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No. 24-865

# 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*

## BRIEF OF THE CATO INSTITUTE AND PACIFIC LEGAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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## QUESTION PRESENTED

Under what circumstances must acting officers be appointed in compliance with the Appointments Clause?

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## INTEREST OF *AMICI CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files *amicus* briefs. This case interests Cato because it concerns whether the limitations of the Appointments Clause apply to the hundreds of acting officers across the federal government.

Founded in 1973, Pacific Legal Foundation is a nonprofit, tax-exempt, California corporation established to litigate matters affecting the public interest. PLF provides a voice for Americans who believe in limited constitutional government, private property rights, and individual freedom. PLF is the most experienced public-interest legal organization defending the constitutional principle of separation of powers in the arena of administrative law, and it routinely litigates cases to enforce the Appointments Clause.

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[1] Rule 37 statement: All parties were timely notified of the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amici* funded its preparation or submission.

## SUMMARY OF ARGUMENT

The Sixth Circuit assumed both (1) that Nancy Berryhill had already been validly appointed as an officer of the United States at the time she purportedly became acting commissioner of Social Security; and (2) that an inferior officer of the United States can be directed to serve as an acting officer in another position without a new, constitutionally compliant appointment as an officer. Both of these assumptions are dubious, and neither is backed up with any analysis. The Court should grant the petition, or at lease grant, vacate, and remand with instructions for the Sixth Circuit to justify and clarify its holding.

## ARGUMENT

The Sixth Circuit below held that "the Appointments Clause [is] not implicated" when an official is selected (or purportedly selected) to serve as an acting officer. App. 14a. Yet the Sixth Circuit also asserted that the purported acting officer at issue in this case was "an inferior officer." App. 27a. Those two statements may seem hard to square. Reconciling them requires several logical jumps that the Sixth Circuit did not spell out and that rest on dubious assumptions. This Court should grant review, or at the very least vacate and remand with instructions for the Sixth Circuit to show its work and clarify its holding.

This Court has made clear that acting officers must be *at least* inferior officers. *See United States v. Arthrex*, 141 S. Ct. 1970, 1985 (2021) ("[A]n inferior officer can perform functions of [a] principal office on [an] acting basis") (citing *United States v. Eaton*, 169 U.S. 331, 343 (1898)). And the Appointments Clause sets out a mandatory procedure for appointment as an

officer. Even if an officer is merely "inferior," (1) Congress must "establish" that particular office "by Law"; (2) Congress must "by Law vest the Appointment of" that particular inferior officer in one of three qualified appointers; and (3) the appointer whom Congress has selected must in fact appoint that inferior officer. U.S. CONST. art. II, § 2, cl. 2.

The Sixth Circuit seemingly presumed that the purported acting officer in this case, Nancy Berryhill, had already been appointed as an inferior officer by virtue of being selected for her prior position as Deputy Commissioner for Operations (DCO) at the Social Security Administration (SSA). But the Sixth Circuit did not analyze any of the three necessary steps under the Appointments Clause to determine whether Berryhill's selection as DCO was in fact an appointment as an inferior officer. The court did not address whether Congress had explicitly created the DCO position by statute. It did not address whether Congress had, by statute, explicitly vested the appointment of the DCO in a qualified appointer (most likely the head of Berryhill's department). And it did not address whether Berryhill had in fact been appointed DCO by such a qualified appointer. These three omissions alone call for summarily vacating and remanding, at the very least.

But there is a further logical leap in the Sixth Circuit's opinion. Even if Berryhill had in fact been validly appointed as an inferior officer when she became DCO, that does not necessarily mean she could assume the duties of acting SSA Commissioner without a new, separate appointment in compliance with the Appointments Clause.

The Sixth Circuit assumed that Berryhill could be assigned acting commissioner duties without a new appointment, relying on *Weiss v. United States*, 510 U.S. 163, 170–74 (1994). App. 12a. But *Weiss* concerned the question whether someone who had already been *confirmed by the Senate* to one office could be temporarily assigned new *principal*-officer duties. *See Weiss,* 510 U.S. at 168 n.2 (noting that every commissioned officer eligible for the expanded duties at issue had been "appointed by the President, with the advice and consent of the Senate."). *Weiss* did not address whether someone who has merely been appointed to an *inferior* office (without Senate consent) can be given new *inferior*-officer duties. Extending *Weiss* from the principal-officer context to the inferior-officer context raises novel questions that the court below, once again, simply did not address.[2]

Further, much of the Sixth Circuit's analysis could be taken to mean that the Appointments Clause does not apply to *any* acting officer selections under the Federal Vacancies Reform Act (FVRA), simply because that law uses the verb "directs." App. 14a. ("The deliberate choice in the Vacancies Reform Act to say that the President 'directs' a qualified individual to become an acting officer instead of 'appointing' the acting officer was purposeful."). But that cannot be right. Even if *Weiss* can be extended to those already serving as inferior officers, many of the people eligible to serve as acting officers under the FVRA are not officers at all. *See, e.g.*, 5 U.S.C. § 3345(a)(3) (extending eligibility for

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[2] *Weiss* also suggested that any new duties added to an officer's portfolio must be "germane" to the office to which that officer was originally appointed. *Weiss*, 510 U.S. at 174. But the Sixth Circuit did not address whether the duties of acting SSA Commissioner are germane to the position of DCO.

acting service to government employees who have spent at least 90 days in a GS-15 salary position). *Weiss* certainly cannot be invoked to grant a mere employee the duties of an officer. Yet the Sixth Circuit's opinion may well be read by lower courts in the Sixth Circuit to completely exempt the FVRA from Appointments Clause analysis, even when the acting officer at issue had previously been serving as a mere employee.

These logical omissions are important, because they allowed the Sixth Circuit to brush aside a serious Appointments Clause problem with Berryhill's purported ascension to acting SSA Commissioner. Berryhill took power under the terms of an order of succession, which means she was never selected *by name* by *any appointer* to assume the important powers she exercised. Because no one named Berryhill to her position, no one made a constitutional "appointment" of Berryhill at all.

The Sixth Circuit made dubious assumptions and combined them with a significant extension of *Weiss*. By doing so, the Sixth Circuit avoided an important question: whether a succession order can serve as a valid appointment mechanism. This Court should grant review to clarify the application of the Appointments Clause to the FVRA. Or alternatively, the Court should grant, vacate, and remand with instructions for the Sixth Circuit to show its work and clarify the scope of its holding.

## CONCLUSION

For the foregoing reasons, and those presented by Petitioner, this Court should grant the petition.

Respectfully submitted,

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