No._____

IN THE SUPREME COURT OF THE UNITED STATES

MARY ARAGON and GERMAN RAMIREZ-GONZALEZ,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for A Writ of *Certiorari* to The United States Court of Appeals for the Ninth Circuit

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JOINT PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In United States v. Eaton, 169 U.S. 331, 343 (1898), the Court held that a President cannot appoint a person to be a Principal Officer of the Executive Branch without concomitant Senate confirmation, unless there is an "exigency" that requires the person to serve in the position for "a limited time . . . under special and temporary conditions" (emphasis added). None of those exceptions, however, applied to the appointment of Matthew Whitaker as Acting Attorney General of the United States in November 2018, a position that he then held for more than three months.

The question presented is as follows:

Did the Ninth Circuit's disposition of Petitioners' claim under Article II's Appointments Clause – namely, that Whitaker's unconstitutional appointment tainted the government's having secured the third superseding indictment in Petitioners' underlying case — contravene Eaton's longstanding rule, particularly considering that the government has never represented that Whitaker did not directly or indirectly impact the United States Attorney's Office for the Southern District of California's decision to seek that indictment in November 2018?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

LIST OF DIRECTLY RELATED PROCEEDINGS

1. United States District Court for the Southern District of California, United States of America v. Mambasse Patara, et al., No. 3:18-cr-02342-BTM. The district court entered judgment regarding Petitioner German Ramirez-Gonzalez on March 20, 2019. It entered judgment concerning Petitioner Mary Aragon on June 6, 2019.

2. United States Court of Appeals for the Ninth Circuit, United States of America v. German Ramirez-Gonzalez, et al., Nos. 19-50096 & 19-50178. The Ninth Circuit entered judgment on June 10, 2021.

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Petitioners Mary Aragon and German Ramirez-Gonzalez (collectively, "Petitioners") respectfully request that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered on June 10, 2021.[1]

OPINION BELOW

A three-judge panel of the Ninth Circuit originally issued an unpublished memorandum disposition and entered judgment on June 10, 2021, affirming

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[1] Speaking about themselves individually, Petitioners will refer to, respectively, "Aragon" and "Ramirez-Gonzalez."

Petitioners' convictions.[2] App. 1-2.

JURISDICTION

The Ninth Circuit entered judgment in this case on June 10, 2021. App. 1-2. This Court has jurisdiction under 28 U.S.C. § 1254(1). See also S. Ct. R. 13.3, 30.1; S. Ct. Miscellaneous Order, July 19, 2021.

CONSTITUTIONAL PROVISION INVOLVED

Article II, Section 2, Clause 2 of the United States Constitution reads as follows: "[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the 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."

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[2] A copy of the memorandum disposition is included in the Appendix. See App. 1-2 (United States v. Ramirez-Gonzalez, 849 Fed. App'x 703 (9th Cir. 2021 (unpublished)).

STATEMENT OF THE CASE

Petitioners draw the following facts from the district court record, including hearing and trial transcripts. Although Petitioners maintain their innocence on the counts on which the jury convicted them, they will – mindful of Jackson v. Virginia, 443 U.S. 307, 318-19 (1979) – present pertinent facts in the light most favorable to the government.

A. During an Encounter with a Border Patrol Agent in 2012, Ramirez-Gonzalez Ostensibly Admits His Alienage

In a nutshell, Ramirez-Gonzalez did not remain in the United States continuously after first arriving here from Mexico. Instead, the evidentiary record reflects that the Department of Homeland Security reinstated a prior removal order concerning Ramirez-Gonzalez on December 30, 2017, therefore authorizing it to remove Ramirez-Gonzalez once again from the United States. App. 126, 182. And during an encounter with a Border Patrol agent on April 30, 2012, Ramirez-Gonzalez initialed and signed a document that stated, among other things, "I admit that I am in the United States illegally, and I do not believe that I would be in danger if returned to my country." App. 128-130.

B. Ramirez-Gonzalez Meets Mambasse Patara and Develops a Multi-Year Friendship with Him

A few years ago, Mambasse Patara, who was then employed as a police

officer with the Los Angeles Police Department, was doing some maintenance on his house's roof in Fontana, California. Ramirez-Gonzalez happened to be driving through that area, and when he noticed Patara, he parked his truck and – being entrepreneurial like many small business owners – called out to Patara to find out whether Patara wanted help from an experienced roofer. App. 147-148.

