No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

OFFICE OF THE NEW YORK STATE ATTORNEY GENERAL

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Federal Vacancies Reform Act of 1998 (FVRA), 5 U.S.C. 3345 *et seq.*, permits an acting officer to perform the functions and duties of an office requiring presidential appointment and Senate confirmation if the appointed officer "dies, resigns, or is otherwise unable to perform the functions and duties of the office." 5 U.S.C. 3345(a). Although the President can make an alternative choice, the default rule is that "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). Subject to certain exceptions, the FVRA is "the exclusive means for temporarily authorizing an acting official to perform the functions and duties" of a covered office. 5 U.S.C. 3347(a).

The questions presented are:

1. Whether a person who becomes the first assistant after a vacancy arises is ineligible to be the acting officer under Section 3345(a)(1).

2. Whether Section 3347(a) prohibits a person who is not an acting officer under Section 3345(a) from being delegated all of the duties of a vacant office that may be delegated to others and that are not exclusive to the vacant office.

PARTIES TO THE PROCEEDING

Petitioner (respondent-appellant below) is the United States of America.

Respondent (petitioner-appellee below) is the Office of the New York State Attorney General.

RELATED PROCEEDINGS

United States District Court (N.D.N.Y.):

In re Grand Jury Subpoenas to the Office of the New York State Attorney General, No. 25-mc-19 (Jan. 8, 2026)

United States Court of Appeals (2d Cir.):

In re Grand Jury Subpoenas to the Office of the New York State Attorney General, No. 26-156 (Aug. 21, 2026)

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OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-65a) is available at 2026 WL 2450485. The order of the court of appeals granting a stay of the mandate and denying a stay of the disqualification order (App., *infra*, 95a-96a) is unreported. The opinion of the district court (App., *infra*, 66a-94a) is reported at 814 F. Supp. 3d 284. The order of the district court denying a stay pending appeal (App., *infra*, 97a-109a) is available at 2026 WL 686046.

JURISDICTION

The judgment of the court of appeals was entered on August 21, 2026. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced in the appendix. App., *infra*, 110a-123a.

STATEMENT

A. The Department Of Justice

The Constitution vests the President with the entire "executive Power" and the duty to "take Care that the Laws be faithfully executed." U.S. Const. Art. II, §§ 1, 3. The "'[i]nvestigation and prosecution of crimes'" is one of the President's "'conclusive and preclusive' authorit[ies]" under Article II. *Trump* v. *United States*, 603 U.S. 593, 620 (2024). The Judiciary Act of 1789, ch. 20, 1 Stat. 73, created two separate yet equally important offices to help the President carry out that solemn responsibility. A U.S. Attorney in each judicial district would prosecute "all delinquents for crimes and offences" and "all civil actions in which the United States shall be concerned." § 35, 1 Stat. 92. And the Attorney General would "prosecute and conduct all suits in the Supreme Court" and advise the President and Cabinet on legal matters. § 35, 1 Stat. 93. Under that original regime, each U.S. Attorney "was a king in his own domain, appointed by the President of the United States and directly answerable to him alone." Whitney North Seymour, Jr., *United States Attorney* 46 (1975).

That decentralized structure proved unsuited to the challenges of a growing Nation and the fits of Reconstruction. In 1870, Congress passed and President Grant signed "An Act to establish the Department of Justice," ch. 150, 16 Stat. 162. The Act made the Attorney General "the head" of the new Department. § 1, 16 Stat. 162. The Attorney General was empowered to "conduct and argue any case in which the government is interested, in any court of the United States," or direct "any officer of his Department to do so." § 5, 16 Stat. 163. He could "require any solicitor or officers of the Department of Justice to perform any duty required of said Department or any officer thereof." § 14, 16 Stat. 164. And he gained "supervision of the conduct and proceedings" of U.S. Attorneys. § 16, 16 Stat. 164.

The Department of Justice's current structure reflects those 19th-century roots. The Attorney General remains "the head" of the Department. 28 U.S.C. 503. Congress created a few offices with defined statutory powers, such as the Solicitor General, the Assistant Attorney General for National Security, and the U.S. Attorneys. See 28 U.S.C. 505, 507A, 509A, 518, 541, 547. But most of the Department's offices—including the Deputy Attorney General and the Assistant Attorneys General heading the Civil Division, the Criminal Division, and the Office of Legal Counsel—are offices whose powers Congress authorized the Attorney General to create and define through internal delegations. See 28 U.S.C. 504, 506; 28 C.F.R. 0.15, 0.25, 0.45 to 0.49, 0.55 to 0.64-6. Congress authorized that structure in two steps.

First, Congress vested virtually all of the Department's powers in the Attorney General personally. He may "conduct any kind of legal proceeding, civil or criminal, * * * which United States attorneys are authorized by law to conduct." 28 U.S.C. 515(a). He may "direct[]" "the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested." 28 U.S.C. 516. "[H]e may personally conduct and argue any case in a court of the United States in which the United States is interested." 28 U.S.C. 518(b). He "shall supervise all litigation to which the United States" is a party and "direct all United States attorneys, assistant United States attorneys, and special attorneys * * * in the discharge of their respective duties." 28 U.S.C. 519. And he is "vested" with "[a]ll functions of other officers of the Department of Justice and all functions of agencies and employees of the Department of Justice," except for the functions of administrative law judges and some functions related to prison work programs. 28 U.S.C. 509.

Second, Congress authorized the Attorney General to delegate those near-plenary powers to anyone else in the Department. He may "authoriz[e] the performance by any other officer, employee, or agency * * * of any function of the Attorney General." 28 U.S.C. 510. He may "specifically direct[]" any "officer * * * or any attorney specially appointed by" him to "conduct any kind of legal proceeding, civil or criminal, * * * which United States attorneys are authorized by law to conduct." 28 U.S.C. 515(a). He may send any officer to any court "to attend to any * * * interest of the United States." 28 U.S.C. 517. He may direct any officer to "conduct and argue any case" in federal court. 28 U.S.C. 518(b). And he "may appoint officials * * * to detect and prosecute" federal crimes. 28 U.S.C. 533(1).

In sum, those provisions allow the Attorney General to "conduct the criminal litigation of the United States Government" and to "appoint subordinate officers to assist him in the discharge" of that responsibility. *United States* v. *Nixon*, 418 U.S. 683, 694 (1974).

B. The Federal Vacancies Reform Act Of 1998

Approximately 1200 positions in the federal government, known as "PAS" offices, require presidential appointment with Senate confirmation. Center for Presidential Transition, *Presidentially Appointed Positions* 1 (Apr. 14, 2021), https://perma.cc/75JF-UNMG. Vacancies are inevitable, particularly during presidential transitions. Congress therefore has "long" authorized the Executive Branch "to direct certain officials to temporarily carry out the duties of a vacant PAS office in an acting capacity, without Senate confirmation." *NLRB* v. *SW General, Inc.*, 580 U.S. 288, 293 (2017); see *id.* at 294-295 (discussing the statutory history).

The primary authorization today is contained in the Federal Vacancies Reform Act of 1998 (FVRA), 5 U.S.C. 3345 *et seq.*, which specifies who may serve as an "Acting officer" to temporarily "perform the functions and duties" of a PAS office in an Executive agency when the PAS officer "dies, resigns, or is otherwise unable to" serve. 5 U.S.C. 3345(a). The "default rule," *SW General*, 580 U.S. at 293, is that "the first assistant to the office of such officer" shall be the acting officer. 5 U.S.C. 3345(a)(1). But the Executive Branch has two other options: The President may designate another PAS officer as the acting officer. 5 U.S.C. 3345(a)(2). Or he may designate someone who has held a sufficiently senior role at the same agency for 90 of the 365 days preceding the vacancy. 5 U.S.C. 3345(a)(3).

The FVRA imposes various other restrictions on acting service. An acting officer generally cannot be a nominee for the permanent post unless she served as first assistant for 90 of the 365 days preceding the vacancy. 5 U.S.C. 3345(b)(1). Acting service cannot last beyond 210 days after the vacancy begins, subject to certain extensions for presidential transitions and while nominations are pending. See 5 U.S.C. 3346, 3349a. And the FVRA makes clear that it is "the exclusive means for temporarily authorizing an acting official to perform the functions and duties of any [PAS Executive] office," unless another statute expressly provides an office-specific alternative or the President makes a recess appointment. 5 U.S.C. 3347(a); see *Guedes* v. *ATF*, 356 F. Supp. 3d 109, 139 (D.D.C. 2019) (citing cases holding that "where the FVRA and an agency-specific statute apply," the Executive Branch "may choose" between them). For U.S. Attorneys, an office-specific vacancy statute authorizes the Attorney General to appoint a U.S. Attorney for a 120-day term and, if such an appointment expires, authorizes the district court to appoint a U.S. Attorney until the vacancy is filled. See 28 U.S.C. 546.

C. Procedural History

1. On February 17, 2025, the U.S. Attorney for the Northern District of New York—a PAS officer appointed by President Biden—resigned. See App., *infra*, 9a. The Attorney General then appointed John A. Sarcone III as U.S. Attorney under 28 U.S.C. 546(a). App., *infra*, 9a. On July 14, 2025, Mr. Sarcone's 120-day term expired, and the judges of the Northern District declined to appoint a replacement under 28 U.S.C. 546(d). App., *infra*, 9a. Invoking authority under statutes including 28 U.S.C. 509, 510, and 515, the Attorney General appointed Mr. Sarcone as a "Special Attorney" and designated him as the First Assistant U.S. Attorney for the Northern District of New York. App., *infra*, 69a-71a. Mr. Sarcone then began serving as Acting U.S. Attorney under the FVRA. *Id.* at 70a. The President has not yet nominated a PAS U.S. Attorney for the Northern District, so Mr. Sarcone's service as Acting U.S. Attorney ended on February 10, 2026. *Ibid.* He has continued to lead the Office as First Assistant U.S. Attorney. See *id.* at 13a.

2. The court of appeals related the following facts: On August 5, 2025—while Mr. Sarcone was serving as Acting U.S. Attorney—a grand jury in the Northern District of New York issued subpoenas to respondent, the New York Office of the Attorney General. App., *infra*, 10a. The subpoenas sought documents and testimony re-

lated to civil enforcement actions brought by respondent against the National Rifle Association and President Trump. *Id.* at 10a-11a. Mr. Sarcone was the only government attorney to request both subpoenas, which he did using the title of "Acting U.S. Attorney." *Id.* at 11a.

Respondent moved to quash both subpoenas, arguing, as relevant here, that Mr. Sarcone was not validly serving as Acting U.S. Attorney. App., *infra*, 11a. Chief Circuit Judge Livingston designated an out-of-district judge to hear the motion. *Id.* at 72a.

The district court granted the motion to quash. App., *infra*, 66a-94a. The court concluded that only the incumbent first assistant at the time the vacancy arises—not a later designee like Mr. Sarcone—is eligible to be the acting officer under Section 3345(a)(1). *Id.* at 80a-85a. And the court rejected the government's alternative argument that Mr. Sarcone had been validly delegated authority from the Attorney General to seek grand-jury subpoenas. *Id.* at 85a-88a. The court held that the delegation violated the FVRA's provision that it is the "exclusive means" for designating "an acting official to perform the functions and duties" of a PAS office. *Id.* at 86a (quoting 5 U.S.C. 3347(a)).

Turning to remedy, the district court held that the defect in Mr. Sarcone's appointment rendered the subpoenas "unreasonable," such that they should be quashed. App., *infra*, 90a. And it "disqualified" Mr. Sarcone "from any further involvement in prosecuting or supervising the instant investigations, regardless of his title." *Id.* at 93a.

3. A divided panel of the court of appeals affirmed. App., *infra*, 1a-65a.

In an opinion authored by Judge Calabresi and joined by Judge Kahn, the panel majority first held that the case was not moot. App., *infra*, 13a-14a. After the district court's decision, the grand jury that issued the subpoenas was discharged, rendering the subpoenas unenforceable under circuit precedent. *Id.* at 14a. That event did not moot the case, the majority concluded, because the dispute was "capable of repetition, yet evading review." *Ibid.* Alternatively, it reasoned that the district court had disqualified Mr. Sarcone from participating in the investigation, and thus the parties had a "live dispute" over his further involvement. *Ibid.*

On the merits, the panel majority held that only the first assistant at the time the vacancy arises is eligible to be the acting officer under Section 3345(a)(1). App., *infra*, 14a-29a. Because that provision automatically elevates the first assistant, the majority asserted, the elevation can occur only the moment the vacancy begins. *Id.* at 15a, 19a. The majority also stated that allowing the Executive to designate a new first assistant would minimize the importance of the President's alternative methods in Section 3345(a)(2) and (a)(3). *Id.* at 17a-18a. And it read the FVRA's legislative history to "validate[]" its interpretation. *Id.* at 24a. It acknowledged the "numerous examples" of acting service by post-vacancy first assistants since 2001 but dismissed that history as the Executive Branch "overstepping." *Id.* at 27a-28a.

The panel majority also held that Section 3347(a)'s exclusivity provision forbade the Attorney General from delegating all of a U.S. Attorney's powers to Mr. Sarcone. App., *infra*, 36a. The majority described Section 3347(a) as calling for a "functional" inquiry into "whether a delegation is so comprehensive that an individual functionally occupies the vacant PAS office by performing its duties, thereby serving as the *de facto* acting officer." *Id.* at 30a-31a. And it held that the *com-*

plete delegation here was impermissible, while declining "to delineate when a partial delegation [would] become[] an impermissible one." *Id.* at 31a.

On remedy, the panel majority held that the district court did not abuse its discretion in quashing the subpoenas as "unreasonable." App., *infra*, 36a. And it held that the government had forfeited any independent objection to Mr. Sarcone's disqualification. *Id.* at 38a-39a.

Judge Park dissented. App., *infra*, 41a-65a. He would have upheld Mr. Sarcone's authority on two independent grounds. See *ibid.*

First, Judge Park would have held that Mr. Sarcone was validly serving as Acting U.S. Attorney under the FVRA. App., *infra*, 46a-59a. Section 3345(a)(1) applies to "'the first assistant *to the office* of such officer'"—language, Judge Park noted, that naturally covers "any first assistant, not just the incumbent first assistant of the departing officer." *Id.* at 46a-48a (quoting, with emphasis added, 5 U.S.C. 3345(a)(1)). As he further explained, statutory history, structure, and longstanding bipartisan practice all confirm that plain-text reading. *Id.* at 48a-51a.

Second, Judge Park would have held that Mr. Sarcone validly obtained the subpoenas while exercising authority delegated to him by the Attorney General. App., *infra*, 59a-65a. In Judge Park's view, Section 3347 prohibits the use of general delegation authorities only "to appoint 'an acting official'"; it does not bar "agency heads from delegating the delegable powers of a PAS office to a non-acting official." *Id.* at 61a.

On the government's motion, the court of appeals stayed its mandate pending this petition but declined to stay the disqualification order. App., *infra*, 95a-96a.

REASONS FOR GRANTING THE PETITION

In the decision below, the Second Circuit joined the Third and Ninth Circuits in invalidating two longstanding executive-branch practices for addressing vacancies in PAS offices. According to those courts, a first assistant may serve as the acting officer under Section 3345(a) *only* if she was first assistant when the vacancy arose; and Section 3347(a) bars the agency head from delegating *all* of the duties of a vacant office that may be delegated to others and that are not exclusive to the vacant office. See App., *infra*, 14a-36a; *United States* v. *Jackson*, No. 25-6214, 2026 WL 2387099, at *3-*13 (9th Cir. Aug. 17, 2026), petition for cert. pending, No. 26-304 (filed Sept. 8, 2026); *United States* v. *Giraud*, 160 F.4th 390, 397-406, (3d Cir. 2025). The government recently filed a petition for a writ of certiorari in the Ninth Circuit case, *United States* v. *Jackson*, No. 26-304 (filed Sept. 8, 2026), seeking review of both of those holdings. The Court should hold this petition pending the disposition of the petition in *Jackson* and then dispose of this petition as appropriate.

As the government explained in *Jackson*, the recent court-of-appeals decisions are incorrect. Nothing in the FVRA's text limits acting service to the pre-vacancy first assistant. Pet. at 14-25, *Jackson*, *supra* (No. 26-304) (*Jackson* Pet.). To the contrary, the statute uses the present tense and imposes an ongoing duty on the "first assistant *to the office* of such officer"—not the pre-vacancy first assistant—to "perform the functions and duties of the office." 5 U.S.C. 3345(a)(1) (emphasis added). Moreover, the Attorney General may delegate his broad law-enforcement authorities to anyone in the Department of Justice. *Jackson* Pet. at 25-29. That practice is not precluded by Section 3347(a), which governs only how someone may become "an acting official," not how he may obtain delegated authority. 5 U.S.C. 3347(a).

Those holdings warrant this Court's review, as the government further explained in *Jackson*. The Second Circuit—like the Third and Ninth Circuits before it—recognized that it was splitting from the Federal Circuit on the delegation question. See App., *infra*, 33a-34a (discussing *Arthrex, Inc.* v. *Smith & Nephew, Inc.*, 35 F.4th 1328 (Fed. Cir. 2022), cert. denied, 143 S. Ct. 2493 (2023)); see also *Jackson* Pet. at 29-30. The Second Circuit also acknowledged that it was forbidding a practice the government has used "numerous" times across the last 25 years. App., *infra*, 27a; see *Jackson* Pet. at 17-18, 27-28 (discussing executive-branch practice and the acquiescence in it by the Government Accountability Office, Congress's FVRA watchdog). And, more immediately, the decision below calls into question the leadership of the U.S. Attorney's Office for both the Northern District of New York and the District of Vermont, which are both currently led by First Assistant U.S. Attorneys who were designated after the last PAS U.S. Attorney resigned. That admitted circuit conflict and the significant consequences for executive-branch practice and current prosecutions warrant this Court's review.

Jackson, however, is a better vehicle than this case for resolving the questions presented. As the court of appeals noted, the grand-jury subpoenas in this case became unenforceable under Second Circuit precedent when the grand jury that issued them was discharged. App., *infra*, 13a. The court nevertheless held, and the government agrees, that the case is not moot both because it is capable of repetition yet evading review and because there is a live dispute over Mr. Sarcone's ongoing involvement in these investigations. *Id.* at 13a-14a. But this Court has an independent obligation to assure itself of its jurisdiction and would need to address the mootness question before reaching the merits. See *Riley* v. *Bondi*, 606 U.S. 259, 273 (2025).

In addition, *Jackson* involves a more typical fact pattern in which criminal defendants seek to disqualify an Acting U.S. Attorney from supervising their criminal prosecutions. This case, by contrast, involves the issuance of subpoenas—a context that led both courts below to address at some length the appropriate remedy under Federal Rule of Criminal Procedure 17. See App., *infra*, 36a-38a, 89a-92a. Again, *Jackson* lacks that wrinkle and cleanly presents the FVRA questions at the heart of this case.

CONCLUSION

The petition for a writ of certiorari should be held pending the disposition of the petition in *United States* v. *Jackson*, No. 26-304 (filed Sept. 8, 2026), and then disposed of as appropriate.

Respectfully submitted.

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SEPTEMBER 2026

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 26-156
August Term, 2025

IN RE GRAND JURY SUBPOENAS TO THE OFFICE OF THE NEW YORK STATE ATTORNEY GENERAL

OFFICE OF THE NEW YORK STATE ATTORNEY GENERAL, PETITIONER-APPELLEE

v.

UNITED STATES OF AMERICA, RESPONDENT-APPELLANT

Argued: May 4, 2026
Decided: Aug. 21, 2026

On Appeal from a Judgment of the United States District Court for the Northern District of New York

Before: CALABRESI, PARK, and KAHN, *Circuit Judges*.

This case concerns whether John A. Sarcone III validly served as, and lawfully exercised the duties of, the Acting U.S. Attorney for the Northern District of New York. We hold that he did not.

The Appointments Clause of the Constitution requires that "Officers of the United States" be nominated by the President and confirmed by the Senate. When a Senate-confirmed U.S. Attorney leaves office, the Federal Vacancies Reform Act of 1998 ("FVRA") specifies who may perform the office's duties in an acting capacity, and for how long. The Government maintains that Sarcone lawfully served as the Acting U.S. Attorney because he was designated First Assistant to the U.S. Attorney after the Senate-confirmed U.S. Attorney left office and thereby automatically became the acting officer under the FVRA. Pursuant to that authority, Sarcone obtained two grand jury subpoenas directed at the New York Office of the Attorney General ("NYOAG") in connection with its investigations into the National Rifle Association and Donald J. Trump for financial misconduct. The Government contends that, even if Sarcone was not the acting officer, the Attorney General's delegation of all the office's duties to him provided an independent source of authority. NYOAG moved to quash the subpoenas.

The United States District Court for the Northern District of New York (Schofield, *J.*, sitting by designation) granted that motion, holding that Sarcone lacked authority to obtain the subpoenas either as Acting U.S. Attorney or through authority delegated by the Attorney General. The court further disqualified Sarcone from future involvement in the underlying investigations.

We hold that Sarcone was not serving as Acting U.S. Attorney when he obtained the subpoenas because the FVRA permits only a First Assistant already in place when the vacancy arises to become the acting officer automatically. We further hold that the general delegation to Sarcone of all the duties of the U.S. Attorney's office was an unlawful use of general delegation authority to circumvent the FVRA's exclusivity provision. Because

Sarcone lacked authority to obtain the subpoenas on either theory, we **AFFIRM** the district court's order quashing them. And because the government on appeal did not provide any argument as to why the district court erred in disqualifying Sarcone from future involvement in the underlying investigations, we treat the issue as forfeited and **AFFIRM** the order below.

Judge Park dissents in a separate opinion.

DONALD B. VERRILLI, JR., Munger, Tolles & Olson LLP, Washington, DC; *with* Hailyn J. Chen & Victoria A. Degtyareva, Munger, Tolles & Olson LLP, Los Angeles, CA; Barbara D. Underwood, Solicitor General (Kumiki Gibson & Michael Jaffe, *on the brief*), Office of the New York State Attorney General, New York, NY, *for Petitioner-Appellee*.

HENRY C. WHITAKER, Counselor to the Attorney General (Rajit S. Dosanjh, Assistant United States Attorney, *on the brief*), *for* Todd Blanche, Acting Attorney General, *for Respondent-Appellant*.

CALABRESI, Circuit Judge:

This case concerns whether John A. Sarcone III validly served as, and lawfully exercised the powers of, the Acting U.S. Attorney for the Northern District of New York. We hold that he did not.

The Appointments Clause of the Constitution requires that "Officers of the United States" be nominated by the President and confirmed by the Senate. When a Senate-confirmed U.S. Attorney leaves office, the Federal Vacancies Reform Act of 1998 ("FVRA") specifies who may perform the office's duties in an acting capacity, and for how long. The Government maintains that Sarcone lawfully served as the Acting U.S. Attorney because he was designated First Assistant to the U.S. Attorney ("FAUSA") after the Senate-confirmed U.S. Attorney left office and thereby automatically became the acting officer under the FVRA. Pursuant to that authority, Sarcone obtained two grand jury subpoenas directed at the New York Office of the Attorney General ("NYOAG") in connection with its investigations into the National Rifle Association and Donald J. Trump for financial misconduct. The Government contends that, even if Sarcone was not the acting officer, the Attorney General's delegation of all the office's duties to him provided an independent source of authority. NYOAG moved to quash the subpoenas.

