is empowered to appoint the agency's "[inferior] officers." 42 U.S.C. §902(a)(1), (a)(3); *id.* §904(a)(1). SSA's second-in-charge is the "Deputy Commissioner of Social Security"—a PAS office with a 6-year term. 42 U.S.C. §902(b)(1), (b)(2). Upon any vacancy in the Commissioner's office, both the Social Security Act and the FVRA automatically elevate the Deputy Commissioner to the role of Acting Commissioner. *See* 42 U.S.C. §902(b)(4); 5 U.S.C. §3345(a)(1).

3. In 2013, SSA Commissioner Michael Astrue resigned. *Brian T.D. v. Kijakazi*, 580 Supp. 3d 615, 620–21 (D. Minn. 2022), *rev'd*, 62 F.4th 424 (8th Cir. 2023). Deputy SSA Commissioner Carolyn Colvin automatically became acting commissioner and ran SSA for the next three years (2013–16). *Id.*

4. In December 2016, President Obama issued a revised order-of-succession for SSA. 81 F.R. 96337 (Dec. 23, 2016). Citing the FVRA and the "authority vested in [him] as President," Obama directed seven SSA offices to succeed (in order) to the role of acting commissioner upon dual vacancies in SSA's two lead posts. *See id.* Atop this seven-office list was: "Deputy Commissioner for Operations [DCO]." *Id.*

5. On January 20, 2017 at noon, President Obama's second term in office ended. U.S. CONST. amend. XX, §1. President Trump began his first term in office. 3 U.S.C. §101. Deputy Commissioner Colvin then resigned, establishing a dual vacancy in SSA's lead posts of commissioner and deputy commissioner. *See Brian T.D.*, 580 Supp. 3d at 620–21.

6. On January 21, 2017 Nancy Berryhill took over SSA, claiming the title of acting commissioner under the terms of President Obama's 2016 order-of-succession for SSA. *See* 4a–5a. Before that moment, Berryhill was Deputy Commissioner of Operations (DCO)—an SSA inferior-officer position governed by the Senior Executive Service (SES). 5a, 40a–41a. Berryhill lacked any current or past experience as a PAS officeholder; no President or Senate ever vetted Berryhill for any position. President Trump also took "no affirmative action" related to Berryhill's service as acting commissioner. Hr'g Tr. 20:12–13, *Brian T.D. v. Kijakazi*, No. 19-cv-2542 (D. Minn. Feb. 18, 2022) (ECF No. 72) (concession by SSA counsel). In particular, President Trump never directed Berryhill to serve as acting commissioner; nor did President Trump endorse this service after-the-fact. *Id.*

7. On November 16, 2017, Berryhill's status as acting commissioner expired under the FVRA's time limit on acting service because President Trump had yet to nominate a full-time SSA commissioner.[24] The FVRA required the SSA commissioner's office from November 17 forward to "remain vacant." 5 U.S.C. §3348(b)(1). But Berryhill "continued serving."[25] In December 2017, Berryhill signed two regulations as acting commissioner. *See* 82 F.R. 59514, 59515 (Dec. 15, 2017); 83 F.R. 711, 712 (Dec. 28, 2017).

8. On March 6, 2018, in a published letter, the Government Accountability Office (or GAO) reported

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[24] *See* GAO Letter re: FVRA Violation (SSA Comm'r) at 1–2 (Mar. 6, 2018), https://tinyurl.com/2s38963m.

[25] *Id.*

Berryhill's FVRA violation.[26] Berryhill responded to the GAO letter by declaring that she would "continue to lead the agency" from her old "position of record" of "Deputy Commissioner of Operations."[27]

9. On April 17, 2018, President Trump named Andrew Saul to be the next SSA commissioner. *See Brian T.D.*, 580 Supp. 3d at 621. Berryhill reclaimed the title of acting commissioner. *Id.*

10. On June 21, 2018, the Court held in *Lucia v. SEC,* 585 U.S. 237 (2018) that administrative law judges (ALJs) within the Securities and Exchange Commission were inferior officers for purposes of the Appointments Clause. *See id.* at 245–52. The Clause then established that these ALJs lacked any proper appointment due to their being hired by lower-level staff rather than by a department head. *Id.*

11. On July 16, 2018, in response to *Lucia,* Acting Commissioner Berryhill purported to grant valid appointments to all SSA ALJs *See* Berryhill Ratification Order, *Fortin v. Comm'r*, No. 2:22-cv-12593-CI (E.D. Mich. May 17, 2023) (ECF No. 25-1). SSA ALJs are responsible for carrying out the SSA commissioner's duty to hear and decide claims for Social Security benefits. *See* 42 U.S.C. §405(b).

