No. 26-348

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

OFFICE OF THE NEW YORK STATE ATTORNEY GENERAL,

Respondent.

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

---

BRIEF IN OPPOSITION

BARBARA D. UNDERWOOD
SOLICITOR GENERAL
KUMIKI GIBSON
OFFICE OF THE NEW YORK STATE ATTORNEY GENERAL
28 Liberty Street
New York, NY 10005
(212) 416-8000

DONALD B. VERRILLI, JR.
Counsel of Record
GINGER D. ANDERS
MUNGER, TOLLES & OLSON LLP
601 Massachusetts Ave. NW
Suite 500E
Washington, DC 20001-5369
(202) 220-1100
Donald.Verrilli@mto.com

HAILYN J. CHEN
VICTORIA A. DEGTYAREVA
MUNGER, TOLLES & OLSON LLP
350 S. Grand Avenue
50th Floor
Los Angeles, CA 90071
(213) 683-9100

Counsel for Respondent
Office of the New York State Attorney General

November 2, 2026

QUESTIONS PRESENTED

After the office of U.S. Attorney for the Northern District of New York became vacant, the Attorney General appointed John Sarcone III the First Assistant to the office of U.S. Attorney and asserted that Sarcone thereby automatically became the Acting U.S. Attorney under the Federal Vacancies Reform Act, 5 U.S.C. 3345 *et seq*. The Attorney General also purported to delegate to Sarcone all powers and duties of the U.S. Attorney under 28 U.S.C. 515.

The questions presented are:

1. Whether the court of appeals correctly held that Sarcone's appointment as Acting U.S. Attorney was invalid because Section 3345(a)(1) permits only an incumbent First Assistant to automatically become the acting officeholder.

2. Whether the court of appeals correctly held that Section 3347 prohibited the Attorney General from using her general delegation authority to circumvent the Federal Vacancies Reform Act by delegating all of the powers of the U.S. Attorney to Sarcone.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iii
INTRODUCTION 1
STATEMENT 4
A. Legal Background 4
B. Procedural History 5
ARGUMENT 12
I. The Decision Below Is Correct 12
A. The FVRA's Automatic-Succession Provision Applies Only to the First Assistant Serving when the Vacancy Begins 12
B. The Attorney General Cannot Appoint a De Facto Acting U.S. Attorney via Delegation 22
II. There Is No Conflict Among the Courts of Appeals 25
III. If the Court Intends to Review the Questions Presented, It Should Grant Certiorari in Both This Case and in *Jackson* 28
CONCLUSION 33

TABLE OF AUTHORITIES

Page(s)

CASES

Arthrex, Inc. v. *Smith & Nephew, Inc.*,
35 F.4th 1328 (2022) 26, 27

Axon Enter., Inc. v. *FTC*,
598 U.S. 175 (2023) 28

Bartenwerfer v. *Buckley*,
598 U.S. 69 (2023) 20

Bissonnette v. *LePage Bakeries Park St., LLC*,
601 U.S. 246 (2024) 14

Collins v. *Yellen*,
594 U.S. 220 (2021) 10

Edmond v. *United States*,
520 U.S. 651 (1997) 1

Exxon Mobil v. *Corporación CIMEX*,
146 S. Ct. 1909 (2026) 17, 21

Fischer v. *United States*,
603 U.S. 480 (2024) 14

In re Grand Jury Proceeding,
971 F.3d 40 (2d Cir. 2020) 32

In re Grand Jury Proceedings,
744 F.3d 211 (1st Cir. 2014) 32

TABLE OF AUTHORITIES
(continued)

Page(s)

In re Grand Jury Proceedings (Larson),
785 F.2d 629 (8th Cir. 1986) 32

Learning Resources, Inc. v. *Trump*,
607 U.S. 229 (2026) 28

Loper Bright Enterprises v. *Raimondo*,
603 U.S. 369 (2024) 28

Moody v. *NetChoice, LLC*,
603 U.S. 707 (2024) 28

NLRB v. *Noel Canning*,
573 U.S. 513 (2014) 2

NLRB v. *SW General, Inc.*,
580 U.S. 288 (2017) 2, 13-16, 21, 22, 25, 29

People v. *National Rifle Association of America, Inc.*,
171 N.Y.S.3d 782 (N.Y. Sup. Ct. 2022)..... 6

People v. *National Rifle Association of America, Inc.*,
203 N.Y.S.3d 255 (N.Y. App. Div. 2023)..... 6

People v. *Trump Org., Inc.*,
169 N.Y.S.3d 612 (N.Y. App. Div. 2022)..... 6

TABLE OF AUTHORITIES
(continued)