The United States District Court for the Northern District of New York (Schofield, *J.*, sitting by designation) granted that motion, holding that Sarcone lacked authority to obtain the subpoenas either as Acting U.S. Attorney or through authority delegated by the Attorney General. The court further disqualified Sarcone from future involvement in the underlying investigations.

We hold that Sarcone was not serving as Acting U.S. Attorney when he obtained the subpoenas because the FVRA permits only a First Assistant already in place when the vacancy arises to become the acting officer automatically. We further hold that the general delegation to Sarcone of all the duties of the U.S. Attorney's office was an unlawful use of general delegation authority to circumvent the FVRA's exclusivity provision. Because Sarcone lacked authority to obtain the subpoenas on either theory, we **AFFIRM** the district court's order quashing them. And because the government on appeal did not provide any argument as to why the district court erred in disqualifying Sarcone from future involvement in the underlying investigations, we treat the issue as forfeited and **AFFIRM** the order below.

I. Background

A. Legal Framework

The Constitution prescribes distinct and important roles for the Executive and Legislative branches of government in the appointment of "Officers of the United States." Generally, such officers must be nominated by the President and confirmed by the Senate under the Appointments Clause:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . 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 Offic-

> ers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2. Known as "PAS" offices, approximately 1,000 Executive Branch positions require presidential nomination and Senate confirmation. Congress includes U.S. Attorneys among those offices subject to the PAS process. 28 U.S.C. § 541(a).

The Appointments Clause is more than a mere formality. "[I]t is among the significant structural safeguards of the constitutional scheme." *Edmond v. United States*, 520 U.S. 651, 659 (1997). At the Founding, "'the power of appointment to offices' was deemed 'the most insidious and powerful weapon of eighteenth century despotism.'" *Freytag v. Commissioner*, 501 U.S. 868, 883 (1991) (quoting Gordon S. Wood, *The Creation of the American Republic 1776-1787*, at 79 (1969)). By subjecting the President's nominees to Senate confirmation, the Framers envisioned a critical role for the legislature in ensuring that those who fill PAS roles possess the qualifications and character befitting of the office. As Alexander Hamilton wrote in the Federalist Papers, the Appointments Clause serves as an "excellent check upon a spirit of favoritism in the President." The Federalist No. 76 (Alexander Hamilton). Otherwise, an Executive with a unilateral appointment power "would be governed much more by his private inclinations" than he would if his nominees required Senate approval. *Id.*

While the PAS process is the "default manner of appointment," the Constitution affords Congress the flexibility to establish alternative means of appointment for inferior officers. *United States v. Arthrex, Inc.*, 594 U.S. 1, 12 (2021) (quoting *Edmond*, 520 U.S. at 660). Recognizing that the PAS process can take time and that vacancies occasionally arise, Congress set out certain fixed means by which PAS offices may be filled for a "limited time, and under special and temporary conditions," until the Senate confirms a presidentially appointed nominee. *United States v. Eaton*, 169 U.S. 331, 343 (1898).

With respect to U.S. Attorneys, two different statutes enable an official temporarily to perform the role. The first is the FVRA, 5 U.S.C. § 3345 *et seq.*, which applies to all PAS offices across the Executive branch. When a PAS officer "dies, resigns, or is otherwise unable to perform the functions and duties of the office," the FVRA identifies three categories of individuals who may fill the office on an acting basis. 5 U.S.C. § 3345(a). First, "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). Under this provision, First Assistants "automatically assume acting duties" without any action required by the Executive. *NLRB v. SW Gen., Inc.*, 580 U.S. 288, 305 (2017). In this regard, (a)(1) is the FVRA's "default rule." *Id.* at 293.

Second, the President may temporarily fill the position with a Senate-confirmed official who is already serving in a different PAS office. 5 U.S.C. § 3345(a)(2). And third, the President may temporarily assign someone within the agency to the acting role if that individual satisfies certain seniority and experience criteria. *Id.* § 3345(a)(3). Eligible individuals within all three of these categories are limited to serving for "no longer than 210 days beginning on the date the vacancy occurs," or, subject to certain requirements, while a nomination is pending. *Id.* § 3346(a).

The FVRA is "the exclusive means for temporarily authorizing an acting official to perform the functions and duties of" a PAS office. *Id.* § 3347(a). In making the FVRA exclusive, Congress sought to prevent overreliance on acting officials, which it viewed as a "threat to the Senate's advice and consent power." *SW Gen.*, 580 U.S. at 293-95. The statute's exceptions are narrow. A separate "statutory provision" governs only if it "*expressly* . . . authorizes the President, a court, or the head of an Executive department, to designate an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity." *Id.* § 3347(a)(1)(A) (emphasis added). And a statute vesting an agency head with "general authority . . . to delegate duties" does not qualify. *Id.* § 3347(b).

For U.S. Attorneys, an additional statute offers a mechanism for temporary appointments consistent with the FVRA's exclusivity provision. 28 U.S.C. § 546 provides that when an "office of United States attorney is vacant," the Attorney General may appoint an Interim U.S. Attorney for no more than 120 days, provided that the Senate had not previously refused to confirm that individual. 28 U.S.C. § 546(a)-(c). If the 120-day period lapses, "the district court for such district" is authorized to "appoint a United States attorney to serve until the vacancy is filled." *Id.* § 546(d). These two statutory provisions, the FVRA and § 546, are the only means by which U.S. Attorney's offices may be filled on a temporary basis. Otherwise, the President must obtain for his nominee the advice and consent of the Senate.

B. Sarcone's Appointment

On February 17, 2025, the Senate-confirmed U.S. Attorney for the Northern District of New York, Carla B. Freedman, left office. Under the FVRA, the then-FAUSA for the district, Daniel Hanlon, automatically became Acting U.S. Attorney. On February 28, the Attorney General appointed John A. Sarcone III as Interim U.S. Attorney under 28 U.S.C. § 546, effective March 17, replacing Hanlon as the temporary head of the office.

Sarcone's interim term expired 120 days later on July 14. That day, the Northern District's Board of Judges declined to exercise its authority under 28 U.S.C. § 546(d) to appoint a U.S. Attorney for the district, leaving the office vacant. The Department of Justice then took a series of personnel actions within the district. First, it reassigned Daniel Hanlon from FAUSA to Deputy U.S. Attorney, creating a vacancy in the FAUSA role. Second, it appointed Sarcone to the now-vacant FAUSA position, stating that the "[r]eason" for the "[t]emporary [a]ppointment" was to "[s]erv[e] as Acting U.S. Attorney for a 210-day period." App'x 2090-92. Third, it designated Sarcone a Special Attorney under 28 U.S.C. § 515, a position traditionally used for cross-district prosecutions or specific high-profile investigations rather than district-wide responsibilities. The designation letter purported to vest Sarcone with authority "to conduct in the Northern District of New York, any kind of legal proceedings, civil or criminal, including Grand Jury proceedings, . . . which United States Attorneys are authorized to conduct" for an "indefinite" period. App'x 2087. Based on these appointments as FAUSA and Special Attorney, Sarcone represented to the Chief Judge of the Northern District that, "by operation of law under the [FVRA]," he was "now serving as Acting United States Attorney for the Northern District of New York indefinitely." App'x 2086.

C. The Grand Jury Subpoenas

The subpoenas in this case sought information relating to two enforcement actions brought by NYOAG, which New York Attorney General Letitia James has led since 2018. First, in August 2020, NYOAG sued the National Rifle Association ("NRA"), a nonprofit incorporated in New York, along with its senior executives. *See People v. National Rifle Ass'n*, Index No. 451625/2020 (N.Y. Sup. Ct.). NYOAG alleged that the NRA mishandled its assets and misappropriated charitable funds for personal use. A jury returned a verdict against the NRA and its executives, and New York courts have upheld the verdict. *See People v. National Rifle Ass'n*, 171 N.Y.S.3d 782, 786-87 (N.Y. Sup. Ct. 2022); *People v. National Rifle Ass'n*, 203 N.Y.S.3d 255, 261-62 (N.Y. App. Div. 2023).

Second, in September 2022, NYOAG sued Donald J. Trump and his associates for financial fraud, based on conduct in his personal capacity as a New York business owner. *See People v. Trump*, Index No. 452564/2022 (N.Y. Sup. Ct.). NYOAG alleged that they inflated the value of Trump's assets by as much as $2.2 billion a year. The trial court found the defendants liable, and both state and federal courts have upheld that determination. *See, e.g.*, *Trump v. James*, 2022 WL 1718951 (N.D.N.Y. 2022); *People v. Trump Org., Inc.*, 38 N.Y.3d 1053, 1054 (N.Y. 2022).

On August 5, 2025, NYOAG was served with two grand jury subpoenas. App'x 68-74. They demanded production of "[a]ny and all documents relating to" or "reflecting communications about" NYOAG's NRA and Trump cases. *Id.* at 70, 74. The subpoenas were obtained by Sarcone, who identified himself as the "Acting United States Attorney." *Id.* at 68, 72. They referenced neither his "Special Attorney" nor his "First Assistant" title and named no prosecutor other than Sarcone. Yet by the time the subpoenas were served on NYOAG, Sarcone's 120-day term as Interim U.S. Attorney under § 546 had already expired.

D. Procedural History

On August 19, 2025, NYOAG moved to quash the subpoenas. It argued that the subpoenas were issued in retaliation and with an intent to harass Letitia James and NYOAG; were unreasonable intrusions on New York's sovereignty; infringed on NYOAG's First Amendment rights; were overbroad and unduly burdensome; sought privileged information; and were invalid because Sarcone was not lawfully serving as Acting U.S. Attorney when he obtained them.

The Government opposed the motion on every ground. As relevant here, it asserted that Sarcone was validly serving as Acting U.S. Attorney because he had been appointed FAUSA while the U.S. Attorney position was vacant and was thereby automatically elevated to the office under the FVRA. And regardless of his title under the FVRA, the Government maintained, the Attorney General's delegation to Sarcone of all the duties of U.S. Attorney as Special Attorney and FAUSA independently authorized him to obtain the subpoenas.

The Northern District judges recused themselves from deciding the motion, having declined to appoint a U.S. Attorney when Sarcone's 120-day term as Interim

U.S. Attorney expired. The Chief Judge of this Court designated Judge Schofield of the Southern District of New York to decide the motion. On January 8, 2026, the district court quashed the subpoenas, finding that Sarcone "was not lawfully serving as Acting U.S. Attorney when the subpoenas were issued." *In re Grand Jury Subpoenas to Off. of N.Y. State Att'y Gen.*, 814 F. Supp. 3d 284, 288 (N.D.N.Y. 2026). The district court held that only a FAUSA serving when the vacancy arises is eligible to assume the role of Acting U.S. Attorney under the FVRA's automatic-succession provision. *See id.* Because Sarcone was named FAUSA after the U.S. Attorney's office was already vacant, the FVRA's automatic-succession provision did not apply. *Id.*

The district court also rejected the Government's alternative argument that Sarcone could obtain the subpoenas through his delegated authority as Special Attorney and FAUSA under §§ 510 and 515. The delegation to Sarcone, the district court concluded, was an improper "attempt to use general delegation to create an Acting U.S. Attorney outside the FVRA's statutory framework," in violation of the FVRA's exclusivity provision, 5 U.S.C. § 3347(a). *Id.* at 297-98. The district court accordingly invalidated the subpoenas under Federal Rule of Criminal Procedure 17. It also disqualified Sarcone from "any further involvement in prosecuting or supervising the criminal investigations that prompted the subpoenas." *Id.* at 298. The district court did not address any of NYOAG's other claims in support of its motion to quash.

The Government timely appealed. It concedes that Sarcone can no longer serve as Acting U.S. Attorney under the FVRA's 210-day time limit because his purported tenure had long since expired. *See* Respondent-Appellant's Br. 3 n.1. As of this decision, the President has not submitted a nominee to the Senate and, according to the Government, Sarcone continues to serve as the operative head of the U.S. Attorney's office. *See id.*

II. Standard of Review

We review a district court's decision to quash grand jury subpoenas for abuse of discretion. *United States v. Skelos*, 988 F.3d 645, 660 (2d Cir. 2021). Questions of statutory interpretation are reviewed *de novo* and factual determinations are reviewed for clear error. *United States v. Freeman*, 99 F.4th 125, 127 (2d Cir. 2024); *In re Subpoena Issued to Dennis Friedman*, 350 F.3d 65, 68-69 (2d Cir. 2003). Decisions to disqualify an attorney, including a prosecutor, are reviewed for abuse of discretion. *See United States v. Jones*, 381 F.3d 114, 119 (2d Cir. 2004); *United States v. Badalamenti*, 794 F.2d 821, 828 (2d Cir. 1986).

III. Discussion

The Government asserts that the district court erred in quashing the subpoenas and disqualifying Sarcone. Specifically, it says that Sarcone was validly serving as Acting U.S. Attorney under the FVRA when he obtained the grand jury subpoenas, and, in any event, he had sufficient authority as FAUSA and Special Attorney. For the reasons discussed below, we disagree.

A. Mootness

Before reaching the merits, we must first consider whether this appeal is moot. On March 9, 2026, the grand jury that issued the subpoenas was discharged. Respondent-Appellant's Rule 28(j) Letter, *In re Grand Jury Subpoenas to the Off. Of the N.Y. State Att'y Gen.*

v. United States, No. 26-156 (2d. Cir.), ECF No. 87. In this Circuit, grand jury subpoenas become unenforceable upon the discharge of the issuing grand jury. *In re Grand Jury Proceedings*, 971 F.3d 40, 50 (2d Cir. 2020). NYOAG is thus no longer subject to the subpoenas, as both parties agree. But the subpoenas' unenforceability "does not render [the] motion to quash moot." *Id.* at 53. We retain "jurisdiction to review the issues raised" because, given the limited duration for which a grand jury sits, "this dispute is 'capable of repetition, yet evading review.'" *Id.* (citing *United States v. Juvenile Male*, 564 U.S. 932, 938 (2011)).

The appeal remains live for a second reason as well: the district court also disqualified Sarcone "from any further involvement in prosecuting or supervising the instant investigations, regardless of his title." *In re Grand Jury Subpoenas*, 814 F. Supp. 3d at 300. That prospective disqualification was based on Sarcone's alleged improper appointment and is a "live dispute" on which the Government can obtain "effectual relief" by prevailing on appeal. *Council for Responsible Nutrition v. James*, 159 F.4th 155, 162 (2d Cir. 2025). This case is therefore not moot.

B. Sarcone's Appointment as Acting U.S. Attorney Under the FVRA

The Government's front-line argument is that the grand jury subpoenas were valid because Sarcone lawfully obtained them in his capacity as the Acting U.S. Attorney. Both parties agree that the U.S. Attorney for the Northern District is a PAS office subject to the FVRA, and that the office is vacant. The last Senate-confirmed U.S. Attorney departed on February 17, 2025, shortly after President Trump took office. Pursuant to 28 U.S.C. § 546, the Attorney General appointed Sarcone as Interim U.S. Attorney, effective March 17, 2025. Once Sarcone's 120-day term as Interim U.S. Attorney expired, he was then designated as the new FAUSA and as a Special Attorney, effective July 15, 2025. Because the U.S. Attorney's office was vacant at the time that Sarcone became FAUSA, the Government contends that he automatically became Acting U.S. Attorney by operation of the FVRA's automatic-succession provision, 5 U.S.C. § 3345(a)(1). We disagree. The FVRA makes clear that the automatic-succession provision applies only to the person serving as First Assistant at the time the vacancy arises. Because Sarcone was not the FAUSA when the previous U.S. Attorney left office and created the vacancy, § 3345(a)(1) did not apply.

1. Statutory Language and Structure

Through paragraphs (a)(1), (a)(2), and (a)(3) of § 3345, Congress delimited the three means by which a PAS vacancy may temporarily be filled under the FVRA. Paragraph (a)(1)'s designation of the First Assistant as the acting official is the FVRA's default provision, operating automatically upon the vacancy of the PAS office. That automaticity is critical: it ensures continuity in the PAS office without requiring the President or agency head to take any action at all. But Congress also knew that (a)(1) would sometimes fail to supply a qualified successor, such as when no First Assistant is in place, or when the President might prefer to select someone other than the default designee. Accordingly, Congress defined in paragraphs (a)(2) and (a)(3) a limited pool of officials from which the President could choose. These officials must either be Senate-confirmed officers serving in a different PAS office, 5 U.S.C. § 3345(a)(2), or possess sufficient agency expertise and experience for the role, *id.* § 3345(a)(3).

In short, if the President wishes to deviate from the default, the new person must be sufficiently qualified. A statutory scheme providing for automatic succession to ensure continuity, paired with presidential flexibility within certain limits, makes good sense. *See Biden v. Nebraska*, 600 U.S. 477, 512 (2023) (Barrett, *J.*, concurring) ("Context also includes common sense."). This approach reflects a prudent way for Congress to safeguard its Appointments Clause power while affording some degree of Executive discretion during temporary vacancies.

Reading (a)(1) to encompass First Assistants who are designated after the vacancy arises would turn the FVRA's common-sense framework on its head. Under that reading, the President could install virtually anyone as the acting officer simply by naming that person First Assistant, regardless of whether they possessed any of the qualifications Congress required for the Executive to depart from the default.

Sidestepping (a)(2) and (a)(3) in this way also would invert the statute's internal logic. Congress made (a)(1) automatic precisely because it requires no fresh exercise of judgment: the First Assistant had already been vetted and installed before any vacancy arose, for reasons having nothing to do with filling the vacant office. Designating a First Assistant after the vacancy is not automatic succession at all; it is a deliberate and discretionary choice made without any of the criteria Congress enacted to govern such deliberate choices under (a)(2) and (a)(3). The Government would thus convert the FVRA's one non-discretionary path into its most discretionary one, untethered by any qualification requirements.

The incentives such a scheme would create run exactly backward. An Executive who wanted an unqualified loyalist in an acting role would have no reason to use (a)(2) and (a)(3), which demand Senate confirmation or substantial agency tenure. He would instead route every acting appointment through (a)(1), which demands nothing. The Government's reading thus rewards evasion and penalizes compliance—a strange design for a statute Congress enacted to stop the Executive from skirting the Vacancies Act, and one that would undermine the statute's purpose as "a reclamation of the Congress's Appointments Clause power." *SW Gen., Inc. v. NLRB*, 796 F.3d 67, 70 (D.C. Cir. 2015), *aff'd*, 580 U.S. 288 (2017).

The Government asserts that, even under its reading, (a)(2) and (a)(3) still serve a function in three narrow situations where (a)(1) is unavailable. First, where the First Assistant position is itself a PAS office, (a)(1) is unavailable because the First Assistant cannot be appointed without Senate confirmation. Second, (a)(1) is unavailable when the office of an agency head is vacant and the First Assistant must be appointed by the agency head. And third, (a)(2) and (a)(3) play a role where the President wishes to keep the current First Assistant in his place and appoint someone else for the acting role.

Even accepting all three hypotheticals as valid—and we are dubious that they are[1]—they do little to advance

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[1] For example, the Government's third scenario is not really a scenario at all. It posits that (a)(2) and (a)(3) play a distinct role when the President wishes to leave the incumbent First Assistant

the Government's position. First, it would be anomalous for Congress to have conditioned the extent of the President's discretion on the unrelated happenstance of whether the officer's First Assistant role happened to be vacant. The most coherent reading of the statutory framework is that Congress focused on the PAS office itself in determining the President's options. Second, the Government does not, and cannot, dispute that its reading would impose essentially no limits on Executive discretion and hence is the exact opposite of what § 3345, in both its design and its specific requirements, was written to accomplish.

Beyond the clear structure of the statutory scheme, § 3345's plain text also confirms the incumbency requirement in (a)(1). That provision provides that if a PAS officer "dies, resigns, or is otherwise unable to perform the functions and duties of the office," then "the first assistant to the office of such officer shall perform the functions and duties of the office in an acting capacity subject to the time limitations of section 3346." 5 U.S.C. § 3345(a). The mechanism operates on a self-executing if-then basis: if the triggering event occurs, then the First Assistant "shall" automatically become the acting officer. The first two triggers—death and resignation—are instantaneous events: one is either dead or alive, and in a job or out of it. Accordingly, the relevant question

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in that position while installing someone else as acting officer. But under the Government's own reading of (a)(1), the President would not need (a)(2) or (a)(3) to accomplish just that. He could momentarily reassign the incumbent First Assistant, designate his preferred candidate to the now-vacant First Assistant slot, and that candidate would automatically become Acting U.S. Attorney under (a)(1). The President could then put the original First Assistant back in place.

under the statute is who occupies the First Assistant role at the instant that the triggering event occurs. A conditional event anchored to an instantaneous trigger cannot reach forward in time to encompass a First Assistant appointed *after* the triggering event has already passed.

Ordinary usage demonstrates the instantaneous nature of the triggering language. Take a single, but dramatic, example: if the President dies, the Vice President "shall become President" automatically. U.S. Const. amend. XXV, § 1. This provision plainly refers to whoever is Vice President at the moment of death. Were the Vice Presidency itself vacant, succession would pass to the Speaker of the House; it would not go to whoever later is made Vice President. 3 U.S.C. § 19(a)(1). The Twenty-Fifth Amendment's automatic-succession mechanism thus operates precisely as the FVRA does.

The Government advances several textual arguments for a broader reading, but none persuade. First, the Government points to the statute's reference to the "first assistant *to the office* of such officer" rather than the "first assistant to the officer," arguing that this phrasing permits later-appointed First Assistants to qualify under § 3345(a)(1). That reading asks the phrase "to the office" to bear more weight than it can; we do not see why that difference of words makes the slightest difference semantically. The statutory text is consistent with a straightforward reading of the statute. The First Assistant becomes the acting officer not because of any personal association with the departed officeholder, but because of his relationship to the newly vacated *office*.

Second, the Government observes that other provisions of § 3345 contain "backward-looking language" while (a)(1) does not and asserts that this absence means (a)(1) does not impose an incumbency requirement. Respondent-Appellant's Br. 22. Specifically, the Government notes that (a)(3) conditions the President's authority to name acting officials on how long the candidate served in the agency before the vacancy, while (a)(1) lacks a similar requirement. This argument misapprehends how the statute operates. Paragraph (a)(1) has no backward-looking constraint because its focus is on a specific point in time: the moment the vacancy arises. A First Assistant's eligibility for automatic succession under (a)(1) turns solely on whether they occupied that position when the vacancy arose, not on how long they had served before that moment, or any other retrospective criteria.

Third, the Government asserts that the catchall phrase following "dies" and "resigns"—"is otherwise unable to perform the functions and duties of the office"—necessitates an ongoing state, rather than an instantaneous trigger. But to discern the phrase's meaning, "[t]wo general principles are relevant." *Fischer v. United States*, 603 U.S. 480, 487 (2024). First, a term is "given more precise content by the neighboring words with which it is associated." *United States v. Williams*, 553 U.S. 285, 294 (2008). Second, and more specifically, "a general or collective term at the end of a list of specific items is typically controlled and defined by reference to those specific items that precede it." *Fischer*, 603 U.S. at 481.