12. On July 8, 2022, SSA ALJ Virginia Herring (a Berryhill-appointed ALJ) denied Petitioner Joseph Fortin's claim for benefits. 6a, 32a. Fortin filed this

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26 GAO Letter, *supra* note 24, at 1–2.

27 Joe Davidson, *Social Security Is Now Headless Because of Trump's Inaction*, WASH. POST, Mar. 12, 2018, https://wapo.st/3fWMefq (quoting Berryhill message to SSA employees).

claim in 2014. *Id.* After six years of litigation, the Sixth Circuit held in 2020 that Fortin merited a new hearing before a different, properly-appointed ALJ because the last ALJ in Fortin's case was appointed by agency staff rather than any SSA commissioner. *See Ramsey v. Comm'r of Soc. Sec.*, 973 F.3d 537, 540 (6th Cir. 2020). ALJ Herring afforded Fortin the new hearing that the Sixth Circuit ordered, but the final result was yet another denial of Fortin's claim. 6a, 32a. Fortin exhausted his administrative remedies and then timely sought judicial review. *Id.*

13. The district court affirmed ALJ Herring's benefits denial. 70a. Fortin argued that Berryhill's acting service (and ensuing appointment of Herring) violated the Appointments Clause. *See* 35a–38a. The district court rejected all of Fortin's arguments in this regard, including his points that: (1) President Trump never approved Berryhill's acting service (44a–49a); and (2) Berryhill improperly retook her DCO job in March 2018, precluding her April 2018 return as acting commissioner (54a–56a).

14. The Sixth Circuit affirmed the judgment of the district court (following Fortin's timely appeal). 30a. The panel concluded that Fortin's Appointments Clause challenges to Berryhill's acting service failed because the Clause "was not implicated" by the way in which Berryhill happened to assume (or reassume) the role of acting commissioner. 14a, 25a–26a.

15. The Sixth Circuit denied Fortin's timely petition for rehearing en banc. *See* 72a–73a.

16. This certiorari petition follows.

REASONS TO GRANT THE PETITION

I. The circuits are split on the Appointments Clause's applicability when Congress uses statutory terms other than "appoint."

The Sixth Circuit's decision in Fortin's case splits the circuits on when the Appointments Clause applies to (and thus cabins) a person's assumption of an officer role. This Court has said that the Clause governs "*all* officers of the United States" and that "[n]o class or type of officer is excluded." *Buckley v. Valeo*, 424 U.S. 1, 132 (1976) (per curiam) (italics-in-original). The Sixth Circuit nevertheless holds that the Appointments Clause is "not implicated" when a person assumes an officer role under a statute that lacks the word 'appoint.' 12a–14a. The Fifth Circuit and the D.C. Circuit, by contrast, respect that the Appointments Clause governs all officer positions, even when Congress uses words other than 'appoint' to describe how the position may be assumed.

The Fifth Circuit confirms this reality through its enforcement of the Appointments Clause against the U.S. Preventive Services Task Force (or PSTF). *See Braidwood Mgmt., Inc. v. Becerra*, 104 F.4th 930, 937, 940–47 (5th Cir. 2024), *cert. granted*, No. 24-316 (U.S. Jan. 10, 2025). Observing that PSTF members are "principal officers," the Fifth Circuit has ruled that the Appointment Clause requires such members to be appointed by the President with the Senate's advice and consent. *Id.* at 946–47. The Fifth Circuit reaches this determination even though the statute behind the PTSF establishes that "[m]embers of the Task Force are '**convened**'"—as opposed to saying

PTSF members are 'appointed.' *Id.* at 936–37 & n.7 (bold added) (quoting 42 U.S.C. §299b-4(a)(1)).