Patara accepted Ramirez-Gonzalez offer and – quite pleased with Ramirez-Gonzalez's work – later hired Ramirez-Gonzalez to do other projects on Patara's property. He also served as a reference for prospective jobs that awaited Ramirez-Gonzalez. App. 148-149. The two men soon developed an acquaintanceship and began to socialize periodically outside of their initial homeowner-contractor relationship. App. 149-151.

Ramirez-Gonzalez apparently never adjusted his immigration status, and at all times when he resided in the United States, he was present here while undocumented. See, e.g., App. 126-130, 176-182. But it does not appear that Patara was aware of Ramirez-Gonzalez's unlawful presence in the United States. App. 174.

C. Petitioners Apparently Arrange to Bring Fermin Lopez, a Mexican National, Into the United States

Construing evidence regarding the operative events of this case in the

government's favor, Petitioners ostensibly were involved in a scheme to cross Fermin Lopez, a Mexican national who at times falsely claimed to be Ramirez-Gonzalez's uncle,[3] into the United States without legal documentation. The scheme's genesis occurred when Petitioners and Lopez supposedly dined together a restaurant in Tijuana in early-March 2018. There, according to Lopez's trial testimony, the three persons discussed Ramirez-Gonzalez's supposed need to add another worker (presumably Lopez) to his contracting business for a project a "sheriff" desired and, perhaps, a plan to effectuate that by later crossing Lopez into the United States – although Lopez provided contradictory testimony about the latter topic.[4] App. 89-93, 112-114.

Consequently, once again according to Lopez's trial testimony, on April 21, 2018, following additional group planning meetings in Tijuana, Aragon allegedly

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[3] Lopez's account – involving three statements and trial testimony that were both internally and externally inconsistent – was intrinsically non-credible. Indeed, Lopez admitted during his direct examination at trial that he had made false statements to an Assistant U.S. Attorney during an interrogation and earlier to a Border Patrol agent about being related to Ramirez-Gonzalez. And he had also testified at a deposition about never wanting to reenter the United States again unlawfully – following which he did attempt to do so in late-January 2019. App. 101-111. But under Jackson, Petitioners nevertheless endeavor to construe it in the light most favorable to the government.

[4] Patara wired money to Ramirez-Gonzalez in Mexico on March 14, 2018, because he thought Ramirez-Gonzalez needed a loan for contracting-related projects there. App. 152-155.

drove Ramirez-Gonzalez and Lopez eastward in Mexico from Tijuana to a predetermined location in Tecate called Nona's Chula Vista. Once there, Ramirez-Gonzalez and Lopez proceeded to the border fence, which they "jumped." App. 92.

Aragon then reentered the United States by driving through the Tecate port of entry, and she drove to a location north of the border, approximately 800-1000 meters (a little more than a half-mile) from the Golden Acorn Casino on State Route 80, to where Ramirez-Gonzalez and Lopez had walked on foot for 4-6 hours. App. 92-94, 117-119. Ramirez-Gonzalez supposedly requested the pickup after calling Aragon on her cell phone at approximately 11:00 p.m. App. 94.

From that meeting location, Aragon next drove Ramirez-Gonzalez and Lopez to a hotel in El Centro, California. App. 93-94. The three persons apparently stayed overnight at the hotel on April 21 and 22, 2018. App. 94-95.

D. Patara and His Wife Drive Down to El Centro to Meet Petitioners and Lopez

Apparently thinking that he and his wife, Minerva Hernandez, would be meeting Petitioners at the Golden Acorn Casino in San Diego County to gamble,

Patara and Hernandez drove from Fontana to El Centro, California, on April 23, 2018. During the drive south, Patara and Ramirez-Gonzalez apparently exchanged messages via the WhatsApp cell phone app regarding directions to a McDonald's restaurant in El Centro. App. 131-137, 156-160.

Once there, Patara and Hernandez parked at the McDonald's restaurant, sometime after Petitioners and Lopez had already arrived. Rather than enter the restaurant, Patara and Hernandez stayed in the parking lot, where they spoke to – respectively – Ramirez-Gonzalez and Aragon. Lopez was "smoking a cigarette" in the McDonald's parking lot, and therefore could not hear the conversations. App. 96-97.

Supplying the only evidence regarding what supposedly transpired during that meeting, Lopez suggested in his trial testimony that the group had hatched a plan that ultimately would result in Lopez's being transported past a fixed Border Patrol checkpoint in Pine Valley, within miles of the Golden Acorn Casino. For instance, after the parking lot confabs at the McDonald's had concluded, Ramirez-Gonzalez told Lopez to "'[g]et in'" the car that Patara was driving. App. 97. Lopez then supposedly heard some vague talk about a "checkpoint" but could not recall the specifics. Id.

