No. 22-639

IN THE
Supreme Court of the United States

ARTHREX, INC.,
Petitioner,
v.
SMITH & NEPHEW, INC.; ARTHROCARE CORP.;
AND UNITED STATES OF AMERICA,
Respondents.

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

REPLY FOR PETITIONER

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CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, petitioner Arthrex, Inc., states that the corporate disclosure statement included in the petition remains accurate.

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REPLY FOR PETITIONER

Respondents nowhere dispute what the Federal Circuit itself admitted: The interpretation of the FVRA that the court adopted renders the statute's scope "vanishingly small." Pet. App 13a. Under that interpretation, the FVRA does not apply to the PTO at all, and it applies to other agencies only in the exceptionally rare instances where Congress makes a duty non-delegable—something Congress virtually never does. The court's decision thus effectively reads the FVRA out of the U.S. Code.

That decision warrants review. Congress enacted the FVRA to impose meaningful constraints on temporary appointments—constraints Congress deemed essential to protect the Senate's advice-and-consent power. The Fed-

eral Circuit's decision makes the statute wholly ineffective. An agency can put whomever it wants in power, for however long it wants, so long as the agency does not *call* the person an "acting officer." The Senate's advice-and-consent power should not be so easily circumvented.

Respondents' arguments on the merits are no reason to deny review. And this case is an eminently suitable vehicle: It squarely presents whether the PTO's succession plan violates the FVRA's mandate of exclusivity.

The Court should grant review.

I. This Case Presents An Exceptionally Important Question Of Law

Congress enacted the FVRA to impose real constraints on the use of temporary officers during a vacancy. The court of appeals made those constraints optional. Its ruling presents exceptionally important issues that warrant this Court's review.

A. Congress enacted the FVRA to protect the Senate's advice-and-consent power, "a critical 'structural safeguard[] of the constitutional scheme.'" *NLRB* v. *SW Gen., Inc.*, 580 U.S. 288, 293 (2017). The FVRA sets forth three statutory options for temporary appointees. 5 U.S.C. §3345(a). It carefully limits how long they may serve. *Id.* §3346. And it makes those options "the *exclusive means* for temporarily authorizing an acting official to perform the functions and duties" of an office. *Id.* §3347(a) (emphasis added). Congress passed that legislation following years of disputes over the Executive Branch's use of delegations to create its own succession plans that bypassed Congress's approved methods for temporary appointments. Pet. 4-8.

Under the court of appeals' interpretation, Congress wasted all that effort and accomplished nothing. In that

court's view, an agency can simply *delegate* all of the agency head's authority to the agency's preferred successor. So long as the agency does not *call* the person an "acting officer," the person can run the agency indefinitely. The court recognized a technical exception for "non-delegable" duties. But that limitation is a mirage: *All* duties are presumed delegable, and Congress virtually never makes a duty *non*-delegable. Under the court of appeals' construction, the FVRA imposes no real constraints at all.

This Court need not speculate about those consequences. The court of appeals *admitted* them. It acknowledged that its interpretation "renders the FVRA's scope 'vanishingly small.'" Pet. App 13a. The Act imposes "no constraints whatsoever on the PTO." *Ibid.* And it affects only a "very small subset of duties" elsewhere. *Ibid.*

Respondents do not disagree. They nowhere dispute that, under the decision below, the FVRA does not apply to the PTO. And while they try to marshal examples of non-delegable duties from other agencies, the lists they come up with are embarrassingly short and notable mainly for their sheer obscurity.

Smith & Nephew cites a grand total of *one* statute: a 1950 provision that authorizes "only" the Secretary of the Interior to convey public-domain lands "comprising or appurtenant to * * * dry land and irrigation field stations" in six specified localities. S&N Br. 22 (citing 7 U.S.C. §389). The government comes up with another four equally obscure examples, including a statute that grants NASA's Administrator flexibility to adjust basic pay rates

for up to ten employees in that agency. Gov't Br. 14 n.5 (citing, *e.g.*, 5 U.S.C. § 9807(c)(1)).[1]

To call those showings paltry would be generous. There are more than a *thousand* presidentially appointed, Senate-confirmed offices across the federal government, each of which has numerous duties. See H. Comm. on Oversight & Reform, 116th Cong., *Policy and Supporting Positions* 212 (Dec. 2020). Based on respondents' research, the Federal Circuit's decision might limit the FVRA's application to as few as *five* obscure duties. If anything, the court of appeals was too charitable when it said its interpretation rendered the FVRA's scope "vanishingly small." The decision effectively reads the statute out of the U.S. Code.

