Nos. 22-639 and 22-925

In the Supreme Court of the United States

ARTHREX, INC., PETITIONER

v.

SMITH & NEPHEW, INC., ET AL.

FALL LINE PATENTS, LLC, PETITIONER

v.

UNIFIED PATENTS, LLC,
FKA UNIFIED PATENTS, INC., ET AL.

*ON PETITIONS FOR WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT*

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
MELISSA N. PATTERSON
JOSHUA M. SALZMAN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the Commissioner for Patents violated the Federal Vacancies Reform Act of 1998, 5 U.S.C. 3345 *et seq.*, by exercising a delegable function or duty of the Director of the United States Patent and Trademark Office pursuant to a longstanding agency delegation order.

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OPINIONS BELOW

The opinion of the court of appeals in *Arthrex, Inc.* v. *Smith & Nephew, Inc.*, No. 18-2140 (Pet. App. 1a-28a), is reported at 35 F.4th 1328. A prior opinion of the court of appeals (Pet. App. 31a-62a) is reported at 941 F.3d 1320. A final written decision of the Patent Trial and Appeal Board (Pet. App. 126a-168a) is not published in the United States Patents Quarterly but is available at 2018 WL

2084866. An order of the United States Patent and Trademark Office Commissioner (Pet. 29a-30a) is unreported.

The opinion of the court of appeals in *Fall Line Patents, LLC* v. *Unified Patents, LLC fka Unified Patents, Inc.*, No. 19-1956 (Pet. App. 1a-7a), is not published in the Federal Reporter but is available at 2022 WL 17747862. A prior opinion of the court of appeals (Pet. App. 10a-21a) is not published in the Federal Reporter but is reprinted at 818 Fed. Appx. 1014. An order of the United States Patent and Trademark Office Commissioner (Pet. App. 8a-9a) is unreported.

JURISDICTION

The judgment of the court of appeals in *Arthrex, Inc.* v. *Smith & Nephew, Inc.*, No. 18-2140, was entered on May 27, 2022. A petition for rehearing was denied on August 11, 2022 (Pet. App. 169a-170a). On October 28, 2022, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including January 8, 2023. The petition was filed on January 6, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

The judgment of the court of appeals in *Fall Line Patents, LLC* v. *Unified Patents, LLC fka Unified Patents Inc.*, No. 19-1956, was entered on December 19, 2022. The petition for a writ of certiorari was filed on March 20, 2023 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Article II of the Constitution requires the President to obtain "the Advice and Consent of the Senate" before appointing certain "Officers of the United States." U.S. Const. Art. II, § 2, Cl. 2. When an office requiring such advice and consent—known as a Presidentially appointed, Senate-confirmed (PAS) office—is vacant, the Federal Vacancies Reform Act of 1998 (FVRA), 5 U.S.C. 3345 *et*

seq., provides a mechanism for authorizing an "acting officer" to temporarily discharge the duties of the office, without Senate confirmation to that office. 5 U.S.C. 3345 (capitalization and emphasis omitted). The FVRA creates a default rule that, when a vacancy arises, "the first assistant to the office of such officer shall perform the functions and duties of the office temporarily in an acting capacity." 5 U.S.C. 3345(a)(1). Alternatively, the President "may direct a person" who already serves in a PAS office, or who served in a senior position in the relevant agency for at least 90 days during the 365-day period before the vacancy arose, to "perform the functions and duties of the vacant office temporarily in an acting capacity." 5 U.S.C. 3345(a)(2) and (3).

The FVRA establishes certain time limits on service as an "acting officer." 5 U.S.C. 3346. An official serving as an "acting officer" pursuant to the FVRA can exercise all of the functions and duties of the vacant office, including those that are specifically committed by statute exclusively to that office. See 5 U.S.C. 3348(a) and (d).

