No. 23-315

In the Supreme Court of the United States

VIRNETX INC. AND LEIDOS, INC.,
Petitioners,

v.

MANGROVE PARTNERS MASTER FUND, LTD.; APPLE INC.; BLACK SWAMP IP, LLC; AND KATHERINE K. VIDAL, UNDER SECRETARY OF COMMERCE FOR INTELLECTUAL PROPERTY AND DIRECTOR OF THE UNITED STATES PATENT AND TRADEMARK OFFICE,
Respondents.

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

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

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QUESTION PRESENTED

Whether the Commissioner for Patents' exercise of the Patent and Trademark Office Director's authority pursuant to an internal agency delegation violated the Federal Vacancies Reform Act.

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies helps restore the principles of constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*.

This case interests *amicus* because the Federal Circuit's interpretation of the FVRA would allow the executive branch to evade the limitations of the Vacancies Act at will. Without this Court's review, the executive branch will continue to fill vacant offices indefinitely with officials who have neither been appointed by the President nor confirmed by the Senate, which undercuts political accountability.

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

INTRODUCTION AND SUMMARY OF ARGUMENT

Two years ago, this Court ruled that Administrative Patent Judges (APJs) possessed too much unreviewable authority for officers who have not been appointed by the President and confirmed by the Senate. *United States v. Arthrex, Inc.*, 141 S. Ct. 1970 (2021). This Court had previously held that officers of the United States may only be exempted from Senate consent if they are "directed and supervised" by a superior officer who has been appointed by the President and confirmed by the Senate (a "PAS" officer). *Edmond v. United States*, 520 U.S. 651, 663 (1997). Applying that test, the Court found that APJs were not adequately "directed and supervised" for one key reason: When deciding whether to cancel a patent, their unreviewable decision was "the last stop for review within the Executive Branch." *Arthrex*, 141 S. Ct. at 1977.

To fix this constitutional defect, the Court adjusted the statutory scheme to allow the Patent and Trademark Office (PTO) Director to review every decision of the APJs. *Id.* at 1986–87 (plurality op.). Since the PTO Director is normally a PAS position, granting the PTO Director the power to review APJ decisions seemingly made APJs inferior under *Edmond*'s rule. This Court anticipated that placing accountability for APJ decisions in the PTO Director, an officer appointed by the President, would ensure that "the President remains responsible for the exercise of executive power—and through him, the exercise of executive power remains accountable to the people." *Id.* at 1988 (plurality op.).

But no such accountability resulted. A few months before this Court issued its decision, the previous PTO

Director resigned, and the office fell vacant. That vacancy ended up lasting more than a year, during which time the functions and duties of the position were delegated to an official who had neither been appointed by the President nor confirmed by the Senate: Commissioner for Patents Andrew Hirshfeld, an inferior officer appointed by the Secretary of Commerce. Petition at 12–13.

After this Court's *Arthrex* decision came down, the PTO decided that Commissioner Hirshfeld would be the recipient of the PTO Director's new power of review. *Id.* Ironically, despite this Court agreeing with Arthrex that it was unconstitutional for non-PAS APJs to have the last word on Arthrex's patent, the only immediate remedy was potential review by a *different* non-PAS officer, Commissioner Hirshfeld.

Commissioner Hirshfeld was still exercising the delegated powers of the PTO Director when VirnetX sought review of the APJs' decisions at issue in this case. Just like Arthrex, VirnetX never had the opportunity to ask a PAS officer to review the APJs' decisions. It was Hirshfeld who denied VirnetX's request for review. *Id.*

The PTO's delegation of power to Commissioner Hirshfeld not only undermined the spirit of this Court's previous decision in *Arthrex*, it also violated the letter of the Vacancies Act. Congress is well aware of the important role that both presidential nomination and Senate confirmation play in ensuring political accountability. That is why Congress passed the Federal Vacancies Reform Act (FVRA) in 1998. The FVRA ensures that even when a PAS office falls vacant, the President remains accountable for the decisions of the

acting officer who temporarily fills that vacant PAS office. This is because under the FVRA, it is the President's choice alone to either allow the default acting officer to serve (the first assistant to the office) or to select another eligible acting officer. 5 U.S.C. § 3345(a).