Patara next drove Ramirez-Gonzalez and Lopez to the Golden Acorn

Casino's parking lot, leaving at approximately 10:34 p.m. App. 122. Simultaneously, Hernandez entered a car that Aragon drove, and it departed from the McDonald's parking lot. App. 98.

During the drive, Hernandez at 10:52 p.m. texted Patara, "Be careful. The border patrol just passed." App. 139. Ramirez-Gonzalez called Aragon at 10:53 p.m., and spoke briefly with her. App. 140. Hernandez later texted Patara ("We passed the Golden Casino") at 11:28 p.m. App. 140-141.

When Patara's car arrived at the casino at 11:35 p.m., he parked it in the casino's lot. App. 138. Ramirez-Gonzalez instructed Lopez to remain in the car. Ramirez-Gonzalez and Patara then entered the casino and remained there for approximately 18 minutes. App. 99, 142.

As the men returned to the car at 11:53 p.m, one of them was having a cell phone conversation in English that Lopez could not understand. Lopez did not know anything about what had occurred inside the casino involving Ramirez-Gonzalez and Patara, although other evidence indicates that Ramirez-Gonzalez received a call from Aragon at 11:44 p.m. that lasted for approximately nine minutes. App. 99, 116, 142.

E. Aragon Drives Unchecked Through the Pine Valley Checkpoint

At approximately 11:43 p.m. that evening, Aragon drove with Hernandez on

the westward portion of the I-8 highway toward the Pine Valley checkpoint, which Border Patrol agents were then operating. An agent observed Aragon and waived the car through without asking any questions. Shortly thereafter, Aragon used her cell phone to call Ramirez-Gonzalez, and she then spoke with him for approximately nine minutes.[5] App. 80-88, 120-121, 125.

F. Patara Drives Ramirez-Gonzalez and Lopez to the Pine Valley Checkpoint, But Border Patrol Agents Stop and Later Arrest the Three Men

Viewing the evidence in the light most favorable to the government, Ramirez-Gonzalez apparently construed the phone call to signal that he, Patara, and Lopez should drive westward from the Golden Acorn Casino toward the Pine Valley checkpoint. But the government did not adduce any evidence regarding what Ramirez-Gonzalez and Aragon actually discussed.

Consequently, at 11:53 p.m., the three men left the casino, and entered Patara's car. Patara then drove westward on the I-8. App. 142-144. Aragon and Hernandez apparently arrived home in the Fontana area at 3:38 a.m on April 24, 2018. App. 123-124.

Eventually, Patara's vehicle arrived at the Pine Valley checkpoint at

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[5] Shortly before at 11:40 p.m. Aragon called Ramirez-Gonzalez and spoke with him for 28 seconds. App. 125.

approximately 12:10 a.m. on April 24, 2018. Unlike Aragon, however, a Border Patrol agent did not waive Patara through. Instead, he directed Patara to stop at the primary inspection area, and Patara so complied. App. 53-58, 121-123. Lopez testified that Patara did not appear nervous. App. 115.

After a Border Patrol agent, Francisco Gamez, manning the primary area approached the vehicle, Patara rolled down the driver's side window and immediately identified himself as an off-duty officer with the Los Angeles Police Department. Patara provided his employment-related identification card to the agent, and he also announced – prudently, considering that he is an African-American immigrant, originally from Togo – that he was carrying his service revolver. App. 42, 162-172.

Agent Gamez asked Patara for his citizenship. Patara accurately responded that he is a U.S. citizen. Seeing Ramirez-Gonzalez seated in the vehicle's passenger seat, Agent Gamez posed the same question to Patara's acquaintance. Ramirez-Gonzalez replied incorrectly that he is a U.S. citizen. Observing Ramirez-Gonzalez's demeanor, Agent Gamez supposedly noticed that Ramirez-Gonzalez did not make eye contact with him and appeared to be uncomfortable. App. 42, 59, 65.

Lopez, according to Agent Gamez, was then sleeping in the vehicle's

backseat.[6] After Patara apparently volunteered that Lopez is a U.S. citizen, he awoke Lopez, Agent Gamez then also asked Lopez for citizenship information. Lopez, supposedly per earlier instructions from Ramirez-Gonzalez, eventually incorrectly replied in Spanish that he is a U.S. citizen. App. 59-61, 100.

