

No. _____

In the
Supreme Court of the United States

JORGE ALEJANDRO AVALOS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

An Assistant Field Office Director within Immigration and Customs Enforcement (ICE) ordered Jorge Avalos removed from the United States under 8 U.S.C. § 1228(b). He was not appointed by a “Head[] of Department[],” as the Appointments Clause normally requires for “inferior Officers.” U.S. Const., art. II, § 2, cl. 2.

The questions presented are:

(1) Whether a bureaucrat lacks a “continuing position established by law” merely because the disputed acts are part of his full-time job, as the Ninth Circuit held here, contrary to the conclusions of the Second and D.C. Circuits as well as the Office of Legal Counsel; and

(2) Whether a bureaucrat’s last-word authority over whether a noncitizen is removed from the United States constitutes significant authority under the Appointments Clause.

PARTIES, RELATED PROCEEDINGS, AND RULE 29.6 STATEMENT

The parties to the proceeding below were Petitioner Jorge Alejandro Avalos and the United States. There are no non-governmental corporate parties requiring a disclosure statement under Supreme Court Rule 29.6.

All proceedings directly related to the case, per Rule 14.1(b)(iii), are as follows:

- *United States v. Avalos*, No. 23-CR-828-DMS, U.S. District Court for the Southern District of California, Judgment issued December 1, 2023.
- *United States v. Avalos*, No. 23-3944, U.S. Court of Appeals for the Ninth Circuit, Opinion issued December 17, 2025.
- *United States v. Avalos*, No. 23-3944, U.S. Court of Appeals for the Ninth Circuit, Order denying rehearing and rehearing en banc issued May 6, 2026.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jorge Alejandro Avalos respectfully prays that the Court issue a writ of certiorari to review the order of the United States Court of Appeals for the Ninth Circuit entered on December 17, 2025.

INTRODUCTION

This petition concerns two questions about the Appointments Clause. First: If a regulation establishes the duties of a bureaucrat, but those duties are part-time, are those duties continuing? The Ninth Circuit says no. Second: Is it an act of significant executive authority to order a noncitizen removed? The Ninth Circuit, again, says no.

In its answer to the first question, the Ninth Circuit creates a split. In the other circuits to consider the issue, “temporary positions can be offices” subject to

the Appointments Clause. *United States v. Donziger*, 38 F.4th 290, 296 (2d Cir. 2022) (cleaned up); *accord Ass’n of Am. Railroads v. U.S. Dep’t of Transp.*, 821 F.3d 19, 36–39 (D.C. Cir. 2016). As the Office of Legal Counsel warns, a contrary rule would allow Congress to “evade the requirements of the Appointments Clause, under the guise of creating a ‘noncontinuous’ position, by providing for a longstanding position in the federal government—particularly one with a historical pedigree of being treated as an office—to periodically expire and renew.” *The Test for Determining “Officer” Status Under the Appointments Clause*, 49 Op. O.L.C. ___, slip op. at 6 (Jan. 16, 2025) (“2025 OLC Opinion”).

In its answer to the second question, the Ninth Circuit disregards both modern and historical authority from the Court. Nearly a century before adopting the “significant authority” test, the Court held that immigration inspectors *must* be acting as officers under the Appointments Clause when inspecting and ordering noncitizens removed at the border. *Nishimura Ekiu v. United States*, 142 U.S. 651, 663 (1892). In this specific immigration context, the structural guarantees of the Appointments Clause are even more essential, as other constitutional protections fall away regarding this “sovereign prerogative.” *See Dep’t of Homeland Security v. Thuraissigiam*, 591 U.S. 103, 139 (2020) (discussing *Nishimura Ekiu*).

The Court should grant this petition. The Appointments Clause question is preserved and case-determinative. This case presents an excellent opportunity for the Court to clarify that a bureaucrat’s “small (though far from unimportant)” jurisdiction can still render her an inferior officer, especially when, within that

jurisdiction, she exercises “the full power of the Attorney General.” *Morrison v. Olson*, 487 U.S. 654, 718 (1988) (Scalia, J., dissenting).

