No. 26-304

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

DEVONTE DEVON JACKSON, ET AL.

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

REPLY BRIEF FOR THE PETITIONER

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This is a quintessential case for certiorari. The Ninth Circuit joined an acknowledged circuit conflict, upending decades of executive-branch practice on who may wield the powers of a PAS office during a vacancy. That decision risks chaos during future presidential transitions and casts a pall over roughly a dozen U.S. Attorney's Offices nationwide.

Respondents claim that the Ninth Circuit was wrong to concede the conflict, that there are various vehicle problems, and that this case is unimportant because the Executive has alternative appointment methods. Respondents' distinction of contrary circuit precedent and their asserted vehicle problems are illusory. Most fundamentally, respondents never grapple with the consequences, particularly for presidential transitions when most officials eligible for acting service under other authorities will be holdovers from the previous administration. The Federal Vacancies Reform Act of 1998

(FVRA), 5 U.S.C. 3345 *et seq.*, preserves the Executive's flexibility to ensure that the functions and duties of PAS offices continue to be performed during vacancies. If the next President is going to be compelled on Day 1 to staff his Administration with holdovers from the previous one, it should be this Court, not the circuit courts, that requires that result. And the Court should reject that result, because respondents fail to rehabilitate the circuits' misreading of the FVRA.

A. The Decision Below Is Incorrect

1. Section 3345(a)(1) is not limited to pre-vacancy first assistants

a. The FVRA permits the current first assistant to serve as the acting officer, regardless of when she became first assistant. Pet. 14-18. Respondents have no persuasive response to the textual and contextual basis for that interpretation.

First, the FVRA focuses on "the first assistant *to the office* of such officer" without regard to when she assumed her role. Pet. 14. Respondents claim (Br. in Opp. 27) that Congress chose office-centric language because "there is no 'officer' present." But if the statute simply said "the first assistant to * * * such officer," 5 U.S.C. 3345(a)(1), it would have been perfectly clear that "such officer" was the PAS "officer" who created the vacancy, 5 U.S.C. 3345(a), and that would at least have suggested that the "first assistant" was the individual who served under that outgoing officer *pre*-vacancy. Indeed, Congress used just such language ("*his* first assistant") in a predecessor statute. Pet. 15. Congress's shift to office-centric language plainly did *something*—it made clear that the current first assistant is the acting officer. Respondents' reading nullifies that change.

Second, the FVRA uses the present tense, directing that the first assistant "shall perform" the office's duties if the officer "dies, resigns, or is otherwise unable to perform." Pet. 15-16 (emphasis omitted). Respondents insist (Br. in Opp. 27) that this language applies only "at the moment the vacancy occurs." But the first assistant does not perform those duties for a nanosecond; they are performed on an ongoing basis by whoever serves as first assistant.

Third, if Congress wanted to impose a pre-vacancy limit, it had numerous ways to do so, such as language in other FVRA provisions requiring pre-vacancy service for certain purposes and in a vacancy statute for inspectors general that draws the very pre-vacancy line respondents urge. Pet. 16-17. Respondents suggest (Br. in Opp. 27-28) that the other FVRA provisions serve different purposes. Nevertheless, they show that Congress knew how to peg FVRA eligibility requirements to the date of the vacancy—something it did not do in Section 3345(a)(1), but later did in the inspector-general statute.

Fourth, the Executive and Legislative Branches have long agreed on that interpretation, and post-vacancy first assistants have frequently performed acting roles since the George W. Bush Administration. Pet. 17-18. Respondents dismiss (Br. in Opp. 29) that practice as less significant than the practice this Court deemed insufficient for congressional acquiescence in *NLRB* v. *SW General, Inc.*, 580 U.S. 288, 307-308 (2017). But here, the government is not claiming that acquiescence can overcome the statutory text; our point is merely that the political branches' longstanding agreement confirms what the text says. While respondents note (Br. in Opp. 28-29) that the political branches briefly took the other

view at the end of the Clinton Administration, they do not dispute that each branch's position has been consistent since 2001, across parties.

b. Respondents' contrary theory, like the Ninth Circuit's, rests on the erroneous premise (Br. in Opp. 25) that Section 3345(a)(1) is a one-time-only "automatic-succession provision." Respondents, however, have no answer to the fundamental problem: Section 3345(a)(1) directs that the first assistant "shall *perform*" the office's functions and duties, and performance is an ongoing task, not a one-time-only event. Pet. 19.