2. The Patent Act of 1952 (Patent Act), 35 U.S.C. 1 *et seq.*, establishes the United States Patent and Trademark Office (USPTO) as an agency within the United States Department of Commerce "responsible for the granting and issuing of patents and the registration of trademarks." 35 U.S.C. 2(a)(1); see 35 U.S.C. 1(a). The USPTO is subject to the "policy direction of the Secretary of Commerce," but it retains responsibility for decisions "regarding the management and administration of its operations" and exercises independent control over matters such as "budget allocations," "personnel decisions," and "other administrative and management functions." 35 U.S.C. 1(a).

The USPTO is headed by the agency's Director, an official who is appointed by the President with advice and

consent of the Senate. 35 U.S.C. 3(a)(l). The Patent Act states that "[t]he powers and duties of the [USPTO] shall be vested in" the Director. *Ibid.*; see *United States* v. *Arthrex, Inc.*, 141 S. Ct. 1970, 1987 (2021) (plurality opinion). The Director has broad statutory authority to delegate those powers to subordinate officers and employees. See 35 U.S.C. 3(b)(3)(B) (authorizing the Director to "delegate to [subordinate officials] such of the powers vested in the Office as the Director may determine"); Patent and Trademark Office Efficiency Act (Efficiency Act), Pub. L. No. 106-113, App. I, Tit. IV, Subtit. G, Ch. 3, § 4745, 113 Stat. 1501A-587 (codified at 35 U.S.C. 1 note) (creating a presumption that "an official to whom functions are transferred under this subtitle (including the head of any office to which functions are transferred under this subtitle) may delegate any of the functions so transferred to such officers and employees of the office of the official as the official may designate").

The Patent Act also creates the office of Deputy Director, who is appointed by the Secretary of Commerce upon nomination by the Director. 35 U.S.C. 3(b)(1). The Deputy Director is "vested with the authority to act in the capacity of the Director in the event of the absence or incapacity of the Director." *Ibid.*

The USPTO's leadership foresaw that there could be times (such as periods following Presidential transitions) when the positions of both Director and Deputy Director might be simultaneously vacant. Because the Deputy Director is the "first assistant" to the Director, the FVRA's default rule would be of no help to the USPTO during such vacancies. And because the Deputy Director position itself can be filled only through "nomination by the Director" and appointment by the Secretary of Commerce, 35 U.S.C. 3(b)(1), a vacancy in the Director position could

prevent the installment of a new Deputy Director. In such circumstances, and absent some type of alternative arrangement, none of the duties of the Director could be performed until such time as the President named an Acting Director.

Consistent with longstanding Executive Branch practice, the USPTO has taken proactive steps to protect against interruption in its operations by issuing a standing directive known as Agency Organization Order 45-1. See USPTO, *Agency Organization Order 45-1* (issued Nov. 7, 2016); see 18-2140 C.A. Doc. 161-2 (Feb. 3, 2022). In pertinent part, that order provides that, in the event of simultaneous vacancies in the positions of Director and Deputy Director, the "non-exclusive functions and duties" of the Director position will be performed by the "Commissioner for patents"—a position that is filled through appointment by the Secretary for a term of five years. *Arthrex* Pet. App. 182a; see 35 U.S.C. 3(b)(2).

The order is an exercise of the Director's delegation authority, not of any power conferred by the FVRA. Accordingly, the order does not purport to designate the Commissioner for Patents as an "acting official" during periods when the Director and Deputy Director are unavailable. It instead authorizes the Commissioner to perform only the "non-exclusive" (*i.e.*, delegable) functions of the Director. 18-2140 C.A. Doc. 161-2, at 2.

3. The Leahy-Smith America Invents Act, 35 U.S.C. 100 *et seq.*, establishes a process called "inter partes review [(IPR)]," which allows the USPTO to "reconsider and to cancel an issued patent claim in limited circumstances." *Oil States Energy Servs., LLC* v. *Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1370 (2018). When an IPR proceeding is instituted, "the Patent Trial and Appeal Board—an adjudicatory body within the PTO created

to conduct inter partes review—examines the patent's validity." *Id.* at 1371; see 35 U.S.C. 6(b)(4) and (c), 316(c).