OPINION BELOW

A Ninth Circuit panel affirmed Mr. Avalos’s conviction in a published opinion. *See* Pet. App. A. Mr. Avalos subsequently filed a petition for rehearing and rehearing en banc. The two panel members voted to deny. *See* Pet. App. B.

JURISDICTION

The Ninth Circuit affirmed Mr. Avalos’s conviction on December 17, 2025. Pet. App. A. The court denied Mr. Avalos’s petition for rehearing or rehearing en banc on May 6, 2026. *United States v. Avalos*, No. 23-3944, Docket No. 63. The Court has jurisdiction under 28 U.S.C. § 1254(1)(1).

CONSTITUTIONAL PROVISION INVOLVED

The Appointments Clause provides that the President “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.” U.S. Const., art. II, sec. 2, cl. 2.

STATEMENT OF THE CASE

In 2023, Jorge Alejandro Avalos attempted to enter the United States. He was arrested and charged with attempted illegal reentry following removal under 8 U.S.C. § 1326. He moved to dismiss the information under 8 U.S.C. § 1326(d). He explained that the removal order serving as an element of the illegal reentry offense—a 2009 removal order—was invalid under the Appointments Clause. Pet. Appx. 9a. The officer who had ordered him removed was an “inferior Officer” under the Appointments Clause but had not properly been appointed. Const. art. II, § 2, cl. 2. He satisfied all procedural and substantive requirements to bring a motion to challenge the validity of the 2009 removal order serving as an element of the instant criminal offense. Pet. Appx. 11a; *see United States v. Palomar-Santiago*, 593 U.S. 321, 323 (2021) (addressing those requirements).

The 2009 removal order stemmed from when Jorge Avalos was 19 years old. He had stolen a necklace from a man on the street in Los Angeles. He pleaded guilty in California superior court to second-degree robbery, his first conviction. Presentence Report 7–8. While in custody, an Assistant Field Office Director within ICE ordered him removed to Mexico. Pet. Appx. 32a. Jorge Avalos had not lived in Mexico since he was six years old. Presentence Report 10.

The Assistant Field Office Director ordered Mr. Avalos removed through streamlined removal proceedings, often called administrative removals. 8 U.S.C. § 1228(b); 8 C.F.R. § 238.1; *see Riley v. Bondi*, 606 U.S. 259, 267 (2025) (summarizing these proceedings). The Assistant Field Office Director had been

designated by another ICE employee, his Field Office Director, as a “deciding Service officer.” 8 C.F.R. § 238.1(a). In that role, he was charged with making “the Executive’s *final* determination on the question of removal.” *Riley*, 606 U.S. at 267 (emphasis in original).

As a “deciding Service officer,” certain regulations established the Assistant Field Office Director’s duties. He was to make final, unappealable decisions “concerning custody or bond.” 8 C.F.R. § 238.1(g). Then he was to review all “evidence in the record” to find whether a noncitizen was “deportab[le].” 8 C.F.R. § 238.1(d). There were three key questions regarding deportability: (i) citizenship; (ii) immigration status as a noncitizen; and (iii) whether that person has a final conviction for an aggravated felony. 8 U.S.C. § 1228(b); *see also* 8 C.F.R. § 238.1(b).

If the deciding service officer found “that the record of proceeding, including the alien’s timely rebuttal, raise[d] a genuine issue of material fact,” or if he “deem[ed]” that “additional evidence may aid [him] in the rendering of a decision” for any reason, regulations allowed for him to develop that evidence. 8 C.F.R. § 238.1(d)(2)(ii)(A). He could “obtain additional evidence from any source, including the alien,” which would become part of the administrative record. 8 C.F.R. § 238.1(d)(2)(ii)(A), (h). He could do so through his existing powers as an immigration officer, a prerequisite to acting as a deciding service officer. Those powers include the ability “to interrogate and administer oaths,” “to arrest,” “to conduct searches,” and “to execute warrants.” 8 C.F.R. § 287.5(a), (c)–(e); *see* 8 C.F.R. § 238.1(a) (noting only immigration officers with these powers can act as a

deciding service officer). The deciding service officer was to enforce stringent deadlines: if he “does not receive a timely response,” he was to issue a final order of removal. 8 C.F.R. § 238.1(d)(1). After reviewing the evidence, and developing more as needed, the officer had the power to either “terminate” proceedings, or, instead, “issue and cause to be served upon the alien a Final Administrative Removal Order that states the reasons for the deportation decision.” 8 C.F.R. § 238.1(d)(1), (3).