Ostensibly unconvinced by the information that the three men gave him – including Patara's stating that the three men had just been at the Golden Acorn Casino – Agent Gamez gestured for Patara to drive the vehicle to the checkpoint's secondary inspection area. Patara apparently complied immediately. App. 62-63, 66.

There, Ramirez-Gonzalez eventually acknowledged during further questioning by Agent Gamez that he did not have any documentation permitting him to be in the United States. App. 64-65. Ramirez-Gonzalez also stated that he had come down to the Golden Acorn Casino to "celebrate their wives' birthday [sic]." Patara – who voluntarily surrendered his service revolver and once again produced his police-issued identification – also told another Border Patrol agent (Angel Moreno) that he, Ramirez-Gonzalez (a "friend" for "about five years"), and Lopez had just left the Golden Acorn Casino after driving down from the Los Angeles area to celebrate their wives' birthdays. App. 70-76.

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[6] Contrarily, Lopez testified that he was indeed awake. App. 99-100.

Suspecting that Patara had transported Ramirez-Gonzalez and Lopez within the United States knowing they were not U.S. citizens with permission to be here, Border Patrol agents arrested Patara. App. 65, 68. Agents also arrested Ramirez-Gonzalez and Lopez, after conducting fingerprints checks, so that they could be detained as prospective material witnesses. App. 67, 69, 77-78.

G. The Government Initially Deems Ramirez-Gonzalez as Exclusively a Material Witness But Later Obtains His Indictment for Allegedly Transporting Lopez, While the Government Lacked a Senate-Confirmed Attorney General and the United States Attorney's Office for the Southern District of California Did Not Have a Senate-Confirmed United States Attorney

After filing a complaint in the United States District Court for the Southern District of California against Patara on April 25, 2018, charging him with violating 8 U.S.C. § 1324(a)(1)(A)(ii) by supposedly having transported Ramirez-Gonzalez and Lopez within the United States (App. 34-37), the government later secured an indictment against Patara on May 9, 2018. The indictment charged Patara with two transport counts, each under § 1324(a)(1)(A)(ii). App. 38-39.

Following further investigation, however, the government's theory changed.

It secured a superseding indictment from a grand jury on July 5, 2018, charging Patara and Ramirez-Gonzalez under § 1324(a)(1)(A)(ii) with having transported Lopez. App. 40.

And then the government shifted its theory a second time. It obtained an second superseding indictment on October 4, 2018. There, the grand jury charged Patara and Petitioners with having violated § 1324(a)(1)(A)(ii) by allegedly having transported Lopez. App. 41.

Finally, after those three attempts, the government settled on a fourth – and final – prosecutorial strategy. A grand jury returned a two-count third superseding indictment on November 15, 2018. In count one, it alleged that Patara and the Petitioners had violated § 1324(a)(1)(A)(ii) by supposedly having transported Lopez. But in count two, it somewhat remarkably contended that Ramirez-Gonzalez simultaneously was a transportee, charging Patara and Aragon under the same statutory provisions with transporting Ramirez-Gonzalez. App. 32-33.

As of November 15, 2018 – the date the grand jury returned the third superseding indictment – Matthew Whitaker was the Acting Attorney General of the United States. Before being appointed to that position on November 7, 2018, Whitaker was the Chief of Staff and Senior Counselor, a position that does not necessitate Senate confirmation, to the preceding Attorney General, Jefferson

Beauregard Sessions III. See, e.g., App. 5.

On that same day, Adam Braverman was the Acting United States Attorney for the Southern District of California. Sessions had appointed Braverman as Acting U.S. Attorney on November 17, 2017. See App. 4-5. After that period, the United States District Court for the Southern District of California appointed Braverman to a new interim tenure in that position on March 12, 2018. See App. 4, 5, 13. Thus, Braverman never received Senate confirmation, before leaving the position in January 2019, after the Senate confirmed Robert S. Brewer, Jr. as United States Attorney. Brewer soon thereafter took office on January 16, 2019. App. 5.

H. The District Court, Without Reaching a Key Constitutional Issue, Determines That Whitaker Was Legally Appointed as Acting Attorney General, and Braverman Received a Lawful Appointment from the District Court as Acting United States Attorney

Ramirez-Gonzalez moved to dismiss the third superseding indictment because of Whitaker's and Braverman's appointments-related taint, but the district court denied it in a written order entered on February 11, 2019. In a nutshell, the district court determined that Whitaker's serving as Acting Attorney General was valid under the Federal Vacancies Reform Act, notwithstanding his appointment did not comply with the Attorney General Succession Act. This is because, in the

district court's estimation, the Attorney General Succession Act established a permissible – but not mandatory – regime that a president could bypass and instead utilize the Federal Vacancies Reform Act's mechanisms. App. 6-12.

