No. 23-173

In the Supreme Court of the United States

BRIAN T. DAHLE,
Petitioner,
v.

KILOLO KIJAKAZI,
ACTING COMMISSIONER OF SOCIAL SECURITY,
Respondent.

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

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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September 22, 2023

QUESTION PRESENTED

The Federal Vacancies Reform Act provides that in certain circumstances, "the President (and only the President) may direct" an eligible person to temporarily serve as an acting officer. This *amicus* brief will focus on one question presented in this case, which is whether the president may exercise this power after leaving office via an order that does not identify any particular person by name.

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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 the interaction of the Federal Vacancies Reform Act with the Appointments Clause, a core separation-of-powers provision.

SUMMARY OF ARGUMENT

This case is about political accountability. The day after President Trump took office in January 2017, Nancy Berryhill purportedly became acting commissioner of the Social Security Administration (SSA). But no one actually named her to that position. Rather, Berryhill's elevation was due to an Order of Succession issued by President Obama the previous month, which named and ranked positions (not people) within SSA to fill potential future vacancies in the office of commissioner. *See Providing an Order of Succession Within the Social Security Administration*, 81 Fed. Reg. 96,337 (Dec. 30, 2016). When the offices of commissioner and deputy commissioner did indeed fall

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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 *amicus* funded its preparation or submission.

vacant, Berryhill found herself occupying the highest-ranking position in that Order of Succession, the Deputy Commissioner for Operations (DCO). She took office as acting commissioner despite being named by neither President Obama (who did not know when or if a vacancy would arise in the future and did not know if Berryhill would fill it) nor President Trump (who took no action at all).

Who can the people blame for Berryhill's appointment? No one named her, so no one bears full responsibility. That is a problem. In fact, because no one named Berryhill to her position, no one made a constitutional "appointment" of Berryhill at all.

Under the Federal Vacancies Reform Act (FVRA), "the President (and only the President) may direct" eligible persons to serve as acting officers. 5 U.S.C. § 3345(a)(2); (a)(3). The Eighth Circuit held that President Obama's Order of Succession complied with this provision and "directed" Berryhill to serve as acting commissioner. But that statutory holding creates a constitutional problem. The Eighth Circuit's interpretation of the FVRA would bring the law squarely in conflict with the Appointments Clause. Petitioner's interpretation would avoid this conflict by requiring the current president to affirmatively approve each acting officer, when the name and identity of that acting officer is known. The constitutional problem raised by the Eighth Circuit's statutory holding calls for this Court's review. The Court should grant the petition to consider the implications of the Eighth Circuit's FVRA interpretation in light of the Appointments Clause.

ARGUMENT

The Constitution requires, as a default rule, that "Officers of the United States" must be nominated by the president and confirmed by the Senate. U.S. Const. Art. II, § 2, cl. 2. The Constitution allows only one potential exception to this default rule: If an officer is merely an "inferior officer," Congress may waive Senate consent. *Id.* But even if an officer is inferior, Congress is limited in its choice of who may appoint that officer. "[T]he Constitution limits congressional discretion to vest power to appoint 'inferior Officers' to three sources: 'the President alone,' 'the Heads of Departments,' and 'the Courts of Law.'" *Freytag v. Comm'r*, 501 U.S. 868, 878 (1991) (quoting U.S. Const. Art. II, § 2, cl. 2). To exempt an inferior officer from Senate consent, Congress must "by Law vest" that inferior officer's "Appointment" in one of these three options.

"This Article II limitation on the number of actors authorized to make final decisions in selecting officers helps to ensure that the public knows the identity of the official who bears ultimate responsibility for each officer appointment." Jennifer L. Mascott, *"Officers" in the Supreme Court:* Lucia v. SEC, 2017–2018 Cato Sup. Ct. Rev. 305, 315 (2018). Even if Congress wished to, it could not vest the power to appoint an officer in some lower-ranking official. As this Court has observed, "The Constitutional Convention rejected [James] Madison's complaint that the Appointments Clause did 'not go far enough if it be necessary at all': Madison argued that 'Superior Officers below Heads of Departments ought in some cases to have the appointment of the lesser offices.'" *Freytag*, 501 U.S. at 884 (quoting 2 Records of the Federal Convention of 1787, pp. 627–628 (M. Farrand rev. 1966) [hereinafter

Farrand]). "The Framers understood . . . that by limiting the appointment power, they could ensure that those who wielded it were accountable to political force and the will of the people." *Id.*

To comply with the Appointments Clause, an "appointment" must identify, *by name*, the person being appointed. If the recipient of the appointment power (here, President Obama) instead makes an appointment by contingency order, then the accountability mandated by the Appointments Clause vanishes. The people cannot blame President Obama for Berryhill's performance, because Obama did not choose Berryhill for the position. Indeed, the people cannot blame any single person for Berryhill's accession to the position of acting commissioner, because her accession resulted from the combined actions and inactions of no fewer than four people. That is precisely the diffusion of accountability that the Appointments Clause forbids.