The D.C. Circuit similarly does not indulge the notion that the Appointments Clause vanishes when Congress confers an officer role using words other than 'appoint.' In *Al Bahlul v. United States*, 967 F.3d 858 (D.C. Cir. 2020), the D.C. Circuit evaluated an Appointments Clause claim arising from a trial under the Military Commissions Act of 2006 (or 2006 MCA). *Id.* at 863, 867–75. At issue was whether the "convening authority" possessed a valid appointment. *Id.* The parties agreed that the convening authority was "an officer of the United States" but disagreed on whether the 2006 MCA "vest[ed] the [Defense] Secretary with the power to appoint [this officer]." *Id.* at 870, 873. The 2006 MCA described the convening authority as an "official . . . **designated by** the Secretary." *Id.* at 868 (bold added). The D.C. Circuit determined that this text was "sufficient to vest the Secretary with the constitutional power to appoint." *Id.* at 873–74. The D.C. Circuit held this way because "**Congress need not use explicit language to vest an appointment**." *See id.* (bold added).

The Sixth Circuit concedes in Fortin's case that "acting officers . . . . are inferior officers." 3a. Yet, the Sixth Circuit goes on to hold that the Appointments Clause does not govern these 'officers of the United States' because the FVRA describes acting officers as persons *directed* to serve rather than as persons *appointed* to serve. 12a–14a. Such analysis sharply contrasts with the view of the Appointments Clause maintained by the Fifth Circuit and the D.C. Circuit. In recognizing the Clause's applicability to members

of the U.S. Preventive Services Task Force and to military 'convening authorities'—even though the statutes conferring these officer positions do not use the word 'appoint'—the Fifth Circuit and the D.C. Circuit each serve to ensure that the Clause is not reduced "to a form of words." *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920).

The Sixth Circuit's view, on the other hand, means that the Appointments Clause's structural safeguards no longer protect the people of Michigan, Ohio, Kentucky, and Tennessee—at least when it comes to acting officers. 12a. Virtually every statute establishing an acting-officer position lacks the word 'appoint.' *See* 5 U.S.C. §3345(a)(2), (a)(3); S. REP. NO. 105-250, at 16–17 (collecting statutes). Thirty million Americans who may be subject to the decisions of an acting officer at any given time have thus lost their "right to be subjected only to *lawful* exercises of executive power that can ultimately be controlled by a President accountable to [the people]." *See United States v. Arthrex*, 594 U.S. 1, 30 (2021) (Gorsuch, J., concurring-in-part and dissenting-in-part).

II. The question presented is an important, widely-recurring problem, and this case is an ideal vehicle for resolving it.

There is no shortage of federal provisions that create officer roles but do not use the word 'appoint.' This past year (in 2024), the Fifth Circuit addressed the Appointment Clause validity of a statute that created an officer role (PTSF Member) through use of the term "convened." *Braidwood Mgmt.*, 104 F.4th at 936–37 (quoting 42 U.S.C. §299b-4(a)(1)). That same

year, the Seventh Circuit decided an Appointments Clause challenge to a federal regulation that created an officer role ("Temporary Appellate Immigration Judge") through the word "designate." *Bernardo-De La Cruz v. Garland*, 114 F.4th 883, 889, 891–92 (7th Cir. 2024) (quoting 8 C.F.R. §1003.1(a)(4) (2022)). And then there are the litany of statutes like the FVRA that confer acting-officer roles through words like "direct," "designate," and "assign" *See* 5 U.S.C. §3345(a)(2), (a)(3); *see also* S. REP. NO. 105-250 at 16–17 (listing 40 separate acting-officer statutes).