Despite having these powers, the deciding service officer in Mr. Avalos’s case did not himself interview Mr. Avalos, gather evidence, or put anyone under oath. Instead, the officer made “findings of fact and conclusions of law” by relying solely on a different ICE staffer’s paperwork. Pet. Appx. 32a. The paperwork indicated the different ICE staffer had served a notice of proceedings, then explained Mr. Avalos’s rights and responsibilities, then taken his admissions, and then taken a waiver of judicial review within the span of a single minute. Pet. Appx. 29a–30a.

Based on that paperwork, the deciding service officer issued an order to Mr. Avalos stating, “By the power and authority vested in the Secretary of Homeland Security, and in me as the Secretary’s delegate under the laws of the United States, I find you deportable as charged and order that you be removed from the United States to: MEXICO or to any alternate country prescribed in section 241 of the Act.” Pet. Appx. 32a. There is no administrative appeal within any part of the executive once a removal order is issued by the deciding service officer. *Riley*, 606 U.S. at 267; *see* 8 C.F.R. § 1003.1(b). Five days after this administrative removal order was issued, Mr. Avalos was walked across the border to Mexico.

In 2023, although Mr. Avalos had not tried to enter the country for over a decade, his family urged him to try to come to the United States to say goodbye to his dying father. He did. He was caught and charged in this case with illegal reentry after deportation under U.S.C. § 1326. Presentence Report 8.

He filed a motion to dismiss the information on the Appointments Clause issue, which the district court denied. Mr. Avalos pled guilty subject to a conditional plea agreement and was sentenced to 18 months. Pet. Appx. 26a–28a.

On appeal, Mr. Avalos argued he had met each procedural requirement needed to bring his Appointments Clause challenge to his administrative removal order under 8 U.S.C. § 1326(d). He explained that, for as long as this country has had federal immigration statutes, immigration officials making the final decision about someone’s deportation have been considered inferior officers subject to the Appointments Clause. And like independent special counsel, commissioned military officers who occasionally act as summary court-martials, United States commissioners, and others held to be officers through part-time or temporary duties, the deciding officer in his case “occup[ied] a ‘continuing’ position established by law.” *Lucia v. Securities and Exchange Comm.*, 585 U.S. 237, 245 (2018).

The Ninth Circuit affirmed the district court. It addressed only the merits of the Appointments Clause question. It held that deciding service officers do not qualify as inferior officers because they “neither occupy a continuing position nor exercise significant authority.” Pet. Appx. 17a.

The Ninth Circuit established this Appointments Clause rule: a “position is not continuing and permanent where, like the position of special master, the responsibilities of the position are temporary, episodic, and periodic rather than continuous, the duties, functions, salary and means of appointment are not delineated by law, and there is no regular appropriation made to pay compensation for discharging those responsibilities.” Pet. Appx. 14a. It reasoned that “[n]o statute sets forth” deciding service officers’ duties; “[u]nder the regulation, any number of enumerated DHS employees . . . may serve as a deciding Service officer”; and “the regulation does not provide for any ‘regular appropriation’ to pay.” Pet. Appx. 18a. It held that three of the Court’s prior cases addressing part-time and temporary officers under the Appointments Clause “provide[] no guidance for determining when employees are inferior officers because there was no dispute that the . . . [relevant officials] were officers.” Pet. Appx. 19a (discussing *Kennedy v. Braidwood Management, Inc.*, 606 U.S. 748, 762 (2025); *Weiss v. United States*, 510 U.S. 163, 169 (1994); and *Morrison*, 487 U.S. at 671 n.12).