Further, the FVRA also incentivizes the President to put forward a permanent nomination for a vacant office, rather than relying on an unconfirmed acting officer indefinitely. That is because the FVRA places a time limit on acting service, giving the President a limited time from the date a vacancy arises to submit a permanent nominee for Senate consideration. 5 U.S.C. § 3346.

The delegation to Commissioner Hirshfeld disregarded both of these limitations, severing the chain of accountability to the President that the FVRA was meant to protect. Commissioner Hirshfeld's original appointment to his primary job was made by the Secretary of Commerce, and the delegation of the PTO Director's powers was made via a standing delegation order issued by a prior PTO Director. Petition at 12–13. The President had nothing to do with either.

In addition, because Commissioner Hirshfeld assumed the powers of the PTO Director via delegation rather than under the FVRA, those powers came with no time limit. Commissioner Hirshfeld could have continued exercising the powers of PTO Director indefinitely, even if President Biden had chosen not to submit a permanent nominee to the Senate for consideration.

When the *Arthrex* case went back to the Federal Circuit, a panel held that the FVRA permits such an

end-run around political accountability. *Arthrex, Inc. v. Smith & Nephew, Inc.*, 35 F.4th 1328, 1335–1337 (Fed. Cir. 2022), *cert. denied*, 143 S. Ct. 2493 (2023).[2] But that decision was wrong. The drafters of the FVRA knew better than to allow its restrictions to be so easily evaded. The plain text of the FVRA forbids delegations that "temporarily authoriz[e] an acting official to perform the functions and duties of [a PAS] office." 5 U.S.C. § 3347(a). That is exactly what the delegation to Commissioner Hirshfeld purported to do, and the FVRA makes such delegations invalid.

To restore the FVRA's limits on unaccountable acting service in critical PAS positions, the Court should grant the petition and reverse the Federal Circuit.

ARGUMENT

I. SECTION 3347 OF THE FVRA INVALIDATES THE PURPORTED DELEGATION OF AUTHORITY TO COMMISSIONER HIRSHFELD.

A. Section 3347 of the FVRA clarifies that agencies may not delegate *all* the powers of a vacant PAS office to a single person, even if delegating such powers separately would otherwise be legal.

Congress's primary motivation for reforming the Vacancies Act in 1998 was to foreclose the ability of agencies to make delegations in evasion of the Act, delegations just like the one at issue in this case. In the 1970s, the Department of Justice (DOJ) began arguing "that the Vacancies Act only 'provides one [possible]

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[2] Because the *Arthrex* panel addressed this FVRA question prior to the lower-court opinion in this case being issued, the panel below considered itself bound to follow that precedent. Petitioners' Appendix at 12a n.3.

method for filling certain positions on an interim basis', and that some departments and agencies, including DOJ, 'have statutory authority to assign duties and powers of positions on a temporary basis outside the Vacancies Act.'" Morton Rosenberg, Cong. Rsch. Serv., *The New Vacancies Act: Congress Acts to Protect the Senate's Confirmation Prerogative* 2–3 (Nov. 2, 1998). DOJ argued that it had such authority under the department's organizational statutes, which vested all functions and duties of the department in the attorney general and allowed the attorney general to delegate those functions to other department officials. *Id.* at 3.

Making similar arguments based on their own organizational statutes, "the Departments of Health and Human Services (HHS), Education, and Labor . . . adopted the same rationale with respect to administrative provisions in their own enabling legislation." *Id.* Using this theory, dozens of people served as acting officers across the executive branch for longer than the Vacancies Act's time limits allowed, performing all the delegable functions and duties of vacant offices without any of the Vacancies Act's restrictions. *Id.* at 4.

