No. 21- _____

IN THE

Supreme Court of the United States

FENDI BROOKS,
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

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QUESTIONS PRESENTED

This case presents important questions of great constitutional magnitude regarding longstanding federal statutory law, to wit:

1. When colorably alleging a structural, constitutional violation, specifically, that an individual illegally exercised the powers of the office of the Attorney General in violation of the Appointments Clause, must a litigant show that he/she was prejudiced by such illegally acting individual?

2. When colorably alleging a that an individual illegally exercised the powers of the office of the Attorney General in violation of the statutory scheme prescribing the precise succession mechanisms, *viz.*, the Federal Vacancies Reform Act, and the Attorney General Succession Act, must a litigant show that he/she was prejudiced by such illegally acting individual?

PARTIES TO THE PROCEEDING

The Parties to the proceeding are the Petitioner, Fendi Brooks, and the United States of America.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Fendi Brooks, 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. 1a. The opinion of the United States Court of Appeals for the Third Circuit is unpublished and reproduced in the Appendix herein at App. 3a.

The transcript of the omnibus hearing held on March 7, 2019 is reproduced in the Appendix herein at App. 14a.

During the hearing, the District Court entered its order from the bench denying Petitioner's motion to dismiss based on the asserted violation of the Appointments Clause and the federal statutory scheme governing succession for the office of Attorney General. App. 62a.

JURISDICTION

The opinion of the United States Court of Appeals for the Third Circuit affirming the District Court's order was entered on December 29, 2020. The present petition is being filed by postmark on or before May 28, 2021. Supreme Court Rules 13.1, 13.3, 29.2, and 30.1; Supreme Court Order, March 19, 2020, Order List: 589 U.S. ("the deadline to file any petition for a writ of certiorari due on or after the date of this order is extended to 150 days from the date of the lower court judgment…."). This Court properly has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

The Federal Vacancies Reform Act of 1998 (the "FVRA"), 5 U.S.C. §§ 3345-3349, provides the default mechanism for the filling of vacancies within the executive branch of offices with appointments "required to be made by the President, by and with the advice and consent of the Senate[.]" 5 U.S.C. § 3348(b). However, this default mechanism is excepted, as relevant here, when Congress has provided for a more specific manner of temporarily authorizing an acting official to perform the functions and duties, i.e., when "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). Congress explicitly enacted a self-enforcing deterrent to violations of the FVRA by declaring that actions taken in violation of the FVRA "shall have no force or effect" and precluding the ability to subsequently uphold any such actions, which "may not be ratified" later. 5 U.S.C. § 3348(d)(1) & (2).

In contrast to the generally applicable FVRA, a different statute specifically governs succession upon vacancy of the office of Attorney General, 28 U.S.C. § 508 (the "Attorney General Succession Act" or the "AGSA")[1], which provides the following:

> 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

[1] Unlike many other succession provisions in the United States Code, *see, e.g.*, 38 U.S.C. § 304 (Deputy Secretary of Veterans Affairs); 40 U.S.C. § 302(b) (Deputy Administrator of General Services); 42 U.S.C. § 902(b)(4) (Deputy Commissioner of Social Security) (each naming the respective officer "Acting" head of the agency "unless the President designates another officer"), the AGSA is mandatory, restricting the President's discretion to designate individuals to assume the role as acting Attorney General. Thus, the AGSA provides the sole, specific statutory scheme pertaining to a vacancy in the office of the Attorney General of the United States.

> that office, and for the purpose of section 3345 of title 5 the Deputy Attorney General is the first assistant to the Attorney General.

28 U.S.C. § 508(a). The statute additionally requires that,

> [w]hen 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(b).

Federal law empowers exclusively the Attorney General to exercise a tremendous amount of the coercive power of the state. *See* 28 U.S.C. §§ 501-530d (Chapter 31 of Title 28: "The Attorney General"). Along with such powers come corresponding immense duties, including 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 (emphasis added).

The Attorney General 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 (emphasis added).

Regardless of any statutory scheme, however, "[t]he 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.

STATEMENT

This Petition arises from a direct criminal appeal of Petitioner's conviction as the prosecution against her occurred when the Department of Justice (the "DOJ") was headed by the purported acting Attorney General, Matthew G. Whitaker. This case raises serious constitutional and statutory questions as President Trump fired Attorney General Jefferson B. Sessions, III, and named Matthew G. Whitaker as acting Attorney General.

Petitioner was charged with, *inter alia*, conspiracy to possess with intent to distribute cocaine. App. 4a. The District Court of the Virgin Islands had jurisdiction pursuant to 48 U.S.C. § 1612(a) and 28 U.S.C. § 1331.