While the isolated phrase "is otherwise unable to perform" could hypothetically describe an ongoing state rather than a discrete instant, settled principles of statutory construction tell us to read a "general or collective term at the end of a list of specific items in light of any common attributes shared by the specific items." *Bissonnette v. LePage Bakeries Park St., LLC*, 601 U.S. 246, 252 (2024) (internal quotation marks omitted). The shared attribute of the two terms, "dies" and "resigns," is that they describe instantaneous events that create a vacancy. Read consistently with that shared attribute, the phrase "is otherwise unable to perform" constitutes a singular moment in time—the onset of the incapacity that triggered the vacancy. Even though the resulting incapacity, which follows the instantaneous event, may continue into the future, the statute's triggering mechanism looks to the initial onset of the vacancy rather than to the ongoing state that follows.

Any contrary reading of the catchall phrase "is otherwise unable to perform" would destroy the statute's careful enumeration. If that phrase authorized continuous, open-ended substitution untethered to a fixed triggering instant, Congress would have had no reason separately to list "dies" and "resigns" as distinct triggers in the first place. Construing the catchall phrase to reach beyond the moment of onset would therefore "render[] meaningless the specific text that accompanies" it. *Fischer*, 603 U.S. at 487.

Finally, the Government further contends that (a)(1) necessarily refers to an ongoing state of vacancy, rather than to its onset, because the same conditional clause—"dies, resigns, or is otherwise unable to perform the functions and duties of the office"—also governs (a)(2) and (a)(3), the discretionary categories available to the President after a vacancy has occurred. This, too, misapprehends the statute. Across all three provisions, the triggering event—the "if"—is the same: the onset of the vacancy. What differs is the consequence—the "then." Under (a)(1), the First Assistant in place at the onset of the vacancy "shall" become the acting officer. "Shall" signals an automatic result occurring instantaneously with the trigger. Under (a)(2) and (a)(3), by contrast, the onset of the vacancy simply triggers the President's discretion to act, which the President "may" exercise thereafter at a time of his choosing. A single triggering event thus produces one automatic consequence and two discretionary consequences. There is nothing illogical or contradictory about that deliberate statutory scheme.

2. Statutory History

As discussed below, the Government relies on legislative history to ask us to read a momentous change into the alteration of a few words in 1998. But the statutory history of the FVRA, as well as the legislative history that the government marshals, "reinforce[] [our] textual analysis" and foreclose that reading. *Snyder v. United States*, 603 U.S. 1, 12 (2024). We turn first to the statutory history.

The statutory phrase designating the First Assistant who was in place automatically to become the acting officer traces its roots to the original Vacancies Act of 1868. *See* Act of July 23, 1868, ch. 227, 15 Stat. 168. Since then, materially similar language has appeared in every iteration of the law through minor rewordings. Prior to the FVRA, the Vacancies Act provided that if a PAS officer "dies, resigns, or is sick or absent," "*his* first assistant . . . shall perform the duties of the office until a successor is appointed." 5 U.S.C. § 3345 (1997) (emphasis added). With the FVRA's enactment in 1998, "*his* first assistant" was changed to "the first assistant *to the office* of such officer." 5 U.S.C. 3345(a) (emphasis added). According to the Government, by uncoupling the First Assistant from the singular individual filling the PAS office, Congress intended to remove the incumbency requirement so that the First Assistant "to the office" may become the acting official at any point during the vacancy.

Rather than freighting the modest change in a few words with the enormous significance the Government claims, Congress was doing something far more mundane: continuing its longstanding practice of modernizing and clarifying statutes through slight rephrasing. Indeed, there are at least two simple explanations for the change.

First, the change removed the male-default pronoun to reflect a plain reality: by 1998, women routinely held senior-level, Senate-confirmed offices throughout the Executive branch. During the first year of the presidential administration under which the FVRA was passed, for example, women filled roughly a third of these positions. *See Who Are the Women of the U.S.: Equality*, President's Interagency Council on Women, https://perma.cc/8U5K-NB8M. Read against that backdrop, Congress's replacement of the male-centric language with a gender-neutral formulation was unremarkable.

Second, the change reflected a standardization throughout the statutory provision to focus on the *office* rather than the individual *officeholder*. In the modern statute, § 3345 speaks in office-centric terms throughout. The triggering provision applies to an officer who can no longer "perform the functions and duties *of the office*." 5 U.S.C. § 3345(a) (emphasis added). Paragraph (a)(2) reaches "a person who serves *in an office* for which appointment is required." *Id.* § 3345(a)(2) (emphasis added). And (c)(2) provides that the "expiration of a term *of office* is an inability to perform the functions and duties *of such office*." *Id.* § 3345(c)(2) (emphasis added). In rewriting the Vacancies Act, Congress merely conformed (a)(1) to the office-centric language running through the entirety of the section.

Congress "does not alter the fundamental details of a [statutory] scheme in vague terms or ancillary provisions —it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). Had Congress meant to abolish the longstanding incumbency requirement in (a)(1), it would have done so far more clearly in the written text.

3. Legislative History

Because the FVRA's "text and context suffice to identify Congress's intent," we need not "consider its legislative history." *Schneiderman v. Am. Chem. Soc'y,* 172 F.4th 158, 182 (2d Cir. 2026). Nevertheless, we turn to it here because the Government relies on it. We find, instead, that the legislative history validates what the text and structure of the FVRA already provide and runs exactly contrary to the Government's reading.

As originally introduced in the Senate, the FVRA bill contained two relevant differences from what ultimately became law. First, rather than saying "first assistant to the office of such officer," the original bill instead said "first assistant *of such officer*." S. Rep. No. 105-250, at 25 (1998) (emphasis added). Second, that earlier version drew from a much narrower pool of individuals who could become the acting officer: only the First Assistant under (a)(1), or someone already serving in another Senate-confirmed position under (a)(2), could serve. *Id.*

It contained no counterpart to (a)(3)'s qualified-agency-staff provision.

Senator Lieberman objected to the earlier version of the bill. He warned that "the universe of individuals who may serve as acting" was too "severe" in its limitations and "could be harmful to the functioning of the executive branch." 144 Cong. Rec. S11037 (daily ed. Sept. 28, 1998). "Because individuals holding Senate-confirmed positions already have a lot to do," Lieberman predicted, "it almost always will be the first assistant who takes over as the acting." *Id.* And as he understood the meaning of (a)(1), "a first assistant apparently can take over only if he or she was the first assistant *at the time of the vacancy*." *Id.* (emphasis added).

The version of the bill that ultimately won Senator Lieberman's approval and became law contained two relevant changes. First, in (a)(1), "first assistant of such officer" became "first assistant to the office of such officer." Second, (a)(3) was added, which expanded the pool of eligible acting officers to include senior agency staff.

The Government asserts that the change in (a)(1)'s language deliberately removed an incumbency requirement in response to Lieberman's concerns that the FVRA's criteria were too severe. But Lieberman's own statements refute that account: it was the addition of (a)(3), not the tweak in (a)(1), that changed his mind. He explained, "the final version of the bill resolves one of my biggest concerns—that we not define who may serve as an acting official in a manner that, in some cases, effectively precludes anyone from serving in an acting capacity." 144 Cong. Rec. S12861 (daily ed. Oct. 21, 1998). Significantly, Lieberman explained that the final bill resolved this problem "by offering the President the option to choose any senior agency staff who has worked at the agency for at least 90 days to serve as the acting official." *Id.*

Lieberman thus attributed his change of heart entirely to (a)(3), saying nothing to suggest that (a)(1)'s incumbency requirement had been removed. Indeed, that Lieberman originally understood (a)(1) to require incumbency and said nothing about the issue when announcing his support for the bill *reinforces* our reading of the statutory text that nothing substantively changed in (a)(1) through its amended language.

The Government's account is further belied by the remainder of the legislative history. The FVRA's overriding purpose was to *limit* the Executive's overuse of temporary appointments and to protect the Senate's role in the appointment of Executive officers. As the Senate Report for the first version of the FVRA bill explained, "[i]f the Constitution's separation of powers is to be maintained, . . . legislation to address the deficiencies in the operation of the current Vacancies Act is necessary," because "the Senate's confirmation power is being undermined as never before." S. Rep. No. 105-250, at 5 (1998). Congress would not have drained the FVRA of force through a minor rewording of (a)(1) while declaring its purpose to be the opposite. And when it comes to legislative history, "the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill" rather than "the passing comments of one Member," on which the Government relies. *Garcia v. United States*, 469 U.S. 70, 76 (1984) (citations omitted).

In any event, to the extent that individual Senators' comments do cast light on a statutory scheme, they expressed the same sentiment as the Senate Report. When introducing the bill, Senator Thompson explained that "legislation is needed to preserve one of the Senate's most important powers: the duty to advise and consent on presidential nominees." 144 Cong. Rec. S6413 (daily ed. June 16, 1998). Senator Lieberman agreed, saying that the bill "addresse[d] an enormously important issue: the need to protect the Senate's constitutional role in the appointment of Federal officers." 144 Cong. Rec. S12861 (daily ed. Oct. 21, 1998). Legislation was necessary, Lieberman explained, because "[u]nfortunately, in too many cases, over the course of the past several Administrations, the Senate's constitutional prerogatives have been ignored, through the Executive's far too common practice of appointing acting officials to serve lengthy periods in positions that are supposed to be filled with individuals confirmed by the Senate." *Id.*

The Government's view—that the FVRA *expanded* the President's discretion to install acting officials under (a)(1) compared with its predecessor—thus runs directly counter to the problem Congress understood itself to be solving.

4. Executive Practice

Finally, the Government cites "a quarter-century of Executive Branch practice of having agency heads appoint first assistants after a vacancy arises." Respondent-Appellant's Reply Br. 14. It is true that, since the FVRA's enactment, there have been numerous examples of this practice. *See id.* at 14-16 & n.3 (listing examples). But an executive practice that has gone unchallenged for some time "'does not, by itself, create power.'" *Medellín v. Texas*, 552 U.S. 491, 532 (2008) (quoting *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981)). That is especially so where, as here, the Executive has a documented history of overstepping the bounds Congress proscribed. *See* S. Rep. No. 105-250, at 5 (1998) ("[T]he Senate's confirmation power is being undermined as never before."). Indeed, the FVRA's very purpose was to restore the Senate's Advice-and-Consent power against the Executive's contravention of the Vacancies Act and the Appointments Clause. *See SW Gen.*, 580 U.S. at 295. That the Executive branch has pushed the limits of the FVRA since its enactment proves only that the original mischief the statute was enacted to curtail persisted, not that Congress blessed it.[2]

The Government warns on policy grounds that our reading would unduly burden the Executive branch during transitions between presidential administrations, when agency heads often appoint First Assistants after a vacancy arises. But we do not "avoid the plain mean-

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[2] Significantly, the Executive practice of designating post-vacancy First Assistants to become acting officers did not immediately follow the change of words in (a)(1) that the Government principally relies on. For several years following the FVRA's enactment, the official position of the Department of Justice's Office of Legal Counsel was that "you must be the first assistant when the vacancy occurs" in order to become the acting officer. *Guidance on Application of Fed. Vacancies Reform Act of 1998*, 23 Op. O.L.C. 60, 64 (1999). None of the Government's examples date to this post-enactment period. Rather, it was not until 2001 when the Office of Legal Counsel curiously *reversed* its position on the incumbency requirement that the Executive began a practice of post-vacancy appointments. *See Designation of Acting Assoc. Att'y Gen.*, 25 Op. O.L.C. 177 (2001).

ing of a statute by construction" simply "because we think as written it begets hard . . . consequences." *Helvering v. New York Tr. Co.*, 292 U.S. 455, 470 (1934) (internal quotation marks omitted). Balancing Executive flexibility against Senate input is Congress's prerogative under the Appointments Clause—not ours. And by making (a)(2) and (a)(3) available during transitions, Congress gave the Executive precisely the degree of flexibility it deemed appropriate.

* * *

Text, structure, and history all point the same way. We hold that only the First Assistant in place when a vacancy arises may become the acting officer under § 3345(a)(1). Sarcone was not; he was designated FAUSA after the vacancy arose. He therefore was not lawfully serving as Acting U.S. Attorney when he obtained the subpoenas directed at NYOAG.

C. Sarcone's Authority as FAUSA and Special Attorney

The Government asserts in the alternative that, even if Sarcone was not properly serving as Acting U.S. Attorney, he nevertheless had authority to obtain the subpoenas through the Attorney General's delegation of authority to him as Special Attorney and FAUSA.

The Attorney General is the "head of the Department of Justice" and is vested with nearly "[a]ll functions" of the agency." 28 U.S.C. §§ 503, 509. She may "conduct any kind of legal proceeding, civil or criminal, . . . which United States attorneys are authorized by law to conduct." *Id.* § 515(a). She also has authority to "supervise all litigation" on behalf of the United States, and to "direct all United States attorneys, assistant United

States attorneys, and special attorneys" in carrying out their duties. *Id.* § 519. Beyond these direct powers, the Attorney General also may delegate broadly. She may appoint special attorneys and may delegate "any function of the Attorney General" to "any other officer, employee, or agency of the Department of Justice." *Id.* §§ 515, 510. And she may "specifically direct[]" any "attorney specially appointed by" her to "conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings . . . , which United States attorneys are authorized by law to conduct." *Id.* § 515(a).

Like the Attorney General, many agency heads possess general delegatory authority. But the FVRA's exclusivity provision forecloses using that authority to circumvent its requirements. It specifies that "Sections 3345 and 3346 are the exclusive means for temporarily authorizing an acting official to perform the functions and duties of" a PAS office, unless a different statute "expressly" authorizes another designation method or the President makes a recess appointment. 5 U.S.C. § 3347(a). A statute "providing general authority . . . to delegate duties" does not qualify as such an exception and thus cannot bypass the FVRA's terms. *Id.* § 3347(b).

The exclusivity provision's controlling principle is that, without an independent provision expressly providing otherwise, §§ 3345 and 3346 are the sole means by which someone can serve as an acting officer. The statute dictates that whether someone is impermissibly serving as an acting officer turns on function, not form. Section 3345 defines an acting officer not by whether an individual claims that label but by whether he performs "the functions and duties of the" vacant "office." *Id.* § 3345(a)(1)-(3). Under that functional conception of acting officers, the dispositive inquiry is whether a delegation is so comprehensive that an individual functionally occupies the vacant PAS office by performing its duties, thereby serving as the *de facto* acting officer.

A straightforward application of the FVRA's exclusivity provision bars Sarcone's wholesale delegation. He was granted complete authority to "conduct in the Northern District of New York, any kind of legal proceedings, civil or criminal, including Grand Jury proceedings and proceedings before United States Magistrates, which United States Attorneys are authorized to conduct." App'x 2072. The delegation was made under the Attorney General's general delegation authority, §§ 510, 515, and it was exhaustive of the PAS office's functions and duties.

To be clear, we have no occasion today to delineate when a partial delegation becomes an impermissible one. The delegation in the instant case presents no such difficulty: the sweeping delegation given to Sarcone of all the duties of the U.S. Attorney for the Northern District left him indistinguishable from an *acting officer*. To install someone in a vacant office through a general delegation authority that § 3347(b) expressly forbids, is to install an acting officer by another name. The FVRA forbids it.

The Government asserts that the exclusivity provision applies only to "designating an 'acting official' to perform all the functions and duties of an office, not the means of delegating some or all the office's delegable duties to a non-acting official." Respondent-Appellant's Br. 45. On that view, the delegation to Sarcone assertedly complied with the FVRA on two counts. First, Sarcone received no nondelegable functions, the Government having identified no such functions of U.S. Attorneys. And second, the delegation designated Sarcone as Special Attorney and FAUSA, not as Acting U.S. Attorney—a purely nominal designation, which § 3345(a) rejects.

The Government's reading of the exclusivity provision would, however, render the FVRA a dead letter. Under that reading, whenever the Executive wished to fill a vacancy free of the FVRA's limits, all the Executive would need to do would be to delegate all the powers of the vacant office to that handpicked individual without calling him the "acting" officer. For U.S. Attorneys, that means the Attorney General could install any attorney to serve as the Acting U.S. Attorney, regardless of whether that person has been confirmed by the Senate for another office or possessed any agency experience.

Additionally, that functional Acting U.S. Attorney could serve *indefinitely*. He could serve for the entirety of a presidential term—or longer—without the Senate ever having the opportunity to confirm him, and this could occur despite the FVRA's specific 210-day limit on such unconfirmed U.S. Attorneys.

Beyond evading the FVRA's eligibility requirements and time limits, the Government's reading would allow the Executive to bypass the Appointments Clause's requirement of Senate confirmation altogether whenever a PAS office's duties are wholly delegable. Such a reading that permits the Executive to evade both Congress's requirements in the FVRA and the Constitution's mandate that PAS officers be Senate-confirmed cannot be correct. Limitless and indefinite discretion was precisely what the Appointments Clause was designed to check and what the FVRA sought to curtail. *See SW Gen.*, 580 U.S. at 313 & n.1 (Thomas, *J.*, concurring).

The Government's reading fares no better as a matter of text. Section 3347 draws no line between delegable and non-delegable duties. It bars, in general terms, using general delegation power to authorize an official to "perform the functions and duties of" a PAS office, regardless of whether any particular duty is delegable. 5 U.S.C. § 3347(a). And we may not read into the statute a distinction that its plain text does not contain. *See United States v. Helm*, 58 F.4th 75, 90 (2d Cir. 2023) ("When the statutory text is plain and unambiguous, our sole function is to enforce it according to its terms." (quoting *United States v. Bedi*, 15 F.4th 222, 226 (2d Cir. 2021)).

The Government contends, however, that this Court and others have "concluded that the FVRA does not invalidate the exercise of delegable functions and duties of a vacant office," and thus that the delegation to Sarcone was permissible. Respondent-Appellant's Br. 49. None of the cases it cites supports the Government's position here.

The Government principally relies on the Federal Circuit's decision in *Arthrex, Inc. v. Smith & Nephew, Inc.*, 35 F.4th 1328 (Fed. Cir. 2022). In that case, Arthrex challenged an action the Commissioner for Patents took when he exercised all the "non-exclusive functions and duties of" the Director of the Patent and Trademark Office—a then-vacant PAS position. *Id.* at 1332. Arthrex argued that § 3347 barred the Commissioner from doing so, but the Federal Circuit disagreed, holding that "[t]he plain language of the statute limits the scope of the FVRA to non-delegable functions and duties." *Id.* at 1338.

We decline to adopt *Arthrex*'s reasoning insofar as it limits the scope of § 3347 to only non-delegable duties because it goes beyond what the statute provides. In concluding that the FVRA was so limited, *Arthrex* relied on the definition of "function or duty" in § 3348, which defines the term as one that must "be performed by the applicable officer (*and only that officer*)." 5 U.S.C. § 3348(a) (emphasis added). That definition may well distinguish between delegable and non-delegable functions, and on that basis the court reasoned that § 3347's reference to "functions and duties" was equally cabined. But transposing § 3348's definition to other sections of the statute is plainly improper. Section 3348 expressly states that its definition applies only "[*i*]*n this section*," *id.* (emphasis added), supplying no general definition governing the statute as a whole. That definition thus has no bearing on the meaning of § 3347's exclusivity terms—or any other part of the FVRA.

The Government's remaining cases are inapplicable because they expressly concern the scope of § 3348 rather than § 3347. *See Schaghticoke Tribal Nation v. Kempthorne*, 587 F.3d 132, 135 (2d Cir. 2009) (per curiam) (interpreting § 3348); *Stand Up for California! v. U.S. Dep't of the Interior*, 994 F.3d 616, 622 (D.C. Cir. 2021) (same); *Kajmowicz v. Whitaker*, 42 F.4th 138, 148 (3d Cir. 2022) (same); *Gonzales & Gonzales Bonds & Ins. Agency, Inc. v. U.S. Dep't of Homeland Sec.*, 107 F.4th 1064, 1073-74 (9th Cir. 2024) (same). They also involve limited delegations totally different from the complete delegation of a PAS office's duties before us here.[3]

Thus, while these cases confirm that non-acting officials may take on *some* delegable functions of a vacant PAS office—a proposition no party disputes—none of them supports the complete delegation of *all* of a PAS office's duties to a single individual as has occurred in the case before us. That distinction is decisive because it goes to the exclusivity provision's determinative inquiry: whether a person's delegation is so comprehensive that he functionally occupies the vacant PAS office as the *de facto* acting officer.

The Government warns that our position would "end the common practice . . . of having principal deputies or other individuals perform the delegable powers of a vacant PAS office in a non-acting capacity," which "would significantly upend the ordinary functions of the government." Respondent-Appellant's Br. 43. That misstates our holding completely. We reaffirm that agency heads remain free to delegate a vast universe of delegable functions that reside in vacant PAS offices. We hold only that the FVRA is violated when, as happened here, a delegation is so comprehensive that its recipient functionally occupies the vacant office.

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[3] In *Schaghticoke*, for example, we upheld a limited delegation of the power to recognize an Indian tribe. *See* 587 F.3d at 135 ("[T]he Secretary of Interior delegated . . . the Indian acknowledgment duties of the Assistant Secretary—Indian Affairs."). And in *Stand Up for California!*, the D.C. Circuit reviewed only the "redelegation of final decisionmaking authority" over the acquisition of land in trust for an Indian tribe. *See* 994 F.3d at 621; *see also Kajmowicz*, 42 F.4th at 146 n.2 (reviewing a delegation of rulemaking authority under a specific statute, not for an entire PAS office).

Because the general delegation to Sarcone of all the duties of the U.S. Attorney functionally made him the acting officer in all but name, we hold under the FVRA's exclusivity provision that Sarcone lacked authority to obtain the subpoenas based on that delegation.

D. The District Court's Decision to Quash the Subpoenas and Disqualify Sarcone

1. Motion to Quash[4]

The district court did not abuse its discretion in quashing the subpoenas. Federal Rule of Criminal Procedure 17 permits a district court to quash a subpoena "if compliance would be unreasonable or oppressive," including where a subpoena reflects an "abuse of the grand jury process." *In re Grand Jury Subpoena Duces Tecum Dated Jan. 2, 1985 (Simels)*, 767 F.2d 26, 30 (2d Cir. 1985). A subpoena obtained by a prosecutor lacking lawful authority is the product of an abuse of the grand jury process, and compliance with it would be unreasonable and oppressive.

This conclusion follows from the well-established principle that the proper remedy for a "Government actor's exercise of power that the actor did not lawfully possess" is invalidation of the *ultra vires* action. *Collins v. Yellen*, 594 U.S. 220, 258 (2021); *see also Lucia v. SEC*, 585 U.S. 237, 251 (2018) (invalidating executive action taken in violation of the Appointments Clause). And the Government acknowledges that a "grand jury subpoena

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[4] As noted above in Section III.A, although the quashed subpoenas are no longer enforceable, the issue of whether they were properly quashed is not moot because it is capable of repetition, yet evading review. *See In re Grand Jury Proceedings*, 971 F.3d at 53-54.

may be invalidated where the person who requested the subpoena lacks *any* authority to request the subpoenas from the grand jury." Respondent-Appellant's Br. 58 n.20; *see also In re Grand Jury Investigation*, 916 F.3d 1047 (D.C. Cir. 2019) (reviewing a motion to quash grand jury subpoenas on the ground that the issuing attorney lacked lawful authority to obtain them).