Proper application of the Appointments Clause to these kinds of provisions is then an important and widely-recurring issue. And Fortin's case affords an ideal vehicle for resolving this issue. All the relevant facts are settled—for example, the circumstances of Berryhill's service as acting commissioner between January 2017 (when Berryhill took office) and June 2019 (when Saul took over as SSA commissioner). All the legal provisions relevant to Fortin's case are equally settled, from the FVRA's plain text to the terms of President Obama's 2016 order-of-succession for SSA. Fortin's Appointments Clause challenges have been fully preserved and ventilated before the district court and the Sixth Circuit, each of which has issued a comprehensive decision in this case. Finally, there can be no doubt about how much the question presented matters in Fortin's case. As even the district court noted, if Berryhill's service as acting commissioner was an "appointment" governed by the Appointments Clause, then Fortin has strong arguments for why this service violated the Clause at the time that Berryhill appointed the ALJ who later denied Fortin's benefits claim. *See* 55a–56a.

III. The decision below is wrong, premised on a grave misunderstanding of this Court's Appointments Clause jurisprudence while ignoring the Clause's text and history.

Three fatal errors pervade the Sixth Circuit's conclusion that: "Berryhill was not 'appointed' to the Acting Commissioner role, and the Appointments Clause was not implicated by her assumption of the role." 14a. **First**, the Sixth Circuit misunderstands the significance of "linguistic distinction[s]" in the Court's Appointments Clause jurisprudence. *See* 12a. **Second**, the Sixth Circuit misunderstands what the Court has said about when "an officer's powers and duties . . . [may] expand without the need for a separate appointment." *Id.* **Third**, the Sixth Circuit pays no attention whatsoever to the text or history of the Appointments Clause, both of which confirm that Berryhill's assumption of her acting commissioner role both could (and did) implicate the Clause.

1. *Linguistic Distinctions.* The Sixth Circuit makes much of Congress's "deliberate choice" to say that "the President 'directs' a qualified individual to become an acting officer instead of 'appointing' the acting officer." 14a. This analysis misunderstands the limited role of "linguistic distinction[s]" under the Appointments Clause. 12a. Such distinctions matter in determining: (1) whether a person is an officer or a non-officer; and (2) whether Congress has of its own accord required a person to be appointed, even if nothing in the Constitution requires this. But once it is undisputed that a person is an officer for purposes of the Appointments Clause—as Berryhill (the acting commissioner) undoubtedly was—no decision of this

Court supports the Sixth Circuit's conclusion that Congress, by using a word other than 'appoint,' may negate the constitutional rule that "***all* officers** . . . are to be appointed in accordance with the Clause." *Buckley,* 424 U.S. at 132 (emphasis added).

When persons "are not officers at all, but [are] instead non-officer employees," the Appointments Clause "cares not a whit about who named them." *Lucia v. SEC*, 585 U.S. 237, 245 (2018). Separating officers from non-officer employees is then a critical part of getting the Appointments Clause right. In this arena, linguistic distinctions may be helpful, as proved true for the Court in determining whether a "merchant appraiser [was] an officer." *Auffmordt v. Hedden*, 137 U.S. 310, 326 (1890). The Court noted that the statute creating the position "[did] not use the word 'appoint'"—the statute instead "use[d] the word 'select.'" *Id.* at 327. The Court further observed that the position "[was] without tenure, duration, continuing emolument, or continuous duties, and . . . acts only occasionally and temporarily." *Id.* And on the basis of all these facts, the Court held that a merchant appraiser was "not an 'officer,' within the meaning of the [Appointments] [C]lause." *Id.*

Besides distinguishing officers from employees, a statute's wording may also command a separate appointment regardless of any constitutional rule. The Court detailed this possibility in *Weiss v. United States*, 510 U.S. 163 (1994). Addressing the distinct office of "military judge," the Court observed that the existence of this office required the Court to consider two *separate* possibilities in terms of how the office might be filled: "**either** Congress has, by [textual]

implication, required a second appointment, **or** the Appointments Clause, by constitutional command, requires one." *See id.* at 170 (bold added). The Court then rejected the first possibility—that Congress had *of its own accord* required a separate appointment—since Congress chose words like 'detail' and 'assign' rather than saying "appointment." *Id.* at 172.