For this petition's purposes, what is most significant is the district court's avoiding the constitutional question – namely, whether the Federal Vacancies Reform Act is invalid as applied because Whitaker was not eligible to serve as a non-Senate-confirmed Principal Officer. App. 12-13. Instead, the district court determined that because Braverman's second appointment as Acting United States Attorney was valid, and he at least in theory had a constitutionally appointed person (then-Deputy Attorney General Rod Rosenstein) supervising him at Main DOJ, Whitaker did not taint the government's obtaining the third superseding indictment (or anything else that occurred).[7] App. 14-15.

I. The District Court Denies Petitioners' Rule 29 Motions

Following the government's case-in-chief, the government decided to rest. All three defendants then moved under Rule 29 of the Federal Rules of Criminal Procedure for judgments of acquittal. The district court, however, denied them.

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[7] The district court also reasoned that Braverman had independent statutory authorization under 28 U.S.C. § 547(1) to "prosecute all offenses against the United States." App. 14.

App. 48-49.

Quite significantly, the government noted that it was proceeding against Petitioners (principally, but not exclusively) under § 1324(a)(1)(A)(ii) based on an aiding-and-abetting theory. App. 45-47. In particular, for Ramirez-Gonzalez (who argued that he cannot be liable criminally because he was exclusively a passenger on April 23 and 24, 2018, see App. 43-45), the district court reasoned that Ramirez-Gonzalez's pre-April 24 conduct was not sufficient to result in a conviction on count 1. But it did determine that Lopez's testimony that Ramirez-Gonzalez had instructed him at the primary checkpoint on April 24 to claim U.S. citizenship falsely was sufficient – if the jury were to believe Lopez – to prove liability under an aiding-and-abetting theory.[8] App. 45-46.

Regarding Aragon, the district court determined – apparently without noting that all of Aragon's supposed conduct had occurred before April 24, 2018 – that evidence including Aragon's two phone calls with Ramirez-Gonzalez in the late-evening hours on April 23, 2018, was sufficient to support a conviction on both

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[8] The district court also determined that the jury could infer that Ramirez-Gonzalez aided and abetted the putative scheme by directing Lopez to enter Patara's car in the McDonald's parking lot in El Centro on April 23, 2018. App. 46.

counts. App. 48.

Following the close of all evidence, the three defendants renewed their Rule 29 motions, and the district court once again denied them. App. 50-51.

J. The Jury Acquits Patara, But Incongruously Convicts Petitioners

After the government rested, Patara decided to testify in his defense. Petitioners elected not to do so in theirs. App. 145-146.

Among other things, acknowledging that he had wired money to Ramirez-Gonzalez on March 14, 2018, while Ramirez-Gonzalez was then residing in Tijuana (see App. 89-93, 112-114, 152-155), Patara maintained that he did not know that Ramirez-Gonzalez was undocumented in the United States. App. 174. Patara further testified that he was unaware about Lopez's alienage, and did not know that Ramirez-Gonzalez and Lopez had crossed the U.S.-Mexico border into Tecate on April 21, 2018. App. 173, 175. Rather, Patara merely thought that he and Hernandez were meeting only Petitioners in El Centro, before proceeding to the Golden Acorn Casino to gamble. App. 159-160.

Perhaps sufficiently persuaded by Patara's testimony, during the seventh trial day, the jury returned a verdict on February 26, 2019, that acquitted Patara on both counts. But the jury convicted Ramirez-Gonzalez on count one (involving Lopez) and Aragon on both counts. App. 16-22.

K. The District Court Sentences Petitioners to Time Served

At a hearing on March 20, 2019, the district court sentenced Ramirez-Gonzalez to time already served in federal custody – 259 days. It also imposed a two-year period of supervised release. App. 23-25.

Unsurprisingly, Aragon's hearing on May 20, 2019, yielded a similar result. There, the district court sentenced Aragon to time served (126 days), and further imposed a two-year supervised release period. App. 27-29.

L. The Court of Appeals' Disposition

In a short unpublished memorandum disposition on April 8, 2021, a three-judge panel of the Ninth Circuit affirmed Petitioners' convictions and – except for three of the special supervised release conditions for Ramirez-Gonzalez – their sentences. App. 1-2. Particularly pertinent to the present petition, the panel determined that Whitaker's appointment as Acting Attorney General did not violate the Appointments Clause because – at least in its estimation – Braverman's having become Acting U.S. Attorney for the Southern District of California under 28 U.S.C. § 554(d) signified that someone in the United States Department of Justice had legal authority to seek the operative superseding indictment that charged Petitioners. Id.