On the second question, the Ninth Circuit held that deciding service officers “do not possess authority sufficient to confer officer status.” Pet. Appx. 19a. It reasoned that the officers “are limited in the scope of their decisions and have limited authority” because they cannot “consider ‘any applicable ground’ for removal.” Pet. Appx. 20a. They instead only issue removal orders to noncitizens who they find have convictions that qualify as aggravated felonies. Pet. Appx. 20a. It asserted they “do not possess broad procedural powers,” because their ability to

obtain evidence, administer oaths, and evaluate evidence is “meaningfully circumscribed by statute and regulation.” Pet. Appx. 20a. And, finally, the Ninth Circuit held that deciding service officers have narrower authority than the immigration inspectors who were considered to be inferior officers in *Nishimura Ekiu*, because deciding service officers make “straightforward determinations” about which convictions are aggravated felonies. Pet. Appx. 23a.

REASONS FOR GRANTING THE PETITION

This Court’s review is warranted because the Ninth Circuit has injected considerable confusion into the nation’s Appointments Clause jurisprudence. First, the decision below relied on an erroneous understanding of the Appointments Clause to create a split. In the Ninth Circuit, executive officers are not subject to the structural constraints of the Appointments Clause if their duties are “temporary, episodic, and periodic.” Pet. Appx. 14a. In the Second and D.C. Circuits, “temporary positions can be offices.” *Donziger*, 38 F.4th at 296 (cleaned up); *accord Ass’n of Am. Railroads*, 821 F.3d at 36–39. The Office of Legal Counsel agrees. 2025 OLC Opinion, *supra*, at 6.

Further, the Ninth Circuit has held that an officer need not be subject to the structural protections of the Appointments clause when he makes make “the Executive’s *final* determination on the question of removal.” *Riley*, 606 U.S. at 267. That rule not only encourages administrative agencies to escape the Appointments Clause’s requirements by diffusing important executive decisions. It also contorts modern and historical Appointments Clause precedent to establish the principle

that it is not an act of significant executive authority to order someone deported. It does so in the circuit that decides the majority of immigration appeals filed in the United States. The petition should be granted.

I. The Ninth Circuit’s rule conflicts with all other courts’ Appointments Clause rules on part-time and temporary officers.

“The ‘manipulation of official appointments’ had long been one of the American revolutionary generation’s greatest grievances against executive power, because ‘the power of appointments to offices’ was deemed ‘the most insidious and powerful weapon of eighteenth century despotism.’” *Freytag v. Commissioner*, 501 U.S. 868, 883 (1991) (simplified). “Those who framed our Constitution addressed these concerns by carefully husbanding the appointment power to limit its diffusion.” *Id.* In adopting the Appointments Clause, the Framers “[a]id[ed] out the permissible methods of appointing ‘Officers of the United States,’ a class of government officials distinct from mere employees.” *Lucia*, 585 U.S. at 241 (quoting U.S. Const., art. II, § 2, cl. 2). They created one of “the significant structural safeguards of the constitutional scheme.” *Edmond v. United States*, 520 U.S. 651, 659 (1997).

To be subject to the constraints of the Appointments Clause, “an individual must occupy a ‘continuing’ position established by law.” *Lucia*, 585 U.S. at 245 (quoting *United States v. Germaine*, 99 U.S. 508, 511 (1879)). What exactly constitutes a continuing position is the subject of disagreement.

In the Second and the D.C. Circuits, “[t]emporary [p]ositions [c]an [b]e [o]ffices.” *Donziger*, 38 F.4th at 296; accord *Ass’n of Am. Railroads*, 821 F.3d at 36–

39. In *Donziger*, the Second Circuit addressed a special prosecutor appointed for a single criminal contempt proceeding. It reviewed early Supreme Court cases “for guidance on how to determine whether a particular temporary position is sufficiently ‘continuing’ to constitute an office.” 38 F.4th at 296. It also relied on an Office of Legal Counsel opinion doing the same. *Id.* at 297 (citing *Officers of the United States Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 112–13 (2007)).