Based on this delegation theory, President Bill Clinton appointed Bill Lann Lee as acting assistant attorney general for civil rights in December 1997. *Id.* at 1. Lee's service began after the Vacancies Act's time limit for filling the vacant position had already expired, and his appointment was the final straw for Congress. *Id.* Lee's designation was particularly galling to some senators because it came "immediately after the Senate refused to confirm him for that very office." *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 936 (2017). A group of senators would soon set to work to

reform the Vacancies Act and prevent similar designations in the future.

These efforts began with a March 1998 hearing on reforming the Vacancies Act. The use of delegation statutes to evade the limitations of the Vacancies Act was the subject of committee chairman Fred Thompson's entire opening remarks. *See Oversight of the Implementation of the Vacancies Act: Hearing on S. 1764 Before the S. Comm. on Governmental Affairs*, 105th Cong. 1–5 (Mar. 18, 1998) [hereinafter *Senate Hearing*][3] (noting that Lee could "serve indefinitely according to the Justice Department's theory" and that "this is clearly not what the Congress envisioned").

The initial and primary goal of Vacancies Act reform was to reject the argument "that these broad housekeeping provisions somehow override or are in the Department's words, 'independent of and not subject to,' the more specific provisions of the Vacancies Act." *Id.* at 12 (Sen. Byrd). As another member of the committee put it, "We can cure the Vacancies Act loophole that [DOJ has] divined, and I hope we do, one way or another and do it real tight." *Id.* at 22 (Sen. Levin). And as the ranking member of the committee said directly to a DOJ lawyer testifying at the hearing, "You have been able to interpret [the Vacancies Act] in a way that lets you go ahead and do things that were never intended . . . . So I think we have to go ahead with this, and I want to make sure that this time we do make it airtight." *Id.* at 35 (Sen. Glenn).[4]

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[3] *Available at* https://bit.ly/3G8kS3w.

[4] This goal remained the primary motivating factor for Vacancies Act reform through the entirety of the process. *See* 144 Cong. Rec.

To this end, Congress made crucial changes to the "exclusivity" provision of the Vacancies Act. Prior to the FVRA's enactment in 1998, this provision read, in full: "A temporary appointment, designation, or assignment of one officer to perform the duties of another under section 3345 or 3346 of this title may not be made otherwise than as provided by those sections, except to fill a vacancy occurring during a recess of the Senate." *See Doolin Sec. Sav. Bank, F.S.B. v. Off. of Thrift Supervision*, 139 F.3d 203, 206–07 (D.C. Cir. 1998) (quoting prior version of the Vacancies Act in full). While this language made clear that an acting appointment *under the Vacancies Act* must strictly comply with the Vacancies Act's own limitations (such as its time limits and qualification requirements), it arguably left open the question whether *other statutes*, such as the general vesting and delegation statutes for each department, could be used to appoint acting officers.

The FVRA's new exclusivity provision, found in Section 3347, goes much further. It mandates that no other statute may be used by the executive branch to temporarily fill a vacancy in an office normally requiring presidential appointment and Senate consent (a "PAS" office) unless that statute includes an express statement making clear that it can indeed be used to designate acting officers. Subsection 3347(a) of the FVRA provides:

S12,824 (Oct. 21, 1998) (Sen. Byrd) ("[T]he matter of exclusivity is the bedrock point on which the executive and legislative branches have historically differed. Indeed, it is very likely that we would not be here today were it not for the differing interpretations as to the exclusivity of the Vacancies Act.").

> (a) Sections 3345 and 3346 are the exclusive means for temporarily authorizing an acting official to perform the functions and duties of any [PAS] office of an Executive agency . . . unless—
>
> (1) a statutory provision expressly—
>
> (A) authorizes the President, a court, or the head of an Executive department to designate an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity; or
>
> (B) designates an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity; or
>
> (2) the President makes an appointment to fill a vacancy in such office during the recess of the Senate . . .