Petitioner filed a motion to dismiss based on the violation of the Appointments Clause with the appointment of Whitaker to acting Attorney General, which the District Court denied from the bench, without written order or explanation of its reasoning. App. 62a. Petitioner pled guilty to violating 21 U.S.C. §§ 846 and 841(b)(1)(A)(ii)(II), specifically reserved the right to appeal the denial of her motions to suppress and dismiss in the plea agreement, and timely appealed.

On December 29, 2020, the Court of Appeals issued a non-precedential opinion in the instant case affirming the District Court's denial of the motion to dismiss. App. 3a. The Court issued the judgment the same day. App. 1a.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI IS WARRANTED TO ADDRESS WHETHER PREJUDICE IS REQUIRED TO BE SHOWN BY A PARTY WHEN A GOVERNMENTAL DEPARTMENT WAS AFFLICTED BY A STRUCTURAL, CONSTITUTIONAL VIOLATION WHILE TAKING ACTIONS THAT DETERMINED THAT PARTY'S RIGHTS.

In the decision below, the Third Circuit explicitly declined to address whether the appointment of Whitaker violated either the Constitution or federal statute ("[e]ven assuming that Whitaker's appointment was invalid — which is a question we need not reach"), but affirmed the district court's denial of Petitioner's motion to dismiss based on the alleged requirement that "Brooks must show that Whitaker's tenure somehow affected her proceeding and prejudiced her in some way." App. 7a (cleaned up).

This case presents questions of law exceptionally similar to those presented in a case now pending decision before this Court. Specifically, in the consolidated case of *Collins, et al., v. Mnuchin, et al.*, Nos. 19-422 & 19-563, two of the four questions presented are as follows:

1. Whether FHFA's structure violates the separation of powers; and

2. Whether the courts must strike down the statutory provisions that make FHFA independent and set aside a final agency action that FHFA took when it was unconstitutionally structured.

Id. (Brief for *Collins* petitioners at i).

Here, the question presented is whether, assuming the appointment of Whitaker as acting Attorney General violated the Constitution, *viz.*, the Appointments Clause, and/or federal statute, *viz.*, the FVRA and/or the AGSA, courts must set aside the departmental actions taken by the DOJ during the illegal tenure

of the acting Attorney General. The answer to this question is of the utmost importance to our constitutional system of law for reasons described in *Collins* regarding a different alleged structural violation of the Constitution:

> Amicus's position is that cases like this one should be decided on a "sliding scale," Amicus Br. 40, with the extent of the officer's powers and the scope of the President's removal authority providing the grounds for ad hoc, case-by-case decisions about whether a particular removal restriction is constitutional. That approach would give Congress almost no guidance in a context in which it is essential to establish "high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict."

Reply brief for *Collins* petitioners at 2 (quoting *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 (1995)).

And the issue *sub judice* hinges precisely on the same considerations presented in *Collins*, namely, whether proof of prejudice is required for courts to remedy a violation of the separation of powers requirement:

> Defendants tacitly acknowledge that this Court has *never* found that a violation of the separation of powers was harmless error. Indeed, the Court has routinely awarded meaningful remedies when the argument for harmless error was *stronger* than it is here. *See, e.g.*, *Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018). Article II's Vesting Clause and the Take Care Clause guarantee, among other things, the President's accountability for exercises of Executive Power. A violation of those structural provisions is a structural error categorically excluded from the harmless error rule.
>
> But even if the Court disagrees, in a separation of powers case harmless error should not be found if there is "any uncertainty at all" about the consequences of the constitutional violation. *See* Plfs.' Br. 71 (quoting *Sugar Cane Growers Co-op v. Veneman*, 289 F.3d 89, 96 (D.C. Cir. 2002)).

Id. at 4 (emphasis in original).

To be sure, "as the central guarantee of a just government" in the eyes of the Founders, "the principle of separation of powers is embedded in the Appointments Clause." *Freytag v. Comm'r,* 501 U.S. 868, 882 (1991).

Thus, this Court's decision in *Collins* will directly inform the proper decision in this case.

II. THE DECISION BELOW IS WRONG.

This Court has long recognized that the steadfast safeguards of the Appointments Clause were enacted with full appreciation that they would sacrifice efficiency because "[t]he Constitution is not a road map for maximally efficient government, but a system of 'carefully crafted restraints' designed to 'protect the people from the improvident exercise of power.'" *N.L.R.B. v. Noel Canning*, 573 U.S. 513, 601 (2014) (Scalia, *J.*, concurring) (quoting *I.N.S. v. Chadha*, 462 U.S. 919, 957 (1983)).

