No. 19- _____

IN THE

Supreme Court of the United States

TOMAS LIRIANO CASTILLO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

Joseph A. DiRuzzo, III
Counsel of Record
DiRuzzo & Company
401 East Las Olas Blvd., Suite 1400
Ft. Lauderdale, Florida 33301
Office: (954) 615-1676
Fax: (954) 827-0340
Email: jd@diruzzolaw.com

QUESTIONS PRESENTED

The questions presented are:

1. Can announcements made via the President's personal social media be sufficient to put litigants against the Federal Government on notice so that litigants could forfeit an argument resulting in Federal Rule of Criminal Procedure 52(b)'s plan error review and, if so, under what circumstances?

2. Did Matthew G. Whitaker's appointment as the Acting Attorney General violate the Appointments Clause, the Federal Vacancies Reform Act, and/or the Attorney General Succession Act?

PARTIES TO THE PROCEEDING

The Parties to the proceeding are the Petitioner, Tomas Liriano Castillo, and the United States of America.

TABLE OF CONTENTS

INDEX TO THE APPENDIX

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Constitutional Provisions

PETITION FOR WRIT OF CERTIORARI

Petitioner, Tomas Liriano Castillo, respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINION BELOW

The judgment of the United States Court of Appeals for the Third Circuit is reproduced in the Appendix herein at App. 001. The opinion of the United States Court of Appeals for the Third Circuit is unpublished and reported at *United States v. Castillo*, 772 F. App'x. 11 (3d Cir. May 9, 2019), and is reproduced in the Appendix herein at App. 003. The denial of Petitioner's Petition for Rehearing *en banc*, issued on June 27, 2019, is not officially reported and is reproduced in the Appendix herein at App. 011.

JURISDICTION

The opinion of the United States Court of Appeals for the Third Circuit affirming the District Court's judgment was entered on May 9, 2019. A petition for panel rehearing and rehearing *en banc* was denied on June 27, 2019. The present petition is being filed by postmark on or before September 25, 2019. Supreme Court Rules 13.1, 13.3, 29.2, and 30.1. This Court properly has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, & RULE-BASED PROVISIONS INVOLVED

The Appointments Clause mandates that "[the President] ... shall nominate, and by and with the Advice and Consent of the Senate, shall appoint ... Officers of the

United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law[.]" U.S. CONST., art. II, § 2, cl. 2.

The Federal Vacancies Reform Act of 1998 provides the statutory scheme for temporary, or acting, employment,

> (a) If an officer of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office) whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate, dies, resigns, or is otherwise unable to perform the functions and duties of the office—
>
> (1) the first assistant to the office of such officer shall perform the functions and duties of the office temporarily in an acting capacity subject to the time limitations of section 3346;
>
> (2) notwithstanding paragraph (1), the President (and only the President) may direct a person who serves in an office for which appointment is required to be made by the President, by and with the advice and consent of the Senate, to perform the functions and duties of the vacant office temporarily in an acting capacity subject to the time limitations of section 3346; or
>
> (3) notwithstanding paragraph (1), the President (and only the President) may direct an officer or employee of such Executive agency to perform the functions and duties of the vacant office temporarily in an acting capacity, subject to the time limitations of section 3346, if—
>
> (A) during the 365-day period preceding the date of death, resignation, or beginning of inability to serve of the applicable officer, the officer or employee served in a position in such agency for not less than 90 days; and
>
> (B) the rate of pay for the position described under subparagraph (A) is equal to or greater than the minimum rate of pay payable for a position at GS-15 of the General Schedule.

5 U.S.C. § 3345(a).

The Attorney General Succession Act provides that:

> (a) In case of a vacancy in the office of Attorney General, or of his absence or disability, the Deputy Attorney General may exercise all the duties of that office, and for the purpose of section 3345 of title 5 the Deputy Attorney General is the first assistant to the Attorney General.
>
> (b) When by reason of absence, disability, or vacancy in office, neither the Attorney General nor the Deputy Attorney General is available to exercise the duties of the office of Attorney General, the Associate Attorney General shall act as Attorney General. The Attorney General may designate the Solicitor General and the Assistant Attorneys General, in further order of succession, to act as Attorney General.

28 U.S.C. § 508.

Rule 52 states: "(b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention." Fed. R. Crim. P. 52(b).