5 U.S.C. § 3347(a).

Further emphasizing this clear statement rule of construction, Subsection 3347(b) next provides an example of a type of statute that does *not* satisfy Subsection 3347(a)'s clear statement rule. Not coincidentally, the example used was the very type of statute at issue in the controversies that led to the FVRA's passage. This exemplary subsection explains that:

> Any statutory provision providing general authority to the head of an Executive agency . . . to delegate duties statutorily vested in that agency head to, or to

> reassign duties among, officers or employees of such Executive agency, is not a statutory provision to which subsection (a)(1) applies.

5 U.S.C. § 3347(b).[5]

The text of Section 3347, the new exclusivity provision, thus sets out a rule that, in some circumstances, invalidates delegations even when those delegations would otherwise be authorized by law. Specifically, a delegation is invalid if (1) it "temporarily authoriz[es] an acting official to perform the functions and duties of" a PAS office *and* (2) the statute providing the purported authority to make the delegation does not expressly authorize the President, a court, or the head of an executive department "to designate an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity."

With this language, Congress achieved its goal of enacting a law that forbids the executive branch from using delegation to evade the Vacancies Act. As the statement of purpose in the FVRA Senate Report described it, the purpose of the FVRA was "to create a clear *and exclusive* process to govern the performance of duties of offices in the Executive Branch" during vacancies. S. Rep. No. 105-250, at 1 (1998) [hereinafter *Senate Report*] (emphasis added). And as emphasized by the example provided in Subsection 3347(b), "Statutes that generally permit agency heads to delegate or

[5] This subsection provides an *example* of one type of statute that would not satisfy the clear statement rule of Subsection 3347(a), but not an exhaustive list. It is the clear statement rule of Subsection 3347(a) that determines whether a statute may be used to temporarily fill a vacancy, not the example provided in Subsection 3347(b).

reassign duties within their agencies are specified not to constitute statutes that provide for the temporary filling of particular offices." *Id.* at 2.

It will usually be clear when a statute lacks a clear statement expressly authorizing acting appointments.[6] The only part of Section 3347's test that may require some interpretation in particular cases will thus usually be the first one, the question whether a delegation has "temporarily authoriz[ed] an acting official to perform the functions and duties of" an office. But applying this test is straightforward, because this language is found repeatedly throughout the FVRA—it is precisely what Section 3345 of the FVRA permits the President to do *in certain circumstances*. Section 3345 lays out the various scenarios in which the President may authorize an official "to perform the functions and duties of the vacant office temporarily in an acting capacity." 5 U.S.C. § 3345(a). Thus, a delegation that violates the exclusivity provision of the FVRA is simply a delegation that purports to accomplish the equivalent of an acting appointment made *pursuant* to the Vacancies Act.

An appointment made *pursuant to* the Vacancies Act is an appointment that temporarily grants all the authority of a vacant office to a single acting officer. Thus, a delegation is illegal if it (1) grants all the authority (2) of a vacant PAS office (3) to a single person. It is no defense to say that all the delegated powers are *normally* delegable, because the exclusivity provision

[6] The Senate Report identified several statutes that *did* contain such an express statement, none of which were delegation statutes. *Senate Report* at 15–17.

of the FVRA partially supersedes and limits the reach of any delegation statute *in this specific circumstance*.[7]

In Hirshfeld's case, as in most delegations, the government's position is that the PTO Director has no exclusive duties. *See* U.S. Patent & Trademark Off., *Notice of Delegation to Commissioner for Patents and Notice of Delegation to Commissioner for Trademarks* (Oct. 30, 2014) ("All of the Director's duties under Titles 35 and 15 . . . are delegable (i.e., non-exclusive) duties."). Thus, the delegation at issue purported to delegate *all* of the Director's functions and duties, in violation of Section 3347.

B. Prior to the FVRA's passage in 1998, actions taken by unauthorized acting officers could be challenged and vacated in court.