Because, as held above, Sarcone was not properly serving as the Acting U.S. Attorney under the FVRA, he lacked any lawful authority to obtain the grand jury subpoenas. And as we have further held, Sarcone also lacked authority as a delegee of all the duties of the U.S. Attorney's office.[5]

Indeed, and significantly in the instant case, Sarcone never invoked his supposed authority as a delegee. When Sarcone obtained the subpoenas, he identified himself solely as the Acting U.S. Attorney. He requested the subpoenas, signed cover letters, and directed delivery of responsive documents all under that title. *See* App'x 68-73. He did the same throughout the investigations, not once invoking his other titles. App'x 2242. Even had the delegation been valid, the subpoenas were obtained on the erroneous premise that Sarcone was the

[5] It is also uncertain whether such a broad delegation is permissible under § 515, let alone the FVRA. In a different case with related facts, the Government admitted that "it was not aware of any case dealing with such a delegation [under § 515] that was coextensive with the authority of a statutorily created PAS office." *United States v. Naviwala*, 825 F. Supp. 3d 451, 516 (D.N.J. 2026) (internal quotation marks omitted); *see also In re Persico*, 522 F.2d 41 (2d Cir. 1975) (upholding a limited delegation of authority over grand jury inquiries but nothing more).

Acting U.S. Attorney, not in his Special Attorney or FAUSA capacities that the Government now invokes.

Sarcone's hypothetical ability to obtain the subpoenas under different circumstances does not permit us to uphold them on the facts before us. In a different world, the Attorney General might have granted or might still grant Sarcone or someone like him a narrow delegation to conduct the specific investigations involved in this case, rather than entrust him with all the duties of the U.S. Attorney's office. Such a delegee might then have obtained or might still obtain the subpoenas in his capacity as Special Attorney and FAUSA. Such a delegation might well be permissible under the FVRA. But we cannot uphold an improperly requested subpoena because it could have been properly issued some other way. *See In re Grand Jury Proceeding (Oberlander)*, 971 F.3d 40, 50 (2d Cir. 2020) (refusing to enforce a subpoena unlawfully sought from a grand jury whose term had expired, even though another grand jury could have obtained the same information). The district court therefore properly quashed the subpoenas.

2. Disqualification

In addition to quashing the grand jury subpoenas, the district court "disqualified [Sarcone] from any further involvement in prosecuting or supervising" the underlying investigations. *In re Grand Jury Subpoenas*, 814 F. Supp. 3d at 300. In doing so, it observed that "[r]recent U.S. Attorney appointment opinions have adopted similar remedies." *Id.* (citing *United States v. Giraud*, 160 F.4th 390 (3d Cir. 2025); *United States v. Garcia*, No. 2:25-CR-00227, 2025 WL 2784640 (D. Nev. Sept. 30, 2025)). Noting that "courts often set aside actions taken under unlawful appointments and require new proceedings before properly appointed officials," the court reasoned that "[t]he same principles" required Sarcone's disqualification from the investigations at issue. *Id.* (citing *Lucia*, 585 U.S. at 251-52; *Ryder v. United States*, 515 U.S. 177, 187-88 (1995); *Flinton v. Comm'r of Soc. Sec.*, 143 F.4th 90, 99 (2d Cir. 2025)). Because the government did not sufficiently address this issue on appeal, we treat the issue as forfeited and affirm the disqualification.

We have held that when a party fails to argue sufficiently an issue in its briefs, the issue is considered forfeited "and normally will not be addressed on appeal." *Norton v. Sam's Club*, 145 F.3d 114, 117 (2d Cir. 1998); *Tolbert v. Queens Coll.*, 242 F.3d 58, 75 (2d Cir. 2001). "Merely mentioning the relevant issue" is not enough "properly [to] present [the] issue on appeal." *Gross v. Rell*, 585 F3d 72, 95 (2d Cir. 2009).[6] Accordingly, we affirm the district court's disqualification of Sarcone from further involvement in the investigations at issue.

IV. Conclusion

We hold that Sarcone was not lawfully serving as Acting U.S. Attorney for the Northern District of New York under the FVRA, and that the delegation to him of all the duties of that office as Special Attorney and FAUSA was an unlawful circumvention of the FVRA's exclusivity provision. Because Sarcone thus lacked any lawful authority to obtain the subpoenas, the district court

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[6] The government addresses the issue of disqualification briefly in passing. But these "conclusory" sentences are insufficient to overcome forfeiture, *see Zhang v. Gonzales*, 426 F.3d 540, 545 n.7 (2d Cir. 2005), and fall far short of meeting the demanding abuse of discretion standard for reversing the district court's disqualification, *see Jones*, 381 F.3d at 119; *Badalamenti*, 794 F.2d at 828.

properly quashed them. And because the government failed to address the issue of disqualification, we treat the issue as forfeited and decline to hold that the district court abused its discretion in disqualifying Sarcone from future involvement in the underlying investigations.

We have considered the Government's remaining arguments and conclude that they are without merit. We therefore **AFFIRM** the judgment of the district court.

PARK, *Circuit Judge*, dissenting:

The office of the U.S. Attorney for the Northern District of New York (N.D.N.Y.) became vacant when Carla Freedman resigned in February 2025. Five months later, the Attorney General appointed John A. Sarcone III as First Assistant U.S. Attorney ("FAUSA") for N.D.N.Y. The Federal Vacancies Reform Act ("FVRA") states that if a U.S. Attorney resigns, "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). This makes clear that Sarcone became Acting U.S. Attorney when he was appointed as FAUSA. Nonetheless, the Attorney General took a belt-and-suspenders approach and also appointed Sarcone as Special Attorney with all powers of U.S. Attorneys under 28 U.S.C. § 515. So Sarcone had the authority to issue subpoenas both as Acting U.S. Attorney and as Special Attorney.

The majority misreads § 3345(a)(1) to apply only to the person serving as FAUSA at the moment the vacancy first arose. But the FVRA contains no such limitation to a specific person or point in time. And the majority's arguments based on statutory structure are actually policy arguments that overlook Congress's understanding that the executive branch must function during periods of transition and political stalemate. Finally, the majority concludes that Sarcone's appointment as Special Attorney violated the FVRA's exclusivity provision. But 5 U.S.C. § 3347 does not prohibit agency heads from delegating certain powers of an office to a non-acting official.

I respectfully dissent.

I

A

Article II of the Constitution requires the President to obtain "the Advice and Consent of the Senate" before appointing "Officers of the United States." U.S. Const. art. II § 2, cl. 2. "Given this provision, the responsibilities of an office requiring Presidential appointment and Senate confirmation—known as a 'PAS' office—may go unperformed if a vacancy arises and the President and Senate cannot promptly agree on a replacement." *NLRB v. SW Gen., Inc.*, 580 U.S. 288, 292 (2017). As a result, Congress has authorized the President to appoint acting officers of PAS offices since President Washington's first term.

Congress has expanded this authority over time as the executive branch has grown and confirmation timelines have lengthened. The first Vacancies Act of 1792 authorized the President to fill vacancies only in the Departments of War, Treasury, and State,[1] but in 1868, Congress broadened the authority to appoint acting officers of almost all executive offices.[2] And, by 1988, Congress lengthened the 1868 Act's term limit for acting officers from 10 to 120 days.[3]

In the 1970s, a dispute arose between the Department of Justice ("DOJ") and the Comptroller General about whether limitations on acting officers in the Vacancies Act of 1868 applied to the DOJ. The DOJ argued

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[1] Act of May 8, 1792, ch. 37, § 8, 1 Stat. 281.

[2] Act of July 23, 1868, ch. 227, 15 Stat. 168.

[3] *Id.*; Act of Feb. 6, 1891, ch. 113, 26 Stat. 733; Presidential Transitions Effectiveness Act, Pub. L. No. 100-398, § 7, 102 Stat. 985, 988 (1988).

that the Attorney General had independent statutory authority to fill vacant offices, and it pointed to 28 U.S.C. §§ 509-510, which permit the Attorney General to exercise the duties of vacant offices and to delegate those duties to others. *See SW Gen.*, 580 U.S. at 294. Then in 1998, the Attorney General relied on her delegation authority—rather than the Vacancies Act—to "designate Bill Lann Lee to perform the functions and duties of and to act as Assistant Attorney General in charge of the Civil Rights Division" after the Senate had rejected Lee's appointment to that role. *Oversight of the Implementation of the Vacancies Act: Hearing Before the S. Comm. on Governmental Affairs*, 105th Cong. 102 (1998). In response, and after "intense negotiations," Congress passed the Federal Vacancies Reform Act. *See* Morton Rosenberg, Cong. Rsch. Serv., 98-892 A, *The New Vacancies Act: Congress Acts To Protect the Senate's Confirmation Prerogative* 9 (1998).

The FVRA expanded the President's authority to appoint acting officers and clarified the limits of that authority. First, like the Vacancies Act, § 3345 began with the default rule that "the first assistant to the office" of a departed officer would serve as acting officer, and it permitted the President to override that default rule by selecting any PAS officer to fill the vacancy. 5 U.S.C. § 3345(a)(1), (a)(2). Congress also added a new third channel to fill vacancies: the President could select a senior official from the office of the vacancy. *Id.* § 3345(a)(3). Second, § 3346 increased acting officers' terms from 120 to 210 days, with the option for an acting officer to serve indefinitely while a first or second nomination is pending. Third, § 3347 clarified that §§ 3345 and 3346 are "the exclusive means for temporarily authorizing an acting official to perform the functions and duties of any [PAS] office," with exceptions for recess appointments and statutes that "expressly" authorize an officer to serve "in an acting capacity." Finally, § 3348 provided that if there was no acting officer, "the office shall remain vacant," and only the agency head could perform the office's non-delegable duties.

B

Intensifying partisan battles over nominations have led "[a]ll recent Presidents [to] rel[y] significantly on acting officials in Senate-confirmed roles." Nina A. Mendelson, *The Permissibility of Acting Officials: May the President Work Around Senate Confirmation?*, 72 ADMIN. L. REV. 533, 538 (2020). That is particularly true at the beginning of Presidential administrations, when the prior President's appointees often resign *en masse* and the Senate can be slow to confirm new nominees.

During the first year of President Trump's second term, the Senate was especially slow to confirm U.S. Attorneys, who oversee federal prosecutions in 94 districts across the country. Senate Minority Leader Chuck Schumer put a hold on all DOJ nominees as an act of protest.[4] As a result, the Senate did not confirm any of President Trump's U.S. Attorney nominees for nine months after his inauguration; by the end of 2025, the Senate had confirmed only 31 U.S. Attorneys, leaving many positions vacant across the country.[5]

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[4] *See* James Fanelli, Dave Michaels, Corinne Ramey, *A New Front in Trump's Clash with the Judiciary: Appointing Prosecutors*, WALL ST. J. (July 27, 2025).

[5] *See* Press Release, U.S. S. Comm. on the Judiciary, Senate Republicans Confirm 14 Law and Order Nominees to Deliver Safer Streets for Americans (Dec. 19, 2025), https://perma.cc/Z935-N7V2.

The position of U.S. Attorney for N.D.N.Y. became vacant when Carla Freedman, the U.S. Attorney appointed by President Biden, resigned on February 17, 2025, shortly after President Trump took office. To date, there is no Senate-confirmed U.S. Attorney for N.D.N.Y.

Since February 2025, the functions of the vacant office have been performed by different people under different statutory authorizations. First, when Freedman resigned, Daniel Hanlon, the FAUSA at the time, became Acting U.S. Attorney under the FVRA's default provision, 5 U.S.C. § 3345(a)(1). Then, on February 28, 2025, Attorney General Pamela Bondi announced that she would appoint Sarcone interim U.S. Attorney for N.D.N.Y. under 28 U.S.C. § 546, which authorizes the Attorney General to appoint interim U.S. Attorneys for 120-day terms. Sarcone's appointment as interim U.S. Attorney was effective on March 17 and ended on July 14, 2025. On that day, the district court in N.D.N.Y. could "appoint a United States attorney to serve until the vacancy is filled" under § 546(d). But the district court declined to exercise its authority under § 546(d) either to allow Sarcone to continue as acting officer or to appoint a replacement.[6] The office of U.S. Attorney thus became vacant again.

On July 14, 2025, the Attorney General appointed Sarcone "Special Attorney to the United States Attorney General" and authorized him "to conduct in the Northern District of New York, any kind of legal proceedings, civil or criminal, including Grand Jury proceedings and proceedings before United States Magis-

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[6] Press Release, U.S. Dist. Ct. for N.D.N.Y, United States Attorney for N.D.N.Y. (July 14, 2025), https://perma.cc/XP4Z-WB8F.

trates, which United States Attorneys are authorized to conduct." App'x at 2087, 2095. The DOJ also reassigned Hanlon from FAUSA to Deputy U.S. Attorney and designated Sarcone as FAUSA. The United States asserted that Sarcone—as FAUSA to the vacant U.S. Attorney office—became Acting U.S. Attorney under 5 U.S.C. § 3345(a)(1).

On August 5, 2025, Sarcone requested that the district court issue two grand jury subpoenas to the Office of the New York State Attorney General ("OAG"), which it duly issued. OAG moved to quash the subpoenas, which the district court granted. It concluded that Sarcone lacked authority to issue the subpoenas as Acting U.S. Attorney or as Special Attorney and disqualified him from the proceedings.

II

Sarcone was Acting U.S. Attorney under 5 U.S.C. § 3345(a)(1) when he issued the subpoenas, so the district court should not have quashed them or barred Sarcone from the OAG investigations.

A

5 U.S.C. § 3345(a)(1) states that if a PAS officer "dies, resigns, or is otherwise unable to perform the functions and duties of the office," "the first assistant to the office of such officer shall perform the functions and duties of the office temporarily in an acting capacity subject to the time limitations of section 3346." This language creates a "general," "default rule" that "the first assistant to a vacant office shall become the acting officer." *SW Gen.*, 580 U.S. at 293. So anytime (1) there is a vacancy, (2) there is a first assistant, and (3) the time limit in § 3346 has not elapsed, the first assistant becomes act-

ing officer. The application here is straightforward: (1) the office of U.S. Attorney for N.D.N.Y. was vacant, (2) Sarcone was first assistant, and (3) the time limit in § 3346 had not elapsed,[7] so Sarcone became Acting U.S. Attorney.

This should be the end of the analysis. But the majority asserts that "only the First Assistant in place when a vacancy arises may become the acting officer under § 3345(a)(1)." *Ante* at 28. This is wrong. The FVRA is clear that any first assistant to a vacant office can become acting officer under § 3345(a)(1).

Start with the text. Subsection (a)(1) states that if a PAS officer departs, then "the first assistant *to the office* of such officer" becomes acting officer. 5 U.S.C. § 3345(a)(1) (emphasis added). The words "to the office" have meaning, "as each word in a statute should." *Ransom v. FIA Card Servs., N.A.*, 562 U.S. 61, 70 (2011). Without them, the statute would refer to "the first assistant . . . of such officer"—*i.e.*, the first assistant of the departed PAS officer. With them, the statute refers to a position—"first assistant *to the office* of such officer"—not a person. To this, the majority asserts that the difference in words between the two formulations does not make "the slightest difference semantically." *Ante* at 18. But a newly selected first assistant has the same relationship "to the office" that the incumbent did, even though he was not the first assistant to the departing

[7] 5 U.S.C. § 3346 states that acting officers under § 3345 can serve "for no longer than 210 days beginning on the date the vacancy occurs," subject to tolling provisions. For purposes of this appeal, it does not matter whether the 210-day clock began when Freedman resigned or when Sarcone's § 546 appointment elapsed because the subpoenas were timely issued either way.

officer. So the words "to the office" make clear that § 3345(a)(1) applies to any first assistant, not just the incumbent first assistant of the departing officer.

The statutory history confirms this interpretation. The FVRA's predecessor, the Vacancies Act of 1868, stated that "[w]hen the head of an Executive agency . . . dies, resigns, or is sick or absent, *his first assistant* . . . shall perform the duties of the office." 5 U.S.C. § 3345 (1988). An early draft of the FVRA also referred to "the first assistant of such officer." S. Rep. No. 105-250, at 25 (1998). If Congress merely sought to "remove[] the male-default pronoun" as the majority implausibly suggests, *ante* at 22, this formulation would have sufficed. But Congress amended the FVRA to reference "the first assistant to the office of such officer"—not the first assistant to a specific officer. 5 U.S.C. § 3345(a)(1). "When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect." *Intel Corp. Inv. Pol'y Comm. v. Sulyma*, 589 U.S. 178, 189 (2020) (cleaned up). Reading "the first assistant to the office" to cover all first assistants to the office gives effect to Congress's amendment.[8]

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[8] The Supreme Court has warned against "allowing ambiguous legislative history to muddy clear statutory language" in the FVRA. *SW Gen.*, 580 U.S. at 307 (quoting *Milner v. Dep't of Navy*, 562 U.S. 562, 572 (2011)). But to the extent the history is relevant, it tends to support this interpretation. As one of the FVRA's sponsors, Senator Thompson, explained: "The term 'first assistant to the office' is incorporated into 5 U.S.C. § 3345(a)(1), rather than 'first assistant to the officer.' This change is made to 'depersonalize' the first assistant." 144 Cong. Rec. S12822 (daily ed. Oct. 21, 1998). The majority agrees that this "change reflected a standardization throughout the statutory provision to focus on the *office* rather than the

The statutory structure supports this interpretation. Unlike subsection (a)(1), which imposes no limit on which "first assistant to the office" may become acting officer, subsection (a)(3) limits the pool of eligible senior agency officials to incumbents. Under subsection (a)(3), only officials who served "for not less than 90 days" "during the 365-day period preceding the date of death, resignation, or beginning of inability to serve" can be appointed. 5 U.S.C. § 3345(a)(3)(A). Section 3345(b)(1) imposes the same requirement on acting officers whom the President has nominated for Senate approval. The express incumbency requirements in § 3345(a)(3) and § 3345(b) thus suggest that Congress meant not to impose an incumbency requirement in § 3345(a)(1).[9]

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individual *officeholder*," but disregards this "office-centric language" by limiting § 3345(a)(1) to the first assistant of the departing officer. *Ante* at 22-23. Moreover, the phrase "to the office" was added after Senator Lieberman objected to the earlier draft as too restrictive because under its initial formulation "a first assistant apparently can take over only if he or she was the first assistant at the time of the vacancy." 144 Cong. Rec. S11037 (daily ed. Sept. 28, 1998). Lieberman did not "attribute[] his change of heart *entirely* to (a)(3)." *Ante* at 25 (emphasis added). When he endorsed the FVRA, he remarked that the original draft "contained a *number* of troubling provisions," and that the bill was revised to "address the concerns that remained." 144 Cong. Rec. S12861 (daily ed. Oct. 21, 1998) (emphasis added). That he highlighted the addition of (a)(3) as one of the changes he was "particularly pleased" about, *id.* does not support the majority's inference "that nothing substantively changed in (a)(1) through its amended language," *ante* at 25.

[9] Subsections 3345(a)(3) and (b)(1) also suggest that when Congress cared about incumbency, it considered 90 days of service in the year before the vacancy to be the relevant bar. The majority offers no explanation for its view that Congress conditioned § 3345(a)(1) on the more arbitrary question of who served as first assistant at

Finally, the political branches have endorsed this understanding in opinion and practice. "[W]hile courts must exercise independent judgment in determining the meaning of statutory provisions, the contemporary and consistent views of a coordinate branch of government can provide evidence of the law's meaning." *Bondi v. VanDerStok*, 604 U.S. 458, 480-81 (2025) (cleaned up). Since 2001, the legislative and executive branches have agreed that "a person need not have been in the first assistant position before the vacancy occurs in order to serve as acting officer." Letter from Victor S. Rezendes, Managing Director, Strategic Issues, GAO, to U.S. Senator Joseph Lieberman and U.S. Representative Dan Burton (Dec. 7, 2001) ("2001 GAO Letter"); *see also Designation of Acting Associate Attorney General*, 25 Op. O.L.C. 177, 179-80 (2001) (concluding that "subsection (a)(1) applies to someone who . . . was designated as first assistant after the vacancy occurred," in part because the opposite conclusion would render the words "to the office" in § 3345(a)(1) "meaningless").[10] Based on these interpretations, the executive branch has "routinely relied on post-vacancy first assistants to serve as acting officials under the FVRA." Reply Br. at 14-15 & n.3 (listing 31 examples from the Department of Justice

the moment the PAS officer departed without regard to the duration of that service.

[10] To be sure, OLC initially "believe[d] that the better understanding is that you must be the first assistant when the vacancy occurs in order to be the acting officer by virtue of being the first assistant." *Guidance on Application of Federal Vacancies Reform Act of 1998*, 23 Op. O.L.C. 60, 63-64 (1999). But OLC offered no analysis to support that preliminary view, it reversed course two years later, and it has maintained for the past 25 years that post-vacancy first assistants may become acting officer under § 3345(a)(1).

in the Bush, Obama, Trump, and Biden administrations).[11]

In short, the text of § 3345(a)(1), the FVRA's structure, and longstanding, bipartisan interpretations and practices all point in the same direction: any first assistant to a vacant office becomes acting officer under § 3345(a)(1). Sarcone was first assistant to the vacant office, and the § 3346 time limit had not elapsed, so he was Acting U.S. Attorney when he issued the subpoenas.

B

The majority reaches the opposite conclusion by making up an "incumbency requirement." *See ante* at 17-18. But § 3345(a)(1) never mentions incumbency, and courts should not "read into statutes words that aren't there." *Romag Fasteners, Inc. v. Fossil, Inc.*, 590 U.S. 212, 215 (2020). The majority's interpretation also renders § 3345(a)(1) a nullity anytime a PAS officer and first assistant resign simultaneously during presidential transitions—an odd result given that the FVRA grants more latitude to the executive during times of transition. *See* 5 U.S.C. § 3349a (extending the § 3346 time limits for vacancies arising within 60 days of a new President's inauguration).

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[11] The majority discounts this historical practice as executive branch self-aggrandizement, saying it demonstrates only that "the Executive branch has pushed the limits of the FVRA since its enactment." *Ante* at 27. But the Government Accountability Office—the agency in the *legislative* branch tasked with reporting violations of the FVRA, *see* 5 U.S.C. § 3349—has reached the same conclusion, *see* 2001 GAO Letter. This cannot be dismissed as the self-interested interpretation of a single branch.

The majority's defense of its incumbency requirement is weak. First, it misreads the text. The majority contends that the phrase "dies, resigns, or is otherwise unable to perform" refers only to the moment the PAS office becomes vacant because "[t]he first two triggers —death and resignation—are instantaneous events." *Ante* at 18. The problem with this argument is that the third trigger—"is otherwise unable to perform"—describes a continuing state, not a discrete event. So the majority's interpretation of "is otherwise unable" to refer only to "the onset of the incapacity that triggered the vacancy," *id.* at 20, reads the phrase "is otherwise unable" as "becomes otherwise unable." But Congress knows how to identify the instant a vacancy arises, rather than its continuing state. Elsewhere in § 3345, it referred to the "beginning of inability to serve of the applicable officer." 5 U.S.C. § 3345(a)(3)(A), (b)(1)(A).[12] Moreover, the text of subsection (a)(1) confirms that it operates for the duration of the vacancy, not just its opening, because

[12] The phrase "is otherwise unable to perform" also cannot be limited to the onset of the vacancy because it sets the endpoint for acting officers who take over "temporarily" because of sickness. The time limitations in § 3346 do not apply "in the case of a vacancy caused by sickness," 5 U.S.C. § 3346(a), and nothing in § 3346 says that an acting officer's service ends once the PAS officer recovers. Instead, the triggering language supplies this limit by tying the acting officer's term to continued incapacity. Once recovered, the PAS officer "is" no longer "unable to perform," so subsection (a)(1) ceases to apply. But under the majority's interpretation, the "statute's triggering mechanism looks to the initial onset of the vacancy rather than to the ongoing state that follows," *ante* at 20, so it cannot then displace the acting officer when an inability to perform ends. Similarly, the majority agrees that when Sarcone became interim U.S. Attorney, he "replac[ed] Hanlon as the temporary head of the office," even though the time limitations in § 3346 had not expired. *Id.* at 8.

