No. 21-651

In the Supreme Court of the United States

EDMOND LUMAJ, PETITIONER

v.

MERRICK B. GARLAND, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Appointments Clause, U.S. Const. Art. II, § 2, Cl. 2, permits the Board of Immigration Appeals to issue decisions when operating under the supervision of an Acting Attorney General designated under the Federal Vacancies Reform Act of 1998, 5 U.S.C. 3345 *et seq.*, and a Senate-confirmed Deputy Attorney General.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is unreported but is reprinted at 856 Fed. Appx. 339. The decisions of the Board of Immigration Appeals (Pet. App. 11a-29a) and the immigration judge (Pet. App. 30a-49a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 12, 2021. A petition for rehearing was denied on June 2, 2021 (Pet. App. 50a-51a). The petition for a writ of certiorari was filed on October 29, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

An immigration judge (IJ) concluded that petitioner, a noncitizen, is removable from the United States and denied his requests for asylum, withholding of removal,

and protection under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85 (CAT).[1] Pet. App. 30a-49a. The Board of Immigration Appeals (Board) affirmed the IJ's decision and denied petitioner's motion for reconsideration. *Id.* at 14a-19a, 23a-29a. The court of appeals denied petitioner's petitions for review of the Board's decisions. *Id.* at 1a-10a. As relevant here, the court of appeals rejected petitioner's claim that the Board could not constitutionally act when under the supervision of an Acting Attorney General. *Id.* at 9a-10a.

1. a. Under the Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*, administrative removal proceedings generally involve two levels of agency adjudication within the Department of Justice. First, an official from the Department of Homeland Security (DHS) initiates removal proceedings before an IJ, an official appointed by and exercising authority delegated from the Attorney General. See 8 U.S.C. 1101(b)(4), 1229(a), 1229a(a); 8 C.F.R. 239.1, 1003.10, 1003.14. After considering the evidence produced during the proceedings, the IJ decides whether the noncitizen is removable from the United States. See 8 U.S.C. 1229a(c)(1)(A); 8 C.F.R. 1240.12; see also 8 U.S.C. 1229a(e)(2) (defining "removable" to mean inadmissible or deportable). The IJ also decides any request for asylum, withholding of removal, and CAT protection made during removal proceedings. 8 C.F.R. 1208.2(b), 1208.4(b)(3), 1208.14(a), 1208.16(a), 1208.18(b)(1).

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[1] This brief uses the term "noncitizen" as equivalent to the statutory term "alien." See *Barton* v. *Barr*, 140 S. Ct. 1442, 1446 n.2 (2020) (quoting 8 U.S.C. 1101(a)(3)).

Next, if the IJ orders the noncitizen removed, the noncitizen generally may file an administrative appeal to the Board, which represents the second level of agency adjudication. See 8 C.F.R. 1003.1(b), 1003.3, 1240.12(c), 1240.15. The Board exercises its "independent judgment and discretion in considering and determining the case[]" pursuant to the authority delegated to it by the Attorney General. 8 C.F.R. 1003.1(d)(1)(ii); see 8 C.F.R. 1003.1(a)(1) and (d)(3). If the Board affirms the IJ's decision (and the case is not referred to the Attorney General for further review), the order of removal becomes final upon entry of the Board's decision. 8 U.S.C. 1101(a)(47)(B)(i), 1103(g)(2); 8 C.F.R. 1003.1(d)(7) and (h).