Page(s)

People v. *Trump Org., Inc.*,
2022 WL 489625 (N.Y. Sup. Ct. Feb. 17, 2022) 6

People v. *Trump Org., Inc.*,
38 N.Y.3d 1053 (2022) 6

Pulsifer v. *United States*,
601 U.S. 124 (2024) 20

Rumsfeld v. *Padilla*,
542 U.S. 426 (2004) 14

SWANCC v. *U.S. Army Corps of Engineers*,
531 U.S. 159 (2001) 22

Trump v. *James*,
2022 WL 1718951 (N.D.N.Y. May 27, 2022) 6

Trump v. *Mazars USA, LLP*,
39 F.4th 774 (D.C. Cir. 2022) 32

Trump v. *United States*,
603 U.S. 593 (2024) 25

TRW Inc. v. *Andrews*,
534 U.S. 19 (2001) 20

United States v. *Comey*,
810 F. Supp. 3d 768 (E.D. Va. 2025), *appeal docketed*, No. 25-4674 (4th Cir. Dec. 22, 2025) 30

TABLE OF AUTHORITIES
(continued)

Page(s)

United States v. *Giraud*,
160 F.4th 390 (3d Cir. 2025) 26

United States v. *Jackson*,
187 F.4th 1198 (9th Cir. 2026) 3, 11

United States v. *James*,
810 F. Supp. 3d 752 (E.D. Va. 2025),
appeal docketed, No. 25-4673
(4th Cir. Dec. 22, 2025) 30

STATUTES

5 U.S.C. 3345 *et seq.* 2

5 U.S.C. 3345(a) 9, 13-16, 26

5 U.S.C. 3345(a)(1) 3, 4, 9, 11-15, 17-21, 31

5 U.S.C. 3345(a)(2) 4, 10, 12, 14-16, 20-22

5 U.S.C. 3345(a)(3) 4, 9-10, 12, 14-22

5 U.S.C. 3345(b)(1) 19

5 U.S.C. 3346 11

5 U.S.C. 3346(a) 5

5 U.S.C. 3347(a) 5, 10, 23

5 U.S.C. 3347(a)(1) 5

5 U.S.C. 3347(b) 5, 23

TABLE OF AUTHORITIES
(continued)

Page(s)

5 U.S.C. 3348(a) 27

5 U.S.C. 3348(a)(2) 26

5 U.S.C. 3349a 5

28 U.S.C. 515 ..... 3, 8, 10

28 U.S.C. 541(a) 1, 4

28 U.S.C. 546 ..... 5, 7

28 U.S.C. 546(a) 20

28 U.S.C. 546(a)-(c) 5

28 U.S.C. 546(d) 5, 7, 8, 29

RULES

S. Ct. R. 14 32

CONSTITUTIONAL PROVISIONS

U.S. Const. art. II, § 2, cl. 2 ..... 1, 4, 12

LEGISLATIVE MATERIALS

144 Cong. Rec. S11038 (daily ed. Sept. 28, 1998) (statement of Sen. Lieberman) 17

144 Cong. Rec. S12822 (daily ed. Oct. 21, 1998) (statement of Sen. Thompson) 17, 18

TABLE OF AUTHORITIES
(continued)

Page(s)

144 Cong. Rec. S12824 (daily ed. Oct. 21, 1998) (statement of Sen. Byrd) 17

144 Cong. Rec. S12861 (daily ed. Oct. 21, 1998) (statement of Sen. Lieberman) 18

OTHER AUTHORITIES

The Federalist No. 76 (Alexander Hamilton) (Clinton Rossiter ed., 1961)..... 2, 16, 29

https://www.nynd.uscourts.gov/news/re-united-states-attorney-northern-district-new-york 9

Robert Jackson, Address at the Second Annual Conference of United States Attorneys: The Federal Prosecutor (Apr. 1, 1940), *available at* https://www.justice.gov/sites/default/files/ag/legacy/2011/09/16/04-01-1940.pdf 2

Nominations Submitted to the Senate, 2026 Daily Comp. Pres. Doc. Supp. 7 (updated Feb. 13, 2026), *available at* 2026 WL 487918 32

INTRODUCTION

This case arises out of efforts by the Department of Justice (petitioner or DOJ) to abuse the prosecutorial power of the United States in pursuit of President Trump's campaign of retribution against New York Attorney General Letitia James. To pursue that effort, the Executive Branch needed a compliant U.S. Attorney who would be willing to open a criminal investigation into the Office of the New York State Attorney General (respondent here). They found such a person in John Sarcone III. The Attorney General therefore appointed Sarcone Acting U.S. Attorney for the Northern District of New York, using the "acting" designation to circumvent the requirement that U.S. Attorneys be nominated by the President and confirmed by the Senate. Sarcone immediately launched criminal investigations into respondent and obtained sweeping grand jury subpoenas demanding records related to respondent's successful enforcement actions against Mr. Trump and his political allies.