Some courts, including the Federal Circuit, have erroneously interpreted Section 3348 of the FVRA to be the *only* grounds for challenging and invalidating the actions of an illegal acting officer. But that cannot

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[7] At the March 1998 Senate hearing, a DOJ attorney defended the legality of the delegation strategy by arguing that "The assistant attorney general in charge of the Civil Rights Division . . . exercises only the power that the Attorney General chooses to give him. It would be anomalous, indeed, if the occurrence of a vacancy lessened her authority to assign duties in the way that best promotes the efficiency of the Department." *Senate Hearing* at 27 (DOJ attorney Daniel Koffsky). But Congress in the FVRA made the judgment that it is *not* anomalous to reduce an agency's delegation authorities during a vacancy, because doing so is the only way to ensure that the limitations of the Vacancies Act are followed. In other words, Congress was aware of the argument that foreclosing the delegation strategy would require partially superseding and limiting otherwise applicable delegation authorities, and Congress chose to do exactly that.

be so, because such challenges were available under prior versions of the Vacancies Act, which lacked any equivalent to Section 3348.

Before the FVRA's passage, litigants could challenge the service of allegedly illegal acting officers in court, both to enjoin their future actions *and* to invalidate their past actions. The latter relief, however, was subject to defenses such as ratification and the *de facto* officer doctrine.

Two cases from the 1990s demonstrate the legal state of affairs prior to the FVRA's passage: *Olympic Federal S&L v. Office of Thrift Supervision*, 732 F. Supp. 1183 (D.D.C. 1990), and *Doolin Security Savings Bank, F.S.B. v. Office of Thrift Supervision*, 139 F.3d 203, (D.C. Cir. 1998).

In *Olympic*, a savings and loan association sued to enjoin the Office of Thrift Supervision (OTS) from appointing a receiver or conservator for that association. Among other claims, Olympic argued that the purported acting director of OTS, Salvatore Martoche, had not been validly appointed under the Vacancies Act and was thus without legal authority to take actions on behalf of OTS. The court agreed with Olympic, finding that Martoche's appointment did not comply with the statutory terms of the Vacancies Act. *Olympic*, 732 F. Supp. at 1194–95. Finding that Martoche was without legal authority under the Vacancies Act and rejecting the government's other theories to justify Martoche's authority, the court enjoined OTS from appointing a conservator or receiver for Olympic. *Id.* at 1202–03.

Crucially, the court also recognized that private litigants could, generally speaking, challenge the *past*

actions of invalidly appointed acting officers and seek vacatur. Nothing in the Vacancies Act at the time stood in the way of such a challenge. Rather, to the extent such challenges were more difficult than pre-emptive challenges seeking injunctions, it was because of doctrines unrelated to the Vacancies Act that provided greater legal insulation for past acts. Specifically, the court noted that under then-binding D.C. Circuit precedent, the *de facto* officer doctrine limited a court's ability to undo prior acts. *Id.* at 1187 (citing *Andrade v. Lauer*, 729 F.2d 1475, 1496–97 (D.C. Cir. 1984)).

A second case that also concerned the Office of Thrift Supervision further confirmed this understanding of the Vacancies Act. In *Doolin*, unlike in *Olympic*, the action being challenged had *already* occurred. *Doolin* concerned yet another purported acting director of OTS, Jonathan Fiechter. Fiechter had signed a notice of charges that began an administrative enforcement proceeding against Doolin, a bank. Those proceedings culminated in a cease and desist order against Doolin that OTS issued four years after the notice. *Doolin*, 139 F.3d at 204. Petitioning for review of that order, Doolin argued, among other things, that Fiechter had no legal authority to sign the notice and begin the proceedings. The bank argued that Fiechter was not lawfully serving as acting director of OTS because he had not been appointed using the procedures of the Vacancies Act and because the agency could not legally delegate to him all of the director's powers. *Id.* at 211.

Just as in *Olympic*, the *Doolin* court never suggested that the past actions of an unlawfully appointed acting officer could not be challenged in court. Rather,

just as in *Olympic*, the court operated under the assumption that such actions could be challenged and vacated, but that such challenges were subject to general administrative law defenses *unrelated* to the Vacancies Act. Ultimately, the court found that it did not need to decide whether Fiechter had been lawfully appointed as acting director because one such defense applied. Specifically, the court found that the notice of charges had been subsequently ratified by a different, validly appointed acting director of OTS. *Id.* at 212–14.