STATEMENT

The Petitioner's initial sentence was vacated by the Court of Appeals, *see United States v. Castillo,* 742 F. App'x 610, 615-16 (3d Cir. 2018), and was remanded for resentencing, *id.* at 616. "That resentencing hearing was scheduled for November 8, 2018. The day before, November 7, 2018, Attorney General Jeff Sessions resigned from office, and the President named Matthew Whitaker, who had been the Attorney General's Chief of Staff, to be the Acting Attorney General." App. 005.

The Petitioner's

> resentencing took place as scheduled. He did not object to being resentenced while Mr. Whitaker was serving as Acting Attorney General. Six days later, however, [Petitioner] filed a motion to vacate his sentence. In that motion, he argued for the first time that Whitaker's designation as Acting Attorney General violated both federal law and the Constitution and, in turn, rendered his sentence invalid.

App. 005-6 (footnote omitted).

In the Government's answering brief, it failed to raise any argument that the Petitioner forfeited his argument (and by extension that the appropriate standard of review was plain error). Subsequently, the case was transferred from the U.S. Attorney's Office for the District of the Virgin Islands to the Appellate Section of the Criminal Division at the Department of Justice. As a result, and for the very first time, the Government argued in a supplemental brief that plain error review applied.

At oral argument the panel (and Judge Rendell in particular) appeared to be of the view that notwithstanding the fact that counsel for the Petitioner was unaware of Whitaker's installation as the Acting Attorney General, such was of no moment because "it had happened, [and] it does not matter" that counsel for the Petitioner (and by necessary extension the Petitioner) was unaware. Oral argument recording at 14:00-14:17.[1] Similarly, Judge Jordan remarked that "forfeiture is when you don't make the argument at the time the court can do something about it." Oral argument recording at 14:17-14:30.

Further, in response to counsel for the Petitioner's representation that counsel was unaware that Whitaker had been named as the Acting Attorney General at the time of the Petitioner's resentencing, the Government argued that plain error review was appropriate because "in fact it was around noon on November 7th that the President said first over Twitter that he was going to be designating" Whitaker as the Attorney General. Oral argument recording at 22:00-22:22.

---

[1] *Available at* https://www2.ca3.uscourts.gov/oralargument/audio/18-3579_USAv.Castillo.mp3 (last accessed June 8, 2019).

Ultimately, the Court of Appeals employed the plain error standard of review and upheld the Petitioner's sentence.

The Petitioner timely petitioned the Court of Appeals for panel rehearing and rehearing *en banc*. The request was denied. App. 011.

REASONS FOR GRANTING THE WRIT

I. THE IMPLICATIONS OF THE PRESIDENT'S USE OF HIS PERSONAL SOCIAL MEDIA ACCOUNTS FOR LITIGANTS AGAINST THE FEDERAL GOVERNMENT IS AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE SETTLED BY THIS COURT.

The Court of Appeals concluded that because President Trump made an announcement via his personal social media account, such was sufficient to require the Petitioner to raise the issue before the trial court and therefore plain error review applied. App. 006 at fn. 4. The decision below expanded plain error review beyond its historical moorings and was wrong.

A. Historical context and scope of Rule 52's plain error test.

Rule 52(b) of the Federal Rules of Criminal Procedure was drafted as a restatement of the common law. *See* Fed. R. Crim. P. 52(b) Advisory Committee Note to Subdivision (b) ("This rule is a restatement of existing law …"). In *Wiborg v. United States*, 163 U.S. 632 (1896) this Court recognized the "plain error doctrine," and stated that "if a plain error was committed in a matter so absolutely vital to defendants, we feel ourselves at liberty to correct it" even though the defendants in the case had not "duly excepted" to the error at trial. *Id.* at 658-59. Consequently, the plain error rule "tempers the blow of a rigid application of the contemporaneous-objection requirement." *United States v. Young,* 470 U.S. 1, 15 (1985).

The plain error rule has its genesis in contemporaneous-objection requirement that, because by "immediately apprising the trial judge of the objection, counsel gives the court the opportunity to conduct the trial without using the tainted evidence." *Henry v. Miss.,* 379 U.S. 443, 448 (1965). At its core, the plain error rule is predicated upon an assumption that a litigant knew of objectionable material at trial and failed to lodge a contemporaneous objection. *See United States v. Frady,* 456 U.S. 152, 163 (1982) (Rule 52(b) "reflects a careful balancing of our need to encourage all trial participants to seek a fair and accurate trial the first time around against our insistence that obvious injustice be promptly redressed.").