The Appointments Clause exists to check precisely that sort of abuse of executive power. The Clause requires the President to obtain "the Advice and Consent of the Senate" before appointing certain "Officers of the United States," including those for whom Congress has "by Law" required advice and consent. U.S. Const. art. II, § 2, cl. 2. Congress has provided that U.S. Attorneys require presidential nomination and Senate confirmation. 28 U.S.C. 541(a).

The Senate's advice and consent is "more than a matter of etiquette or protocol." *Edmond* v. *United States*, 520 U.S. 651, 659 (1997) (citation modified). It constrains Presidents from installing "unfit characters" who lack any "merit" beyond their personal alle-

giance to the President or their "pliancy" and "obsequious[ness]." The Federalist No. 76, at 457-458 (Alexander Hamilton) (Clinton Rossiter ed., 1961). And it allows Congress to demand that those who wield executive power owe their primary allegiance to the rule of law, not to the whims or prejudices of any particular President. See *NLRB* v. *Noel Canning*, 573 U.S. 513, 523 (2014). Nowhere are those protections more essential than in choosing U.S. Attorneys, who command an "immense power to strike at citizens, not with mere individual strength, but with all the force of government itself." Robert Jackson, Address at the Second Annual Conference of United States Attorneys: The Federal Prosecutor (Apr. 1, 1940), *available at* https://www.justice.gov/sites/default/files/ag/legacy/2011/09/16/04-01-1940.pdf.

In appointing Sarcone, DOJ evaded those critical protections, and frustrated the Senate's advice and consent prerogative, by misusing the Federal Vacancies Reform Act ("FVRA"), 5 U.S.C. 3345 *et seq*. That statute confers on the Executive Branch limited authority to fill vacancies in offices requiring Senate confirmation by installing interim officials to discharge the responsibilities of the office pending the nomination and confirmation of a successor. See *NLRB* v. *SW Gen., Inc.*, 580 U.S. 288, 292-293 (2017). Congress enacted the FVRA to *prevent* appointments like Sarcone's—to safeguard the Senate's advice and consent power against the Executive Branch's excessive use of acting officers—and the statute accordingly strictly limits both who may serve in such an interim role and how long such officials may serve. DOJ sought to avoid those limits here by purporting to appoint Sarcone the "First Assistant" U.S. Attorney *after* the office of U.S. Attorney was already vacant and asserting that he automatically became Acting U.S. Attorney

pursuant to Section 3345(a)(1) of the FVRA. As a backstop, the Attorney General also purported to delegate to Sarcone all of the functions of the U.S. Attorney under 28 U.S.C. 515.

The courts below correctly rejected those maneuvers, quashed the grand jury subpoenas that Sarcone alone had issued, and disqualified Sarcone from investigating respondent. The Second Circuit correctly held that Section 3345(a)(1) permits only the *incumbent* First Assistant at the time the vacancy arises to automatically assume the duties of the office, and that the FVRA expressly prohibits agencies from circumventing its requirements using general delegation authority as DOJ purported to do here. DOJ's contrary arguments would vitiate the FVRA's strict limits on who can serve in an acting capacity and enable the Executive to bypass advice and consent at will—exactly what the FVRA was enacted to prevent.

The Ninth Circuit reached the same conclusion in *United States* v. *Jackson*, No. 26-304, in which DOJ also seeks certiorari on the same questions. Because DOJ is wrong on the merits, and because there is no conflict among the circuits—indeed, the Third Circuit has likewise rejected DOJ's arguments—DOJ's petitions in this case and in *Jackson* should be denied. But if the Court decides the questions presented warrant review, it should grant certiorari in both cases. Granting review in this case as well as *Jackson* would ensure that the Court considers the questions presented in light of the full implications of DOJ's position: DOJ seeks here to defend the installation of an unfit loyalist to retaliate against the President's perceived political enemy—the worst-case scenario motivating the Appointments Clause itself. Unlike in *Jackson*, the Court's decision here would dictate whether the challenged government conduct may continue, as no other

DOJ employee has been willing to pursue the lawless investigations that Sarcone has spearheaded. And unlike in *Jackson*, where the President has nominated a U.S. Attorney to fill the vacancy, here the questions presented have indisputable prospective significance and no potential mootness question would complicate this Court's review.