Accordingly, no one, neither the President, nor Congress, can discard the Constitutional requirements as "[t]he Appointments Clause prescribes the *exclusive means of appointing 'Officers.'" Lucia*, 138 S. Ct. at 2051 (emphasis added). And the Constitution unequivocally requires the Senate to confirm principal officers, as noted by Justice Scalia:

> The troublesome need to do so is not a bug to be fixed by this Court, but a calculated feature of the constitutional framework. As we have recognized, while the Constitution's government-structuring provisions can seem "clumsy" and "inefficient," they reflect "hard choices ... consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked."

Noel Canning, 134 S. Ct., at 2610 (Scalia, *J.*, concurring) (quoting *Chadha*, 462 U.S. at 959).

> Violations of the Appointments Clause are quintessentially
>
> > "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*, 514 U.S. at 239). In other words, as explained by the court of appeals in a different recent decision:

> An individual litigant need not show direct harm or prejudice caused by an Appointments Clause violation. As the D.C. Circuit has noted, "it will often be difficult or impossible for someone subject to a wrongly designed scheme[, including an Appointments Clause violation,] to show that the design—the structure—played a causal role in his loss." But this difficulty to show direct harm does not diminish the important individual liberty safeguarded by the Appointments Clause. Such harm is presumed.

Cirko on behalf of Cirko v. Comm'r of Soc. Sec., 948 F.3d 148, 154 (3d Cir. 2020) (quoting *Landy*, *supra*, at 1131). As the *Landry* Court observed, "[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." 204 F.3d at 1131.

The Third Circuit's holding and recognition in *Cirko* is undoubtedly correct, and reflects the principles that this Court has artfully articulated with respect to the vital importance of the Constitution's structural safeguards:

> "The Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty." Their solution to governmental power and its perils was simple: divide it. To

> prevent the "gradual concentration" of power in the same hands, they enabled "[a]mbition ... to counteract ambition" at every turn. The Federalist No. 51, p. 349 (J. Cooke ed. 1961) (J. Madison). At the highest level, they "split the atom of sovereignty" itself into one Federal Government and the States. They then divided the "powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial."

Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2202 (2020) (cleaned up).

However, the court below held that, "[b]ecause Brooks has failed to show how Whitaker's appointment affected her, we hold that the District Court did not err in denying Brooks's motion to dismiss." App. 8a.

Requiring proof of prejudice fundamentally undermines the Constitution's structural protections and directly conflicts with this Court's jurisprudence, as explicitly reaffirmed just last year:

> Our precedents say otherwise. We have held that a litigant challenging governmental action as void on the basis of the separation of powers is not required to prove that the Government's course of conduct would have been different in a "counterfactual world" in which the Government had acted with constitutional authority.

Seila, 140 S. Ct. at 2196 (citing *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 512 n. 12 (2010)).

Accordingly, the decision below is incompatible with both longstanding and recent extant precedent of this Court that informs our understanding of the Constitution's central safeguard of separation of powers protected by the Appointments Clause. The decision below allows the illegal appointment of an individual to act as the Attorney General of the United States, a principal officer, in

direct contravention of the Constitution and the federal statutory scheme designed to protect it. The result is that the President may violate the Appointments Clause with impunity – free of any consequences – so long as the illegally acting Officer does not directly take a specific action that affects the rights of a specific person; or, at least to the extent that evidence of such is unattainable by that person.

Such cannot be the proper function of the Appointments Clause; when the Government violates the Constitution, its illegal actions cannot be upheld. Likewise, assuming Whitaker's appointment violated the FVRA and the AGSA, federal law expressly prevents such violation from being "ratified." 5 U.S.C. § 3348(d)(2).

This Court should grant the writ to correct the decision below, and remand for consideration of whether Whitaker illegally held the office of Attorney General and, if so, determination of the appropriate remedy.

III. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT AND THIS CASE PRESENTS A GOOD VEHICLE.

In the decision below, the Court of Appeals "decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). Indeed, in rendering a decision incompatible with well-settled, oft repeated, and recently reaffirmed decisions of this Court, the decision below "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power[.]" Sup. Ct. R. 10(a).

Additionally, this case squarely presents the questions as they were properly preserved and addressed by the trial and appellate courts. Consequently, this case is

an ideal vehicle for the Court to consider the central protection of the structural integrity of our Constitution, the separation of powers it promises, and the unflinching requirements mandated by the Appointments Clause.

And, as discussed, *supra*, determination of this case will be directly informed by this Court's decision in *Collins*. Therefore, the Court should grant the *writ* so that, should this Court hold in *Collins* that a lack of prejudice would not present a bar to judicial remedy of a violation of the Constitution's separations of powers requirement, this Court can remand this case for the Third Circuit to determine the merits of Petitioner's claim and the appropriate remedy.

CONCLUSION

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

Respectfully submitted,

By: /s/ Joseph A. DiRuzzo, III Digitally signed by /s/ Joseph A. DiRuzzo, III Date: 2021.04.06 16:36:40 -04'00'

Dated: April 6, 2021

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