The plain error rule promotes finality and judicial efficiency by requiring claims of error to be raised in the trial court—where they can be examined with the benefit of direct participants and fresh recollections and, if necessary, they can be corrected—in order to receive full consideration on appeal. *See United States v. Vonn*, 535 U.S. 55, 73 (2002) ("the value of finality requires defense counsel to be on his toes, not just the judge"); *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977) (contemporaneous-objection rule "encourages the result that [trial] proceedings be as free of error as possible"). The rule "reduce[s] wasteful reversals by demanding strenuous exertion to get relief for unpreserved error." *United States v. Dominguez Benitez*, 542 U.S. 74, 82 (2004). And the rule diminishes opportunities and incentives for gamesmanship. It discourages a party from silently acquiescing in error in the trial court and then, by using that error—"pull[ing] the ace out of his sleeve," *United States v. Busche*, 915 F.2d 1150, 1151 (7th Cir. 1990)—to gain reversal on appeal

should the trial outcome, or the sentence following a guilty plea, be unsatisfactory. *Vonn*, 535 U.S. at 73; *Luce v. United States*, 469 U.S. 38, 42 (1984); *Wainwright*, 433 U.S. at 89.

However, and importantly to this case, Rule 52(b) is "founded upon considerations of fairness to the parties and of the public interest in bringing litigation to an end *after fair opportunity* has been afforded to present all issues of law and fact." *United States v. Atkinson*, 297 U.S. 157, 159 (1936) (emphasis added).

B. The Court of Appeals' novel application of Rule 52 to the President's social media was erroneous.

1. The Petitioner was never provided a fair opportunity to present issues of law and fact.

First, there can be no doubt that the Petitioner's re-sentencing took place less than twenty-four hours after the President issued his tweet on his personal social media. It is undisputed that we do not live in a world of perfect information. Consequently, because the President issues a tweet on his personal social media does not mean that every litigant against the Federal Government is aware of such (let alone being immediately put on official notice). To conclude otherwise would require all litigants against the Federal Government (including but not limited to criminal defendants and the attorneys representing their clients) to follow the President's (and potentially other governmental officials') personal social media. Such should not be the law (but if such is the law this Court should take this this opportunity to officially so state in order to properly inform the American public).

Allowing the President to use his personal social media to make official announcements should as a matter of law be verboten. For courts to sanction the use of personal social media to make official announcements would give the President (and all governmental officials) perverse incentives to make announcements on the social media (which members of the American public may not have access to) and then claim that litigants either forfeited an argument based on the social media post or, in the alternative, claim that a deferential standard of review applies. That is exactly what happened in this case.[2]

Second, and related to the first point above, litigants against the Federal Government should be given a reasonable amount of time to learn of official governmental events/actions that are announced on social media (and on the internet for that matter) and to take appropriate action. In this case, providing for less than twenty-four hours for the Petitioner to learn that the President announced that Whitaker would head the Department of Justice as the Acting Attorney General and raise such argument at the resentencing was not a fair opportunity to present all issues of law and fact. *See Atkinson, supra.*

Indeed, the Court of Appeals was of the view that Rule 52(b)'s plain error standard "*is meant to protect the courts, not appellants*[.]" App. 006 at fn. 4 (emphasis added). But such a conclusion cannot be squared with this Court's statement in *Atkinson* that the contemporaneous-objection requirement, and by

[2] Such would also, necessarily, impart a quasi-governmental status upon privately-run social media platforms.

extension Rule 52(b)'s plain error standard of review, is founded upon the factual assumption that a litigant had a "fair opportunity … to present all issues of law and fact." 297 U.S. at 159.

In this case, the Petitioner filed his motion to vacate six days after his resentencing (and one week after Attorney General Sessions was removed from office). Such was a reasonable amount to time to raise the issue for the Petitioner to have a fair opportunity, *see Atkinson, supra,* to preserve it for *de novo* appellate review. Moreover, at no point has there been any allegation that counsel for the Petitioner was, in fact, aware that Whitaker assumed the role as Acting Attorney General, which would be a factual prerequisite to claim that the Petitioner "sandbagged" the trial court, i.e. remained silent about his objection to belatedly raise the error only if and when the case did not conclude in his favor. *See Puckett v. United States*, 556 U.S. 129, 134 (2009).

2. The underlying policies of the plain error provision of Rule 52 are not advanced when applied to developments that are external to the litigation against the Federal Government.