STATEMENT

A. Legal Background

Under the Appointments Clause, "Officers of the United States" ordinarily must be nominated by the President and appointed with the "Advice and Consent of the Senate." U.S. Const. art. II, § 2, cl. 2. Congress has directed that U.S. Attorneys shall be appointed in that manner: "The President shall appoint, by and with the advice and consent of the Senate, a United States attorney for each judicial district." 28 U.S.C. 541(a). But Congress has also provided stopgap mechanisms for appointing an acting or interim U.S. Attorney pending confirmation of a new officeholder.

The FVRA establishes three pathways for appointing "acting" officials to fill offices across the Executive Branch that require presidential nomination and Senate confirmation (known as "PAS" offices). First, the FVRA's automatic-succession provision, Section 3345(a)(1), specifies that if a vacancy occurs, "the first assistant to the office of such officer shall perform the functions and duties of the office." 5 U.S.C. 3345(a)(1). Second, the President may override that default rule by designating someone whom the Senate has previously confirmed for a different office. 5 U.S.C. 3345(a)(2). Third, the President may designate an officer or employee of the Executive agency at issue who meets statutorily specified seniority and experience criteria. 5 U.S.C. 3345(a)(3). However chosen,

acting officials may serve for "no longer than 210 days beginning on the date the vacancy occurs," unless a nomination is pending or the vacancy coincides with a presidential transition. 5 U.S.C. 3346(a), 3349a.

Subject to certain exceptions, the FVRA is the "exclusive means for temporarily authorizing an acting official to perform the functions and duties of" a PAS office. 5 U.S.C. 3347(a). The exceptions are narrow: other statutes govern if they "expressly" designate an officer or employee to "perform the functions and duties of a specified office temporarily in an acting capacity," or expressly authorize "the President, a court, or the head of an Executive department" to designate such an officer or employee. 5 U.S.C. 3347(a)(1). But a statute vesting an agency head with "general authority" to "delegate" or "reassign" duties within the agency does not qualify. 5 U.S.C. 3347(b).

Second, 28 U.S.C. 546 authorizes appointment of temporary U.S. Attorneys. 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, so long as the appointee is not someone "whose appointment by the President to that office the Senate refused to give advice and consent." 28 U.S.C. 546(a)-(c). If those 120 days elapse and the office remains vacant, the district court for the relevant district "may appoint a United States attorney to serve until the vacancy is filled." 28 U.S.C. 546(d).

B. Procedural History

This case arises out of President Trump's effort to retaliate against respondent for pursuing two enforcement actions.

1. In September 2022, after a three-year investigation, respondent filed a complaint alleging that Donald

Trump (then a private business owner) and his associates had committed financial fraud by inflating the value of his assets. Pet.App.10a. After extensive proceedings, the trial court found the defendants liable. Pet.App.10a. Despite Mr. Trump's attempts to dismiss or enjoin the enforcement action, state and federal courts repeatedly concluded that the action was lawful and initiated in good faith. See *Trump* v. *James*, 2022 WL 1718951, at *12-14, *19-20 (N.D.N.Y. May 27, 2022); *People* v. *Trump Org., Inc.*, 2022 WL 489625, at *5 (N.Y. Sup. Ct. Feb. 17, 2022); *People* v. *Trump Org., Inc.*, 169 N.Y.S.3d 612, 614-615 (N.Y. App. Div. 2022); *People* v. *Trump Org., Inc.*, 38 N.Y.3d 1053, 1054 (2022).

In August 2020, respondent filed a lawsuit against the National Rifle Association (NRA) and its senior executives for financial misconduct. Pet.App.10a. A jury returned a verdict against the NRA and its executives. The NRA challenged the enforcement action as retaliatory and politically motivated, but courts uniformly rebuffed those attacks. *People* v. *Nat'l Rifle Ass'n of Am., Inc.*, 203 N.Y.S.3d 255, 261-262 (N.Y. App. Div. 2023); *People* v. *Nat'l Rifle Ass'n of Am., Inc.*, 171 N.Y.S.3d 782, 786-787 (N.Y. Sup. Ct. 2022).

2. In response, Mr. Trump and his proxies spent years disparaging Attorney General James and calling for her prosecution.

In April 2019, shortly after respondent began its investigations, President Trump tweeted that the NRA was "under siege" and that Attorney General James was "illegally using the State's legal apparatus to take down and destroy this very important organization." C.A.App.1508. Pamela Bondi, who was then Mr. Trump's personal lawyer and whom President Trump later appointed United States Attorney General, stated that Attorney General James "can't get

away with this" and "needs to be looked at." C.A.App.1332-1333.