The panel, however, did not address Petitioners' argument that Whitaker

nevertheless could have directly or indirectly influenced Braverman's decision making. Nor did it discuss Petitioners' having noted that the government could have – but, pointedly, did not in its answering brief in the Ninth Circuit – readily undercut this issue by certifying that Whitaker had not done anything as Acting Attorney General that impacted this case.

ARGUMENT

1. Simply put, Whitaker's appointment as Acting Attorney General without having been confirmed by the Senate – indeed, the Senate had not confirmed him between 2017 and 2018 even as an inferior officer within the Executive Branch – contravened the Court's longstanding precedents regarding the Appointments Clause, including United States v. Eaton, 169 U.S. 331 (1898). Considering that the government has never argued – in this case or, apparently any other – that the Attorney General is not a Principal Officer for that clause's purposes, therefore subject to mandatory Senate confirmation, its sole remaining argument is that Whitaker's tenure, which lasted more than three months, was too short to present constitutional problems. But that does not square with Eaton, which permitted such interim appointments without Senate confirmation only for exigent circumstances (see 169 U.S. at 343), something that plainly did not occur here. Certiorari is therefore warranted. See Sup. Ct. R. 10(c).

2. Although the Ninth Circuit attempted to duck the fundamental constitutional question that this petition presents by noting Braverman's appointment as Acting United States Attorney, the mere possibility that Whitaker could have either directly or indirectly influenced the United States Attorney's Office for the Southern District of California to seek a third superseding indictment here – something the government could have, but notably did not, disclaimed either in the district court or the Ninth Circuit – makes this a ripe question appropriate for the Court's resolution. And this case is a suitable vehicle for resolving it because the government has repeatedly declined opportunities to disclaim Whitaker's putative taint from his unconstitutional appointment.

3. Petitioners further note that because they do not present a facial challenge to every official act that Whitaker took during his unconstitutional tenure as Acting Attorney General, the Court need not concern itself with broader ramifications that could result from answering Petitioners' question presented affirmatively. That is, because the rule that Petitioners advocate here – requiring a criminal conviction to be reversed only it flows directly from an act attributable to the unconstitutionally appointed Acting Attorney General – has narrow application, the Court can validate longstanding Appointments Clause principles that cases such as Eaton set forth, without disturbing other convictions that the

government procured in criminal cases pending in district courts during Whitaker's tenure. Consequently, this case is a suitable – and, indeed, narrowly tailored – vehicle for the Court to adjudicate this important issue.

The Court should therefore grant Petitioners' joint petition for a writ of certiorari. See Sup. Ct. R. 10(c).

I. AS THE COURT HAS LONG HELD, THE APPOINTMENTS CLAUSE REQUIRES THAT A PRINCIPAL OFFICER WITHIN THE EXECUTIVE BRANCH CANNOT HOLD OFFICE WITHOUT SENATE CONFIRMATION, EXCEPT FOR LIMITED EXCEPTIONS NOT APPLICABLE HERE.

A. In a nutshell, Article II's Appointment Clause distinguishes between two types of Executive Branch "officers" – "principal" and "inferior" – and specifies how each receives an appointment. Principal officers are those who report exclusively to the President of the United States. The government did not argue in the district court that the Attorney General is not a principal officer and, indeed, such a hypothetical argument would be untenable given the Executive Branch's structure. Except during a Senate recess, therefore, the Attorney General can only receive his or her appointment after being nominated by the president and confirmed by the Senate. U.S. Const. art. II, § 2, cl. 2.

Petitioners acknowledge that a person may temporarily serve as Attorney

General if that position becomes vacant. But he or she cannot do so without being within the universe of persons who meet the baseline to serve as an acting Principal Officer. There are two ways that one can satisfy that constitutional prerequisite.

B. First, a person may act temporarily as Attorney General if the Senate had already confirmed him or her to an office where it is foreseeable that the holder might have to later perform the Attorney General's functions. The quintessential such position, of course, is Deputy Attorney General, and there would be no doubt that Whitaker's appointment would have been constitutional if he already had been Senate-confirmed to the Department of Justice's number-two position. Cf. Weiss v. United States, 510 U.S. 163, 173-75 (1994) (holding that an Appointments Clause violation does not occur when an officer assumes duties "germane" to those of the office for which the Senate had already confirmed him or her).