The Petitioner presents an analogous case[3] for this Court's consideration. In *Nguyen v. United States*, 539 U.S. 69 (2003), the criminal defendants' direct appeals were heard by a three-judge panel of the Ninth Circuit, which included an Article IV district judge. *Id.* at 72-73. Neither criminal defendant "objected to the composition of the panel before the cases were submitted for decision; neither [criminal defendant]

[3] The Petitioner would submit that the decision below violates the spirit if not the letter of *Nguyen*, which can justify this Court's discretionary review. *See* Supreme Ct. R. 10(c).

sought rehearing after the Court of Appeals rendered judgment to challenge the panel's authority to decide their appeals." *Id.* at 73. The Government in *Nguyen* "urged [this Court to] affirm [based on the criminal defendants'] failure to object to the panel's composition in the Court of Appeals." *Id.* at 77. "The Government also contend[ed] that [the criminal defendants did] not meet the requirements for relief under plain-error review." *Id.*

This Court rejected the Government's arguments and stated that it had "agreed to correct, at least on direct review, violations of a statutory provision that embodies a strong policy concerning the proper administration of judicial business even though the defect was not raised in a timely manner." *Id.* at 78 (cleaned up). This Court went on to note that the statutory scheme at issue

> embodie[d] weighty congressional policy concerning the proper organization of the federal courts. Section 292(a) does not permit any assignment to service on the courts of appeals of a district judge who does not enjoy the protections set forth in Article III. Congress' decision to preserve the Article III character of the courts of appeals is more than a trivial concern, …, and is entitled to respect.

Id. at 79–80 (cleaned up).

Such is the case here as the proper application of the Appointments Clause, U.S. CONST. art. II, § 2, cl. 2, the Federal Vacancies Reform Act of 1998 ("FVRA"), 5 U.S.C. §§ 3345-3349, and the Attorney General Succession Act, 28 U.S.C. § 508, likewise are more than a trivial concern, and are entitled to utmost respect. Admittedly, while *Nguyen* addressed "the proper administration of judicial business," 539 U.S. at 78, there is no reasoned basis not apply the same logic to this case because the Appointments Clause, the FVRA, and the Attorney General Succession Act, work

in unison to ensure the proper balance of powers between the Executive and Legislative branches.

In rejecting the application of plain error in *Nguyen,* this Court acknowledged that

> we think it inappropriate to accept the Government's invitation to assess the merits of petitioners' convictions or whether the fairness, integrity, or public reputation of the proceedings were impaired by the composition of the panel. It is true, as the Government observes, that a failure to object to trial error ordinarily limits an appellate court to review for plain error. But to ignore the violation of the designation statute in these cases would incorrectly suggest that some action (or inaction) on petitioners' part could create authority Congress has quite carefully withheld.

Id. at 80 (cleaned up citing, *inter alia,* to Rule 52(b)).

Such logic applies with equal force here. In this case the plain error rule should not have come to bear as ignoring the Appointments Clause, the FVRA, and the Attorney General Succession Act would incorrectly suggest that the Petitioner's failure to raise an objection before the District Court could create authority the Founders (in providing for the Appointments Clause) and Congress (in enacting the FVRA and the Attorney General Succession Act) have withheld.

In other words, the departure from ordinary principles of appellate review is appropriate here due to the unique nature of the error at issue and its connection to policies of checks and balances between the Executive and Legislative Branches of Government, for which this Court has supervisory power. Paralleling *Nguyen*, this case involves policies concerning "the proper administration of" inter-branch business and did *not* involve trial error. The general application of the plain error rule,

reaffirmed in *Nguyen*, therefore should not apply. *Cf. id.* at 81 ("federal courts may not use their supervisory powers to circumvent the obligation to assess *trial errors* for their prejudicial effect.") (emphasis added); *accord Vonn,* 535 U.S. at 62-63 (cleaned up, emphasis added) ("the defendant *who sat silent at trial* has the burden to show both that his 'substantial rights' were affected and that the court of appeals' discretionary authority to correct the error should be exercised.").

The Court should grant the petition and address any convergence between the President's personal social media and plain error review.

II. WHETHER WHITAKER'S TENURE AS THE ACTING ATTORNEY GENERAL VIOLATED THE APPOINTMENTS CLAUSE, THE FEDERAL VACANCIES REFORM ACT, OR THE ATTORNEY GENERAL SUCCESSION ACT, ARE IMPORTANT QUESTIONS OF FEDERAL LAW THAT SHOULD BE SETTLED BY THIS COURT.