As the litigation progressed, the attacks grew more strident. Mr. Trump called Attorney General James a "Racist Scoundrel," repeatedly accused her of committing "criminal Election Interference" and fraud, and called for her to be "impeached" or held "criminally liable." C.A.App.1523, 1538, 1541, 1551, 1554. He reposted comments asserting that Attorney General James "belong[s] in jail." C.A.App.1557. Lawyers close to Mr. Trump "craft[ed] specific, novel legal schemes that a Justice Department could use to go after" Attorney General James. C.A.App.1335. In the words of Alina Habba, one of Mr. Trump's personal lawyers, Mr. Trump's inner circle was sending a message that Attorney General James was "not going to get away with it." C.A.App.1337.

3. On February 17, 2025, the Senate-confirmed U.S. Attorney for the Northern District of New York left office. Under the FVRA, the incumbent First Assistant U.S. Attorney for the district automatically became Acting U.S. Attorney. On February 28, Attorney General Bondi appointed John Sarcone III, a DOJ outsider, interim U.S. Attorney under 28 U.S.C. 546, effective March 17. Pet.App.9a.

The President failed to submit a nominee to the Senate, and after Sarcone's 120-day interim term expired, the Board of Judges for the Northern District of New York declined to appoint a U.S. Attorney under 28 U.S.C. 546(d). DOJ then took several steps to extend Sarcone's tenure. DOJ appointed Sarcone First Assistant U.S. Attorney, stating that the reason for the "[t]emporary [a]ppointment" was to "[s]erv[e] as Acting U.S. Attorney for a 210-day period." Pet.App.9a. DOJ also designated Sarcone a "Special Attorney" under 28 U.S.C. 515. Although that position

is "traditionally used for cross-district prosecutions or specific high-profile investigations," the designation purported to give Sarcone authority "to conduct in the Northern District of New York, any kind of legal proceedings, civil or criminal, including Grand Jury proceedings," that "United States Attorneys are authorized to conduct," for an "indefinite" period. Pet.App.9a.

Sarcone quickly followed through on President Trump's threats to investigate Attorney General James. On August 5, 2025, respondent was served with two grand jury subpoenas, demanding production of "[a]ny and all documents relating to" or "reflecting communications about" respondent's cases against Mr. Trump and the NRA. Pet.App.10a-11a. Sarcone obtained and signed the subpoenas himself under the title "Acting United States Attorney" and made them returnable directly to him. Pet.App.11a; C.A.App.68, 72. Neither subpoena named any other prosecutor or mentioned Sarcone's purported "Special Attorney" or "First Assistant" titles. Pet.App.11a; C.A.App.68, 72.

Respondent moved to quash the subpoenas on multiple grounds, including that the subpoenas were retaliatory and that Sarcone lacked authority to obtain them as a result of his unlawful appointment. Pet.App.11a. The district court granted the motion on the ground that Sarcone was unlawfully appointed under the FVRA, and disqualified him from further involvement in the investigations of respondent. Pet.App.66a-94a.

4. Shortly after the district court issued its opinion, the District Court for the Northern District of New York attempted to fill the vacancy in the office of U.S. Attorney by appointing Donald Kinsella interim U.S. Attorney under 28 U.S.C. 546(d). President Trump

immediately fired him.[1] As a result, Sarcone continues to serve as the "operative head" of the U.S. Attorney's Office. Pet.App.13a. The President has not nominated anyone to fill the vacancy.

5. The court of appeals affirmed the district court's decision. Pet.App.1a-40a.

a. The court of appeals first determined that the case was not moot. Although the grand jury that issued the subpoenas had been discharged, the parties' dispute over the subpoenas was "capable of repetition, yet evading review," and in all events, DOJ could obtain relief on appeal as to Sarcone's disqualification. Pet.App.13a-14a (citation omitted).

On the merits, the court held that under Section 3345(a)(1), only a First Assistant serving at the time a vacancy arises automatically becomes the acting officer. Pet.App.14a-29a. That construction followed from the provision's "plain text," which provides that the first assistant "shall" automatically become the acting officer the moment a triggering event occurs. The statute thus necessarily asks "who occupies the First Assistant role" at that moment. Pet.App.18a-19a. That construction also followed from the statutory structure: Section 3345(a) sets out an automatic default First Assistant succession in paragraph (a)(1) and provides for "flexibility" in paragraphs (a)(2) and (a)(3), which allow the President to choose an acting officer from a statutorily defined pool of qualified officials. Pet.App.15a-16a. If DOJ were correct that First Assistants designated after a vacancy arises automatically assume the office, the statutory structure would collapse, leaving the Executive free to "install virtually

[1] https://www.nynd.uscourts.gov/news/re-united-states-attorney-northern-district-new-york.

anyone," including an "unqualified loyalist," without any need to satisfy paragraph (a)(2) or (a)(3). Pet.App.16a-17a.