"perform[ing] the functions and duties of the office" is also a continuing state.

The majority's interpretation relies on the *ejusdem generis* canon, which reads a general term at the end of a list in light of common characteristics shared by the preceding terms. It thus treats the third cause of a vacancy (is otherwise unable to perform) as an instantaneous event matching the first two (dies or resigns). *See ante* at 19-20. But the majority gives no reason why the relevant characteristic is how the incapacity is triggered rather than how long the officer is unavailable. In any event, the third cause is different because, unlike death or resignation, it describes a state that may be continuing and may or may not be permanent. "[O]ne is either dead or alive, and in a job or out of it," *id.* at 18, but an officer who is ill one week may be better the next. The majority's attempt to read timing into "is otherwise unable" fails because *ejusdem generis* cannot override the plain meaning of the text. *See Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 588 (1980) ("[*E*]*jusdem generis* . . . is only an instrumentality for ascertaining the correct meaning of words when there is uncertainty." (cleaned up)); *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 227 (2008) ("[W]e do not woodenly apply limiting principles every time Congress includes a specific example along with a general phrase.").

Second, the majority's interpretation gives the same words in the same Act different meanings. The phrase "dies, resigns, or is otherwise unable to perform the functions and duties of the office," governs not only § 3345(a)(1), but also § 3345(a)(2) and (a)(3). If that phrase limited when first assistants could become acting officer under (a)(1), it would also limit when a President could select an acting officer under (a)(2) and (a)(3). But a President can select acting officers under (a)(2) and (a)(3) anytime during a vacancy. *See SW Gen.*, 580 U.S. at 309.

To be sure, (a)(1) uses the mandatory "shall" to describe the consequence of a vacancy while (a)(2) and (a)(3) use the permissive "may." *Ante* at 21. But "shall" does not have the temporal significance the majority assigns it. The same language ("dies, resigns, or is otherwise unable to perform") also appears in § 3348(b) followed by the word "shall," without imposing any time limit. *See* 5 U.S.C. § 3348(b)(1) (stating that if no acting officer is serving, and a PAS officer "dies, resigns, or is otherwise unable to perform," "the office shall remain vacant"). If the majority were correct that the word "shall" "signals an automatic result occurring instantaneously with the trigger," then § 3348(b) would be unintelligible. *Ante* at 21. An office does not "remain" vacant in an instant. The majority's conclusion—that "dies, resigns, or is otherwise unable to perform" temporally limits subsection (a)(1) to the moment of the PAS officer's departure—does not make sense because those words do not similarly limit any of the other three provisions in which they appear.

Third, the majority relies on a non-sequitur. It jumps from the premise that the phrase "dies, resigns, or is otherwise unable to perform" limits *when* a first assistant can become acting officer to a conclusion about *which* first assistant can become acting officer—*i.e.*, only an incumbent first assistant. But a time limit is different from an incumbency requirement, so the former cannot create the latter. To illustrate this point, consider the implication of the majority's argument if

Hanlon—the incumbent FAUSA when Freedman resigned—had remained FAUSA on July 14, 2025, when Sarcone's interim appointment under § 546 elapsed. If the majority were correct that § 3345(a)(1) operates only at the moment of the PAS officer's departure, then it would have operated only on February 17, when Freedman resigned, so Hanlon would not have become Acting U.S. Attorney on July 14, even though he was the incumbent FAUSA. But this would make little sense and OAG conceded at oral argument that Hanlon would become Acting U.S. Attorney in this hypothetical. Oral Arg. Tr. at 29-31. The majority's reading of the statute is thus internally inconsistent—in some places, it says the automatic-succession provision is limited to a person (the incumbent FAUSA), but elsewhere, to a point in time (when the vacancy arises).

Turning to structure, the majority argues that if the President can select someone to become first assistant, and thus acting officer under subsection (a)(1), then he can sidestep (a)(2) and (a)(3) altogether. But "[l]anguage in a statute is not rendered superfluous merely because in some contexts that language may not be pertinent." *United States v. Turkette*, 452 U.S. 576, 583 n.5 (1981). Although in this context a President could effectively select an Acting U.S. Attorney under subsection (a)(1) by appointing the FAUSA, the FVRA applies to a wide range of PAS offices, and for others, the President must rely on (a)(2) or (a)(3) to select the acting officer. First, the first assistant to an agency head is often itself a PAS position.[13] Congress knew this was common when

[13] *See, e.g.*, 28 U.S.C. §§ 504, 508(a) (Department of Justice); 22 U.S.C. § 2651a(a)(2) (Department of State); 31 U.S.C. § 301(c) (Department of the Treasury); 10 U.S.C. § 132 (Department of De-

it passed the FVRA. *See* 5 U.S.C. § 3345(b)(2)(B) (referencing when "the office of such first assistant is an office for which appointment is required to be made by the President, by and with the advice and consent of the Senate"). For these positions, the President cannot choose the first assistant who becomes acting officer under (a)(1). Second, the President must rely on (a)(2) and (a)(3) to select an acting officer when the PAS office

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fense); 6 U.S.C. § 113(a)(1)(A) (Department of Homeland Security); 7 U.S.C. §§ 2210, 2211 (Department of Agriculture); 49 U.S.C. § 102 (Department of Transportation); 43 U.S.C. § 1452 (Department of the Interior); 29 U.S.C. § 552 (Department of Labor); 20 U.S.C. § 3412 (Department of Education); 42 U.S.C. § 7132 (Department of Energy); 31 U.S.C. § 502(b) (Office of Management and Budget); 10 U.S.C. § 7015 (Department of the Army); 10 U.S.C. § 8015 (Department of the Navy); 10 U.S.C. § 9015 (Department of the Air Force); 42 U.S.C. § 3533 (Department of Housing and Urban Development); 22 U.S.C. § 287(b) (United Nations Representative); 51 U.S.C. § 20111(b) (National Aeronautics and Space Administration); 5 U.S.C. § 1102(b) (Office of Personnel Management); 50 U.S.C. § 3026 (Office of the Director for National Intelligence); 15 U.S.C. § 633(b)(1) (Small Business Administration); 42 U.S.C. § 902(b) (Social Security Administration).

lacks a designated first assistant[14] and when the first assistant must be chosen by the PAS officer.[15]

So the plain-text reading of (a)(1)—that any first assistant performs the functions and duties of the vacant office—does not create superfluity. Instead, it allows the President to use (a)(1) to fill vacancies where he may freely select the first assistant but requires him to use (a)(2) or (a)(3) to fill vacancies otherwise. There is nothing "anomalous" about Congress limiting who the President can choose to be Acting Attorney General or Acting Secretary of State, but letting him select an Acting U.S. Attorney under (a)(1). *Ante* at 17.[16] So even if

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[14] *See* S. Rep. No. 105-250, at 12 (explaining that "[c]ertain officers have first assistants designated by statute" and "[o]ther departments and agencies have established first assistants by regulation," but cases remain where "there is no first assistant"). After the FVRA passed, several agencies designated first assistants to their PAS offices. *E.g.*, Organization of the Department of Justice, 64 Fed. Reg. 6526 (Feb. 10, 1999); Agency Organization: Vacancy, Disability, and Absence, 64 Fed. Reg. 62122 (Nov. 16, 1999) (Department of the Treasury); Organization and Delegation of Duties, 78 Fed. Reg. 23158, 23160 (Apr. 18, 2013) (Department of Transportation).

[15] *E.g.*, 12 U.S.C. § 5491(b)(5) (Bureau of Consumer Financial Protection); 44 U.S.C. § 2103(c) (National Archives and Records Administration).

[16] The majority's charge that this interpretation would "impose essentially no limits on Executive discretion" is overblown. *Ante* at 17. The FVRA limits how long an acting official may serve under (a)(1), 5 U.S.C. §§ 3345(a)(1), 3346; it limits when a person who has been nominated for a vacant PAS office may perform the duties of that office in an acting capacity, *id.* § 3345(b)(1); and Congress has separately limited the President's ability to pick first assistants for certain offices, *see supra* at 15 & n.13. These are the limits Congress specified. During transitions, when joint resignations of PAS officers and their first assistants are commonplace, relying on subsections (a)(2) and (a)(3) might require the President to fill vacan-

(a)(1) sometimes renders (a)(2) and (a)(3) inapplicable, that does not justify adopting an atextual reading of (a)(1). *Cf. Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 457 (2007) ("The 'loophole,' in our judgment, is properly left for Congress to consider, and to close if it finds such action warranted.").

The majority's remaining structural arguments are grounded in policy and its conception of the statute's "internal logic" and "incentives." *Ante* at 15-16. It infers that "Congress made (a)(1) automatic precisely because it requires no fresh exercise of judgment." *Id.* at 15. That does not follow. Congress could have made subsection (a)(1) automatic simply to ensure that the duties of a PAS office do not "go unperformed if a vacancy arises and the President and Senate cannot promptly agree on a replacement." *SW Gen.,* 580 U.S. at 292. Automaticity does not support the majority's inference because (a)(1) operates automatically under either reading. The majority's view that Congress intended to remove the President's discretion to install acting officials under (a)(1) comes instead from its own view that Congress wanted "to stop the Executive from skirting the Vacancies Act." *Ante* at 16. "But no legislation pursues its purposes at all costs." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987). And the majority's account that the FVRA was aimed to protect the Senate's constitutional role by restricting the President's ability to

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cies with holdovers from prior administrations or career officials. It makes sense that for some offices, Congress meant to give the President leeway to choose someone he trusts to serve in a temporary acting capacity. *See Trump v. Slaughter,* 609 U.S. ----, 146 S. Ct. 2283, 2310 (2026) ("To discharge the duties of his trust, the President must have the assistance of officers he can trust." (cleaned up)).

fill vacancies is oversimplified and self-serving. The FVRA was "a compromise measure," *SW Gen.*, 580 U.S. at 307, that expanded the President's authority to select acting officers, including by allowing the President to select senior agency officials and by increasing acting officers' terms from 120 to 210 days. The FVRA is thus a good example of why the Supreme Court has "repeatedly" warned that "the text of a law controls over purported legislative intentions unmoored from any statutory text." *Oklahoma v. Castro-Huerta*, 597 U.S. 629, 642 (2022) (collecting cases).

In sum, the FVRA's text, structure, and purpose rebut the majority's conclusion that only the incumbent first assistant when a vacancy first arises can become acting officer under 5 U.S.C. § 3345(a)(1). The better reading of the statute is that *any* first assistant to a vacant office becomes acting officer, subject only to the time limits in § 3346.

III

The subpoenas were also valid because Sarcone had authority to issue them as Special Attorney.

A

Congress has authorized the Attorney General to exercise all powers of U.S. Attorneys and to delegate those powers to others, through several reinforcing statutes. The Attorney General is the "head of the Department of Justice," 28 U.S.C. § 503, vested with virtually "[a]ll functions of other officers of the Department of Justice," *id.* § 509. She has authority to "make [appropriate] provisions . . . authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General." *Id.* § 510.

She may "conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings . . . , which United States attorneys are authorized by law to conduct," and "specially appoint[]" other attorneys to conduct those proceedings. *Id.* § 515(a). She also may "direct[]" "the conduct of litigation in which the United States . . . is interested," *id.* § 516; "sen[d]" "any officer of the Department of Justice . . . to attend to the interests of the United States in a suit," *id.* § 517; and personally or by delegation "conduct and argue any case in a court of the United States in which the United States is interested," *id.* § 518(b).

These statutory authorizations are essential for the Attorney General to exercise her "broad power to enforce the criminal laws of the United States." *In re Persico*, 522 F.2d 41, 55 (2d Cir. 1975). The Attorney General has long relied on these provisions to delegate prosecutorial authority to others. *See, e.g.*, *id.* at 45 (describing the appointment of a Special Attorney to a "Strike Force" against organized crime); *see also United States v. Wrigley*, 520 F.2d 362, 370 (8th Cir. 1975) ("[U]ntil Congress imposes limitations on the power of the Attorney General, we must accept his right to authorize, absent a violation of the Constitution, special attorneys to conduct any criminal proceeding in a designated judicial district which United States Attorneys are authorized to conduct.").

Here, Attorney General Bondi relied on these statutes to appoint Sarcone as Special Attorney and to authorize him to conduct "any kind of legal proceedings, civil or criminal, including Grand Jury proceedings . . . which United States Attorneys are authorized to conduct." App'x at 2087, 2095. This delegation authorized Sarcone to issue the subpoenas.[17]

B

The majority concludes that this delegation was invalid under the FVRA's exclusivity provision, which prohibits the Attorney General from relying on delegation statutes to appoint "an acting official." 5 U.S.C. § 3347. But this is incorrect because § 3347 does not prohibit agency heads from delegating the delegable powers of a PAS office to a non-acting official, as the Attorney General did here. Section 3347 covers actions that "temporarily *authoriz[e] an acting official* to perform the functions and duties" of a PAS office. 5 U.S.C. § 3347(a) (emphasis added). It thus ensures that the executive must follow the FVRA when it names acting officers and conveys *all* authorities of a PAS office to them. But when the executive has delegated only the delegable authorities of the PAS office, it has not "authoriz[ed] *an acting official* to perform the functions and duties" of a PAS office under § 3347.

The structure of the FVRA supports this conclusion. Section 3348(b) states that when a PAS office is vacant, "only the head of such Executive agency may perform" the duties of the office that are "required by statute to be performed by the applicable officer," *i.e.*, non-delegable duties. *Id.* § 3348(a)(2)(A), (b). By requiring agency heads to perform a vacant office's *non-delegable* duties, § 3348(b) contemplates that non-acting officers can per-

[17] Even if Sarcone did not become Acting U.S. Attorney, the fact that he signed the subpoenas with the title "Acting U.S. Attorney" would not undermine his authority to issue the subpoenas as Special Attorney because it would not make an otherwise-valid subpoena "unreasonable or oppressive." Fed. R. Crim. P. 17(c)(2).

form the *delegable* duties of the vacant office. The majority's assertion that this would "render the FVRA a dead letter," *ante* at 31, is wrong because the executive must still follow the FVRA to select an officer to perform the non-delegable duties of the vacant office.

Interpreting § 3347 to permit delegations that do not create an acting officer is also consistent with the FVRA's history. One of the reasons Congress enacted the FVRA was to address the Attorney General's reliance on 28 U.S.C. §§ 509, 510 to appoint acting officials, as she did in "designat[ing] Bill Lann Lee to perform the functions and duties of and *to act as Assistant Attorney General in charge of the Civil Rights Division*." *Oversight of the Implementation of the Vacancies Act: Hearing Before the S. Comm. on Governmental Affairs*, 105th Cong. 102 (1998) (emphasis added).[18] Section 3347 prohibits that practice, but it does not go further to prohibit delegations of authority to nonacting officials.

Finally, other courts and the political branches have embraced this interpretation. In *Schaghticoke Tribal Nation v. Kempthorne,* 587 F.3d 132 (2d Cir. 2009), we held that the FVRA did not prohibit the Secretary of the Interior from delegating the duty of the vacant office of Assistant Secretary—Indian Affairs "to make Indian acknowledgment decisions" because that duty was not "required by statute or regulation to be performed by the Assistant Secretary." *Id.* at 135 (cleaned up). And the Federal Circuit agrees that "[t]he plain language of

[18] Although the appointment of Bill Lann Lee was controversial, DOJ had made appointments like this routinely before the FVRA. *See Oversight of the Implementation of the Vacancies Act: Hearing Before the S. Comm. on Governmental Affairs*, 105th Cong. 101-06 (1998) (Appendix I).

the statute limits the scope of the FVRA to non-delegable functions and duties." *Arthrex, Inc. v. Smith & Nephew, Inc.*, 35 F.4th 1328, 1338 (Fed. Cir. 2022).[19] The GAO and OLC also agree that the FVRA permits non-acting officers to exercise the delegable duties of a vacant PAS office. *See* Letter from Gary L. Kepplinger, General Counsel, GAO, to U.S. Senators Richard J. Durbin, Russell D. Feingold, and Edward M. Kennedy (June 13, 2008) (concluding that the FVRA did not prohibit the Principal Deputy Assistant Attorney General from performing the duties of the vacant office of Assistant Attorney General for OLC); 23 Op. O.L.C. at 72 ("[T]he Act permits non-exclusive responsibilities to be delegated to other appropriate officers and employees in the agency."). The majority's reading thus disregards the uniform interpretation of both the executive branch and the component of the legislative branch charged with monitoring FVRA compliance. *See supra* at 10 & n.11. And the Senate Report for the bill confirms that Congress understood that the "[d]elegable functions of the [vacant] office could still be performed by other officers or employees" under the FVRA. S. Rep. No. 105-250, at 18; *see ante* at 25-26 (noting that "the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill" (quoting *Garcia v. United States*, 469 U.S. 70, 76 (1984)).

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[19] The majority faults the Federal Circuit for using § 3348 to interpret § 3347. But when interpreting statutes, "our task is to fit, if possible, all parts into an harmonious whole." *Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 100 (2012) (quoting *FTC v. Mandel Bros., Inc.*, 359 U.S. 385, 389 (1959)). By interpreting § 3347 to prohibit delegations that § 3348 contemplates, the majority needlessly reads discord into a coherent scheme.

The FVRA's text, structure, and history, and the practices and interpretations of the political branches all support the government's understanding that § 3347 permits non-acting officers to exercise the delegable duties of a vacant office. Section 3347 thus permitted the Attorney General to appoint Sarcone Special Attorney and to delegate to him the powers of U.S. Attorneys.

C

The majority misreads § 3347 to prohibit the Attorney General from installing a "de facto" Acting U.S. Attorney through delegations, which is how it describes Sarcone's appointment.

There are two problems with this interpretation. First, its premise—that comprehensive delegations are equivalent to acting officer appointments —is mistaken. An acting officer is different from a delegee. Unlike acting officers, delegees cannot exercise nondelegable duties and are limited by the scope of their delegation. That difference remains even when the executive purports to delegate all authorities of a PAS office because unlike an acting officer, a delegee's actions may be subject to factual or legal challenge.[20] And for PAS offices with non-delegable authorities, *see* 5 U.S.C. § 3348(a)(2) (referencing such offices), the recipient of a broad delegation necessarily has less authority than an acting officer, so a broad delegation is not the same as an acting officer appointment.

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[20] Sarcone has faced precisely these challenges. *See Matter of Ord. to Authorize Disclosure of Tax Returns*, No. 25-Misc.-22, 2026 WL 63331, at *3 (N.D.N.Y. Jan. 8, 2026) (concluding that Sarcone could not be delegated the power to authorize an application for the Internal Revenue Service to disclose tax return information under 26 U.S.C. § 6103(i)).

Second, the majority's interpretation is atextual. The FVRA does not use the words "de facto" acting officer. Although the majority says the inquiry is "whether a person's delegation is so comprehensive that he functionally occupies the vacant PAS office," it fails to explain what that means. *Ante* at 34. Would Sarcone be "de facto" Acting U.S. Attorney if he had all delegated powers of U.S. Attorneys, but did not lead the office as FAUSA? What if he were given the same delegation, but a handful of cases were carved out from it? The majority's substitution of the statutory language with its own "de facto" officer test is ungrounded and unhelpful.

IV

Mr. Sarcone had the authority to subpoena OAG both as Acting U.S. Attorney under 5 U.S.C. § 3345(a)(1) and also as Special Attorney. By concluding otherwise, the majority imposes new limits on executive authority, upsetting the balance that Congress struck in the FVRA. I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

25 Misc. 19 (LGS)

IN RE GRAND JURY SUBPOENAS TO THE OFFICE OF THE NEW YORK STATE ATTORNEY GENERAL

Filed: Jan. 8, 2026

OPINION AND ORDER

LORNA G. SCHOFIELD, District Judge, sitting by designation:

On August 5, 2025, a federal prosecutor, on behalf of the United States (the "Federal Government"), requested that grand jury subpoenas be issued to a state prosecutor—the office of New York's Attorney General, Letitia James (the "State Government"). The subpoenas signaled an ongoing federal criminal investigation into two civil cases brought by the State of New York against President Donald J. Trump and the National Rifle Association ("NRA"). John A. Sarcone III, the recently installed Acting U.S. Attorney for the Northern District of New York ("NDNY") personally directed the issuance of both subpoenas; his is the only name on the subpoenas and the documents sought are returnable to him personally.

The State Government moves to quash the subpoenas. It argues, among other things, that the subpoenas intrude on New York's sovereignty and that they were issued in retaliation for the State's civil cases against President Trump and his political allies. The U.S. Attorney's Office for the NDNY opposes the motion on behalf of the Federal Government. The State Government's federalism and retaliation arguments need not be addressed at this stage. The subpoenas are unenforceable due to a threshold defect: Mr. Sarcone was not lawfully serving as Acting U.S. Attorney when the subpoenas were issued.

Mr. Sarcone's service was and is unlawful because it bypassed the statutory requirements that govern who may exercise the powers of a U.S. Attorney. U.S. Attorneys must be nominated by the President and confirmed by the Senate. When a vacancy arises, federal law provides limited alternatives to fill the position temporarily. None authorized Mr. Sarcone to serve as Acting U.S. Attorney on August 5, 2025, when he relied on the authority of the office to request the subpoenas. The U.S. Attorney General initially appointed Mr. Sarcone as Interim U.S. Attorney for 120 days. When that term expired, this District's judges declined to use their statutory authority to extend his tenure. Federal law then required the use of other statutory procedures to fill the position. The Department of Justice did not follow those procedures. Instead, on the same day that the judges declined to extend Mr. Sarcone's appointment, the Department took coordinated steps—through personnel moves and shifting titles—to install Mr. Sarcone as Acting U.S. Attorney. Federal law does not permit such a workaround. A growing body of persuasive authority reinforces this conclusion. Since August 2025, courts in

New Jersey, Nevada and California have held that similarly installed Acting U.S. Attorneys lacked lawful authority. Most recently, in November 2025, the Third Circuit affirmed the New Jersey decision. The Eastern District of Virginia also reached a comparable result in a slightly different procedural posture. The analysis below follows the approach taken by these courts and reaches the same conclusion. When the Executive branch of government skirts restraints put in place by Congress and then uses that power to subject political adversaries to criminal investigations, it acts without lawful authority. Subpoenas issued under that authority are invalid. The subpoenas are quashed, and Mr. Sarcone is disqualified from further participation in the underlying investigations. If the Federal Government chooses to reissue substantially similar subpoenas through a lawfully authorized official, the State Government may renew its motion to quash on grounds not addressed in this decision.

I. BACKGROUND

The Office of the New York State Attorney General represents New York State and its agencies in legal matters, including by conducting civil and criminal investigations and bringing enforcement actions under state law. Attorney General Letitia James currently heads the office. James has served as New York's Attorney General at all times relevant to this action.