At the conclusion of an IPR proceeding, the Board "issue[s] a final written decision" addressing the patentability of the challenged claims. 35 U.S.C. 318(a). Board decisions are subject to direct review in the Federal Circuit. See 35 U.S.C. 141, 319. The statute creating the Board specifies that "[e]ach * * * inter partes review shall be heard by at least 3 members of the Patent Trial and Appeal Board," and that "[o]nly the Patent Trial and Appeal Board may grant rehearings" of Board decisions. 35 U.S.C. 6(c).

4. a. Petitioner Arthrex holds a patent that was reviewed in an IPR proceeding in which the Board found the challenged claims invalid. *Arthrex* Pet. App. 3a. Arthrex appealed to the Federal Circuit and challenged the Board's decision both on the merits and on the ground that the administrative patent judges who serve on the Board are not appointed in the manner required for appointment of principal officers. See U.S. Const. Art. II, § 2, Cl. 2; *Arthrex* Pet. App. 3a. The court of appeals ruled for Arthrex on the latter ground and did not review the merits of the Board's patentability determination. See 941 F.3d 1320. This Court granted review of the court of appeals' decision. 141 S. Ct. 549.

In January 2021, while the litigation was pending before this Court, both the Director and Deputy Director positions became vacant in the wake of the Presidential transition. As a result, pursuant to Agency Organization Order 45-1, Commissioner for Patents Andrew Hirshfeld began to exercise the delegable duties and functions of the USPTO Director.

In June 2021, this Court issued a decision holding that "the unreviewable authority wielded by [administrative

patent judges] during inter partes review is incompatible with their appointment by the Secretary to an inferior office." 141 S. Ct. at 1985. As a remedy, the Court held that 35 U.S.C. 6(c), which states that only Board panels of at least three members may rehear Board decisions, "is unenforceable as applied to the Director insofar as it prevents the Director from reviewing the decisions of the [Board] on his own." 141 S. Ct. at 1987 (plurality opinion); see *id.* at 1997 (Breyer, J., concurring in the judgment in part and dissenting in part) (agreeing with the plurality's "remedial holding"). The Court "conclude[d] that the appropriate remedy is a remand to the Acting Director for him to decide whether to rehear" the Board's decision. *Id.* at 1987 (plurality opinion).

b. On remand, Arthrex was afforded an opportunity to submit a written request for Director review of the Board's decision. *Arthrex* Pet. App. 3a. Because the offices of both the Director and the Deputy Director remained vacant, the request for review was referred to Commissioner Hirshfeld, consistent with Agency Organization Order 45-1. *Id.* at 3a-4a. Commissioner Hirshfeld subsequently issued an order denying rehearing and declaring the original Board decision to be the final decision of the agency. *Id.* at 4a, 30a.

c. Arthrex sought review before the Federal Circuit, challenging both the merits of the Board's patentability determination and the denial of Arthrex's request for Director review. As to the denial of Director review, Arthrex argued that Commissioner Hirshfeld's order violated the Appointments Clause, the FVRA, and separation-of-powers principles. *Arthrex* Pet. App. 5a-20a.

A unanimous panel of the court of appeals affirmed in full. *Arthrex* Pet. App. 1a-28a. With respect to the

FVRA challenge, the court held that the FVRA addresses the performance only of "functions and duties that a PAS officer *alone* is permitted by statute or regulation to perform" and "does not apply to delegable functions and duties." *Id*. at 11a (emphasis added); see 5 U.S.C. 3348(a)(2) (defining "function or duty"). The court noted that this construction was consistent with decisions of other courts of appeals. *Arthrex* Pet. App. 11a (citing *Schaghticoke Tribal Nation* v. *Kempthorne*, 587 F.3d 132, 135 (2d Cir. 2009) (per curiam), cert. denied, 562 U.S. 947 (2010); *Stand Up for Cal.!* v. *United States Dep't of the Interior*, 994 F.3d 616, 622 (D.C. Cir. 2021), cert. denied, 142 S. Ct. 771 (2022)). The court recognized that this interpretation would substantially limit the FVRA's practical impact, but it concluded that such concerns would not "justify departing from the plain language of the statute." *Id.* at 14a. After considering and rejecting Arthrex's alternative argument that the Director's authority to review Board decisions is non-delegable (*id*. at 16a-18a), the court rejected Arthrex's FVRA challenge.[1]

d. Arthrex sought panel rehearing and rehearing en banc, which were denied without noted dissent. *Arthrex* Pet. App. 170a.