The Second Circuit emphasized “three factors that are helpful to consider in determining whether a temporary position is an office.” *Id.* First: A temporary position can qualify as an office if “the position [does] not depend on the identity of the person occupying it, and the duties . . . ‘continue, though the person be changed.’” *Id.* at 297 (quoting *United States v. Maurice*, 26 F. Cas. 1211, 1214 (C.D. Va. 1823) (Marshall, C.J.)). Second: While a “position must not be transient or fleeting,” temporary positions can be offices even if “duties terminate upon performance” and the position is “appointed for a ‘particular case.’” *Id.* at 297–99. The point is that positions with “discrete, short-lived tasks”—which do not have an indefinite duration—are not officer positions. *Id.* at 298–99. But positions that *do* “last for an indefinite period of time, possibly years,” are not “transient or fleeting.” *Id.* at 298. Third: A temporary position can be an office if “the duties of the position [are] . . . more than incidental to the regular operations of government.” *Id.* at 297.

So, in *Donziger*, the Second Circuit emphasized that the temporary special prosecutor there had duties going to “a core power of government,” including

wielding “the awesome responsibility of depriving an individual of his liberty” through prosecution. *Id.* at 297–99. The special prosecutor was thus an officer under the Appointments Clause, despite the narrowly constrained subject of his work. *Id.*

Similarly, the D.C. Circuit “resounding[ly]” held that a single-issue arbitrator in an Amtrak dispute is a principal officer. *Ass’n of Am. Railroads*, 821 F.3d at 37; *see id.* at 36–39. The Office of Legal Counsel has adopted a similar test, reasoning that, otherwise, an agency could “evade the requirements of the Appointments Clause, under the guise of creating a ‘noncontinuous’ position, by providing for a longstanding position in the federal government—particularly one with a historical pedigree of being treated as an office—to periodically expire and renew.” 2025 OLC Opinion, *supra*, at 6.

By contrast, in the Ninth Circuit, temporary positions are not subject to constraints of the Appointments Clause. It has adopted a rule that “a position is not continuing and permanent where, like the position of special master, the responsibilities of the position are temporary, episodic, and periodic rather than continuous.” Pet. Appx. 14a. In the Ninth Circuit, the fact that “any number of enumerated [agency] employees . . . may serve as” the relevant official cuts against constitutional officer status, rather than for it. Pet. Appx. 18a. Instead, what matters is whether a bureaucrat has a “regular appropriation made to pay compensation for discharging [his] responsibilities,” and whether a statute rather than a regulation “sets forth” his “duties, functions, salary and means of appointment.” Pet. Appx. 14a, 18a.

II. The question of whether an unappointed bureaucrat can issue a final order of deportation is one of exceptional importance.

The act of “expel[ling] aliens” is the “inherent and inalienable right of every sovereign and independent nation.” *Wong Wing v. United States*, 163 U.S. 228, 231 (1896). “A decision on removability requires a determination whether it is appropriate to allow a foreign national to continue living in the United States. Decisions of this nature touch on foreign relations and must be made with one voice.” *Arizona v. United States*, 567 U.S. 387, 409 (2012).

Whether issuing a final removal order in a streamlined removal proceeding is the “exercis[e of] significant authority pursuant to the laws of the United States” is thus an exceptionally important question. *Buckley v. Valeo*, 424 U.S. 1, 126 (1976).

It is also one the Court has not addressed in over a century.

In *Nishimura Ekiu*, the Court addressed the legality of an “inspector of immigration[’s]” streamlined removal order. 142 U.S. at 662. The inspector, Mr. Hatch, had ordered Ms. Ekiu removed from the United States for being likely to become a public charge, immediately upon her arrival at the border. *Id.* at 661–62. The Court first held that it would not “re-examine” how the inspector found facts. *Id.* at 660. As a result, it explained, “The case must therefore turn on the validity and effect of the action of Hatch as inspector of immigration.” *Id.* at 662.

The Court understood Ms. Ekiu to “argue[] that the appointment of Hatch was illegal.” *Id.* at 663. Ms. Ekiu “argued” the appointment was illegal “because it was made by the secretary of the treasury, and should have been made by the superintendent of immigration.” *Id.* at 663.

The Court rejected that argument under the Appointments Clause. It explained, “the constitution does not allow congress to vest the appointment of inferior officers elsewhere than ‘in the president alone, in the courts of law, or in the heads of departments.’” *Id.* It explained that the non-cabinet-level officer’s appointments “could be upheld only by presuming them to be made with the concurrence or approval of the secretary of the treasury, his official head.” *Id.* It cited specifically to the Appointments Clause, “Const. art. 2, § 2,” and three Appointments Clause cases. *Id.* It also rejected the argument on statutory grounds: “The Act of 1891 manifestly contemplates and intends that the inspectors of immigration shall be appointed by the secretary of the treasury.” *Id.* Both grounds were necessary to “[t]he result”—that “the inspector of immigration was duly appointed.” *Id.* at 664.