A. Mr. Sarcone's Appointment

The previous, Senate-confirmed, U.S. Attorney for the NDNY, Carla B. Freedman, resigned on February 17, 2025. When she resigned, her top deputy, First Assistant U.S. Attorney Daniel Hanlon, automatically began serving as Acting U.S. Attorney under the default provisions of the Federal Vacancies Reform Act ("FVRA"), 5 U.S.C. § 3345(a)(1).

On February 28, 2025, the U.S. Attorney General appointed Mr. Sarcone as Interim U.S. Attorney for the NDNY under 28 U.S.C. § 546. The appointment order stated that Mr. Sarcone's term would take effect March 17, 2025, and expire after 120 days. Section 546(c) permits an appointee to serve until the earlier of (1) 120 days after the interim appointment or (2) the appointment of a U.S. Attorney under § 541, which requires nomination by the President and confirmation by the Senate. *See* 28 U.S.C. § 546(c)(1)-(2). The White House never formally nominated Mr. Sarcone (or anyone else) as U.S. Attorney. Accordingly, the Senate did not confirm a presidential nominee before Mr. Sarcone's interim appointment expired.

By statute, if no successor is in place when the 120-day period expires, a district court's Board of Judges may appoint a U.S. Attorney for the district. *See* 28 U.S.C. § 546(d). On July 14, 2025, which the parties contend was the last day of Mr. Sarcone's 120-day interim period, the Board of Judges for the U.S. District Court for the NDNY "decline[d] to exercise the authority granted pursuant to 28 U.S. Code § 546(d)" to appoint a U.S. Attorney.

The same day, July 14, 2025, Mr. Sarcone sent a letter to the NDNY Chief Judge Brenda Sannes stating that (1) he had been appointed as a "Special Attorney" under 28 U.S.C. § 515; (2) he had been designated as the "First Assistant" for the NDNY and (3) by operation of the FVRA, he was "now serving as Acting U.S. Attorney for the Northern District of New York indefinitely." Mr. Sarcone enclosed the appointment letter from the

Executive Office for United States Attorneys reflecting the Special Attorney appointment. The appointment letter states that Mr. Sarcone's appointment is indefinite, that he is authorized to conduct in the NDNY "any kind of legal proceedings, civil or criminal, including Grand Jury proceedings . . . which United States Attorneys are authorized to conduct," and that he will report to the "Attorney General or her delegee."

Also on July 14, 2025, the General Counsel for the Executive Office for United States Attorneys received and approved a written request to appoint Mr. Sarcone as First Assistant for a period of one year. Another government form states that the reason for the appointment as First Assistant is "Serving as Acting U.S. Attorney for a 210-day period (5 U.S.C. § 3346(a)(1))" and provides an effective date of July 15, 2025. The Department of Justice also reassigned then-First Assistant, Daniel Hanlon, to the role of "Deputy U.S. Attorney," or "Supervisory Assistant U.S. Attorney," stating as "the reason for the change" that "incumbent will be returned back to a line AUSA [Assistant U.S. Attorney]."

The Federal Government conceded both in its briefing and at oral argument that Mr. Sarcone's appointment as Acting U.S. Attorney is not indefinite. His appointment expires after 210 days, on February 10, 2026. Since July 15, 2025, Mr. Sarcone has purported to serve as Acting U.S. Attorney due to his Special Attorney appointment and First Assistant designation.

On October 8, 2025, the U.S. Attorney General confirmed in writing that the Executive Office for United States Attorneys' appointment was at her "direction" and under her general delegation authority (28 U.S.C. §§ 509, 510 and 515). The confirmation states that, "[f]or the avoidance of doubt . . . [the Attorney General] ratif[ies] Mr. Sarcone's appointment as Special Attorney and his designation as First Assistant United States Attorney for the Northern District of New York, as of July 15, 2025. . . . "

B. The Grand Jury Subpoenas

On August 5, 2025, a few weeks after Mr. Sarcone began serving as Acting U.S. Attorney, the State Government received two grand jury subpoenas related to State Government enforcement actions. Both subpoenas identify "Acting United States Attorney" Sarcone as the Federal Government attorney requesting the subpoena. No line prosecutor is named in connection with the subpoenas.

The first subpoena pertains to *New York v. Trump*, Index No. 452564/2022 (Sup. Ct. N.Y. Cnty.), a civil case the State Government brought against President Trump and his associates alleging financial fraud (the "Trump Subpoena"). The Trump Subpoena spans January 1, 2022, to the present. The second subpoena pertains to *New York v. National Rifle Association*, Index No. 451625/2020 (Sup. Ct. N.Y. Cnty.), a separate civil action brought by the State Government against the NRA, and two of its senior executives, alleging violations of New York charities laws (the "NRA Subpoena"). The NRA Subpoena spans January 1, 2020, to the present.

Mr. Sarcone also sent cover letters dated August 5, 2025, with the subpoenas. The cover letters confirm that each subpoena "relates to an ongoing [federal] criminal investigation." The subpoenas request all documents and records, including communications, relating to the two state cases. Notably, the cover letters direct the State Government to send responsive documents to Mr.

Sarcone personally. While the subpoenas themselves do not specify the federal crimes under investigation, contemporaneous media reporting stated that federal prosecutors had opened "a civil rights investigation" into the New York State Attorney General, and that, according to several sources, "the new subpoenas were part of a broader investigation to determine whether the office had violated the rights of Mr. Trump or others."

On August 19, 2025, the State Government moved to quash the subpoenas on various grounds. In relevant part, the motion argues that Mr. Sarcone was improperly serving as Acting U.S. Attorney and that the subpoenas are unenforceable as a result. The NDNY District Court Judges recused themselves from deciding the motion, having declined to exercise their authority to appoint a U.S. Attorney when Mr. Sarcone's 120-day term as Interim U.S. Attorney expired. On September 4, 2025, Second Circuit Chief Judge Debra Livingston designated the undersigned judge to hear the instant motion.

C. Parallel Challenges to U.S. Attorney Appointments

This case arises against a backdrop of recent decisions addressing similar challenges to Acting or Interim U.S. Attorney appointments. Since August 2025, federal courts have uniformly held that these appointments are invalid. These out-of-circuit decisions are persuasive, even though they are not binding here. They apply the same statutory text to the same or similar appointment maneuvers, and their reasoning is consistent.

In New Jersey, the district court disqualified Acting U.S. Attorney Alina Habba from prosecuting criminal defendants. *United States v. Giraud*, 795 F. Supp. 3d

560, 606 (D.N.J. 2025) ("*Giraud (NJ)*"), *aff'd*, 160 F.4th 390 (3d Cir. 2025) ("*Giraud (NJ Appeal)*"). The Third Circuit affirmed that decision, holding that a contrary reading of the FVRA would undermine Congress's intent to preserve Senate confirmation of presidential appointees. *Giraud (NJ Appeal)*, 160 F.4th at 402, 407.

In Nevada and California, district courts likewise disqualified Acting U.S. Attorneys Sigal Chattah and Bilal Essayli. *United States v. Garcia*, No. 25 Cr. 230, 2025 WL 2784640, at *18 (D. Nev. Sept. 30, 2025) ("*Garcia (NV)*"), *appeal docketed*, No. 25-6468 (9th Cir. Oct. 14, 2025); *United States v. Ramirez*, No. 25 Cr. 264, 2025 WL 3019248, at *20 (C.D. Cal. Oct. 28, 2025) ("*Ramirez (CA)*").[1]

And in Virginia, another district court dismissed indictments of two high-profile defendants—former FBI Director James Comey and New York Attorney General Letitia James—after concluding that the Interim U.S. Attorney who brought the indictments was unlawfully appointed because the statute does not permit successive 120-day Attorney General interim appointments for the same vacancy. *United States v. Comey*, No. 25 Cr. 272, 2025 WL 3266932, at *6 (E.D. Va. Nov. 24, 2025) ("*Comey (VA)*"); *United States v. James*, No. 25 Cr. 122, 2025 WL 3266931, at *5 (E.D. Va. Nov. 24, 2025) ("*James (VA)*"). This Opinion is the seventh to consider a challenge to the recent appointment of an official effectively serving as a U.S. Attorney without Senate confirmation.

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[1] The court disqualified Essayli from performing the functions and duties of an Acting U.S. Attorney but permitted continued service as First Assistant and declined to dismiss indictments signed by Assistant U.S. Attorneys where Essayli had no personal involvement in the prosecutions.

II. PRINCIPLES OF STATUTORY CONSTRUCTION

This case requires interpretation of the FVRA and 28 U.S.C. § 546, the statutes governing the designation of Acting U.S. Attorneys and appointment of Interim U.S. Attorneys, pending Senate confirmation of a U.S. Attorney nominated by the President. Courts are required to apply certain established principles when interpreting statutes. Recent decisions addressing similar U.S. Attorney appointment challenges have applied these principles.[2]

Courts "presume that the legislature says in a statute what it means and means in a statute what it says."[3] *BedRoc Ltd. v. United States*, 541 U.S. 176, 183 (2004). Statutory interpretation therefore begins and ends with the text, if the text is unambiguous. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). Courts examine the text "in context"—both "the specific context in which that language is used" and "the broader context of the statute as a whole." *Id.*

Courts avoid interpretations that make statutory provisions "superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001). Doing so "runs afoul of the cardinal principle of interpretation that courts must give effect, if possible, to every clause and word of a statute." *Loughrin v. United States*, 573 U.S. 351, 358 (2014); *Fischer v. United States*, 603 U.S. 480,

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[2] *See, e.g.*, *Giraud (NJ Appeal)*, 160 F.4th at 397; *Giraud (NJ)*, 795 F. Supp. 3d at 577; *Ramirez (CA)*, 2025 WL 3019248, at *4; *Garcia (NV)*, 2025 WL 2784640, at *4-8; *Comey (VA)*, 2025 WL 3266932, at *6-9; *James (VA)*, 2025 WL 3266931, at *5-8.

[3] Unless otherwise indicated, in quoting cases, all internal quotation marks, footnotes and citations are omitted, and all alterations are adopted.

486 (2024). This principle applies not only when a provision would be entirely useless, but also when that result would follow "in all but the most unusual circumstances." *TRW Inc.*, 534 U.S. at 29. Where one provision would leave another to "lie dormant in all but the most unlikely situations," courts reject such a reading. *Id.* at 31.

Statutory history and structure can "reinforce[]" textual analysis. *Snyder v. United States*, 603 U.S. 1, 12-13 (2024). "Statutory history is an important part of [a statute's] context." *United States v. Hansen*, 599 U.S. 762, 775 (2023). Statutory history means "the enacted lineage of a statute, including prior laws, amendments, codifications, and repeals." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 327 (2012); *see BNSF Ry. Co. v. Loos*, 586 U.S. 310, 329 (2019) (Gorsuch, J., dissenting) (explaining statutory history as "the record of enacted changes Congress made to the relevant statutory text over time"). This type of evidence, "everyone agrees[,] can sometimes shed light on meaning," *Loos*, 586 U.S. at 329 (Gorsuch, J., dissenting), for when Congress amends a statute, courts presume Congress intends the change "to have real and substantial effect," *Ross v. Blake*, 578 U.S. 632, 641-42 (2016).

III. DISCUSSION

Mr. Sarcone is not lawfully serving as Acting U.S. Attorney for the NDNY. His appointment violates the FVRA and the statutes governing U.S. Attorney appointments. Several courts, including the Third Circuit, have recently addressed similar appointment maneuvers and reached the same conclusion.[4] Because Mr. Sarcone used authority he did not lawfully possess to direct the issuance of the subpoenas, the subpoenas are quashed. Mr. Sarcone is also disqualified from further participation in the underlying criminal investigations.

A. Mr. Sarcone is Unlawfully Serving as Acting U.S. Attorney

The Federal Government contends that Mr. Sarcone may serve as Acting U.S. Attorney based on two alternative theories: (1) his designation as First Assistant made him Acting U.S. Attorney under the FVRA's automatic succession provision and (2) regardless of the First Assistant designation, the Attorney General granted Mr. Sarcone the full powers of a U.S. Attorney through general delegation. Both theories fail as a matter of statutory interpretation.

1. Statutory Framework for Filling U.S. Attorney Vacancies

A U.S. Attorney must be nominated by the President and confirmed by the Senate. 28 U.S.C. § 541(a). This requirement ensures that the Senate has a say in who fills the position. The Constitution gives the Senate this "advice and consent" role as a check on Executive power and a guard against "a spirit of favoritism" in federal appointments. *NLRB v. SW Gen., Inc.*, 580 U.S. 288, 293 (2017). Concerns of cronyism go back to this Country's founding. As Alexander Hamilton wrote in 1788,

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[4] *See Giraud (NJ Appeal)*, 160 F.4th at 406-07; *Garcia (NV)*, 2025 WL 2784640, at *14; *Ramirez (CA)*, 2025 WL 3019248, at *1; *see also Comey (VA)*, 2025 WL 3266932, at *1(addressing improper appointment under § 546); *James (VA)*, 2025 WL 3266931, at *1 (same).

the "advice and consent" process prevents the President from unilaterally installing "candidates who ha[ve] no other merit than that . . . of being, in some way or other, personally allied to [the President], or of possessing the necessary insignificance and pliancy to render them the obsequious instruments of his pleasure." The Federalist No. 76, at 394-95 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001); *accord Giraud (NJ)*, 795 F. Supp. 3d at 573-74 (quoting the same). "The Framers envisioned [the "advice and consent" safeguard] as an excellent . . . guard against the appointment of unfit characters from family connection, from personal attachment, or from a view to popularity." *SW Gen.*, 580 U.S. at 293.

When a U.S. Attorney vacancy arises, the office need not sit vacant until the Senate confirms a Presidential nominee. Instead, Congress authorized four means of temporarily filling the position:

- <u>first</u>, by operation of statute—the FVRA automatically designates the First Assistant to serve as Acting U.S. Attorney for up to 210 days. 5 U.S.C. §§ 3345(a)(1), 3346;
- <u>second</u>, by the Attorney General—§ 546 permits the Attorney General to appoint an Interim U.S. Attorney for up to 120 days. 28 U.S.C. § 546(a), (c)(2);
- <u>third</u>, by the President—the FVRA allows the President to select either another Senate-confirmed officer or a senior official with at least 90 days of service in the agency to serve as Acting U.S. Attorney for up to 210 days. 5 U.S.C. § 3345(a)(2)-(3) and

- <u>fourth</u>, by the district court—if the 120-day § 546 period expires without a Senate-confirmed appointee, the district court may appoint a U.S. Attorney to serve until the vacancy is filled. 28 U.S.C. § 546(c)(2), (d).

The first three methods—operation of statute, the President and the Attorney General—are expressly time-limited, operating as stopgaps rather than substitutes for Presidential nomination and Senate confirmation. By contrast, the district court may appoint a U.S. Attorney to serve without a fixed statutory clock, but only as a backstop once the Attorney General's 120-day interim appointment expires, and only until a Senate-confirmed U.S. Attorney fills the vacancy. *Id.* § 546(c)(2), (d). Eligibility requirements also distinguish the four methods. Only the first and third methods impose eligibility requirements. The first, "operation of statute," selects the First Assistant as Acting U.S. Attorney. The third permits the President to designate only a person who has been confirmed by the Senate for another position or who has substantial agency experience as Acting U.S. Attorney.

Congress made the FVRA and § 546 the only statutory routes for temporarily filling U.S. Attorney vacancies. The FVRA states that it provides "the exclusive means for temporarily authorizing an acting official to perform the functions and duties of" a Senate-confirmed position, unless another statute expressly authorizes acting or interim service in a specified office (as § 546 does for U.S. Attorneys). 5 U.S.C. § 3347(a)(1)-(2); 28 U.S.C. § 546(a).

Congress also made explicit that general delegation statutes cannot circumvent the FVRA. General delegation statutes permit agency heads to assign their own duties to subordinates. For example, 28 U.S.C. §§ 509, 510 and 515 allow the Attorney General to delegate Department of Justice functions to other officials. The FVRA expressly states that such statutes are not exceptions to the FVRA's exclusivity. 5 U.S.C. § 3347(b). This provision responded directly to the Department of Justice's practice of using general delegation statutes to install preferred officials in positions requiring Senate confirmation. *See Giraud (NJ Appeal)*, 160 F.4th at 400 (describing the FVRA as "a compromise" that gave the Executive additional flexibility while preventing the use of general delegation statutes "to contravene the Senate's advice-and-consent power"). Courts applying these statutes in the U.S. Attorney context consistently hold that § 546 and the FVRA operate as the only alternatives for temporarily filling a vacancy, and that neither method permits using general delegation authority to bypass the FVRA's requirements.[5]

Here, upon the resignation of the Senate-confirmed U.S. Attorney, former First Assistant Hanlon became Acting U.S. Attorney under the first method. U.S. Attorney General Bondi then appointed Mr. Sarcone as Interim U.S. Attorney under the second method. President Trump did not appoint anyone under the third method. And the District Court for the NDNY declined to appoint anyone under the fourth method. None of these actions are problematic or otherwise challenged. At issue is the Attorney General's subsequent attempt

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[5] *See Giraud (NJ Appeal)*, 160 F.4th at 397-400, 403; *Garcia (NV)*, 2025 WL 2784640, at *10-14; *Ramirez (CA)*, 2025 WL 3019248, at *11-12.

to install Mr. Sarcone under the first method, after his term as Interim U.S. Attorney expired.

2. <u>Only the First Assistant in Place When the Vacancy Arises Becomes Acting U.S. Attorney</u>

The Federal Government's first theory is that the FVRA automatically made Mr. Sarcone the Acting U.S. Attorney when the Attorney General designated him as First Assistant on July 14, 2025—five months after the vacancy first arose. That interpretation is rejected. As explained below, such an interpretation conflicts with the FVRA's text, structure and context; is inconsistent with the statute's history; and has been repeatedly dismissed by courts across the country.[6]

a. Statutory Text, Structure and Context

The Federal Government's interpretation of § 3345(a)(1) contradicts the statute's text, structure and context. The Federal Government argues that the FVRA permitted the Attorney General to wait until the last day of Mr. Sarcone's 120-day term as Interim U.S. Attorney to demote Mr. Hanlon from First Assistant, designate Mr. Sarcone as the new First Assistant and then claim that Mr. Sarcone "automatically" became Acting U.S. Attorney. The Federal Government supports this reading by noting that a vacancy is a "continuing state," so § 3345(a)(1) should apply at any point during the vacancy to whomever holds the First Assistant title at that time. That argument is incorrect.

[6] *See, e.g.*, *Giraud (NJ Appeal)*, 160 F.4th at 397-400; *Giraud (NJ)*, 795 F. Supp. 3d at 584-92; *Garcia (NV)*, 2025 WL 2784640, at *11; *Ramirez (CA)*, 2025 WL 3019248, at *5-7.

As a textual matter, § 3345(a)(1) ties automatic succession to a single point in time: the moment the vacancy arises. The provision states that when a Senate-confirmed officer "dies, resigns, or is otherwise unable to perform the functions and duties of the office," "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). This works as a simple if-then rule. If a vacancy occurs, then the First Assistant serves as acting officer.[7]

As the Supreme Court observed, this provision is "mandatory and self-executing." *SW Gen.*, 580 U.S. at 303. First Assistants "automatically assume acting duties under (a)(1)," *id.* at 305, and that path is fixed to the moment the vacancy arises. Applied here, § 3345(a)(1) took effect when U.S. Attorney Freedman resigned in February 2025. At that moment, First Assistant Hanlon automatically became Acting U.S. Attorney. The Federal Government's interpretation breaks this causal chain and converts a mandatory, self-executing rule into something the Attorney General (a part of the Executive branch) can trigger at will—allowing repeated designation of Acting U.S. Attorneys and defeating the statute's time limitations. *Id.* at 303.

The FVRA's structure reinforces this "if-then" reading. "[S]tatutory language . . . cannot be construed in a vacuum," and "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Roberts v. Sea-Land Servs., Inc.*,

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[7] Other courts recently considering the issue concur with this interpretation. *See, e.g.*, *Giraud (NJ Appeal)*, 160 F.4th at 400; *Giraud (NJ)*, 795 F. Supp. 3d at 586; *Ramirez (CA)*, 2025 WL 3019248, at *4.

566 U.S. 93, 101 (2012). Subsection (a)(1) performs a narrow function. It ensures continuity of leadership by identifying the incumbent First Assistant as the acting officer at the moment a vacancy first arises. Subsections (a)(2) and (a)(3) then give "the President (and only the President)" discretion to override that default by selecting either another Senate-confirmed officer or a senior agency official who meets express tenure requirements to serve for up to 210 days. *See* 5 U.S.C. § 3345(a)(2)-(3); *SW Gen.*, 580 U.S. at 293. Under the Federal Government's interpretation, the Attorney General can obtain the same result by redesignating the First Assistant months into a vacancy. That collapses the statutory structure by shifting the President's selection authority to the Attorney General—without the tenure or confirmation requirements that subsections (a)(2) and (a)(3) require. *See Giraud (NJ Appeal)*, 160 F.4th at 399. Courts avoid interpretations that render statutory provisions superfluous. *TRW Inc.*, 534 U.S. at 29. The Federal Government's interpretation would do exactly that, leaving subsections (a)(2) and (a)(3) functionally inert "in all but the most unusual circumstances."[8] *Id.*

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[8] The Federal Government's opposition identifies two situations that would require the President to invoke subsections (a)(2) or (a)(3) instead of proceeding under the default rule in (a)(1): first, where the first-assistant position is itself an office requiring presidential appointment and Senate confirmation and, second, where the President wishes to keep the first assistant in place and designate someone else as Acting U.S. Attorney. Even accepting those examples, they do not address the argument's core defect. Under the Federal Government's interpretation, the Attorney General could effectively select the acting officer during an ongoing vacancy by changing who qualifies as "first assistant," reducing (a)(2) and (a)(3) to occasional workarounds rather than equal statutory alternatives. The Federal Government also invokes an internal Of-

The Federal Government's reliance on *Russello v. United States* does not cure this problem. 464 U.S. 16 (1983). The Federal Government argues that because § 3345(a)(1) does not include the "backward-looking eligibility" requirements that appear in § 3345(a)(3) and (b)(1)(A), § 3345(a)(1) permits the Attorney General to change the First Assistant during a vacancy and treat that change as triggering automatic acting service. When "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Id.* at 23. But the Federal Government's argument does not override the statutory structure discussed above, and "should not be elevated to the level of interpretive trump card," particularly where "common sense would balk" at the result. *Field v. Mans*, 516 U.S. 59, 67-68 (1995). The better explanation for the omission is that § 3345(a)(1) is a self-executing default that applies when the vacancy arises, so it does not include the screening requirements that Congress used to cabin discretionary selections under sections 3345(a)(2), (a)(3) and (b)(1)(A).

The Federal Government's interpretation fails for the additional reason that it conflicts with the statutory alternative to the FVRA. Section 546 gives the Attorney General authority to appoint an Interim U.S. Attorney for up to 120 days. 28 U.S.C. § 546(a), (c)(2). Under the Federal Government's interpretation, the Attorney

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fice of Legal Counsel opinion to support its reading. *See Designating an Acting Attorney General*, 42 Op. O.L.C. 182 (2018). But whatever persuasive force such views may have, they cannot expand § 3345(a)(1) beyond its text and statutory context.