Here, when the Senate confirmed then-Deputy Attorney General Rosenstein – and everyone else that the Attorney General Succession Act explicitly designated to be in the line of succession – it did so understanding that those persons might have to later ascend to Acting Attorney General under 28 U.S.C. § 508. Thus, the Senate had already advised and consented as of November 2018

that Rosenstein and other succession designees under that statute were qualified to perform the principal officer's functions if later necessary.

But the Senate did not similarly so determine regarding one's suitability to serve as Acting Attorney General for others it confirmed as Principal Officers, such as Cabinet-level secretaries, because the succession statute does not similarly place them in line to assume the Attorney General's duties. In other words, when exercising its advice and consent duties for those other positions, it did not occur to the Senate that those secretaries might later become an Acting Attorney General following a vacancy. And the Senate necessarily never actually evaluated whether they were qualified to exercise that non-germane office's authority.

Consequently, because the Senate as of November 2018 had not confirmed Whitaker to serve in an Executive Branch position in the then-extant presidential administration, his appointment as Acting Attorney General was the first time since 1870 that a President had attempted to designate a person to such a position without his or her serving in any office following the Senate's advice and consent. See Michael Ramsey & Andrew Hyman, "Is the Federal Vacancies Reform Act Constitutional?" (Nov. 10, 2018), http://originalismblog.typepad.com (last visited on November 1, 2021).

C. Second, and quite importantly, the Court has long limited the

circumstances under which a non-Senate confirmed person can be an acting Principal Officer. In Eaton, the Court held that a temporary appointment to perform a principal office's functions – even if the person has not received advice and consent from the Senate – is permissible only when there is genuine "exigency" and for "a limited time . . . under special and temporary conditions." Id. at 343 (emphasis added).

Thus, Eaton recognized that under the case's unique factual circumstances – involving a vacancy of a consular post in what is now known as Thailand, which occurred when the Senate-confirmed officer in that position became seriously ill – it was impossible for a confirmation process to occur quickly enough to fill the post, particularly in an era when the fastest means of traveling from the United States to the Far East was by steamship. Id. at 340.

Contrastingly, however, no such "emergency" existed when Whitaker received his appointment in early-November 2018. Instead, the President requested and received then-Attorney General Jefferson B. Sessions III's resignation, therefore willfully creating a vacancy. See, e.g., "Read Jeff Sessions' resignation letter" (Nov. 7, 2018), https://www.cnn.com/2018/11/07/politics /sessions-resignation-letter/index.html (last visited on November 1, 2021). And instead of allowing the then-Senate confirmed Deputy Attorney General

Rosenstein to become the Acting Attorney General, he appointed Whitaker to that position.

Thus, those circumstances were far removed from the narrow parameters that Eaton had set forth for non-Senate confirmed Principal Officers. See, e.g., NLRB v. SW General, Inc., 137 S. Ct. 929, 949 & n.1 (2017) (Thomas J., concurring) (suggesting that Eaton's exception is limited to exigent and time-limited circumstances).[9]

Moreover, Eaton's characterizing the acting official there as "inferior" (169 U.S. at 343) does not otherwise validate Whitaker's appointment. Quite notably, Eaton concerned officers who would exercise foreign policy authority, a realm in which a president has unique Article II powers. See, e.g., United States v. Curtiss-Wright Ex. Corp., 299 U.S. 304, 319 (1936) (holding that the President is the "sole organ of the nation in its external relations, and its sole representative with foreign nations); see also Zivotofsky ex rel. Zivotofsky v. Kerry, 135 S. Ct. 2076, 2090 (2015) (holding that the President "alone" has power "to make the specific decision of what foreign power he will recognize as legitimate, both for the Nation as a whole and for the purpose of making his own position clear within the context

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[9] But see United States v. Smith, 962 F.3d 755, 765 (4th Cir. 2020) (Eaton stands for the principle that *acting* heads of departments are not principal officers because of the temporary nature of the office.") (emphasis in original)).

of recognition").

D. Contrastingly, however, the Attorney General's powers are quite different: limited to executing the laws that Congress has enacted. Thus, the Senate has a significantly greater constitutional interest in determining who holds that position – even if only a temporary basis – than it did in Eaton, a case involving whether the widow of a person appointed temporarily as a vice consul, an inferior office, could receive payment for her deceased husband's performance while he occupied the post. Eaton, 169 U.S. at 343. Simply put, the Attorney General's authority potentially affects every person in the United States, including issuing advisories to U.S. Attorney's Offices regarding the categories of offenses it should emphasize for prosecution.