B. Respondents urge the Court to deny review because there is no circuit conflict. Gov't Br. 15-16; S&N Br. 11-12. But this Court regularly reviews important separation of powers and similar structural questions even absent a conflict. See, *e.g.*, *Gundy* v. *United States*, 139 S. Ct. 2116 (2019); *Murphy* v. *NCAA*, 138 S. Ct. 1461 (2018); *Bank Markazi* v. *Peterson*, 578 U.S. 212 (2016); *Free Enter. Fund* v. *PCAOB*, 561 U.S. 477 (2010); *Edmond* v. *United States*, 520 U.S. 651 (1997); *Freytag* v. *Comm'r*, 501 U.S. 868 (1991). This case is comparable. The FVRA is a critical protection for the Senate's advice-and-consent power. A decision that renders that statute toothless warrants review even absent a circuit conflict.

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[1] The government also cites a fifth statute, 22 U.S.C. § 4865(a)(2), but it fails to note that Congress recently amended that statute to delete the language on which it relies. Compare James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, § 9301(e)(2)(B)(ii)(II) (Dec. 23, 2022), with 22 U.S.C. § 4865(a)(2)(B)(ii)(I) (2018).

This Court also routinely reviews decisions holding an Act of Congress unconstitutional even absent a circuit conflict. See, *e.g.*, *Iancu* v. *Brunetti*, 139 S. Ct. 2294, 2298 (2019) ("As usual when a lower court has invalidated a federal statute, we granted certiorari."); *Maricopa County* v. *Lopez-Valenzuela*, 574 U.S. 1006, 1007 (2014) (Thomas, J., on denial of stay) (noting "strong presumption" of review); Stephen M. Shapiro *et al.*, *Supreme Court Practice* §4.12, at 264 (10th ed. 2013). A decision that effectively invalidates a statute by interpreting it to be wholly inoperative has similar effects.

The government admits that this Court granted review without a circuit conflict in *NLRB* v. *SW General, Inc.*, 580 U.S. 288 (2017). Gov't Br. 16. It tries to distinguish that case on the ground that the decision under review "cast a cloud over several then-serving high-level officers." *Id.* at 16-17. That argument concedes Arthrex's point: Cases like this may be sufficiently important to warrant review even absent a circuit conflict. The decision below is at least as important as the one in *SW General*, even if for different reasons.

Finally, at least five district courts have rejected respondents' position. Pet. 23-25. Respondents urge that district court conflicts are not grounds for review. Gov't Br. 16; S&N Br. 12. But "district court decisions are relevant * * * as indicators of lower court confusion over an otherwise important question." Shapiro *et al.*, *supra*, §4.8, at 258. Here, those five cases show that the issue is recurring and that many respected jurists think Congress intended the FVRA to have meaningful effect.[2]

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[2] The government disputes whether it sought to avoid appellate review in those cases. Gov't Br. 17 n.6. But only one case (*Bullock*)

II. THE FEDERAL CIRCUIT'S DECISION IS WRONG

Respondents' arguments on the merits likewise fail. Section 3347(a) makes the FVRA "the exclusive means for temporarily authorizing an acting official to perform the functions and duties" of a vacant presidentially appointed, Senate-confirmed office. 5 U.S.C. §3347(a). An agency succession plan that authorizes someone else to perform *all* the agency head's functions, *solely* in the event of a vacancy, violates that mandate because it is a substitute method of appointing an acting officer.

A. Respondents rely on Section 3348(a)'s definition of "function or duty" to include only functions or duties "required by statute to be performed by the applicable officer (*and only that officer*)." 5 U.S.C. §3348(a)(2)(A)(ii) (emphasis added). Gov't Br. 11-12; S&N Br. 19-20. But respondents ignore that definition's key limitation: It applies only to "this section." 5 U.S.C. §3348(a). That definition thus limits only the scope of Section 3348's *remedies*, not the Act's *substantive* provisions in Sections 3345 to 3347. Pet. 8, 29-30; Cato Br. 15-21; cf. *Rubin* v. *Islamic Republic of Iran*, 138 S. Ct. 816, 825-826 (2018) (interpreting statutory reference to "this section" to mean section in which reference appeared).

Section 3348 provides potent remedies, including an automatic voiding provision and a prohibition on ratification. 5 U.S.C. §3348(d)(1)-(2). But nothing in Section 3348 makes those remedies exclusive. Courts regularly granted relief for Vacancies Act violations even before Congress added Section 3348. Cato Br. 12-15. Limita-

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was dismissed on mootness grounds. In three others (*L.M.-M.*, *Public Employees*, and *Behring*), the government dismissed its appeal without explanation shortly after filing. Pet. 23-25.

tions on Section 3348's potent remedies thus do not limit the Act's substantive scope.