I. THE EIGHTH CIRCUIT'S STATUTORY HOLDING WOULD ALLOW UNLIMITED METHODS OF ABDICATING PRESIDENTIAL ACCOUNTABILITY

The Eighth Circuit held that President Obama's Order of Succession validly elevated Berryhill after Obama left office because "presidential orders without specific time limitations carry over from administration to administration" and "a new president does not have to take affirmative action to keep existing orders in place." Petitioner's Appendix at 9a. The Eighth Circuit thus held that a president may make appointments by contingency order at any time in the future, even long after that president has left office. This

holding would allow presidents to employ myriad strategies to avoid accountability for appointments.

Suppose the president issued an order that the winner of the next New York City Marathon would fill the next open vacancy on the President's Council on Sports, Fitness, and Nutrition. Should that appointee be unpopular, the president could accurately say that he did not pick the winner of the race, and that the American people could just as easily blame whoever came in second for allowing the winner to place first.

Or suppose the president issued an order that the next winner of American Idol (a winner chosen by audience vote) would be appointed to the Kennedy Center Board of Trustees. An unpopular choice could be blamed not just on a few people, but on the entire American population. If the president can create any mechanism he chooses for "appointing" someone to a future vacancy, the president can effectively employ popular elections to fill federal offices, a complete abdication of personal responsibility.

And as the facts of this case show, succession orders can also assign the blame for a bad nomination to lower-ranking officials in the federal government. Berryhill was in the position of DCO because she had been selected for that position by a prior acting SSA Commissioner. The official who hired Berryhill thus bears some of the responsibility for Berryhill eventually becoming acting SSA commissioner herself. If the president can make an appointment by designating "whoever then holds position X" to fill the next vacancy in office Y, then the person with responsibility to fill position X has effectively been delegated part of the responsibility for filling office Y. And if the person with responsibility to fill position X is not a head of a

department or a court of law, this would effectively allow the president to "multiply indefinitely the number of actors eligible to appoint," despite the Framers' rejection of an "excessively diffuse appointment power." *Freytag*, 501 U.S. at 885.

Taken to its logical conclusion, the Eighth Circuit's holding means that a president could make an "appointment" of someone who had not even been *born* when that president left office, so long as the president's succession order went unamended for decades. Indeed, a president could use a succession order to fill a future vacancy that occurs not just after that president has left office, but even after that president has *died*. All that would be required for this to happen, under the Eighth Circuit's holding, is that a president's succession order be left in place by each of his successors. It is hard to imagine a less accountable "appointment" than one made by a long-dead ex-president of an appointee whom that president never could have known. But under the Eighth Circuit's holding a president could accomplish exactly that.

This case starkly demonstrates the lack of personal accountability that results when the president makes an "appointment" by contingency order. Berryhill's accession to the position of acting commissioner was the result of a combination of actions and inaction by no fewer than four separate people: President Obama in issuing an Order of Succession that placed the DCO first in line; former Acting SSA Commissioner Carolyn Colvin in both hiring Berryhill to the position of DCO and resigning when President Trump took office; Berryhill herself in choosing not to resign as DCO when Trump took office; and Trump in doing nothing. All four of these combined events (or non-events) were

necessary for Berryhill to be identified as the purported acting commissioner.

"Article II aims to ensure that the identity of the nominating official is clear. This provides a direct line of accountability for any poorly performing officers back to the actor who selected them." Jennifer L. Mascott, *Who Are "Officers of the United States"?*, 70 Stan. L. Rev. 443, 447 (2018) (footnotes omitted). In this case, the line of accountability could not be more muddled.

II. APPOINTMENTS BY CONTINGENCY CIRCUMVENT THE ACCOUNTABILITY MANDATED BY THE APPOINTMENTS CLAUSE

The Framers understood the importance of individual responsibility for presidential nominations and appointments. Their understanding confirms what common sense already indicates: An order that does not name an appointee but merely describes a contingency plan for filling future vacancies is not an "appointment" within the meaning of the Constitution.

"[T]he Framers believed that making single actors responsible for appointment choices would give those actors the motivation to select highly qualified officers because they would face the blame if a government appointment did not pan out." Mascott, *Who Are "Officers of the United States"?*, *supra*, at 456. The Framers' discussions of the Appointments Clause make clear that they viewed a presidential "appointment" as an act by which a president takes responsibility for the choice of an officer. These early discussions, and the principle of accountability at the heart of the Appointments Clause, further confirm that the understood meaning

of an "appointment" was an act *naming* a particular appointee.

Throughout the Constitutional Convention, the Framers debated whether to assign the initial power to nominate officers to a single person (like the president) or to a group of people (like the whole Congress or the Senate). Those urging that initial nominations be made by the president won the debate, and their most important argument was based on individual accountability.