E. If the government elects to file a brief in opposition to this petition, Petitioners anticipate it will argue that Whitaker's tenure of more than three months as Acting Attorney General was too short to create constitutional infirmities under the Appointments Clause, even if it contravened Eaton. But nothing in the Court's case law, including the limited exception that Eaton set forth, establishes a de minimis exception to this vial constitutional requirement. See, e.g., United States v. Arthrex, Inc., 141 S. Ct. 1970, 1985 (2021) (. . . "Only an officer properly appointed to a principal office may issue a final decision

binding the Executive Branch in the proceeding before us."). Simply put, if a putative Principal Officer lacks the authority to hold his office without Senate confirmation, then every official act that he takes is ultra vires and therefore amenable upon judicial review to being invalidated if, as is true here, a more narrowly tailored remedy is not available. See, e.g., id at 1985-88.

Thus, absent any representation from the government that Whitaker did not directly or indirectly impact this case, the question that Petitioners present remains viable. The Court should grant certiorari to resolve it.

II. THIS CASE PRESENTS A SUITABLE VEHICLE TO RESOLVE THE QUESTION PRESENTED.

Although the Ninth Circuit elected not to publish its disposition, there are at least two reasons why this case represents a suitable vehicle to resolve this question.

First, as Petitioners discussed supra, the government has had ample opportunities to disclaim Whitaker's impact on this case, particularly the United States Attorney's Office's important decision to seek a third superseding indictment, charging the offenses on which the jury ultimately convicted Petitioners. Consequently, because Petitioners concededly are not facially attacking Whitaker's appointment, the government's silence makes Petitioners' as-

applied challenge viable, giving the Court an opportunity to resolve a question that will give vital direction to the current and future presidential administrations regarding the Appointments Clause's scope. And the Court therefore need not concern itself with slippery-slope possibilities that presumably would result from a successful facial challenge to Whitaker's appointment.

Second, although the Court has long preferred that a question percolates suitably throughout the federal courts of appeals – or here, in a case involving an Executive Branch officer, that at least one circuit has held Whitaker's appointment to be invalid – this case perhaps represents one of the final opportunities to resolve an issue that arose approximately three years ago. Thus, because the Court has held that federal criminal convictions result in collateral consequences that can persist long after defendants have completed their custodial sentences (see, e.g., Sibron v. New York, 392 U.S. 40, 55-57 (1968)), Petitioners present a ripe question for the Court to resolve.

Consequently, this case is a suitable vehicle for the Court to resolve an important question concerning its Appointments Clause jurisprudence. See Sup. Ct. R. 10(c).

III. CONCLUSION.

The Court should grant the joint petition for writ of certiorari.

Dated: November 8, 2021

Respectfully submitted,

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Counsel for Petitioner MARY ARAGON

No._____

IN THE SUPREME COURT OF THE UNITED STATES

MARY ARAGON and GERMAN RAMIREZ-GONZALEZ,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for A Writ of *Certiorari* to The United States Court of Appeals for the Ninth Circuit

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PROOF OF SERVICE

I, David A. Schlesinger, declare that on November 8, 2021, as required by Supreme Court Rule 29, I served Petitioners Mary Aragon's and German Ramirez-Gonzalez's MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and JOINT PETITION FOR A WRIT OF CERTIORARI on counsel for Respondent by depositing an envelope containing the motion and the joint petition in the United States mail (Priority, first-class), properly addressed to her, and with first-class postage prepaid.

The name and address of counsel for Respondent is as follows:

The Honorable Elizabeth B. Prelogar, Esq.
Solicitor General of the United States
United States Department of Justice
950 Pennsylvania Ave., N.W., Room 5614
Washington, DC 20530-0001
Counsel for Respondent

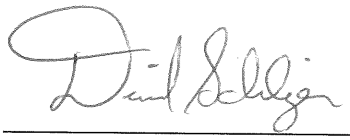
I have also served copies of the motion and the joint petition on counsel for Petitioner Mary Aragon by depositing an envelope containing them in the United States mail (Priority, first-class), properly addressed to him, and with first-class postage prepaid.

The name and address of counsel for Petitioner Mary Aragon is as follows:

David J. Zugman
Burcham & Zugman
402 West Broadway, Suite 1130
San Diego, CA 92101

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 8, 2021



DAVID A. SCHLESINGER
Declarant