5. a. Petitioner Fall Line also holds a patent that was reviewed through an IPR proceeding in which the Board found the challenged claims invalid. *Fall Line* Pet. App. 2a. Fall Line pursued review in the Federal Circuit and in this Court, trailing the Arthrex litigation by several

[1] The court of appeals also rejected Arthrex's Appointments Clause challenge, its separation-of-powers challenge, and its challenges to the merits of the patentability determination. Arthrex does not seek review of those determinations here. *Arthrex* Pet. 15 n.1.

months and raising arguments substantially similar to those raised by Arthrex. *Ibid.* Fall Line first appealed the Board's decision to the Federal Circuit, which vacated and remanded the case to the Board "for proceedings consistent" with the Federal Circuit's 2019 decision in *Arthrex*. *Id.* at 21a. The government petitioned for a writ of certiorari. After this Court decided *Arthrex*, it granted the petition, vacated the court of appeals' judgment, and remanded for further consideration in light of *Arthrex*. 141 S. Ct. 2843.

b. On remand, Fall Line filed a petition for Director review. *Fall Line* Pet. App. 9a. Because the Director and Deputy Director positions remained vacant, Commissioner Hirshfeld addressed the petition, which he denied. *Ibid.*

c. Fall Line again sought review before the Federal Circuit, raising the same challenges that Arthrex had asserted. *Fall Line* Pet. App. 2a. The court of appeals affirmed based on its decision in *Arthrex*. *Ibid.*[2]

ARGUMENT

The court of appeals correctly held that the FVRA did not preclude Commissioner Hirshfeld from exercising the delegable functions and duties of the USPTO Director during the simultaneous vacancies in the offices of Director and Deputy Director. That holding does not conflict with any decision of this Court or another court of appeals. These cases would also be unsuitable vehicles for clarifying the proper construction of the FVRA

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[2] Fall Line raised one additional argument in support of its claim that the Patent Act does not permit the delegation at issue here. Fall Line contended that the statutory delegation authority in 35 U.S.C. 3(b)(3) does not allow delegations to commissioners, even if it applies to other inferior officers. *Fall Line* Pet. App. 4a-7a. The court of appeals rejected that argument, *ibid.*, and Fall Line does not press it in this Court.

because certain provisions of that statute do not apply to the USPTO. Further review is not warranted.[3]

1. The decisions below are correct. As the court of appeals rightly held, the FVRA's "plain language" confirms that the statute does not prohibit the delegation at issue here. Pet. App. 14a. The Executive and Legislative Branches have long interpreted the statute accordingly, and petitioners' contrary arguments are unavailing.

a. The FVRA establishes a mechanism through which certain classes of government officials may "temporarily carry out the duties of a vacant PAS office in an acting capacity, without Senate confirmation." *NLRB* v. *SW Gen., Inc.*, 580 U.S. 288, 293 (2017); see 5 U.S.C. 3345(a), 3347. Subject to certain exceptions, the FVRA is "the exclusive means for temporarily authorizing an *acting official* to perform the functions and duties of any office * * * for which appointment is required to be made by the President, by and with the advice and consent of the Senate." 5 U.S.C. 3347(a) (emphasis added).[4] An "acting" officer serving pursuant to

[3] Because Fall Line's petition "is the same as the petition filed by Arthrex," *Fall Line* Pet. 1 n.1, we hereinafter cite only to Arthrex's petition and appendix.

[4] Petitioners repeatedly overstate (Pet. 17, 20, 27-29) the breadth of the FVRA's exclusivity provision. By its terms, that provision limits only the "means for temporarily authorizing *an acting official*," 5 U.S.C. 3347(a) (emphasis added); it does not prevent the Executive Branch from entrusting the delegable duties of a vacant PAS office to a delegee not serving in an acting capacity. Moreover, that provision is subject to exceptions and, among other things, does not displace any statute that expressly provides another means of designating an acting official to temporarily perform the functions and duties of a specified office. 5 U.S.C. 3347(a)(1). Thus, for example, the FVRA does not displace the Patent Act provision that

the FVRA can exercise all of the functions and duties of the vacant office, including those that are specifically committed by statute exclusively to that office. 5 U.S.C. 3348(a) and (d)(1).