At the Convention, James Wilson argued that vesting appointments in "numerous bodies" like the legislature would lead to "[i]ntrigue, partiality, and concealment." 1 Farrand at 119. By contrast, Wilson explained that "A principal reason for unity in the Executive was that officers might be appointed by a single, responsible person." *Id.*; *see also id.* at 70 (Wilson: "If appointments of Officers are made by a sing[le] Ex[ecutive] he is responsible for the propriety of the same. [N]ot so where the Executive is numerous.").

James Madison similarly noted that vesting the nomination power in a single executive rather than in a larger body like the Senate would lend "the advantage of responsibility." 2 Farrand at 42–43. Madison opposed selection by the Senate because its members "might hide their selfish motives under the number concerned in the appointment." *Id.* at 80.

Nathaniel Gorham opposed appointment by the Senate as well, because he believed the Senate would be "too numerous, and too little personally responsible, to ensure a good choice." *Id.* at 41. Gorham argued that "Public bodies feel no personal responsibility and give full play to intrigue and cabal." *Id.* at 42. Gorham

urged that in making appointments "the Executive will be responsible in point of character at least, for a judicious and faithful discharge of his trust." *Id.* Crucially, Gorham explained that "The Executive would certainly be more answerable for a good appointment, as the whole blame of a bad one would fall on him alone." *Id.* at 43.

Gouverneur Morris likewise argued that the Senate was "too numerous for the purpose" of making appointments because it was "devoid of responsibility." *Id.* at 389. And Edmund Randolph also "laid great stress on the responsibility of the Executive as a security for fit appointments." *Id.* at 81.

Once the Constitution had been drafted and was under consideration in the states, Alexander Hamilton strongly defended the choice to vest the nomination power in a single executive officer—the president. Hamilton wrote that "The sole and undivided responsibility of one man will naturally beget a livelier sense of duty and a more exact regard to reputation." The Federalist No. 76, at 455 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Hamilton explained that under the Constitution's system, "The blame of a bad nomination would fall upon the President singly and absolutely." The Federalist No. 77, at 461 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

It was thus a "central concern" of the Framers "that a single person or entity be accountable for the performance of an officer: if an incompetent person was appointed to the post, the electorate should be able to understand who was responsible for appointing the person." Hanah Metchis Volokh, *The Two Appointments Clauses: Statutory Qualifications for Federal Officers*, 10 U. Pa. J. Const. L. 745, 766 (2008); *see also* James

Wilson, Government: Lectures on Law (1791), in 4 The Founder' Constitution 110, 110 (Philip B. Kurland & Ralph Lerner eds., 1987) ("The person who nominates or makes appointments to offices, should be known. His own office, his own character, his own fortune should be responsible.").

These early debates focused on the required mode of appointment for principal officers (and the default mode for inferior officers), namely presidential nomination followed by Senate consent. The Framers carefully distinguished these two stages as promoting two distinct values, with the first stage (nomination by a single president) promoting accountability and responsibility. *See* 2 Farrand at 539 ("Mr. Govr. Morris said that as the President was to nominate, there would be responsibility, and as the Senate was to concur, there would be security."). Thus, when the Framers added an exception allowing Congress to vest the appointment of inferior officers in "the President alone," the Framers expected that appointments made under that process would be made with the same personal presidential responsibility as appointments made under the default process.[2] An appointment by succession order,

[2] To be sure, the Framers also gave Congress the option to vest the appointment of inferior officers in "the Courts of Law, or in the Heads of Departments," both of which may in some cases be multimember bodies. *See Free Enter. Fund v. PCAOB*, 561 U.S. 477, 513 (2010). But when Congress chooses to vest an appointment in "the President alone" (as Congress chose in the FVRA), Congress chooses to retain all the same values of individual presidential responsibility that are present in the process for appointing principal officers. The Framers' reasons for assigning the nomination of a principal officer to the president alone are thus relevant to the Framers' understanding of the meaning of an "Appointment" of an *inferior* officer by "the President alone."

or by *any* order that results in appointment by contingency rather than by name, is not an "appointment" as the Framers understood it.

CONCLUSION

The Eighth Circuit held that a *former* president can "direct" a person to serve as an acting officer via an order that does not identify the appointee by name. This statutory holding would place the FVRA squarely in conflict with the Appointments Clause, allowing presidents to use the FVRA to avoid accountability for their appointments. By contrast, Petitioner's interpretation would avoid this constitutional problem and ensure that every acting officer selected via the FVRA is actually *named* by the *current* president. The constitutional stakes behind this statutory dispute call for review of the Eighth Circuit's decision. For the foregoing reasons, and those described by the Petitioner, this Court should grant the petition.

Respectfully submitted,

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