A. The extant statutory schemes.

1. The Federal Vacancies Reform Act.

The FVRA, 5 U.S.C. §§ 3345-3349, provides the statutory scheme for temporary, or acting, employment,

> [i]f an officer of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office) whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate, dies, resigns, or is otherwise unable to perform the functions and duties of the office[.]

5 U.S.C. § 3345(a).

In such a scenario, the default rule is, "the first assistant to the office of such officer shall perform the functions and duties of the office temporarily in an acting capacity[.]" 5 U.S.C. § 3345(a)(1). However, under the FVRA (5 U.S.C. § 3345 (a)(2) and (a)(3)), "[t]he President may override that default rule by directing either a

person serving in a different [Presidential appointment and Senate confirmation ("PAS")] office or a senior employee within the relevant agency to become the acting officer instead." *N.L.R.B. v. SW Gen., Inc.*, 137 S. Ct. 929, 935 (2017).

2. The Department of Justice & The Attorney General Succession Act.

Federal law directs the Attorney General of the United States, exclusively, to exercise enormous power in the name of the United States. *See* 28 U.S.C. §§ 501-530d (Chapter 31 of Title 28: "The Attorney General"). Critically, such power includes, that "[e]xcept as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General." 28 U.S.C. § 516.

The Attorney General of the United States is, thus, inseparable to such litigation:

> [e]xcept as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party, and shall direct all United States attorneys, assistant United States attorneys, and special attorneys appointed under section 543 of this title in the discharge of their respective duties.

28 U.S.C. § 519.

Although the FVRA applies broadly, a specific statute governs succession upon vacancy of the office of Attorney General of the United States, *viz.*: "the Attorney General Succession Act" (codified at 28 U.S.C. § 508).

In stark contrast to other succession provisions in the United States Code,[4] the Attorney General Succession Act is mandatory and limits the President's discretion to designate individuals to assume the role as Acting Attorney General.[5] Thus, the Attorney General Succession Act provides the specific statutory scheme pertaining to a vacancy in the office of the Attorney General of the United States.

B. Whitaker's tenure as the Acting Attorney General of the United States violated the Attorney General Succession Act.

The FVRA does not apply in *all* situations of a vacancy of a PAS position. The FVRA is expressly *not* the exclusive means of designating temporary fulfillment of a PAS office if, *inter alia*, "a statutory provision expressly … designates an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity[.]" 5 U.S.C. § 3347(a)(1)(B). The non-exclusivity clause applies here, as 28 U.S.C. § 508(a) expressly provides for the Deputy Attorney General temporarily to fulfill the office of the Attorney General of the United States upon its vacancy.

Furthermore, even in absence of the non-exclusivity clause of the FVRA, the Attorney General Succession Act controls because, while both are federal statutes in *pari passu*, the Attorney General Succession Act specifically governs the office of the Attorney General. *See Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170 (2007) ("normally the specific governs the general."); *Morales v. Trans World Airlines,*

---

[4] *See* 38 U.S.C. § 304 (Deputy Secretary of Veterans Affairs); 40 U.S.C. § 302 (Deputy Administrator of General Services); 42 U.S.C. § 902(b)(4) (Deputy Commissioner of Social Security).

[5] This commonsense view is supported by the FVRA legislative history. *See* 144 Cong. Rec. S12810 (Oct. 21, 1998) (Sen. Byrd) (FVRA sole means of filling vacancies unless another statute creates an explicit exception).

Inc., 504 U.S. 374, 384 (1992) (same); *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (same). Therefore, to the extent the statutes conflict, the Attorney General Succession Act controls.

The Attorney General Succession Act authorizes only the Deputy Attorney General to assume the acting role of the Attorney General unless "neither the Attorney General nor the Deputy Attorney General is available to exercise the duties of the office of Attorney General." 28 U.S.C. § 508(b). In such a case, the statute mandates, "the Associate Attorney General shall act as Attorney General[,]" and gives discretion to the Attorney General to "designate the Solicitor General and the Assistant Attorneys General, in further order of succession[.]" *Id.* Indeed, Whitaker was neither in the potential line of succession nor held a PAS office.

Thus, at the time of Sessions' termination only Rod J. Rosenstein, as the then Deputy Attorney General, could have "exercise[d] all the duties of that office," 28 U.S.C. § 508(a). Consequently, Whitaker's role as Acting Attorney General violated the extant statutory scheme in general, and the Attorney General Succession Act in particular.