The court then held that the FVRA's exclusivity provision bars the Attorney General from using her delegation authority under 28 U.S.C. 515 to install a de facto acting officer. Pet.App.29a-36a. The exclusivity provision bars agency heads from using general delegation statutes to authorize an "'acting official to perform the functions and duties of'" a PAS office. Pet.App.30a (quoting 5 U.S.C. 3347(a)). The court explained that although DOJ argued that the delegation here did not purport to make Sarcone the "Acting" U.S. Attorney or grant him any nondelegable functions, the delegation in fact "left him indistinguishable from" an acting officer, and the FVRA deals in "function, not form." Pet.App.30a-32a. Were the rule otherwise, "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," to "serve *indefinitely*" without Senate confirmation. Pet.App.32a-33a.

The court of appeals then affirmed the district court's remedial rulings. The court held that the subpoenas were properly quashed because "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." Pet.App.36a (quoting *Collins* v. *Yellen*, 594 U.S. 220, 258 (2021)). Even if Sarcone in theory could have obtained the subpoenas in his capacity as Special Attorney or First Assistant, here he obtained the subpoenas (and directed a response) solely under the title of Acting U.S. Attorney. Pet.App.37a-38a. The court of appeals also affirmed

Sarcone's disqualification from participating in the investigations, finding that DOJ had forfeited the issue by failing to "sufficiently address [it] on appeal." Pet.App.38a-39a.

b. Judge Park dissented. Pet.App.41a-65a. In his view, Section 3345(a)(1) authorizes *any* first assistant to fill a vacancy, subject only to the time limits in Section 3346. Pet.App.46a-59a. Judge Park also would have held that the FVRA's exclusivity provision did not prohibit delegation of all "delegable authorities of the PAS office." Pet.App.61a-65a.

6. DOJ attempted a similar maneuver in the District of Nevada, where it purported to appoint Sigal Chattah as First Assistant to the already-vacant office of U.S. Attorney so that she could automatically assume the title of Acting U.S. Attorney. Certain defendants whose indictments were signed by Assistant U.S. Attorneys but listed Chattah as the "Acting U.S. Attorney" challenged her appointment. *United States* v. *Jackson*, 187 F.4th 1198 (9th Cir. 2026). The district court held that Chattah's appointment was invalid and disqualified her from supervising the defendants' prosecutions, but declined to dismiss the indictments. The Ninth Circuit affirmed on substantially the same grounds as the Second Circuit here. Jackson.Pet.App.1a-34a.[2] DOJ has petitioned for a writ of certiorari in *Jackson* (No. 26-304), urging the Court to grant certiorari there and hold this case pending its disposition of *Jackson*. The President has nominated George Kelesis to serve as U.S. Attorney for the District of Nevada.

---

[2] For ease of reference, this brief cites the version of the *Jackson* opinion reprinted in DOJ's petition appendix in No. 26-304.

ARGUMENT

I. The Decision Below Is Correct

A. The FVRA's Automatic-Succession Provision Applies Only to the First Assistant Serving when the Vacancy Begins

Congress enacted the FVRA to provide the Executive Branch with necessary flexibility in the event of a vacancy, while safeguarding Congress's own constitutional prerogative under the Appointments Clause to provide advice and consent to the appointment of officers requiring Senate confirmation. U.S. Const. art. II, § 2, cl. 2. Section 3345 reflects Congress's effort to balance those concerns by precisely specifying three avenues by which an "acting officer" may "perform the functions and duties of the office" if a vacancy occurs in a Senate-confirmed position.

First, under Section 3345(a)(1), 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." 5 U.S.C. 3345(a)(1). Second, "the President (and only the President) may direct a person who serves in" another Senate-confirmed position "to perform the functions and duties of the vacant office temporarily." 5 U.S.C. 3345(a)(2). Third, "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" if that officer or employee satisfies seniority and tenure requirements. 5 U.S.C. 3345(a)(3). As the Second Circuit held, Section 3345's text, the structure of its three categories of acting officers, and Congress's evident purposes in enacting the FVRA establish that only an

incumbent First Assistant may assume the duties of a PAS office under Section 3345(a)(1).