The FVRA thus limits the circumstances under which an official may take on the title of "acting officer" and exercise those powers that can lawfully be performed only by the occupant of a vacant office. Nothing in the FVRA, however, purports to prohibit a subordinate official's exercise of validly delegated authorities. Thus, if an otherwise valid delegation of authorities has been made, the delegated functions may continue to be performed during a vacancy even if there is no serving acting official capable of exercising the vacant office's *non-delegable* functions.

Section 3348 confirms that distinction between functions that are exclusive to the vacant office and those that are not. Under that provision, when a PAS office is vacant and no acting official has been designated in accordance with the FVRA, "the office shall remain vacant" and "only the head of [the] Executive agency may perform any function or duty of such office." 5 U.S.C. 3348(b). Section 3348 further provides that any "function or duty" performed in violation of that provision "shall have no force or effect" and "may not be ratified." 5 U.S.C. 3348(d). But in so providing, Congress narrowly defined the term "function or duty" to encompass only those functions and duties that are required by statute or regulation "to be performed by the applicable officer (and only that officer)." 5 U.S.C. 3348(a)(2)(A)(ii). Congress thus expressly excluded delegable functions and duties from the restriction, leaving

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allows the USPTO's Deputy Director to serve as Acting Director during any vacancy in the office of Director. See 35 U.S.C. 2(b)(1). Such office-specific statutes abound.

the head of the Executive agency responsible in times of vacancy for only those actions that are non-delegable.

b. Shortly after the FVRA was enacted, the Department of Justice's Office of Legal Counsel (OLC) endorsed that plain-text reading. OLC recognized that "Congress understood that there would be occasions * * * when there would, for a period, be no one qualified to serve in an acting capacity." *Guidance on Application of Federal Vacancies Reform Act of 1998*, 23 Op. O.L.C. 60, 72 (Mar. 22, 1999). Congress further understood that requiring all of the vacant office's duties to be performed by the head of the Executive agency during such periods would "seriously impair[]" the business of the government. *Ibid.* Rather than mandating that result, Congress narrowly "delimited" the functions or duties that could be performed only by the acting officer or head of the Executive agency. *Ibid.* OLC observed that "[m]ost, and in many cases all, the responsibilities performed by a PAS officer will not be exclusive, and the Act permits non-exclusive responsibilities to be delegated to other appropriate officers and employees in the agency." *Ibid.* The Executive Branch has operated in accordance with that reading ever since.

The Government Accountability Office (GAO)—the arm of Congress charged with monitoring FVRA compliance, see 5 U.S.C. 3349(b)—has expressed a similar understanding. When asked whether the service of a senior OLC official had violated the FVRA, the GAO determined that the official had not "used the title of Acting Assistant Attorney General for OLC" during the time the position was vacant and had not "performed any functions or duties which under the Vacancies Act may be performed only by the Attorney General as head of the Department." Letter from Gary L. Kepplinger, Gen. Coun-

sel, GAO, to Richard J. Durbin et al., U.S. Senators 3-4 (June 13, 2008), https://gao.gov/assets/b-310780.pdf. Based on those determinations, and noting that "the position of Assistant Attorney General for OLC does not have any duties or functions which are exclusive to the position," the GAO concluded that the official had not violated the FVRA. *Id.* at 4; see *id.* at 4-5.