How to apply this nineteenth century immigration precedent in the context of the Appointments Clause—a context in which the Court “put[s] significant weight upon historical practice”—is exceedingly important. *NLRB v. Noel Canning*, 573 U.S. 513, 524 (2014) (emphasis omitted).

Yet, in this case, the Ninth Circuit declined to resolve whether *Nishimura Ekiu* constituted anything more than “dicta.” Pet. Appx. 23a n.5. It also declined to engage with “what is *necessary*” to “make someone an officer of the United States” under historical precedent. *Lucia*, 585 U.S. at 253 (Thomas, J., concurring) (emphasis in original). Instead, it noted that, even if their powers were *sufficient* to render them officers, the immigration inspectors in *Nishimura Ekiu* were not

“appropriate analogues” to modern bureaucrats deciding streamlined removals. Pet. Appx. 24. The Ninth Circuit noted that the historical immigration inspectors resolved a noncitizen’s eligibility for removal on about a half-dozen different grounds, whereas in modern streamlined administrative removal, deciding service officers resolve a noncitizen’s eligibility for removal on a single statutory ground, with twenty-one subsections, in 8 U.S.C. § 1101(a)(43)(A)–(U). Pet. Appx. 23a–24a. Because of this difference, the Ninth Circuit declined to subject deciding service officers to the Appointments Clause, reasoning that their “authority and discretion is highly constrained by regulation and limited to a narrow set of issues.” Pet. Appx. 24a.

Further, how to reconcile immigration precedent with the modern, yet “general” and “unadorned,” “significant authority” test is exceedingly important. *Lucia*, 585 U.S. at 245–46.

At various times, the Court has emphasized an officer’s “last-word capacity” when conducting an Appointments Clause analysis. *Id.* at 249. An officer has “significant authority” when he has “authority to enter a final decision” regarding an “important function[].” *Freytag*, 501 U.S. at 881–82; *accord Braidwood*, 606 U.S. at 765 (quoting *Edmond*, 520 U.S. at 665) (“in evaluating inferior-officer status, the Court has also examined whether the relevant officer has the ‘power to render a final decision on behalf of the United States’ without review by a principal officer”); *United States v. Arthrex*, 594 U.S. 1, 14 (2021) (holding it “significant” that patent judges “have the ‘power to render a final decision on behalf of the United States’”).

The Court has also emphasized whether officers are “exercising the ‘executive Power.’” *Braidwood*, 606 U.S. at 760 (citing U.S. const., art. II, § 1, cl. 1).

Under this line of analysis, the fact that deciding service officers issue “the Executive’s *final* determination on the question of removal” would likely render them inferior officers subject to the Appointments Clause. *Riley*, 606 U.S. at 267.

But the Ninth Circuit did not address the fact that deciding service officers issue final, administratively unappealable decisions on behalf of the Executive. Pet. Appx. 19a–24a. Nor did it address the quintessentially executive nature of decisions regarding deportation. *See id.*

Instead, the Ninth Circuit weighed other characteristics the Court has emphasized at other times: “the scope of the[officer’s] decisions,” the “range of discretion” and the “breadth” of their “procedural powers.” Pet. Appx. 19a–21a (citing to *Freytag*, 501 U.S. at 873, and *Lucia*, 585 U.S. at 248). Focusing on these procedural and discretionary powers, the Ninth Circuit held that deciding service officers are not subject to the Appointments Clause because they are “limited to deciding a single legal issue,” outside of “adversarial hearings.” Pet. Appx. 21a–22a. In light of these procedural powers, the Ninth Circuit held that ordering a noncitizen removed in administrative removal proceedings is not an act of significant authority under the laws of the United States. Pet. Appx. 21a–24a.