Olympic and *Doolin*, both decided before the FVRA's passage, demonstrate that private litigants could challenge the authority of purported acting officers for noncompliance with the Vacancies Act. Even though that version of the Vacancies Act lacked any equivalent to the FVRA's Section 3348, the actions of invalid acting officers could still be challenged and invalidated in court. It was with this understanding and against this legal backdrop that Congress enacted the FVRA in 1998.

C. The FVRA did not diminish the ability of litigants to challenge actions taken by illegal acting officers.

Since the prior version of the Vacancies Act was a sufficient basis for challenging the actions of unlawful purported acting officers, Section 3347 of the FVRA is a sufficient basis as well. Both the prior version of the Vacancies Act and the FVRA set out a rule of law explaining when some officials purporting to exercise the authorities of a vacant office may not do so. And in those situations where officials act without statutory authority, their actions can be challenged and invalidated as taken without legal authority.

Nonetheless, some lower courts, including the Federal Circuit, have interpreted the FVRA's new "enforcement provision," Section 3348, as if it *diminishes* the general ability of litigants to challenge unlawful delegations under Section 3347. This interpretation is wrong. To understand why, it is first necessary to understand why Section 3348 was added to the FVRA.

In the March 1998 Senate hearing on Vacancies Act reform, the delegation strategy—and how to curtail it—was the dominant topic of conversation. The second most prevalent topic was whether there was a way for *Congress* to more effectively police FVRA violations. At the time, two draft Vacancies Act reform bills proposed a mechanism for Congress to cut off the salary of invalidly serving acting officers, an idea that was ultimately not included in the FVRA. *See Senate Hearing* at 29; 59. But no one at the hearing expressed concerns that *private* litigants could not protect their own interests by enforcing the limitations of the Vacancies Act. Indeed, Senator Strom Thurmond described cutting pay as an *additional* "way to encourage the administration to comply" with the Vacancies Act "other than to retaliate against it *or to sue in court*." *Id.* at 38 (emphasis added). The assumption that private suits were an effective route to enforcement was not surprising, given that *Olympic* had already been decided years before the hearing.

Just a few days after the hearing, however, the D.C. Circuit decided *Doolin*, and this gave Congress a second goal for Vacancies Act reform. Although *Doolin* reaffirmed the presumptive right to challenge the actions of illegally appointed acting officers, *Doolin* also endorsed the use of ratification as a defense for past actions taken by illegal acting officers.

After *Doolin* was decided, Congress set to work to create a new enforcement provision for court challenges. The goal was not to *create* a right to challenge illegal actions in court (which already existed prior to the FVRA) but rather to eliminate ratification as a viable government defense for those actions. That enforcement provision became Section 3348.

"Ample evidence throughout legislative history confirms that § 3348 was written and enacted as direct response to . . . *Doolin*, to expressly overrule its holdings . . . ." Stephen Migala, *The Vacancies Act and an Acting Attorney General*, 36 Ga. St. U.L. Rev. 699, 791 (2020). *See, e.g.*, *Senate Report* at 19–20 ("The Committee . . . is concerned that the ratification approach taken by the court in *Doolin* would render enforcement of the Vacancies Reform Act a nullity in many instances.").

Section 3348's elimination of the ratification defense was not as sweeping as its original drafters had hoped. Due to political compromise, the enacted version of Section 3348 eliminates the ratification defense only for the illegal exercise of the *exclusive* duties of an office. 5 U.S.C. § 3348(a)(2).

But for those exclusive actions that *do* fall within the ambit of Section 3348, that section goes beyond Section 3347 in authorizing more drastic court relief in two key respects. First, unlike Section 3347, Section 3348 allows challenges to the performance of certain duties of a vacant office *even if those duties are divided among multiple people*. Thus, while Section 3347 prohibits circumventing the Vacancies Act by delegating *all* the powers of a vacant office to a *single* person, Section 3348 goes even further, banning the delegation of *any single* exclusive power of a vacant office to *anyone*

(other than an agency head). And second, unlike Section 3347, actions challenged under Section 3348 "may not be ratified." 5 U.S.C. § 3348(d)(2).