1. a. Starting with the text, Section 3345(a)(1) operates "automatically," *SW Gen.*, 580 U.S. at 293, specifying that "[i]f" a vacancy occurs, the First Assistant "shall" assume the acting position. 5 U.S.C. 3345(a)(1). That "mandatory and self-executing" language makes clear that in the event of a vacancy, the First Assistant ascends to the acting role automatically and immediately. *SW Gen.*, 580 U.S. at 303. Notably, the "only first assistant whom section 3345(a)(1) can automatically elevate is the First Assistant serving at the time the vacancy begins." Jackson.Pet.App.13a-14a.

That point is reinforced by the fact that Section 3345(a)'s second two prongs both expressly permit the President to *choose* an official to designate as the acting officer: "the President (and only the President) *may direct*" a Senate-confirmed official or a senior agency employee to perform the duties of the vacant office. Those prongs thus contemplate presidential choice of an official specifically to serve as acting officer. Section 3345(a)(1), by contrast, does not. That subsection makes no mention of any selection of a First Assistant, and does not confer on the President (or anyone else) any authority to direct anyone to assume the role of First Assistant or to direct that a First Assistant perform the duties of the office. Instead, Section 3345(a)(1) provides that "the first assistant" "shall" automatically serve as acting officer, *without* any action by the President or anyone else. That contrast demonstrates that Congress contemplated that the First Assistant who would be elevated to acting status would *already* be in place at the time of the vacancy—such that he could automatically become the acting official

without any "direct[ion]" by the President or anyone else.

Confirming that conclusion, Section 3345(a)(1) refers to "*the* first assistant to the office." The "use of the definite article" indicates that the provision authorizes "generally only one" individual to fill the acting role. *Rumsfeld* v. *Padilla*, 542 U.S. 426, 434 (2004). A comparison to paragraphs (a)(2) and (a)(3) reinforces that interpretation: those paragraphs authorize the President to call on "*a* person," "*an* officer," or "*an* * * * employee" who meets specified criteria—entire groups of potential acting officials. 5 U.S.C. 3345(a) (emphasis added). By contrast, the one First Assistant referenced in paragraph (a)(1) must be the individual who is serving as First Assistant when the vacancy arises, since only *that* First Assistant can "automatically assume acting duties" at that time. *SW Gen.*, 580 U.S. at 305.

The text also confirms that the First Assistant's automatic service begins at a single point in time: the moment the vacancy arises. Section 3345(a) is triggered when a Senate-confirmed official "dies, resigns, or is otherwise unable" to serve in the office. Pet.App.18a-19a. The "first two triggers," death and resignation, are "instantaneous events," such that the First Assistant automatically assumes the acting role at the moment those events occur. Pet.App.18a. The third triggering clause, "is otherwise unable to perform the functions and duties of the office," 5 U.S.C. 3345(a), must be construed in light of the more specific words that come before it and that provide "a more focused meaning." *Fischer* v. *United States*, 603 U.S. 480, 487-488 (2024); *Bissonnette* v. *LePage Bakeries Park St., LLC*, 601 U.S. 246, 252 (2024). Applying that principle to Section 3345(a)(1), the "otherwise" clause is best read to "refer[] to the [same] discrete moment

in time" that "dies" and "resigns" do—when "a validly appointed official *becomes* unable to perform his duties." Jackson.Pet.App.16a. At that point, the First Assistant automatically steps in.

b. The structure and purpose of Section 3345(a) confirm what the text makes plain. As noted, Congress created three ways of installing an acting officer without confirming a successor—and those three ways must be construed in light of each other, as a coherent whole. Section 3345(a)(1)'s First Assistant method is the default, automatic approach. Congress provided that the President can override the default by invoking paragraphs (a)(2) or (a)(3). But Congress sharply limited both of the latter categories to a "limited pool" of other PAS officials and certain senior agency employees. Pet.App.15a; see 5 U.S.C. 3345(a); *SW Gen.*, 580 U.S. at 293. Under DOJ's reading, however, the President (or, as here, an agency head) would never need to rely on paragraphs (a)(2) and (a)(3). In nearly any circumstance where the President could direct an individual to serve as an acting official under paragraph (a)(2) or (a)(3), the Executive could designate the same individual to serve as First Assistant, automatically installing that person as the acting official under paragraph (a)(1). And, of course, the Executive could use paragraph (a)(1) to install someone who would not qualify under paragraphs (a)(2) or (a)(3). It makes no sense to think that Congress would have simultaneously imposed strict requirements on the set of eligible officials under paragraphs (a)(2) and (a)(3) and also permitted the Executive to circumvent those very limitations by using paragraph (a)(1) to name whoever it wants as a post-vacancy First Assistant. Pet.App.16a. Paragraph (a)(1) therefore must be construed to permit only the existing First Assistant to become the acting officer. That is the only construction that enables

Section 3345(a)'s three paragraphs to work together as a coherent framework.