Respondents purport to derive (Br. in Opp. 24) the automatic-succession rule from a combination of Section 3345(a)(1)'s mandatory "shall" and the "dies, resigns, or is otherwise unable" language in Section 3345(a). But the latter language applies to *all* of Section 3345(a), including Sections 3345(a)(2) and (a)(3), which respondents agree (*id.* at 25) are "discretionary." It cannot bear the weight respondents put on it. Pet. 21. As for "shall," it makes Section 3345(a)(1) automatic, but says nothing about succession. Section 3345(a)(1) directs that the first assistant "shall *perform*" the duties, not that she "shall *become*" the acting officer.

Respondents also stress (Br. in Opp. 25) that Section 3345(a)(1) refers to "'*the* first assistant,' not *a* first assistant." But that language means that there is only one first assistant to act at any given time, not that Section 3345(a) operates only once. Pet. 19.

Respondents claim (Br. in Opp. 25) that the government's reading "eviscerates" the President's alternative selection methods in Sections 3345(a)(2) and (a)(3). But they ultimately concede (*id.* at 26) that the government's reading does meaningful work in certain cases, such as when the office of first assistant is vacant and

itself requires Senate confirmation. Respondents minimize (*ibid.*) those circumstances as "unusual," but they include many critical Cabinet-level posts that Congress naturally addressed. Pet. 22-23.

Respondents also emphasize (Br. in Opp. 26) statutory history—namely, Congress's disagreement with how the Clinton Administration made Bill Lann Lee the Acting Assistant Attorney General for the Civil Rights Division after the Senate refused to confirm him to that office. But Congress dealt with that situation in Section 3345(b)(1) by barring first assistants without certain pre-vacancy tenure from serving as acting officers if nominated for the permanent post. The lack of an analogous pre-vacancy restriction in Section 3345(a)(1) dooms respondents' position. Pet. 16.

Finally, respondents assert (Br. in Opp. 30-31) that the government's reading raises constitutional questions under the Appointments Clause. That is a red herring. Given their supervision by the Attorney General, U.S. Attorneys are undisputedly inferior officers, whose appointment may, by law, be vested in an agency head or court. *United States* v. *Hilario*, 218 F.3d 19, 24-26 (1st Cir.), cert. denied, 531 U.S. 1014 (2000); see *United States* v. *Eaton*, 169 U.S. 331, 343 (1898) (holding that acting officials are not principal officers given their limited tenure). And Congress has enacted various provisions vesting the Attorney General with "the power to appoint subordinate officers to assist him in the discharge of his duties." *United States* v. *Nixon*, 418 U.S. 683, 694 (1974); see Pet. 7-8. If the government is right that the FVRA permits those officers to perform acting service when designated first assistant by the Attorney General, that service is authorized by law, consistent with the Appointments Clause.

2. Section 3347(a) does not bar the delegation here

Attorney General Bondi also had statutory authority to delegate her independent power to conduct and supervise litigation in the District of Nevada to Ms. Chattah, which was not barred by the FVRA's exclusivity provision, 5 U.S.C. 3347(a). Pet. 25-29. Respondents fail to refute our arguments on this question too.

Section 3347(a) bars the use of delegation provisions only to create "an acting official," not to delegate an office's delegable duties to someone else. Pet. 26. Respondents assert (Br. in Opp. 32-33) that an official performing an office's functions and duties *is* an "acting official" under the FVRA. But that elides the critical distinction between exclusive, nondelegable duties (which may be performed during a vacancy only by an acting officer) and delegable duties (which may be performed by anyone at any time). The FVRA underscores that distinction in its remedies provision, 5 U.S.C. 3348, which bars the ratification of an exclusive, nondelegable act by an improperly serving official. Respondents emphasize (Br. in Opp. 33) that Section 3348 does not directly apply to Section 3347. But they do not dispute the key point that an acting official is different in kind from an official exercising delegated powers, as only the former may perform any exclusive, nondelegable duties of the vacant office.

Respondents claim (Br. in Opp. 33-34) that our reading renders Section 3347 meaningless, because many offices have only delegable duties and any nondelegable duties cannot be delegated regardless of the FVRA. But before the FVRA, the Department of Justice had argued, rightly or wrongly, that delegation provisions alone allowed it to create full-fledged acting officers

without regard to the vacancies laws. See *id.* at 32. Section 3347 put an end to that practice.