The original draft of Section 3348 would have gone further still, banning the delegation of *any* power of a vacant office, exclusive or not, to any person. Migala, *Acting Attorney General*, *supra*, Appendix at A-11. Some senators objected, however, arguing that this could cause disruption to government operations in the event that a vacancy lingered past the Vacancies Act's deadline. *Id.* at A-21. A subsequent draft of Section 3348 therefore created an exception allowing for the performance of the duties of a vacant office by the head of whatever agency housed that vacant office. *See* Thomas A. Berry, *Closing the Vacancies Act's Biggest Loophole*, Cato Briefing Paper No. 131, at 3 (Jan. 25, 2022). And to ease the potential burden of simultaneously assigning many vacant offices' duties to a single agency head, a further compromise exempted nonexclusive duties from Section 3348's strict rule. *Id.*

Section 3347 and Section 3348 thus work together to prescribe how agencies may delegate the duties of a vacant PAS office and how they may *not* delegate those duties. Section 3347 forbids assigning *all* of the vacant PAS office's duties to any *single* official. And Section 3348 requires, in addition, that if the vacant office had any exclusive duties, only the agency head may be assigned those exclusive duties.

This statutory scheme accomplished three goals: First, agencies could not use delegation statutes to achieve the convenience afforded by the Vacancies Act of assigning all the duties of a vacant office to a single official. Second, the exclusive (and likely most important) duties of the office would only be performed

by the agency head, typically a Senate-confirmed official with political accountability. And third, all the duties of a vacant office could *collectively* still be performed, by a combination of the agency head and at least one other separate delegatee, thus allowing the functions of the office to continue during a lengthy vacancy.

As the Senate Report put it, during a vacancy "Delegable functions of the office could still be performed by other officers or employees, but the functions and duties to be performed only by the officer . . . could be performed solely by the head of the executive agency. . . . All the normal functions of government thus could still be performed. The legislation only limits the person who may perform them." *Senate Report* at 18–19. This closely echoed the desires expressed in an internal Senate committee memo that led to the Section 3348 compromise: "While we think no temporary officer should be allowed to fulfill the duties of an office in violation of the Vacancies Act, we believe the legal duties of the office should still be performed. We recommend allowing delegable duties to be performed by others, limiting non-delegable duties only to the agency head . . . ." Migala, *Acting Attorney General*, *supra*, Appendix at A-11. Both statements concisely capture how Section 3347 and 3348 function together to mandate that no *single* temporary officer is "allowed to fulfill the duties of an office in violation of the Vacancies Act" but that a *combination* of officers may *collectively* perform the duties of the office.

The text and effect of Section 3347 is thus complementary to the text and effect of Section 3348. The exclusivity provision of Section 3347 prohibits assigning *all* the duties of a vacant office to any *single* person.

Violations of this provision can be challenged in court, just as they could be before the FVRA's passage, but they are potentially subject to various defenses such as ratification, just as they were before the FVRA's passage.

In addition, even when a delegation splits the duties of a vacant office among *multiple* people, the enforcement provision of Section 3348 places further limitations on how those duties can be assigned. Duties that had been assigned to the vacant office exclusively before the vacancy, presumptively its most important duties, can only be performed by the agency head. Other, nonexclusive duties may be assigned to other officials. And unlike a violation of Section 3347, any violation of this provision is categorically barred from cure via ratification.

In the event that all of the duties of a vacant PAS office are assigned to a single person who is not the agency head, both the exclusivity provision (3347) and the enforcement provision (3348) come into play. First, for the reasons described above, Section 3347 bars such a delegation, since it is an attempt to create an acting officer through the use of a statute that does not expressly authorize acting appointments. *Any* action by such a delegatee is subject to challenge, just as was the case before the FVRA's passage.

In addition, if any of the duties assigned to the individual are *exclusive*, as Section 3348 defines that concept, then an action carrying out that duty can be challenged and is *automatically* invalid, not curable via a ratification defense.