The noncitizen may file a motion to reconsider an order of the IJ or of the Board. 8 U.S.C. 1229a(c)(6); 8 C.F.R. 1003.2(b), 1003.23(b). The noncitizen may file only one such motion for any given decision, and must file the motion within 30 days of the decision. 8 U.S.C. 1229a(c)(6)(A) and (B); see 8 C.F.R. 1003.2(b)(2), 1003.23(b)(1). The motion must "specify the errors of law or fact in the previous order" and "be supported by pertinent authority." 8 U.S.C. 1229a(c)(6)(C); see 8 C.F.R. 1003.2(b)(1), 1003.23(b)(2). Whether to grant a motion to reconsider is discretionary. 8 C.F.R. 1003.2(a).

b. When a case is pending before the Board, the Board proceeds independently of the Attorney General. See 8 C.F.R. 1003.1(d)(1)(ii); accord *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260, 266-267 (1954). Either the Attorney General or the Deputy Attorney General may, but need not, review any decision of the Board. See 8 U.S.C. 1103(g)(2) (allowing Attorney General review); 8 C.F.R. 1003.1(h)(1)(i) (same);

28 C.F.R. 0.15(a) (generally authorizing the Deputy Attorney General "to exercise all the power and authority of the Attorney General, unless any such power or authority is required by law to be exercised by the Attorney General personally"); 28 C.F.R. 0.15(f)(2) (specifically authorizing the Deputy Attorney General to "[r]eview cases decided by the Board of Immigration Appeals pursuant to 8 CFR 3.1(h)(1)(i)").[2] There is no express time limit on the Attorney General's or the Deputy Attorney General's ability to exercise that authority.

2. The Federal Vacancies Reform Act of 1998 (FVRA), 5 U.S.C. 3345 *et seq.*, provides for the temporary authorization of an official to perform the duties of certain offices that are generally filled by presidential appointment with the Senate's advice and consent. By statutory default, when someone holding such an office "dies, resigns, or is otherwise unable to perform the functions and duties of the office," the "first assistant to the office shall perform" those functions and duties "in an acting capacity," subject to certain time limits.

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[2] The regulatory provision specifically vesting authority to review cases decided by the Board in the Deputy Attorney General, 28 C.F.R. 0.15(f)(2), was promulgated in 1987. See 52 Fed. Reg. 11,043, 11,044 (Apr. 7, 1987). Unchanged since then, it cross-referenced the Attorney General's own authority to review the Board's decisions, which then appeared at 8 C.F.R. 3.1(h)(1)(i) (1987). That authority was recodified in 2003 with only a minor grammatical change. See 68 Fed. Reg. 9824, 9826, 9830 (Feb. 28, 2003) (redesignating 8 C.F.R. Part 3 as 8 C.F.R. Part 1003); see also *id.* at 9832 (using "that" instead of "which" and adding 8 C.F.R. 1003.1(j), which provides that "[t]he jurisdiction of, and procedures before, the Board of Immigration Appeals * * * shall remain in effect as in effect on [the date of recodification] until the regulations in this chapter are further modified by the Attorney General").

5 U.S.C. 3345(a)(1); see 5 U.S.C. 3346 (setting out time limits). The statute also gives "the President (and only the President)" the option of designating certain officials other than the first assistant to serve in an acting capacity. See 5 U.S.C. 3345(a)(2) and (3). As relevant here, the President may select "an officer or employee of [the relevant] Executive agency" who has been at the agency for at least 90 of the 365 days before the office became vacant and has a rate of pay at least equal to a GS-15 position. See 5 U.S.C. 3345(a)(3). Someone selected to be the acting officer under that provision is subject to the same time limits. See 5 U.S.C. 3346.

3. a. Petitioner is a native and citizen of Albania who entered the United States without inspection, admission, parole, or a valid entry document. Pet. App. 3a, 31a. DHS initiated removal proceedings, and petitioner conceded he was removable as charged. *Id.* at 31a-32a. Petitioner applied for asylum, withholding of removal, and CAT protection. *Id.* at 32a. At a hearing before the IJ, petitioner was the sole witness to testify in support of his applications. *Ibid.*; 19-2036 C.A. Administrative Record (A.R.) 116. The IJ found that petitioner did not testify credibly and denied his requests for relief from removal. See Pet. App. 39a-48a.