C. The FVRA did not apply to the vacancy following President Trump terminating Sessions as the Attorney General.

Applicability of the FVRA requires a specific triggering event. The FVRA only applies when a PAS officer "*dies, resigns, or is otherwise unable to perform the functions and duties of the office*[.]" 5 U.S.C. § 3345(a) (emphasis added). Therefore, even if there were no express statute designating the succession upon vacancy of the

office of Attorney General of the United States (a point we do not concede), the FVRA would not apply because President Trump fired Attorney General Sessions.

Although Sessions' employment as Attorney General ended with a purported letter of resignation, circumstances expressly make clear that the resignation was not voluntary. To be sure, sources have confirmed that Sessions had no say in the matter. *See* Laura Jarrett and Kaitlan Collins *Sessions wanted to stay until the end of the week*, CNN (Nov. 7, 2018), *available at* https://www.cnn.com/politics/live-news/jeff-sessions-out/index.html (last accessed September 18, 2019) ("Former Attorney General Jeff Sessions wanted to try to stay until the end of the week, but White House Chief of Staff John Kelly told him no. Kelly was very firm it had to be today [November 7, 2018], according to administration officials.").

In contrast to one of the prerequisite enumerated reasons for the FVRA to apply to a vacancy (i.e., death, resignation, otherwise unable to perform), the intentional creation of a vacancy by a Presidential act does not trigger the FVRA. Here, the resignation was a mere formality, should Sessions have declined his express termination would have resulted. *See id.*

To the extent that Sessions' termination was not express his termination was constructive. This Court has acknowledged an analogous scenario, "an employee who was not fired, but resigns in the face of intolerable discrimination—a 'constructive' discharge." *Green v. Brennan*, 136 S. Ct. 1769, 1774 (2016); *see also Pennsylvania State Police v. Suders*, 542 U.S. 129, 143 (2004) (a constructive discharge occurs upon a "'hostile work environment,' attributable to a supervisor.")

It is hard to imagine a greater degree of pressure or disparity in power than in a case where the President of the United States voices his desire for resignation of an at-will subordinate, as occurred here. Sessions' resignation letter begins with "at your request" and is undated (indicating his uncertainty whether he would be allowed to stay until the end of the week as he requested), and he was reportedly required to vacate the office of Attorney General immediately the same day. Viewed in context, the vacancy was unquestionably due to a discharge, either express or constructive; therefore, the FVRA did not apply.

***

Because the statutes are unambiguous, the Attorney General Succession Act controls who may be designated as Acting Attorney General as it is the specific statutory provision addressing the matter. *See Long Island Care at Home, supra* (when two statutes potentially conflict the specific controls). Whitaker was not among the individuals eligible to hold the position as Acting Attorney General as he held none of the positions listed in Section 508(b). Accordingly, Whitaker's purported role as Acting Attorney General was *ultra vires*.

D. The Appointments Clause was violated.

1. Appointments Clause jurisprudence.

"The Appointments Clause prescribes the exclusive means of appointing 'Officers.'" *Lucia v. S.E.C.*, 138 S. Ct. 2044, 2051 (2018). The Appointments Clause mandates that "[the President] ... shall nominate, and by and with the Advice and Consent of the Senate, shall appoint ... Officers of the United States, whose

Appointments are not herein otherwise provided for, and which shall be established by Law[.]" U.S. CONST., art. II, § 2, cl. 2. The Framers realized the Senate's advice-and-consent power "as 'an excellent check upon a spirit of favoritism in the President' and a guard against 'the appointment of unfit characters ... from family connection, from personal attachment, or from a view to popularity.' THE FEDERALIST NO. 76, p. 457 (C. Rossiter ed. 1961) (A. Hamilton)." *SW Gen., Inc.*, 137 S. Ct. at 935.

By its terms, the Appointments Clause only requires appointments to fill offices that are "established by Law." *See Burnap v. United States,* 252 U.S. 512, 516 (1920) ("Whether the incumbent is an officer or employe[e] is determined by the manner in which Congress has specifically provided for the creation of the several positions, their duties and appointment thereto"). The term "office" "embraces the ideas of tenure, duration, emolument, and duties," *United States v. Germaine*, 99 U.S. 508, 511 (1879), and these characteristics as well as the "means of appointment for that office are specified by statute," *Freytag v. Comm'r,* 501 U.S. 868, 881 (1991).

"[T]he Appointments Clause divides all officers into two classes: principal officers and inferior officers. Only the former are appointed subject to the advise and consent of the Senate." *Com. of Pa., Dep't of Pub. Welfare v. U.S. Dep't of Health & Human Servs.*, 80 F.3d 796, 801 (3d Cir. 1996) (citing *Morrison v. Olson,* 487 U.S. 654, 670 (1988)).