General can use the FVRA to install anyone as Acting U.S. Attorney for up to 210 days simply by designating that person as First Assistant. Carried to its logical extreme, such a reading would allow the Attorney General to install repeatedly the same or different people as First Assistant each time an Interim U.S. Attorney's term expire—keeping the office continuously filled without Senate confirmation. Whether done once or multiple times, this renders § 546's 120-day limit meaningless and provides another reason to reject the Federal Government's interpretation. *See Giraud (NJ Appeal)*, 160 F.4th at 399.

b. Statutory History

The circumstances that led Congress to adopt the FVRA confirm the statutory analysis above. Congress enacted the FVRA to address "the Executive branch's widespread practice—dating back through several administrations—of appointing temporary designees in contravention of existing law and the Appointments Clause." *Id.* at 400. Before the FVRA, acting officials sometimes exceeded statutory time limits, serving without Senate confirmation and occasionally in the face of Senate opposition. *See SW Gen.*, 580 U.S. at 295; *Giraud (NJ Appeal)*, 160 F.4th at 400. In response, Congress enacted the FVRA to protect the Senate's "advice and consent" role while still giving the Executive branch room to fill vacancies temporarily. *See SW Gen.*, 580 U.S. at 295, 307; *Giraud (NJ Appeal)*, 160 F.4th at 400. When Congress amends a statute, courts presume Congress intends the change "to have real and substantial effect." *Ross*, 578 U.S. at 641-42. The Federal Government's interpretation contradicts that principle. Reading the FVRA to permit the Attorney General to designate First Assistants who then automatically ascend to the Acting U.S. Attorney position erodes the statute's intended effect. *See Garcia (NV)*, 2025 WL 2784640, at *9-11.

c. Application in Similar Cases

Courts addressing this issue have consistently rejected the Federal Government's approach for these same reasons. Most recently, the Third Circuit held that only "the first assistant in place at the time of the vacancy automatically assumes acting status under the FVRA" because that reading "'better harmonizes the various provisions in the FVRA and § 546 and avoids the oddities that the [Federal] Government's interpretation would create.'" *Giraud (NJ Appeal)*, 160 F.4th at 400 (quoting *Rep. of Sudan v. Harrison,* 587 U.S. 1, 8, 15 (2019)). The District of Nevada and the Central District of California reached the same conclusion. *Garcia (NV)*, 2025 WL 2784640, at *5-11; *Ramirez (CA)*, 2025 WL 3019248, at *5-7.

In sum, § 3345(a)(1) designates whomever is First Assistant when the vacancy first arose to the position of Acting U.S. Attorney for a period of up to 210 days. That avenue of designating someone to act temporarily as U.S. Attorney is now foreclosed. Mr. Sarcone did not lawfully assume the position of Acting U.S. Attorney under the FVRA's default provision, because he was not the First Assistant when the vacancy first arose.

3. Delegation Statutes Cannot Create a De Facto Acting U.S. Attorney

The Federal Government's second theory is that, even if the FVRA does not make Mr. Sarcone Acting U.S. Attorney, the Attorney General can use her general delegation authority to accomplish the same result—here, by empowering Mr. Sarcone to issue grand jury subpoenas. This second theory fails because Congress enacted a statute that expressly bars this approach, as courts in New Jersey, Nevada and California have also concluded.[9]

The FVRA states that "Sections 3345 and 3346 are the exclusive means for temporarily authorizing an acting official to perform the functions and duties of any office of an Executive agency, unless" another statutory provision authorizes otherwise, or a recess appointment is made. 5 U.S.C. § 3347(a); *accord NLRB v. Newark Elec. Corp.*, 14 F.4th 152, 160-61 (2d Cir. 2021). The statute also states that general delegation statutes do not qualify as exceptions to the FVRA's exclusive procedures. 5 U.S.C. § 3347(b).[10]

Congress added this provision specifically to prevent agencies from using general delegation authority to bypass the FVRA. *See SW Gen.*, 580 U.S. at 294-95 (describing Congress's response to the Department of Justice's use of purported "independent authority" to fill vacancies).[11]

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[9] *See Giraud (NJ Appeal)*, 160 F.4th at 402-03; *Garcia (NV)*, 2025 WL 2784640, at *12; *Ramirez (CA)*, 2025 WL 3019248, at *12.

[10] "Any statutory provision providing general authority to the head of an Executive agency . . . to delegate duties statutorily vested in that agency head . . . is not a statutory provision to which subsection (a)(1) applies." 5 U.S.C. § 3347(b).

[11] While this Opinion need not rely on it, the legislative history underscores this critical context. *See* S. Rep. No. 105-250, at 17 (1998); 144 Cong. Rec. 22,511 (1998) (statement of Sen. Byrd) (explaining that "very broad, very general provisions [(28 U.S.C. §§ 509-510)] . . . are being used to justify what amounts to an end

The Federal Government responds that the Attorney General may delegate the "nonexclusive duties" of a U.S. Attorney (i.e., not duties reserved for the U.S. Attorney such as requesting ex parte orders for personal tax information under 28 U.S.C. § 6103(i)(1)[12]) through authorities including sections 510 and 515, and that delegation of those duties is commonplace. That is true but does not apply here. Neither the documentation for Mr. Sarcone's appointment as Special Attorney nor his correspondence with the Chief Judge draws any distinction between his performing exclusive and nonexclusive duties. The U.S. Attorney General's delegation purports to authorize Mr. Sarcone to conduct any proceedings that U.S. Attorneys may conduct—the full range of the office's powers. At oral argument, the Federal Government acknowledged that the appointment letter conveys "a broad delegation of authority, which includes criminal cases" with "all of the non-exclusive powers of the U.S. Attorney's Office for [the NDNY]." The Federal Government further conceded that nothing in the record supports Mr. Sarcone's appointment being "limited . . . to some discrete set of matters or some subset of all of

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run around the Vacancies Act" and that accepting Department of Justice's position would mean Congress had "systematically divested itself of its constitutional responsibility to advise and consent"); *id.* at 22,508 (statement of Sen. Thompson) ("The Justice Department relies on its organic statute's 'vesting and delegation' provision, which states that the Attorney General can designate certain other powers to whomever she chooses in the Department. . . . "); *id.* at 22,515 (statement of Sen. Durbin) ("I wholeheartedly concur that this law needs clarification so that moves to end-run its application are halted.").

[12] *See In re An Application for an Ex Parte Order to Authorize Disclosure of Tax Returns and Tax Return Information*, No. 25 Misc. 22 (N.D.N.Y. Jan. 8, 2026).

the U.S. Attorney's powers." That is not a delegation of specific, nonexclusive duties. It is an attempt to use general delegation to create an Acting U.S. Attorney outside the FVRA's statutory framework.

The Third Circuit rejected an identical argument. The court held that the FVRA's exclusivity provisions "plainly prohibited" the Attorney General's attempt to create a de facto U.S. Attorney with "the full panoply of [the office's] powers" by delegating the authority to conduct "any kind of legal proceedings" that U.S. Attorneys may conduct. *Giraud (NJ Appeal)*, 160 F.4th at 403. The District of Nevada and Central District of California reached the same conclusion. *Garcia (NV)*, 2025 WL 2784640, at *11-14; *Ramirez (CA)*, 2025 WL 3019248, at *11-12. The Attorney General cannot use general delegation statutes to vest the authority of the U.S. Attorney for the NDNY in Mr. Sarcone.

B. The Subpoenas are Quashed and Mr. Sarcone is Disqualified

Mr. Sarcone is not lawfully serving as Acting U.S. Attorney. Any of his past or future acts taken in that capacity are void or voidable as they would rest on authority Mr. Sarcone does not lawfully have. The subpoenas issued to the Office of the New York State Attorney General at Mr. Sarcone's direction and under his purported authority as Acting U.S. Attorney are therefore invalid and are quashed. Mr. Sarcone is also disqualified from any further involvement in prosecuting or supervising the criminal investigations that prompted the subpoenas.

1. Legal Standard

Rule 17 governs subpoenas in criminal proceedings, including those issued by grand juries. A court "may quash or modify [a] subpoena if compliance would be unreasonable or oppressive." Fed. R. Crim. P. 17(c)(2). Ordinarily, courts view grand jury subpoenas with a presumption of "reasonable[ness]." *United States v. R. Enters., Inc.*, 498 U.S. 292, 300-01 (1991). This presumption applies when a subpoena is issued "through normal channels." *Id.* at 301; *see In re Grand Jury Proceeding*, 971 F.3d 40, 50, 53-54 (2d Cir. 2020) ("*Oberlander*") (holding that a subpoena lacking such structural regularity is a "nullity" that cannot be enforced). Despite this presumption, "courts may not ignore possible abuse of the grand jury process." *United States v. Calk*, 87 F.4th 164, 186 (2d Cir. 2023), *cert. denied*, 145 S. Ct. 144 (2024). "Grand juries are not licensed to engage in arbitrary fishing expeditions, nor may they select targets of investigation out of malice or an intent to harass." *R. Enters., Inc.*, 498 U.S. at 299; *Trump v. Vance*, 591 U.S. 786, 805 (2020).

While subpoena power formally belongs to the grand jury, in modern federal practice, prosecutors often issue grand jury subpoenas with little or no involvement of the grand jurors themselves.[13] The court's role in "[e]nsur-

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[13] *See Lopez v. DOJ*, 393 F.3d 1345, 1349 (D.C. Cir. 2005) ("[T]he term 'grand jury subpoena' is in some respects a misnomer, because the grand jury itself does not decide whether to issue the subpoena; the prosecuting attorney does."); *First Nat'l Bank of Tulsa v. DOJ*, 865 F.2d 217, 220 (10th Cir. 1989) ("[A] United States Attorney has the authority to obtain a blank grand jury subpoena form, fill in the blanks, and serve the subpoena without the authorization (or even knowledge) of the grand jury."); *Doe v. DiGenova*,

ing the regularity of the grand jury process is especially important because of the risks for abuse that inhere in proceedings over which trial and appellate courts rarely have insight." *Calk*, 87 F.4th at 186. Rule 17 therefore functions as a key mechanism to ensure that the grand jury is not "misused" by the Department of Justice. *In re Grand Jury Subpoena Duces Tecum Dated Jan. 2, 1985 (Simels)*, 767 F.2d 26, 29 (2d Cir. 1985).

2. The Subpoenas Are "Unreasonable" under Rule 17

The subpoenas here were issued through an official acting without lawful authority. The subpoenas therefore lacked the regularity required for a presumption of reasonableness. Three weeks after Mr. Sarcone claimed the title of Acting U.S. Attorney, he used that authority to subpoena a state law-enforcement office that the President had publicly cast as a political adversary. The subpoenas' cover letters direct the Office of the New York State Attorney General to send all materials to Mr. Sarcone personally. Grand juries are "not meant to be the private tool of a prosecutor," *Calk*, 87 F.4th at 186, much less one who is not lawfully appointed. Because Mr. Sarcone lacked lawful authority to invoke the grand jury's power in the capacity he claimed, the subpoenas were not issued "through normal channels," *R. Enters., Inc.*, 498 U.S. at 301, and are unreasonable under Rule 17.

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779 F.2d 74, 80 (D.C. Cir. 1985) ("[G]rand jury subpoenas are issued at the request, and in the discretion of the prosecuting attorney involved in the case . . . ."); Charles Doyle, Cong. Rsch. Serv., 95-1135, *The Federal Grand Jury* 8-9 (2025) (explaining that prosecutors usually direct the issuance of grand jury subpoenas).

Contrary to the Federal Government's assertion, Mr. Sarcone's "Special Attorney" appointment under § 515 does not cure the defect. As a preliminary matter, Mr. Sarcone did not direct issuance of these subpoenas under the authority of his § 515 appointment. He did so as "Acting United States Attorney." In six pages, the two subpoenas and their supporting materials identify Mr. Sarcone as "Acting U.S. Attorney" six different times. The enforceability of the subpoenas therefore turns on whether Mr. Sarcone was lawfully serving as Acting U.S. Attorney—not on whether he also held a lawful "Special Attorney" appointment. In any event, while § 515 authorizes the Attorney General to appoint "special attorneys" to "conduct any kind of legal proceeding . . . which United States attorneys are authorized by law to conduct," 28 U.S.C. § 515(a), such an appointment neither confers the office of U.S. Attorney nor does it validate subpoenas issued in a different capacity. *Cf. In re Persico*, 522 F.2d at 45-46 (upholding § 515 authority where special attorneys were operating under the supervision of a properly appointed U.S. Attorney, not purporting to hold the office itself). Section 515 cannot be used to bypass the FVRA's framework or ratify actions undertaken by Mr. Sarcone using his purported authority as "Acting U.S. Attorney."

The Federal Government's argument rests on the proposition that any defect is immaterial because "Special Attorney" Sarcone or other Assistant U.S. Attorneys in the office could have sought the same subpoenas. The Second Circuit has rejected that approach. In *Oberlander*, the Second Circuit held that a court could not enforce a subpoena after the issuing grand jury had concluded its term, despite the Government's contention that enforcing the old subpoena would be no different than enforcing a fresh one. *Oberlander*, 971 F.3d at 51. The Second Circuit disagreed, finding "no great administrative difficulty in requiring, as a precondition to the use of coercive contempt power, the issuance of a new subpoena" by a properly constituted body. *Id.* at 52 (treating subpoenas as a "nullity" where the grand jury had expired). The same logic applies here. When the Federal Government seeks to invoke the district court's coercive power, it must do so based on lawful authority, not by asking courts to treat an unauthorized subpoena as interchangeable with a valid one.

Characterizing the defect as inconsequential also misconstrues what makes the subpoenas unreasonable. The problem is not a lack of subpoena power in the abstract; it is the Federal Government's choice to invoke that power through a statutory end-run and then leverage that power against a perceived rival of the President. Those choices matter for the Rule 17 analysis, even if other prosecutors could request similar subpoenas. *Cf. Simels*, 767 F.2d at 29-30 (focusing on the "dominant purpose" for which the grand jury's process is invoked to police misuse by prosecutors); *Calk*, 87 F.4th at 186 (reaffirming courts' duty not to "ignore possible abuse of the grand jury process"). As Mr. Sarcone lacked lawful authority to request the subpoenas in the capacity of Acting U.S. Attorney, the subpoenas are quashed.[14]

[14] This result also follows *Comey (VA)* and *James (VA)*, where the court dismissed indictments obtained solely by the unlawfully appointed Interim U.S. Attorney. *Comey (VA)*, 2025 WL 3266932, at *3, *10; *James (VA)*, 2025 WL 3266931, at *3, *9.

3. Disqualification

Mr. Sarcone is disqualified from any further involvement in prosecuting or supervising the instant investigations, regardless of his title. Recent U.S. Attorney appointment opinions have adopted similar remedies. The Third Circuit affirmed disqualification of an unlawfully serving Acting U.S. Attorney from further participation in the affected prosecutions. *See Giraud (NJ Appeal)*, 160 F.4th at 396, 407. The District of Nevada similarly disqualified an unlawfully serving Acting U.S. Attorney from the relevant cases. *See Garcia (NV)*, 2025 WL 2784640, at *18. Beyond the U.S. Attorney context, courts often set aside actions taken under unlawful appointments and require new proceedings before properly appointed officials. *See Lucia v. SEC*, 585 U.S. 237, 251-52 (2018); *Ryder v. United States*, 515 U.S. 177, 187-88 (1995); *Flinton v. Comm'r of Soc. Sec.*, 143 F.4th 90, 99 (2d Cir. 2025). The same principles prevent Mr. Sarcone from continuing to direct the investigations at issue.

IV. CONCLUSION

For the foregoing reasons, the State Government's motion to quash is **GRANTED**. Mr. Sarcone is disqualified from any further involvement in prosecuting or supervising any investigation pertaining to *New York v. Trump*, Index No. 452564/2022 (Sup. Ct. N.Y. Cnty.), and *New York v. National Rifle Association*, Index No. 451625/2020 (Sup. Ct. N.Y. Cnty.). Should the Federal Government re-issue the subpoenas at the direction of a lawfully authorized attorney for the Federal Government, without Mr. Sarcone's involvement, the State Government may renew its motion to quash.

The Clerk of Court is respectfully directed to close the motion at Dkt. No. 1 and close the case.

Dated: January 8, 2026
New York, New York

/s/ LORNA G. SCHOFIELD
LORNA G. SCHOFIELD
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 26-156

IN RE GRAND JURY SUBPOENAS TO THE OFFICE OF THE NEW YORK STATE ATTORNEY GENERAL

IN RE GRAND JURY SUBPOENAS TO THE OFFICE OF THE NEW YORK STATE ATTORNEY GENERAL, PETITIONER-APPELLEE

v.

UNITED STATES OF AMERICA, RESPONDENT-APPELLANT

Filed: Sept. 11, 2026

ORDER

Before: GUIDO CALABRESI, MICHAEL H. PARK, MARIA ARAÚJO KAHN, *Circuit Judges*.

The Government moves to stay the mandate of this Court and the district court's disqualification order, pending filing and disposition of a petition for a writ of certiorari in the United States Supreme Court.

IT IS HEREBY ORDERED that the request to stay the Court's mandate is GRANTED, and the request to stay the district court's disqualification order is DENIED.

For the Court:
Catherine O'Hagan Wolfe,
Clerk of Court

Catherine O'Hagan Wolfe

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

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25 Misc. 19 (LGS)

IN RE GRAND JURY SUBPOENAS TO THE OFFICE OF THE NEW YORK STATE ATTORNEY GENERAL

Filed: Mar. 11, 2026

OPINION AND ORDER

LORNA G. SCHOFIELD, District Judge, sitting by designation:

On January 8, 2026, an Opinion & Order issued that quashes two grand jury subpoenas directed at the Office of the New York State Attorney General (the "State Government") and disqualifies John A. Sarcone, III from further participation in the underlying investigations (the "Appointment Order" or the "Order"). The U.S. Attorney's Office for the Northern District of New York (the "Federal Government") moves for a stay pending appeal. The State Government opposes. For the reasons explained below, the motion is denied.

I. BACKGROUND

Familiarity with the facts underlying the January 8, 2026, Appointment Order is assumed. On August 5, 2025, Mr. Sarcone, purporting to act as Acting U.S. Attorney for the Northern District of New York, personally directed the issuance of two grand jury subpoenas to the State Government. The subpoenas concerned two civil enforcement actions brought by the State Government against President Trump and the National Rifle Association, respectively. The subpoenas were returnable to the grand jury at the James T. Foley Courthouse. The accompanying letters stated that, if the State Government preferred to produce by mail or email rather than appearing, it could send the documents to Mr. Sarcone directly.

On January 8, 2026, the Appointment Order granted the State Government's motion to quash. The Order rests on the Federal Vacancies Reform Act (the "FVRA"), 5 U.S.C. § 3345(a)(1), and statutes governing U.S. Attorney appointments. The Order concludes that Mr. Sarcone was not lawfully serving as Acting U.S. Attorney under the FVRA because he was not the First Assistant when the vacancy arose. The Order further concludes that the U.S. Attorney General's general delegation authority under 28 U.S.C. § 515 cannot create a de facto Acting U.S. Attorney outside the FVRA's framework. As remedies, the Order quashes the two subpoenas that Mr. Sarcone personally directed without lawful authority as "Acting United States Attorney," and disqualifies Mr. Sarcone "from any further involvement in prosecuting or supervising any investigation" related to the two civil cases, "regardless of his title."

The Federal Government now seeks a stay of the "Order quashing the subpoenas and disqualifying Mr. Sarcone from participating in the subject investigation" of the State Government pending appeal under Federal Rule of Appellate Procedure 8(a)(1). The Federal Government represents that if a stay is entered, the Federal

Government will not seek to enforce the two subpoenas during the pendency of the appeal. The State Government opposes the motion.

II. LEGAL STANDARD

Four factors guide whether to grant a stay pending appeal: "(1) whether the stay applicant has made a strong showing that [it] is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 434 (2009);[1] *accord Mahdawi v. Trump*, 136 F.4th 443, 449 (2d Cir. 2025). "The party requesting a stay bears the burden of showing that the circumstances justify an exercise of the Court's discretion." *Mahdawi*, 136 F.4th at 449. The first two factors —Likelihood of success on the merits and irreparable harm—"are the most critical." *Nken*, 556 U.S. at 434; *Mahdawi*, 136 F.4th at 449.

III. DISCUSSION

Consideration of the four *Nken* factors weighs against granting a stay. The Federal Government's motion for a stay pending appeal is, therefore, denied.

A. Likelihood of Success on the Merits

The first *Nken* factor asks whether the movant has made a "strong showing" that it is likely to succeed on appeal. *See Nken*, 556 U.S. at 434; *accord Mahdawi*, 136 F.4th at 449. Some district courts have held that a mo-

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[1] Unless otherwise indicated, in quoting cases, all internal quotation marks, footnotes and citations are omitted, and all alterations are adopted.

vant seeking a stay may alternatively satisfy this factor by showing that (1) there are "serious questions" as to the merits and (2) the "balance of hardships tips *decidedly* in its favor." *See Starke v. SquareTrade, Inc.*, No. 16 Civ. 7036, 2017 WL 11504834, at *1 (E.D.N.Y. Dec. 15, 2017) (applying, on a motion to stay, the preliminary injunction standard set out in *Citigroup Glob. Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35-37, 37 n.7 (2d Cir. 2010), which concludes that *Nken* did not implicitly abrogate the Second Circuit's "serious questions" standard); *In re A2P SMS Antitrust Litig.*, No. 12 Civ. 2656, 2014 WL 4247744, at *2 (S.D.N.Y. Aug. 27, 2014) ("A 'serious questions' standard is particularly appropriate when a district court is asked to stay its own order [as] . . . the court has already determined that the applicant failed to succeed on the merits."). The Federal Government has not carried its burden under either approach.

1. "Strong Showing" of Success on Appeal

The Federal Government fails to make a strong showing under *Nken*. The only appellate decision to address the appointment maneuver at issue affirmed the core legal conclusions reached in the Appointment Order and upheld a substantially similar remedy. *See United States v. Giraud*, 160 F.4th 390, 400, 403, 407 (3d Cir. 2025) (holding that "only the first assistant in place at the time of the vacancy automatically assumes acting status under the FVRA" and that the Attorney General's delegation authority cannot be used to create a de facto U.S. Attorney, and affirming the disqualification order). District courts considering the same appointment maneuver have likewise been uniform on the merits. *See United States v. Giraud*, 795 F. Supp. 3d 560, 584-92, 605-06 (D.N.J. 2025), *aff'd*, 160 F.4th 390; *United States v. Garcia*, No. 25 Cr. 230, 2025 WL 2784640, at *5-14, *18 (D. Nev. Sept. 30, 2025), *argued*, No. 25-6468 (9th Cir. Feb. 12, 2026); *United States v. Ramirez*, 807 F. Supp. 3d 1086, 1093-108, 1114 (C.D. Cal. 2025), *reconsideration denied*, No. 22 Cr. 573, 2025 WL 3852786 (C.D. Cal. Dec. 12, 2025); *United States v. Ramirez-Martinez*, No. 22 Cr. 1721, 2026 WL 113431, at *13-18, *22 (D.N.M. Jan. 14, 2026). And unlike those cases, this matter arises pre-indictment and concerns subpoenas that Mr. Sarcone personally directed in ongoing investigations. Such a posture makes the lawfulness of future investigative conduct especially important and supports the narrow disqualification ordered here.