Petitioner timely appealed the IJ's decision to the Board. Pet. App. 23a. On November 8, 2018, the Board dismissed the appeal. *Id.* at 23a-29a. The Board ruled that petitioner waived any challenge to the denial of CAT protection, *id.* at 24a n.1, that the IJ had otherwise properly denied asylum and withholding of removal based on an adverse credibility determination, *id.* at 24a-27a, and that petitioner's due process claim based on asserted difficulty understanding his translator was meritless, *id.* at 27a-29a.

b. On November 7, 2018, one day before the Board issued its decision dismissing petitioner's appeal, Attorney General Jefferson B. Sessions III resigned and the President designated Matthew G. Whitaker to serve as Acting Attorney General under the FVRA, 5 U.S.C. 3345(a)(3). See *Designating an Acting Attorney General*, 42 Op. O.L.C. __, at *1 (Nov. 14, 2018), https://www.justice.gov/olc/file/2018-11-14-acting-ag/download (2018 OLC Op.). Mr. Whitaker ceased serving as Acting Attorney General 99 days later, when the President appointed Attorney General William P. Barr with the Senate's advice and consent.[3] Throughout the period during which Acting Attorney General Whitaker served under an FVRA designation, a Senate-confirmed Deputy Attorney General, Rod J. Rosenstein, held office.[4]

c. Petitioner filed a motion for reconsideration with the Board in December 2018, arguing among other things that the Acting Attorney General's designation had been unlawful. See A.R. 6-33. The Board denied the motion on June 27, 2019, stating that it lacked authority to consider the validity of the Acting Attorney General's designation or to suspend its operations in light of such a challenge. Pet. App. 17a. Accordingly,

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[3] See 165 Cong. Rec. S1353 (daily ed. Feb. 14, 2019); Office of Pub. Affairs, U.S. Dep't of Justice, *William P. Barr Confirmed As 85th Attorney General of the United States* (Feb. 14, 2019), www.justice.gov/opa/pr/william-p-barr-confirmed-85th-attorney-general-united-states.

[4] See U.S. Dep't of Justice, *Former Deputy Attorney General Rod J. Rosenstein*, https://www.justice.gov/archives/dag/staff-profile/former-deputy-attorney-general-rod-j-rosenstein (noting assumption of office on April 26, 2017); *Deputy AG Rod Rosenstein's resignation letter* (Apr. 29, 2019), https://www.documentcloud.org/documents/5982854-Deputy-AG-Rod-Rosenstein-s-resignation-letter (making resignation effective May 11, 2019).

the Board concluded that its decision dismissing petitioner's appeal had not been "shown to have been erroneous by virtue of having been issued during a time while Matthew Whitaker served as Acting Attorney General." *Ibid.*

4. In an unpublished decision, the court of appeals denied petitioner's consolidated petitions for review from the Board's two decisions. Pet. App. 1a-10a. With respect to petitioner's challenge to the Acting Attorney General, the court found no support for the proposition that "the [Board] must suspend operations when there is a challenge to the designation of an Acting Attorney General." *Id.* at 9a-10a (citing *United States* v. *Smith*, 962 F.3d 755, 763-766 (4th Cir.), cert. denied, 141 S. Ct. 930 (2020)). Petitioner sought rehearing on issues unrelated to the Acting Attorney General's supervision of the Board, see C.A. Pet. for Reh'g 1-17, which the court denied, Pet. App. 50a-51a.

ARGUMENT

Petitioner primarily contends (Pet. 1, 13, 18-23) that the Court should grant the petition for a writ of certiorari, vacate the judgment of the court of appeals, and remand (GVR) for further consideration of his challenge under the Appointments Clause, U.S. Const. Art. II, § 2, Cl. 2, in light of *United States* v. *Arthrex, Inc.*, 141 S. Ct. 1970 (2021). That course is not warranted here. This Court in *Arthrex* did not question the constitutionality of having a non-Senate-confirmed official temporarily perform, with statutory authorization, the functions and duties of an officer whose appointment requires the Senate's advice and consent. And even if petitioner were correct that *Arthrex* requires that the Board be supervised by a Senate-confirmed officer under all circumstances, the outcome of this case would be

unchanged, because a Senate-confirmed Deputy Attorney General had the authority to review any Board decision regarding petitioner.