Courts have acknowledged that distinction in related contexts. Section 3348(e) contains another limitation that applies only to "this section": It states that "[t]his section shall not apply to * * * the General Counsel of the National Labor Relations Board." 5 U.S.C. § 3348(e). In *SW General, Inc.* v. *NLRB*, 796 F.3d 67 (D.C. Cir. 2015), the NLRB argued that Section 3348(e) rendered Section 3348(d)'s automatic voiding remedy inapplicable to the general counsel's actions and thus permitted it "to raise arguments like harmless error and the de facto officer doctrine." *Id.* at 78-79. The NLRB did *not* claim that the provision exempted the general counsel from the FVRA entirely. *Ibid.* The D.C. Circuit thus "assume[d] that section 3348(e)(1) renders the actions of an improperly serving Acting General Counsel *voidable*, not void." *Id.* at 79. This Court proceeded on the same basis when it affirmed the D.C. Circuit's holding that the NLRB's general counsel had served in violation of the FVRA. See *NLRB* v. *SW Gen., Inc.*, 580 U.S. 288, 298 n.2 (2017). Consistent with that distinction, the Second Circuit later allowed the NLRB to rely on ratification to cure the violation. Even though the general counsel had served in violation of the FVRA, the court explained, Section 3348(d)'s prohibition on ratification did not apply. See *NLRB* v. *Newark Elec. Corp.*, 14 F.4th 152, 161-163 (2d Cir. 2021).

Those cases confirm that Section 3348's limitations on "this section" apply only to *that section*. They do not limit the Act's *substantive* provisions like Section 3347(a).

B. The government urges that Section 3347(a) makes the FVRA the exclusive mechanism for "temporarily authorizing an *acting official* to perform the functions and duties" of an office. Gov't Br. 10. In its view, that

phrasing merely limits "the circumstances under which an official may *take on the title* of 'acting officer'"—it imposes no meaningful limits on what the official can actually *do*. *Id.* at 11 (emphasis added).

That construction is not plausible. Congress enacted the FVRA to protect the Senate's advice-and-consent power, not to micromanage the job titles that federal officers can list on their business cards or office doors. Section 3347(a) thus makes the FVRA the exclusive means for temporarily "authorizing" someone to perform functions and duties of a vacant office—not temporarily "calling oneself" an acting officer. Congress passed the statute to protect the Senate's confirmation prerogative, not to deflate people's egos.

C. Respondents claim support from the legislative history. Gov't Br. 14-15; S&N Br. 22. But any fair reading of that history favors Arthrex. The Senate Report explains at length that Congress enacted the FVRA to put an end to the Executive Branch's use of delegations to evade the Vacancies Act. S. Rep. No. 105-250, at 3-5 (1998). The government cites one reference to the statute's inapplicability to "[d]elegable functions," but that reference appears in the discussion of Section 3348's enforcement mechanism. *Id.* at 17-18. S&N goes even further afield, citing "additional views" that do not purport to speak for the committee. *Id.* at 30-31.

The government urges the Court not to assume that "Congress intended to pursue [its] goal in the most draconian way possible." Gov't Br. 14. But the issue is not whether Congress intended the statute to be draconian or moderate. The issue is whether Congress intended the statute to accomplish *anything at all*.

D. Respondents urge that Congress's failure to amend the FVRA supports their interpretation. Gov't Br. 15; S&N Br. 14. But "'[c]ongressional inaction lacks persuasive significance' in most circumstances." *Star Athletica, LLC* v. *Varsity Brands, Inc.*, 580 U.S. 405, 424 (2017). "The 'complicated check on legislation' erected by our Constitution creates an inertia that makes it impossible to assert with any degree of assurance that congressional failure to act represents * * * approval of the status quo * * * ." *Johnson* v. *Transp. Agency*, 480 U.S. 616, 672 (1987) (Scalia, J., dissenting) (citation omitted).[3]

E. Respondents' policy arguments fare no better. The government insists that Arthrex's interpretation would "cripple the operation of the federal government." Gov't Br. 14. Not so. The FVRA enables the President to appoint acting officers "with the stroke of a pen," and "there is simply no burden associated with doing that." Pet. App. 19a (citing 5 U.S.C. § 3345(a)(2), (3)).

Smith & Nephew asserts that a ruling for Arthrex would cast doubt on hundreds of thousands of patents issued by Commissioner Hirshfeld. S&N Br. 18. But the de facto officer doctrine precludes collateral challenges to an officer's appointment not made on direct review of the disputed decision. See *Ryder* v. *United States*, 515 U.S. 177, 182 (1995) (decision "pending * * * on direct review").