Respondents also raise (Br. in Opp. 35) more spurious Appointments Clause concerns. But again, if the government is right that Section 3347 does not displace the Attorney General's delegation authorities, then the purported creation of a "de facto acting officer" through delegation (*ibid.*) is statutorily and thus constitutionally authorized. See p. 5, *supra*. While respondents invoke (Br. in Opp. 35) the specter of delegees exercising authority indefinitely, this Court has upheld a statute authorizing a full-blown acting official to perform indefinitely the functions of a vacant PAS office. *Eaton*, 169 U.S. at 336-338, 343-344.

B. This Case Warrants Review

1. As the Ninth Circuit acknowledged (Pet. App. 31a), its holding on the delegation question conflicts with *Arthrex, Inc.* v. *Smith & Nephew, Inc.*, 35 F.4th 1328 (Fed. Cir. 2022), cert. denied, 143 S. Ct. 2493 (2023). The Federal Circuit held that "[t]he FVRA does not * * * restrict who may perform a PAS officer's delegable duties." *Id.* at 1338. The Ninth Circuit held that the FVRA bars "delegat[ing] all the functions of an office that the government argues only has delegable functions." Pet. App. 31a. That is a square conflict.

Respondents wrongly claim (Br. in Opp. 14) that *Arthrex* "cabined its holding to the delegation of a *single* authority: 'the duty to decide rehearing requests.'" The Commissioner of Patents was delegated *all* of "the nonexclusive functions and duties of the [PTO] Director," *Arthrex*, 35 F.4th at 1332, and the Federal Circuit upheld that delegation because "[t]he FVRA does not restrict who may perform the delegable functions and duties of an absent PAS officer," *id.* at 1339. While the

court declined to decide which of the Director's powers were "delegable" besides the rehearing "power at issue" there, *id.* at 1339 n.5, that is irrelevant here.

2. Even absent a circuit conflict, this Court often grants certiorari when lower courts intrude on executive-branch personnel decisions. *E.g.*, *Trump* v. *Slaughter*, 609 U.S. 422 (2026); *Kennedy* v. *Braidwood Mgmt., Inc.*, 606 U.S. 748 (2025); *SW General*, *supra*. It is critical that the President "have the assistance of officers he can trust," *Slaughter*, 609 U.S. at 464, so cases involving restrictions on appointment or removal are recurrent on this Court's docket.

The decision below also carries significant consequences, upending practices that Presidents of both parties have used for decades, particularly during transitions. Pet. 31. Respondents do not deny that history, but minimize it (Br. in Opp. 17) because the petition offered "only" 31 examples. Those examples are limited to the Department of Justice because the Office of Legal Counsel (OLC) could readily verify the requisite records. Given that both OLC and the Government Accountability Office (GAO) have approved the relevant practices for decades, the decision below would compel a sea change in how the Executive Branch operates.

Respondents also suggest (Br. in Opp. 15-17) that the Executive can easily fill vacancies using other tools, like Sections 3345(a)(2) and (a)(3). But those provisions are ill-suited to presidential transitions, as most PAS officers eligible under (a)(2) will have left and cannot be replaced without Senate confirmation, leaving only senior officials eligible under (a)(3) based on their service during the prior administration. Pet. 17-18. There is a reason the Biden Administration preferred Acting Solicitor General Prelogar to a Trump Administration

holdover. Compelling every new President to stock his Administration during its critical early days with his predecessor's appointees is a recipe for crisis—at minimum, it is an important question warranting review.

Respondents urge (Br. in Opp. 15) percolation. But their proposed alternative vehicles do not present these FVRA questions. One pair of appeals involves the U.S. Attorney-specific vacancy statute, and the other pair involves the channeling of federal civil-service claims. The current U.S. Attorney cases are the only assured vehicles for resolving the FVRA questions prior to the next transition. Even before then, the urgent need for review has grown given the current Senate Minority Leader's vow to confirm "very few" of the President's nominees. Burgess Everett, *Democratic-controlled Senate would confirm 'very few' Trump nominees*, Semafor (Oct. 5, 2026), https://perma.cc/P27U-QSTP.

3. The decision below carries serious consequences for 11 U.S. Attorney's Offices nationwide. Pet. 31-32.*

Respondents minimize (Br. in Opp. 17) those consequences because courts to date have only disqualified prosecutors without dismissing indictments. But respondents have presumably sought disqualification for a reason—they want to pick their prosecutor. Moreover, even though Assistant U.S. Attorneys can prosecute individual cases, it is unclear, under the logic of the three circuits that have ruled against the government, why the remaining supervisory AUSAs are any differently situated than the First Assistant.