In the alternative, petitioner suggests (Pet. 19-20) that the Court should grant plenary review, but such review would be unwarranted. The court of appeals correctly declined to disturb the Board's decision issued under the supervision of an Acting Attorney General designated under the Federal Vacancies Reform Act. There is no disagreement about the question in the courts of appeals. And in any event, this case would be a poor vehicle for addressing the question, given the availability, at all relevant times, of a Senate-confirmed Deputy Attorney General with authority to review the Board's decision.

1. a. This Court has explained that "[a] GVR is appropriate when 'intervening developments . . . reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome' of the matter." *Wellons* v. *Hall*, 558 U.S. 220, 225 (2010) (per curiam) (quoting *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996) (per curiam)). That standard is not satisfied in this case.

In *Arthrex*, this Court concluded that administrative patent judges (APJs) at the U.S. Patent and Trademark Office (PTO) exercised authority beyond that permissible for inferior officers under the Appointments Clause, describing the relevant statutory framework as giving APJs "the 'power to render a final decision on behalf of the United States' without any * * * review by their nominal superior or any other principal officer in the Executive Branch." 141 S. Ct. at 1981 (quoting *Edmond*

v. *United States*, 520 U.S. 651, 665 (1997)). To remedy that constitutional infirmity, the Court partially invalidated a statutory provision so that the PTO Director —an officer whose appointment requires the Senate's advice and consent—could "review final [PTO] decisions and, upon review, may issue decisions himself." *Id.* at 1987 (plurality opinion).

Arthrex thus did not decide the question that petitioner presents here: whether the Appointments Clause precludes an official who lacks Senate confirmation from temporarily serving in an acting capacity in an office that requires Senate confirmation and supervises other officers. See Pet. i. Nor does this Court's reasoning in *Arthrex* cast constitutional doubt on the permissibility of the longstanding practice and precedent allowing such temporary service. On the contrary, the Court expressly distinguished APJs from those non-Senate-confirmed officials who "exercised their limited power under 'special and temporary conditions,'" citing precedent establishing more than a century ago that, consistent with the Appointments Clause, "an inferior officer can perform functions of [a] principal office on [an] acting basis." *Arthrex*, 141 S. Ct. at 1985 (citing *United States* v. *Eaton*, 169 U.S. 331, 343 (1898)).

Indeed, the remedy that this Court ordered in *Arthrex* indicates the Court's recognition that the very kind of duty that petitioner identifies—the constitutionally required supervision of other officers' decisions—may be provided by a non-Senate-confirmed official who is temporarily "acting" in an office that requires Senate confirmation. When the Court issued its decision in *Arthrex*, the PTO lacked a Senate-confirmed Director. Nevertheless, the Court specifically "remand[ed] to the *Acting* Director for him to decide whether to rehear"

the matter that APJs could not "finally resolve * * * within the Executive Branch." 141 S. Ct. at 1987 (plurality opinion) (emphasis added); see *id.* at 1997 (Breyer, J., joined by Sotomayor and Kagan, JJ., concurring in the judgment in part and dissenting in part) (agreeing with the plurality's "remedial holding"); see also PTO, *Drew Hirshfeld* (Jan. 20, 2021), https://www.uspto.gov/about-us/executive-biographies/drew-hirshfeld (noting that Commissioner for Patents Hirshfeld is performing the functions and duties of the PTO Director); 35 U.S.C. 3(b)(2) (providing for appointment of the Commissioner for Patents by the Secretary of Commerce, without the Senate's advice and consent).