III. This case is the right vehicle to resolve these issues.

This case is a proper vehicle to resolve the split between the Ninth Circuit, on the one side, and the Second and the D.C. Circuits, on the other, as to whether

officials with temporary positions are subject to the constraints of the Appointments Clause. It is also a proper vehicle to resolve whether immigration officials who issue a final removal order are subject to the constraints of the Appointments Clause.

Mr. Avalos moved to dismiss the information charging him with illegal reentry because the sole deportation order underlying it was issued by an unappointed deciding service officer in violation of the Appointments Clause. *See* Pet. Appx. 11a. He demonstrated that the unappointed deciding service officer acted without accountability: He never met Mr. Avalos or interviewed him and instead relied on another unappointed staffer's paperwork indicating the staffer had served a notice, explained all of Mr. Avalos's rights and responsibilities, taken Mr. Avalos's admissions, and taken his waiver of judicial review in a span of a single minute.

Mr. Avalos also demonstrated that he met the "three prerequisites that defendants facing unlawful-reentry charges must satisfy before they can challenge their original removal orders." *Palomar-Santiago*, 593 U.S. at 324; *see* 8 U.S.C. § 1326(d)(1)–(3). Both the district court and the Ninth Circuit addressed only the merits of the Appointments Clause issue. Pet. Appx. 9a–24a.

The issue of whether the Ninth Circuit was right to reject Mr. Avalos's Appointments Clause claim—to hold that deciding service officers are not subject to the constraints of the Appointments Clause as inferior officers—is thus both cleanly presented and case-determinative.

IV. The Ninth Circuit is wrong, yet it alone governs the majority of immigration cases in the nation.

This Court should take this case because the Ninth Circuit is wrong. Because of the Ninth Circuit’s size and geography, its wrong rule controls the majority of immigration appeals in the nation. *See* U.S. Courts, Table B-3, Sources of Appeals, Original Proceedings, and Miscellaneous Applications Commenced, by Circuit, During the 12-Month Periods Ending September 30, 2021 through 2025.

The Ninth Circuit’s rule that “temporary, episodic, and periodic” positions are not subject to the Appointments Clause is clearly wrong. Pet. Appx. 14a. It allows for significant “evasion of the Appointments Clause through the creation of temporary positions with the same powers as officers.” *Donziger*, 38 F.4th at 297 n.5. There is a reason no other circuit has adopted this approach. Doing so would allow “the mere fragmentation of executive responsibilities into small compartments,” ultimately depriving the executive of his power and duty to appoint responsible officers through dividing up “responsibilities among a number of ‘lesser’ functionaries.” *Morrison*, 487 U.S. at 718 (Scalia, J., dissenting).

Indeed, the Ninth Circuit’s temporary- and part-time-officer rule fundamentally misunderstands the nature of the “continuing and permanent” duties inquiry. *Germaine*, 99 U.S. at 511–12. The inquiry exists to distinguish *contractors* from government officers. As the Court held in *Germaine*, a contract physician is not an officer because he is “only to act when called on . . . in some special case,” and he “gives no bond and takes no oath.” *Id.* at 512.

By contrast, an independent counsel appointed to prosecute certain federal officials *is* an officer, even though the office “is ‘temporary’ in the sense that an independent counsel is appointed essentially to accomplish a single task.” *Morrison*, 487 U.S. at 672. Even private individuals who “work on a volunteer basis and receive no compensation for their service” are clearly officers subject to the Appointments Clause. *Braidwood Management*, 606 U.S. at 798 (Thomas, J., dissenting). And “those serving as military judges must be appointed pursuant to the Appointments Clause,” even when “[t]hey do not serve for fixed terms and may perform judicial duties only when assigned to do so.” *Weiss*, 510 U.S. at 168, 170. The Ninth Circuit’s rule that the Assistant Field Officer Director in Mr. Avalos’s removal case need not be appointed because his duties are part-time is wrong under each of these cases.

Further, the Ninth Circuit’s rule that deciding service officers lack significant authority pursuant to the laws of the United States when ordering noncitizens removed is also wrong. It ignores essential components of both modern and historical Appointments Clause precedent.