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* Since the petition was filed, the heads of the District of Montana, the Eastern District of Kentucky, and the Western District of Washington have been selected in a manner that does not raise the questions presented. But for two of those districts, the method is only temporary, and the questions presented may recur.

Respondents insist (Br. in Opp. 17-18) that, if the government were right about the impending chaos, it would have already happened. But the Second and Ninth Circuits have stayed their mandates pending this Court's decision on certiorari. Pet. App. 80a; 26-348 Pet. App. 95a. Were this Court to deny review, those stays would dissolve, inviting every criminal defendant in the affected districts to seek the First Assistant's disqualification. As for the Third Circuit, the judges of the District of New Jersey ultimately appointed a candidate acceptable to the Administration. See Br. in Opp. 18. That result is unlikely to occur in every affected district.

C. Respondents' Asserted Vehicle Problems Are Illusory

Respondents offer three vehicle objections. All are insubstantial.

First, respondents claim (Br. in Opp. 20-22) that there is an antecedent question whether the district court's disqualification order was appealable under the collateral-order doctrine. Respondents did not dispute jurisdiction below, and their belated doubts are contrived. Every circuit to consider the issue has held that the disqualification of a U.S. Attorney's Office is immediately appealable, and the same logic applies to the disqualification of the Acting U.S. Attorney herself. See *United States* v. *Williams*, 68 F.4th 564, 571 (9th Cir. 2023) (collecting cases). A disqualification order conclusively resolves the U.S. Attorney's involvement; it is collateral to the defendant's guilt or innocence; and critically, it is effectively unreviewable on final judgment because double jeopardy will bar the government from appealing a later acquittal on these grounds. *Id.* at 570-571. Respondents' cases (Br. in Opp. 21) involving the disqualification of defense counsel or counsel in a civil

case are inapposite because there is no analogous bar on later appeals in those situations.

Second, respondents assert (Br. in Opp. 22) that the first question presented is "moot" because Ms. Chattah's FVRA service has purportedly lapsed. But the FVRA is clear that, when the President nominates someone to the vacant office, the acting officer "may serve in the office * * * from the date of such nomination for the period that the nomination is pending in the Senate." 5 U.S.C. 3346(a)(2). Mr. Kelesis's nomination is pending in the Senate, so Ms. Chattah may serve as the acting officer.

Respondents insist (Br. in Opp. 23) that Section 3346(a)(2) does not apply where, as here, the initial FVRA time period expired before the nomination. But nothing in the text says that, and every court of appeals to consider that position has rejected it, consistent with the longstanding view of OLC and GAO. See *Rush* v. *Kijakazi*, 65 F.4th 114, 119-120 (4th Cir. 2023), cert. denied, 144 S. Ct. 999 (2024); *Dahle* v. *Kijakazi*, 62 F.4th 424, 427 (8th Cir. 2023), cert. denied, 144 S. Ct. 549 (2024); 23 Op. O.L.C. 60, 68 (1999); Letter from Anthony H. Gamboa to Sen. Susan M. Collins 2 (Aug. 19, 2004), https://www.gao.gov/assets/b-302743.pdf.

Regardless, whether there is some *other* barrier to Ms. Chattah's service goes to the merits, not mootness. Cf. *Chafin* v. *Chafin*, 568 U.S. 165, 174 (2013). Reversing the Ninth Circuit's erroneous holding that only pre-vacancy first assistants may serve as acting officers would provide the government with effectual relief by removing an essential basis for the district court's disqualification order. If respondents want to seek disqualification on other grounds, they may try on remand, subject to principles of forfeiture.

Third, respondents suggest (Br. in Opp. 23-24) that this case could become moot if the Senate confirms Mr. Kelesis. But the Senate has not confirmed him for ten months. Particularly given Nevada's two Democratic Senators, there is no reason to think the Senate will act in the remaining weeks before his nomination expires when the 119th Congress ends on January 3, 2027. At that point, it is even less likely the new Senate will confirm any new nominee. See p. 9, *supra*. Ms. Chattah may thereafter serve at least another 210 days, see 5 U.S.C. 3346(b)—giving the Court until at least August 2027 before any potential mootness.

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The petition for a writ of certiorari should be granted.

Respectfully submitted.

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