The Federal Government also contends that Rule 17(c)(2) of the Federal Rules of Criminal Procedure does not authorize quashing a subpoena based on an appointment defect. Specifically, the Federal Government argues that "the plain language of the rule makes clear [that] the focus is on the recipient's ability to *comply* with the demands of the subpoena . . . and does not authorize district courts to quash a subpoena that is otherwise reasonable in scope and purpose based on other issues, such as the method by which the person who requested the subpoena from the grand jury was appointed." The Federal Government is correct that Rule 17(c)(2) permits quashing a subpoena only "if compliance would be unreasonable or oppressive." Fed. R. Crim. P. 17(c)(2). But its argument misses the point. The Appointment Order concludes that compliance with subpoenas personally directed by an official using authority he did not lawfully possess is by its nature unreasonable and oppressive. That the Federal Government disagrees with the Order's analysis does not amount to a "strong showing" under *Nken*. *See Nken*, 556 U.S. at 434.

The Federal Government next invokes principles of grand jury independence and limits on judicial interference with prosecutorial decisions. *See United States v. R. Enters., Inc.*, 498 U.S. 292, 298-300 (1991); *United States v. Calandra*, 414 U.S. 338, 343 (1974). These principles are well-established. But the Federal Government again misses the mark. The Appointment Order does not bar a *lawful* investigation. To the contrary, the Order reinforces those principles by ensuring the lawful authority of those conducting and supervising Department of Justice criminal investigations. As the Order explains, the Federal Government remains free to continue the instant investigations, including reissuing the subpoenas, through lawfully authorized officials.

Finally, the Federal Government's reliance on differing remedies in other districts does not change that conclusion because that variation reflects differing facts, not disagreement on the law. In New Jersey, the district court disqualified Acting U.S. Attorney Alina Habba from the two prosecutions at issue, one in which she had signed the indictment and the other in which her only involvement apparently was as head of the U.S. Attorney's Office. *Giraud*, 795 F. Supp. 3d at 605-06. Third Circuit affirmed these case-specific disqualifications. 160 F.4th 390. In Nevada, the district court similarly ordered case-specific disqualification, barring Acting U.S. Attorney Sigal Chattah from the defendants' prosecutions, even though she had played no personal role other than supervising the government's responses to defendants' motions. *Garcia*, 2025 WL 2784640, at *5, *18 & n.14. In the Central District of

California, the court disqualified Acting U.S. Attorney Bilal Essayli from performing any role—including participating in the movants' prosecutions—as Acting U.S. Attorney, but determined that he could act in the role of First Assistant U.S. Attorney, where he had not been involved in the underlying cases. *Ramirez*, 807 F. Supp. 3d at 1108 n.23. In New Mexico, the district court reached the same conclusion on substantially the same facts. *Ramirez-Martinez*, 2026 WL 113431, at *22. In the Eastern District of Virginia, the court disqualified Acting U.S. Attorney Lindsey Halligan and dismissed indictments against James Comey and Letitia James (which Ms. Halligan had personally presented to the grand jury), denying as moot defendants' motions to disqualify Halligan from future involvement in their prosecutions. *United States v. Comey*, No. 25 Cr. 272, 2025 WL 3266932, at *15 (E.D. Va. Nov. 24, 2025), *appeal docketed*, No. 25-4674 (4th Cir. Dec. 22, 2025); *United States v. James*, No. 25 Cr. 122, 2025 WL 3266931, at *13 (E.D. Va. Nov. 24, 2025), *appeal docketed*, No. 25-4673 (4th Cir. Dec. 22, 2025); *see also United States v. Jefferson*, No. 25 Cr. 160, 2026 WL 145277, at *3, *8 (E.D. Va. Jan. 20, 2026) (holding that prior rulings regarding Ms. Halligan's unlawful appointment were binding in similar E.D. Va. cases and barring Ms. Halligan from identifying as a U.S. Attorney until she lawfully holds the office). In each instance, the court tailored the remedy to the nature and scope of the officer's unlawful conduct. *Cf. Lucia v. Sec. & Exch. Comm'n*, 585 U.S. 237, 251 (2018) (holding that the remedy for an unlawfully appointed ALJ was a hearing before a different, properly appointed ALJ, even if the original ALJ later received a valid appointment).

That some district courts declined to invalidate other actions taken by improperly appointed U.S. Attorneys does not compel a different result here. Each case turns on its own facts. The Appointment Order imposes a narrow disqualification that applies only to the two investigations at issue, and rests on Mr. Sarcone's direct and personal involvement with subpoenas issued during ongoing pre-indictment investigations. These facts distinguish this case from those cited by the Federal Government. Taken together, the Federal Government has not made a "strong showing" of likely success on appeal.

2. "Serious Questions" Standard

The Federal Government focuses its briefing on the alternative means of satisfying *Nken*'s first prong, alleging that this case presents "serious legal questions" warranting a stay. Because the movant "must additionally establish that the balance of hardships tips *decidedly* in its favor," the Federal Government's overall burden under the "serious questions" standard "is no lighter than the one it bears under the likelihood of success standard." *Citigroup*, 598 F.3d at 35.

Even assuming that this case presents sufficiently substantial questions, the Federal Government's briefing fails to address the second prong of the test—showing that the "balance of hardships tips *decidedly* in its favor." *Id.* The Federal Government identifies no concrete hardship from proceeding without Mr. Sarcone on these investigations. Mr. Sarcone has no prior prosecutorial experience, and the Federal Government offers no insight into what unique attributes he brings to the instant investigations. Meanwhile, a stay would burden the State Government; being subjected to government action that is undertaken without lawful authority is a serious and cognizable injury. *See Lucia*, 585 U.S. at 251 ("[O]ne who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to relief."). On this record, the Federal Government has not demonstrated that the "balance of hardships tips *decidedly* in its favor," and cannot meet its burden under the "serious questions" standard. *Citigroup*, 598 F.3d at 35.

B. Irreparable Harm

The second *Nken* factor, whether the Federal Government will be irreparably harmed absent a stay of the Order quashing the subpoenas and disqualifying Mr. Sarcone, also weighs against granting a stay. Regarding the subpoenas, the Federal Government represents that if a stay is entered, it will not enforce the two subpoenas during the pendency of the appeal. That representation undercuts any claim of irreparable harm tied to quashing the subpoenas. On disqualification, the asserted harm is primarily disruption to the Executive Branch's preferred chain of command and infringement on Executive prerogatives. Here the Federal Government's showing is likewise insufficient.

First, the Federal Government's cited "chain of command" cases are not comparable. In *Dellinger v. Bessent*, the appellate court stayed an order that compelled the President "to recognize and work with an agency head whom he has already removed." No. 25-5052, 2025 WL 887518, at *3 (D.C. Cir. Mar. 10, 2025) (per curiam). *Dellinger* is inapplicable because the underlying district court order is the converse of the Appointment Order. The latter does not force the Executive Branch to work with any particular individual—much less one "already removed" by the President. *Id.* Instead, the Appointment Order permits the Federal Government to proceed with *any* lawfully authorized official—placing only one of the several thousand attorneys employed by the Department of Justice off limits. The Federal Government has not identified investigative steps that only Mr. Sarcone can undertake, nor has it explained why other prosecutors cannot supervise the investigations. While disruption to a preferred reporting structure may constitute irreparable injury in some circumstances, it does not where the Federal Government fails to proffer anything that makes Mr. Sarcone's contribution in the instant investigations unique.

Second, the Federal Government invokes concerns about separation of powers and cites decisions describing harms from interference with "Executive branch prerogatives." *Nixon v. Fitzgerald*, 457 U.S. 731, 743, 754-55 (1982); *In re Persico*, 522 F.2d 41, 54 (2d Cir. 1975). These abstract invocations carry little weight without concrete disruption of Executive activities. *Compare Texas v. United States*, 787 F.3d 733, 767-68 (5th Cir. 2015) (denying stay where district court order would not meaningfully disrupt Department of Homeland Security operations), *with National Treasury Employees Union v. Trump*, 2025 WL 1441563, at *2 (D.C. Cir. May 16, 2025) (per curiam) (granting stay where preliminary injunction effectively "tie[d] the government's hands" and "eliminate[d] the President's control over the decision to pause implementation of the Executive Order"). Because the Federal Government has not identified any concrete harm that would result from a denial of a stay (i.e., why having another—likely, more experienced—prosecutor replace Mr. Sarcone in the investigations would disadvantage the Federal Government), any abstract harm stemming from interference with Executive prerogative carries little weight.

Third, the Federal Government points to stays entered in *Garcia* (Nevada) and *Giraud* (New Jersey). These were the first two decisions interpreting the FVRA in this context, before judicial interpretation coalesced into a uniform view. Since then, courts addressing the same appointment maneuver have all reached the same conclusion: that those purporting to act as U.S. Attorneys were doing so unlawfully. *See Ramirez*, 807 F. Supp. 3d at 1096-106, 1114; *Ramirez-Martinez*, 2026 WL 113431, at *13-17. No court has concluded otherwise, and the only circuit court to consider the issue affirmed. *Giraud*, 160 F.4th at 400. The Federal Government has not shown irreparable harm sufficient to warrant a stay.

C. Substantial Injury to Other Parties

The third *Nken* factor—whether a stay will substantially injure other parties to the proceeding—also weighs against granting a stay. In response to this factor, the Federal Government represents that it will not enforce the existing subpoenas during the pendency of the appeal. But that representation does not alleviate the State Government's injury. Granting a stay would reinstate Mr. Sarcone's participation in the investigations he directed without lawful authority, restoring the harm remedied by disqualification. *Cf. Lucia*, 585 U.S. at 251-52; *Ryder v. United States*, 515 U.S. 177, 187-88 (1995); *Flinton v. Comm'r of Soc. Sec.*, 143 F.4th 90, 99 (2d Cir. 2025). This factor weighs against a stay.

D. Public Interest

A consideration of the public's interest also favors denying a stay. When the government is a party, the final two *Nken* factors—substantial injury to other parties and the public interest—often overlap. *See New York v. U.S. Dep't of Homeland Sec.*, 969 F.3d 42, 59 (2d Cir. 2020). As the former weighs against a stay, the merged inquiry does not support the Federal Government's position.

The Federal Government again invokes principles of grand jury independence and Executive branch discretion. *See Calandra*, 414 U.S. at 343; *Heckler v. Chaney*, 470 U.S. 821, 832 (1985). While grand jury independence and Executive branch discretion are undoubtedly important, denying the Federal Government's motion does not halt the instant investigations. The Federal Government is free to continue investigating through lawful channels. As such, these principles do not outweigh the public's "substantial" interest in requiring the Executive Branch to "abide by the federal laws that govern [its] existence and operations." *Am. Council of Learned Soc'y v. McDonald*, 792 F. Supp. 3d 448, 495 (S.D.N.Y. 2025). The public's interest in ensuring that those purporting to wield the powers of a U.S. Attorney lawfully possess those powers counsels against a stay.

Ultimately, the *Nken* factors do not support a stay. The Federal Government has not demonstrated a strong likelihood of success on the merits or "serious legal questions" coupled with a balance of hardships tipping decidedly in its favor. Any harm from the investigation-specific disqualification is abstract at best, whereas granting a stay would reinstate an official who acted without lawful authority—a clear injury to the State

Government. The public interest likewise favors ensuring that governmental power is exercised only by officials with lawful authority. Each factor, and all four taken together, weigh against granting a stay.

IV. CONCLUSION

For the foregoing reasons, the Federal Government has not carried its burden under *Nken* and its motion for a stay pending appeal is **DENIED**.

The Clerk of Court is respectfully directed to close the motion at Dkt. No. 52.

Dated: March 11, 2026
New York, New York

/s/ LORNA G. SCHOFIELD
LORNA G. SCHOFIELD
UNITED STATES DISTRICT JUDGE

APPENDIX E

1. 5 U.S.C. 3345 provides:

Acting officer

(a) If an officer of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office) whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate, dies, resigns, or is otherwise unable to perform the functions and duties of the office—

(1) the first assistant to the office of such officer shall perform the functions and duties of the office temporarily in an acting capacity subject to the time limitations of section 3346;

(2) notwithstanding paragraph (1), the President (and only the President) may direct a person who serves in an office for which appointment is required to be made by the President, by and with the advice and consent of the Senate, to perform the functions and duties of the vacant office temporarily in an acting capacity subject to the time limitations of section 3346; or

(3) notwithstanding paragraph (1), the President (and only the President) may direct an officer or employee of such Executive agency to perform the functions and duties of the vacant office temporarily in an acting capacity, subject to the time limitations of section 3346, if—

(A) during the 365-day period preceding the date of death, resignation, or beginning of inability to serve of the applicable officer, the officer or employee served in a position in such agency for not less than 90 days; and

(B) the rate of pay for the position described under subparagraph (A) is equal to or greater than the minimum rate of pay payable for a position at GS-15 of the General Schedule.

(b)(1) Notwithstanding subsection (a)(1), a person may not serve as an acting officer for an office under this section, if—

(A) during the 365-day period preceding the date of the death, resignation, or beginning of inability to serve, such person—

(i) did not serve in the position of first assistant to the office of such officer; or

(ii) served in the position of first assistant to the office of such officer for less than 90 days; and

(B) the President submits a nomination of such person to the Senate for appointment to such office.

(2) Paragraph (1) shall not apply to any person if—

(A) such person is serving as the first assistant to the office of an officer described under subsection (a);

(B) the office of such first assistant is an office for which appointment is required to be made by the President, by and with the advice and consent of the Senate; and

(C) the Senate has approved the appointment of such person to such office.

(c)(1) Notwithstanding subsection (a)(1), the President (and only the President) may direct an officer who is nominated by the President for reappointment for an additional term to the same office in an Executive department without a break in service, to continue to serve in that office subject to the time limitations in section 3346, until such time as the Senate has acted to confirm or reject the nomination, notwithstanding adjournment sine die.

(2) For purposes of this section and sections 3346, 3347, 3348, 3349, 3349a, and 3349d, the expiration of a term of office is an inability to perform the functions and duties of such office.

2. 5 U.S.C. 3346 provides:

Time limitation

(a) Except in the case of a vacancy caused by sickness, the person serving as an acting officer as described under section 3345 may serve in the office—

(1) for no longer than 210 days beginning on the date the vacancy occurs; or

(2) subject to subsection (b), once a first or second nomination for the office is submitted to the Senate, from the date of such nomination for the period that the nomination is pending in the Senate.

(b)(1) If the first nomination for the office is rejected by the Senate, withdrawn, or returned to the President by the Senate, the person may continue to serve as the acting officer for no more than 210 days after the date of such rejection, withdrawal, or return.

(2) Notwithstanding paragraph (1), if a second nomination for the office is submitted to the Senate after the rejection, withdrawal, or return of the first nomination, the person serving as the acting officer may continue to serve—

(A) until the second nomination is confirmed; or

(B) for no more than 210 days after the second nomination is rejected, withdrawn, or returned.

(c) If a vacancy occurs during an adjournment of the Congress sine die, the 210-day period under subsection (a) shall begin on the date that the Senate first reconvenes.

3. 5 U.S.C. 3347 provides:

Exclusivity

(a) Sections 3345 and 3346 are the exclusive means for temporarily authorizing an acting official to perform the functions and duties of any office of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office) for which appointment is required to be made by the President, by and with the advice and consent of the Senate, unless—

(1) a statutory provision expressly—

(A) authorizes the President, a court, or the head of an Executive department, to designate an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity; or

(B) designates an officer or employee to perform the functions and duties of a specified office temporarily in an acting capacity; or

(2) the President makes an appointment to fill a vacancy in such office during the recess of the Senate pursuant to clause 3 of section 2 of article II of the United States Constitution.

(b) Any statutory provision providing general authority to the head of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office) to delegate duties statutorily vested in that agency head to, or to reassign duties among, officers or employees of such Executive agency, is not a statutory provision to which subsection (a)(1) applies.

4. 5 U.S.C. 3348 provides:

Vacant office

(a) In this section—

(1) the term "action" includes any agency action as defined under section 551(13); and

(2) the term "function or duty" means any function or duty of the applicable office that—

(A)(i) is established by statute; and

(ii) is required by statute to be performed by the applicable officer (and only that officer); or

(B)(i)(I) is established by regulation; and

(II) is required by such regulation to be performed by the applicable officer (and only that officer); and

(ii) includes a function or duty to which clause (i)(I) and (II) applies, and the applicable regulation is in effect at any time during the 180-day period preceding the date on which the vacancy occurs.

(b) Unless an officer or employee is performing the functions and duties in accordance with sections 3345, 3346, and 3347, if an officer of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office) whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate, dies, resigns, or is otherwise unable to perform the functions and duties of the office—

(1) the office shall remain vacant; and

(2) in the case of an office other than the office of the head of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office), only the head of such Executive agency may perform any function or duty of such office.

(c) If the last day of any 210-day period under section 3346 is a day on which the Senate is not in session, the second day the Senate is next in session and receiving nominations shall be deemed to be the last day of such period.

(d)(1) An action taken by any person who is not acting under section 3345, 3346, or 3347, or as provided by subsection (b), in the performance of any function or duty of a vacant office to which this section and sections 3346, 3347, 3349, 3349a, 3349b, and 3349c apply shall have no force or effect.

(2) An action that has no force or effect under paragraph (1) may not be ratified.

(e) This section shall not apply to—

(1) the General Counsel of the National Labor Relations Board;

(2) the General Counsel of the Federal Labor Relations Authority;

(3) any Inspector General appointed by the President, by and with the advice and consent of the Senate;

(4) any Chief Financial Officer appointed by the President, by and with the advice and consent of the Senate; or

(5) an office of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office) if a statutory provision expressly prohibits the head of the Executive agency from performing the functions and duties of such office.

5. 5 U.S.C. 3349 provides:

Reporting of vacancies

(a) The head of each Executive agency (including the Executive Office of the President, and other than the Government Accountability Office) shall submit to the Comptroller General of the United States and to each House of Congress—

(1) notification of a vacancy in an office to which this section and sections 3345, 3346, 3347, 3348, 3349a, 3349b, 3349c, and 3349d apply and the date such vacancy occurred immediately upon the occurrence of the vacancy;

(2) the name of any person serving in an acting capacity and the date such service began immediately upon the designation;

(3) the name of any person nominated to the Senate to fill the vacancy and the date such nomination is submitted immediately upon the submission of the nomination; and

(4) the date of a rejection, withdrawal, or return of any nomination immediately upon such rejection, withdrawal, or return.

(b) If the Comptroller General of the United States makes a determination that an officer is serving longer than the 210-day period including the applicable exceptions to such period under section 3346 or section 3349a, the Comptroller General shall report such determination immediately to—

(1) the Committee on Governmental Affairs of the Senate;

(2) the Committee on Government Reform and Oversight of the House of Representatives;

(3) the Committees on Appropriations of the Senate and House of Representatives;

(4) the appropriate committees of jurisdiction of the Senate and House of Representatives;

(5) the President; and

(6) the Office of Personnel Management.

6. 28 U.S.C. 503 provides:

Attorney General

The President shall appoint, by and with the advice and consent of the Senate, an Attorney General of the United States. The Attorney General is the head of the Department of Justice.

7. 28 U.S.C. 509 provides:

Functions of the Attorney General

All functions of other officers of the Department of Justice and all functions of agencies and employees of the Department of Justice are vested in the Attorney General except the functions—

(1) vested by subchapter II of chapter 5 of title 5 in administrative law judges employed by the Department of Justice;

(2) of the Federal Prison Industries, Inc.; and

(3) of the Board of Directors and officers of the Federal Prison Industries, Inc.

8. 28 U.S.C. 510 provides:

Delegation of authority

The Attorney General may from time to time make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General.

9. 28 U.S.C. 515 provides:

Authority for legal proceedings; commission, oath, and salary for special attorneys

(a) The Attorney General or any other officer of the Department of Justice, or any attorney specially appointed by the Attorney General under law, may, when specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrate judges, which United States attorneys are authorized by law to conduct, whether or not he is a resident of the district in which the proceeding is brought.

(b) Each attorney specially retained under authority of the Department of Justice shall be commissioned as special assistant to the Attorney General or special attorney, and shall take the oath required by law. Foreign counsel employed in special cases are not required to take the oath. The Attorney General shall fix the annual salary of a special assistant or special attorney.

10. 28 U.S.C. 516 provides:

Conduct of litigation reserved to Department of Justice

Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.

11. 28 U.S.C. 517 provides:

Interests of United States in pending suits

The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States.

12. 28 U.S.C. 518 provides:

Conduct and argument of cases

(a) Except when the Attorney General in a particular case directs otherwise, the Attorney General and the Solicitor General shall conduct and argue suits and appeals in the Supreme Court and suits in the United States Court of Federal Claims or in the United States Court of Appeals for the Federal Circuit and in the Court of International Trade in which the United States is interested.

(b) When the Attorney General considers it in the interests of the United States, he may personally conduct and argue any case in a court of the United States in which the United States is interested, or he may direct the Solicitor General or any officer of the Department of Justice to do so.

13. 28 U.S.C. 519 provides:

Supervision of litigation

Except as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party, and shall direct all United States attorneys, assistant United States attorneys, and special attorneys appointed under section 543 of this title in the discharge of their respective duties.

14. 28 U.S.C. 533 provides:

Investigative and other officials; appointment

The Attorney General may appoint officials—

(1) to detect and prosecute crimes against the United States;

(2) to assist in the protection of the person of the President; and[1]

(3) to assist in the protection of the person of the Attorney General.[2]

(4) to conduct such other investigations regarding official matters under the control of the Department of Justice and the Department of State as may be directed by the Attorney General.

This section does not limit the authority of departments and agencies to investigate crimes against the

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[1] So in original. The word "and" probably should not appear.

[2] So in original. The period probably should be "; and".

United States when investigative jurisdiction has been assigned by law to such departments and agencies.

15. 28 U.S.C. 542 provides:

Assistant United States attorneys

(a) The Attorney General may appoint one or more assistant United States attorneys in any district when the public interest so requires.

(b) Each assistant United States attorney is subject to removal by the Attorney General.

16. 28 U.S.C. 546 provides:

Vacancies

(a) Except as provided in subsection (b), the Attorney General may appoint a United States attorney for the district in which the office of United States attorney is vacant.

(b) The Attorney General shall not appoint as United States attorney a person to whose appointment by the President to that office the Senate refused to give advice and consent.

(c) A person appointed as United States attorney under this section may serve until the earlier of—

(1) the qualification of a United States attorney for such district appointed by the President under section 541 of this title; or

(2) the expiration of 120 days after appointment by the Attorney General under this section.

(d) If an appointment expires under subsection (c)(2), the district court for such district may appoint a United States attorney to serve until the vacancy is filled. The order of appointment by the court shall be filed with the clerk of the court.

17. 28 U.S.C. 547 provides:

Duties

Except as otherwise provided by law, each United States attorney, within his district, shall—

(1) prosecute for all offenses against the United States;

(2) prosecute or defend, for the Government, all civil actions, suits or proceedings in which the United States is concerned;

(3) appear in behalf of the defendants in all civil actions, suits or proceedings pending in his district against collectors, or other officers of the revenue or customs for any act done by them or for the recovery of any money exacted by or paid to these officers, and by them paid into the Treasury;

(4) institute and prosecute proceedings for the collection of fines, penalties, and forfeitures incurred for violation of any revenue law, unless satisfied on investigation that justice does not require the proceedings; and

(5) make such reports as the Attorney General may direct.