But the Court's analysis in *Weiss* did not end there. The Court recognized that even if Congress did not speak of the "appointment" of military judges in any of the relevant statutes, the Court still had to consider whether "the Appointments Clause requires such an appointment by its own force." *Id.* at 172–73. The Court did *not* do what the Sixth Circuit does here: point to Congress's use of words like 'detail' and 'assign' and call it a day. *See id.* at 173–76. To the contrary, the Court recognized that regardless of the words that Congress used to confer upon persons the role of military judge, the Appointments Clause was implicated (even if no violation existed) because any other view would subvert the Clause. *See id.*

Any remaining doubt on this score is laid to rest by the Office of Legal Counsel, which in a 2003 legal opinion rejects the very approach that the Sixth Circuit takes here in construing the Appointments Clause and the FVRA. *See* 27 Op. O.L.C. 121 (2003). The opinion acknowledges that: (1) "*Weiss* place[s] considerable stress on Congress's use of the terms 'detail' and 'assign'"; and (2) "the Vacancies Reform Act does not use the language of appointment." *Id.* at 124–25. The opinion then goes on to declare: "[w]e nonetheless believe that the 'directs' language of the [FVRA] . . . should be understood to provide the

means for an appointment." *Id.* The opinion admits that any other conclusion "would raise a question about the [FVRA's] constitutionality." *Id.*

2. *Expanding Offices.* In holding that an acting officer's service does not implicate the Appointments Clause, the Sixth Circuit repeatedly insists that this view accords with the notion that "an officer's powers and duties . . . [may] expand without the need for a separate appointment." 12a. Not so. As the Court's decision in *Weiss* illustrates, Congress may expand an officer's powers without defying the Appointments Clause only when *both* of the following conditions are met: (1) the officer whose powers are being expanded already holds a PAS appointment (which prevents any diffusion-of-appointment-power problem); and (2) the power expansion is "germane" to the officer's. functions. *See Weiss,* 510 U.S. at 168 n.2, 174, 176; *see Edmond,* 520 U.S. at 654 ("We upheld the judicial assignments at issue in *Weiss* because each of the military judges had been previously appointed . . . ."). This reality precludes application of the expanding-powers principle to an acting officer like Berryhill, who never possessed any PAS appointment.

3. *Text & History.* The Sixth Circuit's decision here finally displays a complete disregard for text and history. As Justice Thomas observes, "[w]hen the President 'direct[s]' someone to serve as an officer pursuant to the FVRA, he is 'appoint[ing]' that person as an 'officer of the United States' within the meaning of the Appointments Clause." *SW Gen.*, 580 U.S. at 312–13 (Thomas, J., concurring). "Around the time of the framing, the verb 'appoint' meant '[t]o establish anything by decree . . . or '[t]o allot, assign,

or designate.'" *Id.* (dictionary citations omitted). "When the President 'direct[s]' a person to serve as an acting officer, he is 'assign[ing]' or 'designat[ing]' that person to serve as an officer." *Id.* at 313.

The same conclusion follows if one looks at the noun "appointment," which is the pivotal term in the Appointments Clause's prescription that "Congress may by law vest **the appointment** of . . . inferior officers , . . in the President alone." U.S. CONST. art. II, §2, cl. 2. 'Appointment' had a well-settled meaning when the Constitution was ratified: "**[d]irection**" or "**order**." 1 SAMUEL JOHNSON, DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1785) (bold added). Congress's use of "direct" in the FVRA thus puts this law within the Appointments Clause's ambit.

History then confirms what text demonstrates. When President-elect Jefferson inquired about Chief Justice Marshall's ability to serve as acting secretary on Jefferson's first day as President, Jefferson did not speak of expanding Marshall's powers (as chief justice or otherwise). Rather, Jefferson spoke to Marshall as "the person **appointed** to perform the duties of secretary of state" and asked whether a "**reappointment** to be dated the 4th. of March would be necessary."[28] Marshall then confirmed that a reappointment was "indispensably necessary."[29] Against this backdrop, the Sixth Circuit's mechanical insistence that acting officials "are not appointed"—and thus beyond the Appointments Clause—makes review by this Court all the more vital. 12a.

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28 Letter from President-elect Jefferson, *supra* note 14.

29 Letter from John Marshall, *supra* note 18.

CONCLUSION

The Court should grant Fortin's petition.

Respectfully submitted,

/S/
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