Here, petitioner does not assert that any statutory barrier precluded the Acting Attorney General's effective supervision of the Board's work. Cf. *Arthrex*, 141 S. Ct. at 1980-1983. Nor does he contend that the Acting Attorney General lacked "an adequate opportunity" to review the Board's decision in his case. *Id.* at 1987-1988 (plurality opinion). Rather, petitioner's challenge goes only to whether an Acting Attorney General lacking Senate confirmation may constitutionally perform such supervisory functions. Given the difference between the issue decided in *Arthrex* and the question presented here, as well as the terms of this Court's remand in *Arthrex*, petitioner has failed to establish a probability that the court of appeals would reject its previous conclusions in, or disposition of, this case were this Court to GVR in light of *Arthrex*.

b. The court of appeals would be particularly unlikely to alter the outcome of this case based on petitioner's Appointments Clause challenge because that challenge rests on the incorrect premise that no Senate-confirmed officer could have reviewed the Board's

November 8, 2018 decision dismissing petitioner's appeal. Even assuming that Acting Attorney General Whitaker was constitutionally disabled from providing the requisite oversight of the Board due to his lack of Senate confirmation, the presidentially appointed and Senate-confirmed Deputy Attorney General at the relevant time, Rod J. Rosenstein, had the authority to refer the Board's November 8, 2018 decision to himself for review. See 28 U.S.C. 504 (providing for presidential appointment of the Deputy Attorney General with the Senate's advice and consent); 28 C.F.R. 0.15(a) (generally authorizing the Deputy Attorney General "to exercise all the power and authority of the Attorney General, unless any such power or authority is required by law to be exercised by the Attorney General personally"); 28 C.F.R. 0.15(f)(2) (specifically authorizing the Deputy Attorney General to "[r]eview cases decided by the Board of Immigration Appeals pursuant to 8 CFR 3.1(h)(1)(i)" and to redelegate that authority).[5]

Moreover, because no express time constraint applies to the Attorney General's review of Board decisions, Attorney General Barr could have provided such review of the Board's initial decision upon his confirmation by the Senate and assumption of office on February 14, 2019. Attorney General Barr was also in office when,

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[5] As noted above, see p. 4 n.2, *supra*, the regulation cross-referenced in 28 C.F.R. 0.15(f)(2) was recodified without substantive change in 2003. That recodification did not affect 28 C.F.R. 0.15(f)(2)'s specific grant of authority to the Deputy Attorney General to review Board decisions or to redelegate that authority in conformity with the regulation. See *Pennyfeather* v. *Tessler*, 431 F.3d 54, 56 n.1 (2d Cir. 2005) (giving effect to outdated statutory cross-reference). Nor did it affect the Deputy Attorney General's general authority under 28 C.F.R. 0.15(a) to exercise the powers of the Attorney General.

on June 27, 2019, the Board denied petitioner's motion for reconsideration of the Board's original decision. See Pet. App. 12a-19a. Petitioner provides no explanation why those avenues of supervision of the Board's decisions in his case were inadequate, even assuming he were correct about the Appointments Clause. Accordingly, petitioner cannot establish a possibility that the ultimate outcome of this litigation would change if this Court were to GVR in light of *Arthrex*.

2. Contrary to petitioner's alternative suggestion that "the significance of the Appointments Clause issue raised by this case is such that it might justify plenary review" (Pet. 19-20), such review would also be unwarranted. The court of appeals correctly concluded that "there is no support for [petitioner's] position that the [Board] must suspend operations when there is a challenge to the designation of an Acting Attorney General." Pet. App. 9a. Nor is there any disagreement in the courts of appeals about that question.