c. With respect to the matters at issue in these cases, the USPTO acted in accordance with the FVRA's text and with longstanding Executive Branch practice. A Senate-confirmed USPTO Director, Michelle K. Lee, exercised her statutory authority to promulgate Agency Organization Order 45-1, which provides that under certain conditions the Commissioner for Patents "will perform the non-exclusive functions" of the USPTO Director. Pet. App. 182a; see C.A. Doc. 161-2. This order was a valid exercise of the USPTO Director's broad authority to delegate the powers of her office to subordinates. See 35 U.S.C. 3(b)(3)(B); Efficiency Act § 4745, 113 Stat. 1501A-587. Because the order does not purport to designate the Commissioner for Patents as an "Acting Director," and because the order is expressly limited to the Director's "non-exclusive" (*i.e.*, delegable) functions, the court of appeals correctly held that the FVRA did not preclude Commissioner Hirshfeld from exercising the authorities delegated to him. Pet. App. 10a-16a.

d. Petitioners' contrary arguments are unavailing.

Petitioners largely contend (Pet. 17-20) that the text-based interpretation set forth above must be incorrect because it means that the FVRA will seldom preclude the effective performance of the duties of a vacant Executive Branch office. But that is because Congress rarely precludes

delegation of particular duties.[5] Under petitioners' capacious reading, vacancies would cripple the operation of the federal government in the very way that Congress, both in statutory text and by practice, has understandably chosen to avoid. Petitioners also ignore that the FVRA prevents the use of delegation as a means for reassigning duties that are required by *regulation* to be performed only by the applicable officer, and includes a lookback period of 180 days to prevent agencies from circumventing this restriction by revoking the applicable regulation. See 5 U.S.C. 3348(a)(2)(B).

Petitioners' reliance on non-textual indicia of purported congressional intent (Pet. 20-22) is also misplaced. Petitioners note Congress's desire "to uphold the Senate's prerogative to advise and consent to nominations [by] placing a limit on presidential power to appoint temporary officials." Pet. 20 (quoting S. Rep. No. 250, 105th Cong., 2d Sess. 4 (1998) (1998 Senate Report)) (brackets in original). Petitioners assume that Congress intended to pursue that goal in the most draconian way possible. But "the best evidence of Congress's intent is the statutory text." *National Fed'n of Indep. Bus.* v. *Sebelius*, 567 U.S. 519, 544 (2012). In narrowly defining the "function or duty" that can be performed only by the agency head or an acting official serving pursuant to the FVRA, the statutory text plainly indicates that Congress sought to protect its prerogatives without unduly hindering the performance of important governmental functions. See 5 U.S.C. 3348(a)(2). In the same Report that petitioners invoke, the Senate Committee on Governmental Affairs clarified that Section 3348 was included so that, in the event of a

[5] For examples of Executive Branch functions that Congress has expressly made non-delegable, see, *e.g.*, 5 U.S.C. 9807(c)(1); 7 U.S.C. 7996(e)(2); 22 U.S.C. 4865(a)(2); 31 U.S.C. 1344(d)(3); 41 U.S.C. 3304(a).

vacancy, "[d]elegable functions of the office could still be performed by other officers or employees." Pet. App. 13a (quoting 1998 Senate Report 18) (brackets in original). Like many other statutes, the FVRA was thus a "compromise" that imposes certain limits while preventing government paralysis during vacancies. *Ibid.* If Congress becomes dissatisfied with that compromise or with the Executive Branch's longstanding and open exercises of delegated authority, it can amend the statute to address those concerns.

Petitioners' sole text-based argument appears to be that Section 3347(a) provides "the exclusive means for temporarily authorizing an acting official to perform the functions and duties" of any office. See Pet. 27 (emphasis omitted). But in focusing on the word "exclusive" in that provision, petitioners ignore the use of the term "acting official" as an important limitation. As petitioners recognize, the FVRA does not provide the exclusive means for authorizing *any* official to perform delegable duties. See Pet. 30 ("No one disputes that agency heads can delegate functions, or that subordinates can continue to perform delegated functions even if the agency head's office becomes vacant.").