A cabinet-level head of an executive agency, such as the Attorney General of the United States, is "an office requiring Presidential appointment and Senate confirmation—known as a 'PAS' office[.]" *SW Gen.,* 137 S. Ct. at 934; *see* 28 U.S.C. §

503 ("The President shall appoint, by and with the advice and consent of the Senate, an Attorney General of the United States. The Attorney General is the head of the Department of Justice.").

Even Congress may not circumvent the Presidential nomination and advice and consent requirements for principal Officers. "Only the President, with the advice and consent of the Senate, can appoint a principal officer[.]" *Lucia*, 138 S. Ct. at 2051 n.3. Indeed, "the Appointments Clause of Article II is more than a matter of 'etiquette or protocol'; it is among the significant structural safeguards of the constitutional scheme." *Edmond v. United States,* 520 U.S. 651, 659 (1997).

Violations of the Appointments Clause are

> "structural," because of its purpose to prevent encroachment of one branch on another and to preserve the Constitution's structural integrity…. [T]he term "structural" [is] for a set of errors for which no direct injury is necessary—such as a criminal defendant's indictment by a grand jury chosen in a racially or sexually discriminatory manner.

Landry v. F.D.I.C., 204 F.3d 1125, 1130-31 (D.C. Cir. 2000) (citing, *inter alia, Freytag,* 501 U.S. at 878-79 and *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 (1995)). In other words, "a party is not required to show that he has received less favorable treatment than he would have if the agency were lawfully constituted. In essence, the prophylactic, structural nature of the separation of powers justifies permitting claims beyond those where a specific harm ... can be identified." *Collins v. Mnuchin*, 896 F.3d 640, 654 (5th Cir. 2018) (cleaned up). As the D.C. Circuit has succinctly stated: "[f]or Appointments Clause violations, demand for a clear causal link to a party's harm will likely make the Clause no wall at all." *Landry*, 204 F.3d at 1131.

2. Whitaker's tenure as the Acting Attorney General of the United States violated the Appointments Clause.

Regardless of the statutory scheme to fill a vacancy, an Officer of the United States remains subject to the Appointments Clause. *See Lucia*, 138 S. Ct. at 2051 ("[t]he Appointments Clause prescribes the *exclusive* means of appointing 'Officers.'") (emphasis added). Moreover, the Appointments Clause expressly restricts the unauthorized exercise of tremendous powers of a principal officer by requiring both the executive and legislative branches of government to agree on who may wield such powers. *See Lucia*, 138 S. Ct. at 2051 n.3 ("[o]nly the President, with the advice and consent of the Senate, can appoint a principal officer[.]"). To be clear, "the Appointments Clause forbids the President to appoint principal officers without the advice and consent of the Senate." *SW Gen., Inc.*, 137 S. Ct. at 946 (Thomas, *J.*, concurring).

"The principle of separation of powers is embedded in the Appointments Clause." *Freytag*, 501 U.S. at 882. "The principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the documents that they drafted in Philadelphia in the summer of 1787." *I.N.S. v. Chadha*, 462 U.S. 919, 946 (1983) (cleaned up). "The leading Framers of our Constitution viewed the principle of separation of powers as the central guarantee of a just government." *Freytag*, 501 U.S. at 870. The Constitution demands that the extraordinary powers afforded to an individual in a PAS office be subject to safeguards afforded by the doctrine of Separation of Powers and commanded by the Appointments Clause.

> Granting the President unilateral power to fill vacancies in high offices might contribute to more efficient Government. But the Appointments Clause is not an empty formality. Although the Framers recognized the potential value of leaving the selection of officers to "one man of discernment" rather than to a fractious, multimember body, see THE FEDERALIST NO. 76, p. 510 (J. Cooke ed., 1961), they also recognized the serious risk for abuse and corruption posed by permitting one person to fill every office in the Government, see *id.,* at 513; 3 J. Story, Commentaries on the Constitution of the United States § 1524, p. 376 (1833).

SW Gen., Inc., 137 S. Ct. at 948 (Thomas, *J.*, concurring).