The Federal Circuit, like some other lower courts, erred by treating Section 3348 as the *only* means of invalidating actions that violate the FVRA, thus ignoring Section 3347. Even if it were true that all the duties assigned to Commissioner Hirshfeld were nonexclusive, as Section 3348 defines that concept, that would only mean that Section 3348's ratification bar does not apply. But regardless, because Commissioner Hirshfeld was assigned all the duties of a vacant PAS position, that delegation was barred by Section 3347 and is legally ineffective.[8] That means Commissioner Hirshfeld's order denying review was issued contrary to law, and the court below should have allowed VirnetX to challenge that action under Section 3347.

II. THE PRACTICE OF WHOLESALE DELEGATION OF A VACANT OFFICE'S POWERS IS WIDESPREAD AND CALLS FOR THIS COURT'S REVIEW.

Lower courts have frequently misinterpreted Section 3348 to be the *only* grounds for challenging the performance of a vacant office's duties, rather than *supplemental* grounds that complement Section 3347. Correcting this error is exceedingly important, because Section 3348 has not served as the effective enforcement mechanism that Congress intended. Restoring the proper interpretation and force of Section 3347 is thus necessary to ensure that the FVRA places the limits on acting officers that its drafters intended and that its text demands.

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[8] Indeed, the delegation order at issue in this case is triggered *only* when the office of PTO Director is vacant, making it a particularly obvious substitute for the FVRA. Petition at 13.

The executive branch has returned to the pre-1998 practice of routinely delegating all the powers of a vacant office to a single official. This has "effectively created a new class of pseudo-acting officials subject to neither time nor qualifications limits." Nina Mendelson, *The Permissibility of Acting Officials: May the President Work Around Senate Confirmation?*, 72 Admin. L. Rev. 533, 605 (2020).

The use of these pseudo-acting officials is widespread. In September 2020, the Constitutional Accountability Center identified 21 positions where the time limits of the FVRA had run out and officials were self-described on agency websites as "performing the duties" (or equivalent language) of the position. Becca Damante, *At Least 15 Trump Officials Do Not Hold Their Positions Lawfully*, Just Security (Sept. 17, 2020).[9] Professor Anne Joseph O'Connell has also identified at least 73 positions that had no confirmed or acting officer in April 2019, noting that for each of them "the functions of the vacant position presumably were delegated to someone." Anne Joseph O'Connell, Admin. Conf. of the U.S., *Acting Agency Officials and Delegations of Authority* 63 (2019).

The widespread use of this maneuver means that FVRA deadlines have been increasingly ignored. "[I]n the first year of an Administration, one sees a lot of 'acting' titles on agency websites. After the Act's time limits run out, one sees 'performing the functions of [a particular vacant office]' language instead." *Id.* at 11. This loophole also means that the history of nomination battles like that of Bill Lann Lee is repeating itself; those who could never win Senate confirmation to

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[9] Available at http://bit.ly/3YgMUQK.

an office have been delegated all the powers of that very office to serve indefinitely as a pseudo-acting official. *See id.* at 29 ("In some cases, delegations appear to substitute for nominations.").

These pseudo-acting officials wield important power. During the Trump administration, "numerous Federal Register notices of both proposed and final rules" were signed by pseudo-acting officials. Mendelson, *Permissibility of Acting Officials*, *supra*, at 562.

In each of these instances, the government has asserted that the office in question had no exclusive duties, and thus that Section 3348 did not bar the delegation and performance of those duties by someone other than an agency head. Whether that is true or not in any individual case, it ignores a more fundamental problem. By delegating all the powers of the office to a *single* person, each of these delegations violated Section 3347. Given that Section 3348 has not served as an effective deterrent to subversions of the Vacancies Act, the restoration of the original and correct meaning of Section 3347 is crucial to restoring the enforceability of the Vacancies Act's limits.

CONCLUSION

For the foregoing reasons, and those described by the Petitioners, this Court should grant the petition.

Respectfully submitted,

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