2. Petitioners do not identify any substantial basis for further review. "Other circuits agree" with the court of appeals' plain-text reading of the FVRA. Pet. App. 11a (citing *Schaghticoke Tribal Nation* v. *Kempthorne*, 587 F.3d 132, 135 (2d Cir. 2009) (per curiam), cert. denied, 562 U.S. 947 (2010); *Stand Up for Cal.!* v. *United States Dep't of the Interior*, 994 F.3d 616, 622 (D.C. Cir. 2021), cert. denied, 142 S. Ct. 771 (2022)). Petitioners do not meaningfully argue otherwise. Pet. 25 & n.3. Petitioners also acknowledge that, after the court below issued its ruling, the Third Circuit adopted the same

interpretation. See Pet. 25 (discussing *Kajmowicz* v. *Whitaker*, 42 F.4th 138 (2022)). There can be no real dispute that most "courts that have considered the issue"—and all courts of appeals to have done so—"have generally upheld the ability of government officials to perform the delegated duties of a vacant office, so long as the delegation is otherwise lawful under the legal principles that ordinarily govern delegations." Valerie C. Brannon, Cong. Research Serv., R44997, *The Vacancies Act: A Legal Overview* 25-26 (updated May 28, 2021), https://perma.cc/XKG4-L8F7.

Petitioners highlight (Pet. 23-25) a small handful of district-court decisions that have reached contrary results, but those decisions do not create a division of authority significant enough to warrant this Court's intervention. Indeed, several of those decisions come from the United States District Court for the District of Columbia and are arguably inconsistent with the D.C. Circuit's statements that "the FVRA provides the Executive Branch with leeway to set out which functions or duties are exclusive and which are not" unless Congress has done so "through clear statutory mandates." *Stand Up for Cal.!*, 994 F.3d at 622. This Court should allow the D.C. Circuit to resolve any potential internal conflict in the first instance. Cf. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").

Petitioners note (Pet. 26-27) that the government successfully petitioned for certiorari in another FVRA case despite the absence of a circuit split. But in that case, the court of appeals' decision called into question high-level Executive Branch actions under three different Presidents and cast a cloud over several then-serving

high-level officers. See Gov't Pet. at 27, *SW Gen.*, *supra* (No. 15-1251). The government also emphasized that, because the decision in question had been issued by the D.C. Circuit, which has broad jurisdiction over federal governmental action, it might limit the opportunity for further percolation because litigants seeking to raise FVRA challenges could bring their challenges in that court. *Id*. at 29-30. Those considerations are not implicated here.[6]

Even if the question presented otherwise warranted this Court's review, these cases present poor vehicles for considering the proper interaction between Section 3347 and agency delegation orders. While petitioners focus on an alleged conflict between such delegations and Section 3347(a), the principal academic commentator petitioners cite primarily argues that delegation orders are in tension with a different FVRA provision—5 U.S.C. 3347(b). See Nina A. Mendelson, *L.M.-M. v. Cuccinelli and The Illegality of Delegating Around Vacant Senate-Confirmed Offices*, Yale J. on Reg.: Notice & Comment (Mar. 5, 2020), https://perma.cc/HZD9-BGEH.[7] That provision states that a "statutory provision

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[6] Petitioners suggest (Pet. 24-25) that the government's dismissals of appeals from various district-court decisions reflected an effort to avoid further review in the courts of appeals. But many FVRA claims can be resolved once the relevant agency vacancies are filled, and agencies often proceed via that route rather than prolonging litigation. Indeed, in *Arthrex* the USPTO filed an unopposed motion requesting a limited remand so that the new Presidentially-appointed and Senate-confirmed Director could consider whether to rehear the relevant Board decision. C.A. Doc. 192 (May 17, 2022). If the court of appeals had granted that motion, the question presented here would be moot.

[7] The other commentators petitioners cite (Pet. 26) do not discuss the correctness of the longstanding interpretation of the FVRA.

providing general authority to the head of an Executive agency * * * to delegate duties statutorily vested in that agency head" is not "a statutory provision [that] expressly" designates or authorizes the designation of an official to serve "temporarily in an acting capacity," so as to provide a means of designating an acting official independent from the FVRA. 5 U.S.C. 3347(a)(1) and (b). Even if Section 3347(b) could be understood as a limitation on delegation, rather than as a limitation on the type of statutes (in addition to the FVRA) that authorize acting service, Section 3347(b) does not apply here because the USPTO is not an "Executive agency" within the meaning of that provision. See 5 U.S.C. 105 (defining "'Executive agency'" as an "Executive department, a Government corporation, and an independent establishment"); see also Pet. App. 18a (noting that the USPTO is a "subagency of the Department of Commerce"); Pet. 31 n.4. Accordingly, the delegation here was not an exercise by the "'head of an Executive agency,'" and Section 3347(b) "does not actually apply." Pet. App. 18a (emphasis omitted).