Thus, giving an individual the full powers of a PAS office required to be exercised only by a duly appointed principal officer, albeit temporarily, violates a central and structural requirement of the Constitution. No matter what statutory scheme for filling a vacancy controls, the Appointments Clause may not be disregarded. Temporary or not, a grant of the powers and duties of a principal officer is an appointment:

> When 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. Around the time of the framing, the verb "appoint" meant "[t]o establish anything by decree," 1 S. Johnson, A Dictionary of the English Language (def. 3) (6th ed. 1785); T. Sheridan, A Complete Dictionary of the English Language (To Appoint) (6th ed. 1796), or "[t]o allot, assign, or designate," 1 N. Webster, An American Dictionary of the English Language (def. 3) (1828). 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.

SW Gen., Inc., 137 S. Ct. at 946 (Thomas, *J.*, concurring) (alterations in original). Such clearly applies to President Trump directing/appointing Whitaker to serve as the Acting Attorney General.

Even considering the FVRA's default time limitation of 210 days for the temporary fulfillment of an office by an acting officer, 5 U.S.C. § 3346(a)(1), appointment of an individual to any PAS position without the required advice and consent of the Senate violates the Constitution. The Appointments Clause endures, the fact that an individual is "appointed 'temporarily' to serve as *acting* [officer] does not change the analysis. I do not think the structural protections of the Appointments Clause can be avoided based on such trivial distinctions." *SW Gen., Inc.*, 137 S. Ct. at 952 (Thomas, *J.*, concurring). Thus, even Whitaker's temporary appointment as "Acting" Attorney General causes the Appointments Clause to come to bear.

Ignoring the Appointments Clause invites manipulation and must be fastidiously guarded against. For example, the FVRA allows for the acting officer to continue to serve upon the nomination of an individual submitted to the Senate. 5 U.S.C. § 3346(a)(2). Then, the FVRA allows the acting officer to continue in the office for another "210 days after the date of such rejection, withdrawal, or return." 5 U.S.C. § 3346(b)(1). And yet again, the FVRA allows up to another "210 days after the second nomination is rejected, withdrawn, or returned." 5 U.S.C. § 3346(b)(2)(B).

Ultimately, the FVRA would allow for an acting officer to remain in a PAS office for 630 days plus the sum of the days that two rejected nominees' submissions were pending in the Senate—potentially the vast majority, if not entirety, of a President's four-year term. This would be a gross violation of the Constitution by way of circumventing the structural requirements of the Appointments Clause.

Furthermore, this reveals the importance of the triggering event of the FVRA, in that its applicability hinges on a principal officer's death, resignation, or inability to perform. To allow a President to appoint an acting principal officer without advice and consent of the Senate to a vacancy that the President created through terminating a constitutionally appointed principal officer would give every President *carte blanche* authority to disregard the Appointments Clause.

Simply stated, the Constitution does not tolerate what is prohibited through the front door to be permitted through the back.

But that is exactly what has happened in this case. President Trump fired Attorney General Sessions and "temporarily" appointed Whitaker to fill the role of Attorney General, all the while (either by inadvertence or design) avoiding the Appointments Clause's requirement of Senate advice and consent. Such is error of the greatest constitutional magnitude threatening the bedrock constitutional principles that this country was built upon. It must be corrected by this Court.

Accordingly, this Court should grant the petition and address the legality of Whitaker's tenure as Acting Attorney General.

III. THIS CASE PRESENTS A GOOD VEHICLE.

This case squarely presents both questions as Whitaker's tenure as Acting Attorney General was contested at both the trial level and before the Court of Appeals, and the applicability of the President's social media to Rule 52(b)'s plan error standard was raised before the Court of Appeals.

As to the first question presented, this case presents an ideal vehicle for the Court to consider the intersection of the President's (and other governmental officials

as well) use of now ubiquitous social media and contemporaneous-objection requirement.

As to the second question presented, the Department of Justice has never been headed by an individual who was not appointed by the President and confirmed by the Senate (specifically for a position in the Department of Justice and in the line of succession of the Attorney General Succession Act). Indeed, "the lack of historical precedent" is "[p]erhaps the most telling indication of [a] severe constitutional problem." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 505 (2010) (citation omitted). Thus, this case presents an event of historical significance the constitutionality of which this Court should pass upon.

CONCLUSION

For the foregoing reasons, the Petitioner prays that this Court grant his Petition for a Writ of Certiorari.

Respectfully submitted,

By: _____

Joseph A. DiRuzzo, III
Counsel of Record
DIRUZZO & COMPANY
401 East Las Olas Blvd., Suite 1400
Ft. Lauderdale, Florida 33301
Office: (954) 615-1676
Fax: (954) 827-0340
Email: jd@diruzzolaw.com

Dated: Sept. 19, 2019