For one, nowhere in the Ninth Circuit’s analysis under the modern “significant authority” rule does it address that “the relevant officer has the ‘power to render a final decision on behalf of the United States’ without review by a principal officer.” *Braidwood*, 606 U.S. at 765 (quoting *Edmond*, 520 U.S. at 665). It instead weighs only “the scope of their decisions,” the “range of discretion,” and the “breadth” of their “procedural powers.” Pet. Appx. 20a. In so doing, the Ninth

Circuit’s rule falls short by omitting the central role that an officer’s “last-word capacity” serves in any Appointments Clause analysis. *Lucia*, 585 U.S. at 249; *see also Lucia*, 585 U.S. at 269 (Sotomayor, J., dissenting) (emphasizing the role of “the ability to make final, binding decisions on behalf of the Government” in the significant authority test).

Similarly, the Ninth Circuit fails to “put significant weight upon historical practice” when considering whether deciding service officers are inferior officers. *NLRB v. Noel Canning*, 573 U.S. 513, 524 (2014) (emphasis omitted); *see Trump v. Cook*, 146 S. Ct. 2234 (2026) (“We thus look to history not as an end in itself, but (as we often do) to give ‘essential content to undefined provisions in the frame of our government.’”) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring)); 2025 OLC Opinion, *supra*, at 6 (“history and practice carry significant weight in appointments matters”). It refuses to even resolve whether the Court’s nineteenth century Appointments Clause case addressing immigration inspectors, *Nishimura Ekiu*, “was dicta.” Pet. Appx. 23a n.5. Instead, it points out that those historical immigration inspectors considered about four more grounds of removal than modern deciding service officers, which it imagines were less “straightforward” than the modern task of deciding whether a person’s conviction is an aggravated felony. Pet. Appx. 23a. In so doing, the Ninth Circuit sidesteps its historical research and instead falls into the pit identified by Justice Scalia as to officers with “small” jurisdictions. *Morrison*, 487 U.S. at 718 (Scalia, J., dissenting). “The Ambassador to Luxembourg is not anything less than a

principal officer, simply because Luxembourg is small. And the federal judge who sits in a small district is not for that reason ‘inferior in rank and authority.’” *Id.*

Nowhere does the Ninth Circuit address that this case is about an obviously important executive function: deportation. Pet. Appx. 19a–24a. Yet the Court could not be clearer about deportation’s importance and quintessentially executive character. “[T]he power to admit or exclude aliens is a sovereign prerogative.” *Thuraissigiam*, 591 U.S. at 139 (quoting *Landon v. Plasencia*, 459 U.S. 21, 32 (1982)). Further, the “power to seek daunting . . . penalties against private parties on behalf of the United States” is “a quintessentially executive powser.” *Seila Law LLC v. CFPB*, 591 U.S. 197, 219 (2020). “[D]eportation is a particularly severe ‘penalty.’” *Padilla v. Kentucky*, 559 U.S. 356, 365 (2010).

Not only is the Ninth Circuit wrong. Its wrong conclusion now controls the majority of immigration appeals. In each of the last four years, over half of all immigration appeals in the nation were filed in the Ninth Circuit. See U.S. Courts, Table B-3, Sources of Appeals, Original Proceedings, and Miscellaneous Applications Commenced, by Circuit, During the 12-Month Periods Ending September 30, 2021 through 2025, 1, 9 (in 2021, resolving 2,635 of 5,510 petitions for review from the Board of Immigration Appeals; in 2022, 2,451 of 4,399; in 2023, 1,922 of 3,606; in 2024, 2,244 of 3,894; in 2025, 2,910 of 4,492). Last year, nearly two-thirds of all petitions for review from the Board of Immigration Appeals were in the Ninth Circuit. *Id.*

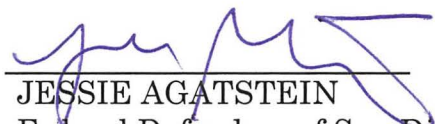
The Court should grant this petition to bring the Ninth Circuit into conformity with the Court and all other circuits' case law on temporary officer positions under the Appointments Clause. Doing so would also allow the Court to straighten out the wrinkles in its "significant authority" test under the Appointments Clause. *Buckley*, 424 U.S. at 126.

CONCLUSION

For these reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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