3. Petitioners also briefly argue (Pet. 31-33) that the decisions below are wrong for the separate reason that the power to rehear Board decisions is an exclusive function that cannot be delegated and therefore was outside the duties and functions that Commissioner Hirshfeld was authorized to perform. But petitioners do not and could not plausibly argue that this question independently

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They merely note that it results in a limited role for the statute and generally propose legislative fixes. See, *e.g.*, Jody Freeman & Sharon Jacobs, *Structural Deregulation*, 135 Harv. L. Rev. 585, 647, 656-663 (2021); Thomas A. Berry, *Closing the Vacancies Act's Biggest Loophole*, Cato Briefing Paper, No. 131 (Jan. 25, 2022), https://www.cato.org/sites/cato.org/files/2022-01/BP-131.pdf.

warrants this Court's review. That challenge does not present a question of government-wide significance but rather is specific to a single provision of the Patent Act. That question also lacks any present significance because the USPTO now has a Presidentially-appointed, Senate-confirmed Director who has not delegated her review authority outside of situations covered by Agency Organization Order 45-1.

In any event, the court of appeals correctly held that the Director could delegate her review authority. In *Arthrex*, this Court concluded that the Director must have the *option* to review final Board decisions. 141 S. Ct. at 1987 (plurality opinion); see *id*. at 1997 (Breyer, J., concurring in the judgment in part and dissenting in part) (agreeing with the plurality's "remedial holding"). To achieve that result, the Court held that 35 U.S.C. 6(c), which states that Board decisions can be reheard only by three-member Board panels, "cannot constitutionally be enforced to the extent that its requirements prevent the Director from reviewing final decisions rendered by [administrative patent judges]." 141 S. Ct. at 1987 (plurality opinion). That partial-severance remedy left the Director free to review Board decisions pursuant to her general authority to exercise the "powers and duties" of the USPTO. See *id*. at 1986, 1987 (citation omitted); 35 U.S.C. 3(a)(1).

Neither the Appointments Clause nor the Patent Act, however, requires the Director to wield her review authority personally. See Pet. App. 16a-18a. Nor does such a restriction follow logically from the *Arthrex* plurality's remedial analysis. To the contrary, treating the authority to review Board decisions in IPRs as one of the Director's "powers and duties" under Section 3(a)(1) logically

implies that the Director may either exercise that authority herself or delegate it to a subordinate.

Petitioners quote the *Arthrex* plurality's statement that "Section 6(c) otherwise remains operative as to the other members of the Board." Pet. 33 (brackets omitted) (quoting 141 S. Ct. at 1987). But while the Commissioner for Patents is designated by statute as a member of the Board, see 35 U.S.C. 6(a), Commissioner Hirshfeld reviewed the Board decisions here not in his capacity as a Board member, but as the Director's delegee under Agency Organization Order 45-1. Indeed, this Court made clear in *Arthrex* that the effect of its decision was to match "the almost-universal model of adjudication in the Executive Branch," 141 S. Ct. at 1987, under which principal officers often delegate final decisionmaking authority. See, *e.g.*, *Smith* v. *Berryhill*, 139 S. Ct. 1765, 1771 (2019) (describing how the Social Security Administration's Appeals Council is that "agency's final decisionmaker" pursuant to a regulatory delegation); 7 C.F.R. 2.35(a)(1) (delegating to a Judicial Officer the Secretary of Agriculture's authority to act "as final deciding officer in adjudicatory proceedings"). Petitioners do not show any error or any basis for further review.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
MELISSA N. PATTERSON
JOSHUA M. SALZMAN
Attorneys

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