a. Petitioner contends (Pet. 2-3, 15-17) that the Board is entirely unable to act when it is under the supervision of an Acting Attorney General who lacks Senate confirmation. That contention is meritless, and the court of appeals correctly declined to disturb the Board's decision on that basis. See Pet. App. 9a-10a. The FVRA expressly permits the President to designate an official to perform, for a limited period, the functions and duties of an office that requires Senate confirmation, "even when the acting official has not been confirmed by the Senate"—a practice that "all three branches of government have long recognized" is permissible. 2018 OLC Op. *2. Petitioner does not dispute that Mr. Whitaker was designated in conformity with the FVRA, see 5 U.S.C. 3345(a)(3), challenging only the

consistency of that designation with the Appointments Clause. See Pet. i. But as the Fourth Circuit has held, "[t]he President's designation of Whitaker as the Acting Attorney General" was "plainly" constitutional, as demonstrated "by both longstanding Supreme Court precedent as well as centuries of unbroken historical practice." *United States* v. *Smith*, 962 F.3d 755, 763, cert. denied, 141 S. Ct. 930 (2020).

As this Court made clear over a century ago, the temporary performance of the duties of a principal office is not the same as holding that office itself and does not require Senate confirmation under the Appointments Clause. See *Eaton*, 169 U.S. at 343. A conclusion to the contrary, the Court explained, "would render void any and every delegation of power to an inferior to perform under any circumstances or exigency the duties of a superior officer, and the discharge of administrative duties would be seriously hindered." *Ibid.*; see *Edmond*, 520 U.S. at 661, 663 (observing that "'inferior officers' are officers whose work is directed and supervised at some level by" Senate-confirmed officers, but also restating *Eaton*'s holding that "a vice consul charged temporarily with the duties of the consul" is an "inferior" officer); see also *Morrison* v. *Olson*, 487 U.S. 654, 672 (1988) (describing the Court's decision as consistent with *Eaton*). And to the extent that petitioner suggests that *Arthrex* announced or implied a new rule that—among a principal officer's duties—the supervision of subordinate officers is uniquely unable to be discharged by an acting official temporarily serving without Senate confirmation, *Arthrex* did no such thing, as explained above. See pp. 9-10, *supra.*

Multiple statutes enacted since 1792 reflect the principles undergirding the Court's decision in *Eaton*. See

NLRB v. *SW General, Inc.*, 137 S. Ct. 929, 935 (2017) ("Since President Washington's first term, Congress has given the President limited authority to appoint acting officials to temporarily perform the functions of a vacant [Senate-confirmed] office without first obtaining Senate approval."); 2018 OLC Op. *10-*12 (detailing the long history of statutes predating the FVRA that also authorized temporary acting service in principal offices by persons lacking Senate confirmation). And Presidents often exercised their statutory authorities to "choose persons who did not hold any Senate-confirmed position to act temporarily as principal officers." *Id.* at *12-*13; see *id.* at *13-*16 (identifying 161 instances involving acting principal officers in Cabinet positions between 1809 and 1860). Accordingly, "[t]he constitutionality of Mr. Whitaker's designation as Acting Attorney General is supported" not only by this Court's precedent, but also "by acts of Congress passed in three different centuries" and "countless examples of executive practice." *Id.* at *26.

b. In any event, this Court's review of the question would not be warranted in this case. There is no division of authority in the courts below; no court of appeals has concluded that a non-Senate-confirmed official may not temporarily act as a principal officer who supervises other officials. And as noted, even if petitioner were correct about the Appointments Clause, that would not alter the outcome in his case, because a Senate-confirmed Deputy Attorney General had the authority to review the Board's initial decision and there was no barrier to later review of that decision (or initial review of the subsequent denial of reconsideration) by a Senate-confirmed Attorney General. See pp. 10-12, *supra*; see *Smith*, 962 F.3d at 766 (observing that even if

there were a constitutional defect in Acting Attorney General Whitaker's service, the defendant could not show an effect on his criminal trial where he had been prosecuted by a Senate-confirmed U.S. Attorney "who was independently empowered by statute"); Pet. App. 9a-10a (citing *Smith*).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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