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[3] The government points to the GAO's approval of Steven Bradbury's service at OLC. Gov't Br. 12-13. But that case involved a "delegation in the regular course, not simply under the circumstance of a vacant office." Letter from Gary L. Kepplinger, U.S. Gov't Accountability Off., to Richard J. Durbin *et al.*, at 5 (June 13, 2008). The PTO delegation here, by contrast, transfers *all* of the Director's functions, *solely* in the event of a vacancy. Those are the features that make it a substitute succession plan in violation of Section 3347(a).

Smith & Nephew never explains why that limitation would not be dispositive.

Finally, Smith & Nephew asserts that the FVRA should be interpreted narrowly because it is "a legislative intrusion into the sphere of executive authority." S&N Br. 23. Precisely the opposite. The FVRA derogates from the Senate's advice-and-consent power by allowing temporary appointments without Senate confirmation so the Executive Branch can operate during vacancies. That context favors a fair construction, not an anemic one.

III. This Case Is An Appropriate Vehicle

Respondents try to manufacture vehicle problems. None of them withstands scrutiny.

A. Smith & Nephew urges that the Federal Circuit's patentability ruling makes this case a poor vehicle. S&N Br. 15-17. That ruling is irrelevant. The Federal Circuit affirmed the Board's ruling under the "substantial evidence" standard after reviewing the disclosures and expert testimony submitted to the Board. Pet. App. 20a, 23a-27a. The substantial evidence standard is "deferential." *Teva Pharms. Int'l GmbH* v. *Eli Lilly & Co.*, 8 F.4th 1349, 1359 (Fed. Cir. 2021). It requires only "more than a mere scintilla" of evidence, *Biestek* v. *Berryhill*, 139 S. Ct. 1148, 1154 (2019), and is even more forgiving than the "clearly erroneous" standard applicable to district court findings, *Dickinson* v. *Zurko*, 527 U.S. 150, 162 (1999).

No such standard restricts the *Director's* review of Board findings. "[A]ll issues of law or fact are reviewed de novo." U.S. Patent & Trademark Off., Interim Process for Director Review § 9 (Sept. 22, 2022). The Federal Circuit's ruling thus in no way preordains the outcome of the Director review that Arthrex seeks.

Smith & Nephew urges that Director Vidal did not intervene in the court of appeals to disavow the Board's decision. S&N Br. 17. But the Senate did not confirm her until April 5, 2022, after briefing and argument were complete. 168 Cong. Rec. S1987 (Apr. 5, 2022). As the court of appeals previously explained, moreover, intervention permits only arguments to a court, not "actual review[ ] of a decision." Pet. App. 40a-41a. And once the Senate confirmed Director Vidal, the PTO *did* ask the Federal Circuit to remand the case so she could rule on Arthrex's petition. Gov't Br. 17 n.6; C.A. Dkt. 192. The Federal Circuit refused, even though no one opposed the motion. C.A. Dkt. 195. The government thus appreciated that Director review would be a meaningful exercise.

B. Smith & Nephew asserts that Arthrex sought relief only under Section 3348 below. S&N Br. 20 n.5. That is both incorrect and irrelevant. While Arthrex did argue that Commissioner Hirshfeld's decision was void under Section 3348(d), it also made more general requests for vacatur that were not tethered to Section 3348. C.A. Dkt. 160 at 2, 11, 27. In any event, Arthrex's petition to this Court does not seek review of remedial issues. The Federal Circuit never reached those issues because it held that there was no violation of the FVRA in the first place. If this Court grants review and reverses, it could remand for the court of appeals to address remedies in the first instance.

Finally, the government contends that this case is a poor vehicle because a *different* FVRA provision, Section 3347(b), does not apply to the PTO. Gov't Br. 17-18; cf. Pet. 31 n.4. That is not a vehicle problem. The question presented is whether the PTO violated *Section 3347(a)'s* mandate of exclusivity by creating its own succession plan. Pet. i. The fact that *other* agencies might also vio-

late a *different* FVRA provision does not make this case a poor vehicle for addressing the question Arthrex's petition actually presents. If anything, the fact that Arthrex is not pursuing a Section 3347(b) claim weighs *in favor* of review because it eliminates a potential alternative ground for decision that might otherwise prevent the Court from reaching the Section 3347(a) violation. See Shapiro *et al.*, *supra*, § 4.4(e), at 248-249 (potential "alternative ground for decision" weighs against review).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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