Congress's purpose in enacting the FVRA confirms that understanding of the relationship among Section 3345(a)'s three prongs. As this Court has explained, in the decades before the FVRA's enactment, the Executive asserted inherent power to fill vacant offices with purportedly temporary appointees. *SW Gen.*, 580 U.S. at 294. By 1998, the Executive was routinely using acting officers to fill high-level positions, often in "contravention of the Senate's wishes." *Id.* at 295. Congress thus "perceiv[ed] a threat to the Senate's advice and consent power"—and that threat had broad implications for sound governance. *Ibid.* The advice and consent power, after all, is designed to "guard against 'the appointment of unfit characters'" for improper reasons. *Id.* at 293 (quoting the Federalist No. 76).

The categories of acting officers that the President may designate under paragraphs (a)(2) and (a)(3) are self-evidently tailored to address those particular concerns. Paragraph (a)(2) permits the President to designate an acting officer who has *already* been confirmed by the Senate (and thus has already been determined by the Senate not to be unfit). Paragraph (a)(3) permits the President to designate a senior agency official who has already been serving at the agency for at least 90 days (and is therefore less likely to be unfit or designated for improper reasons, even though he has not been confirmed).

Paragraph (a)(1) must similarly be interpreted in light of Congress's evident purpose. Construing that provision to permit only the incumbent First Assistant to serve as the acting officer ensures that the position is automatically assumed by the person best situated

to serve immediately, while also limiting the President's ability to circumvent the advice and consent power or to designate someone unfit. Conversely, permitting the President or an agency head to designate any new First Assistant of their choice, solely for the purpose of having that person serve as the acting officer, would enable the Executive to install *anyone*, no matter how unconfirmable or unfit—rendering the FVRA completely ineffective in protecting the Senate's advice and consent power and ensuring the fitness of executive officers. Congress does not enact "self-defeating statutes," and paragraph (a)(1) must be construed so as to enable the FVRA to serve Congress's purposes. *Exxon Mobil* v. *Corporación CIMEX*, 146 S. Ct. 1909, 1919 (2026).[3]

2. DOJ resists that straightforward account of Section 3345's text, structure, and purpose. Instead, DOJ seizes on a few aspects of the text to argue that the FVRA elliptically gives the Executive sweeping power

---

[3] The legislative history underscores Congress's purpose of "securing the Senate's constitutional responsibility to render its advice and consent on presidential nominations," and "bringing to an end a quarter century of obfuscation, bureaucratic intransigence, and outright circumvention" on the part of the Executive. 144 Cong. Rec. S12824 (daily ed. Oct. 21, 1998) (statement of Sen. Byrd). Congress was equally clear about the circumscribed role it envisioned for Section 3345(a)(1). An earlier version did not include paragraph (a)(3), and Senators raised concerns that if the First Assistant position were vacant, too few individuals would be eligible for acting service. 144 Cong. Rec. S12822 (daily ed. Oct. 21, 1998) (statement of Sen. Thompson); 144 Cong. Rec. S11038 (daily ed. Sept. 28, 1998) (statement of Sen. Lieberman). Congress responded by adding paragraph (a)(3). 144 Cong. Rec. S12822 (daily ed. Oct. 21, 1998) (statement of Sen. Thompson). "Neither the problem nor the solution would have made sense if agency heads could simply designate a first assistant after a vacancy arose." Jackson.Pet.App.24a.

to do exactly what Congress was trying to prevent. Those arguments are meritless.

DOJ first argues that the fact that Section 3345(a)(1) refers to the "first assistant to *the office*" that is vacant, rather than the "first assistant to *the officer*," somehow indicates that the Executive may appoint a new First Assistant anytime after a vacancy occurs in order to make that person the acting officer. Jackson.Pet.14-15. That does not follow. The FVRA's use of "office" simply recognizes that as soon as the vacancy occurs, there is no longer any officer in the position at issue. It is therefore entirely natural that Congress referred to the "first assistant to the [just-vacated] office."[4]

DOJ next focuses on Section 3345(a)(1)'s "use[] [of] the present tense," arguing that the provision's third triggering event—the officer "*is* otherwise unable" to fulfill the duties of the office—gives the provision "a continuing, prospective effect" and permits elevation of a First Assistant after the vacancy occurs, at any

---

[4] DOJ's resort to legislative history on this point does not help it. DOJ suggests that members who were initially worried about the FVRA's lack of flexibility came around because the final bill changed "first assistant of such officer" to "first assistant to the office of such officer," which DOJ says eliminated the incumbency requirement. Jackson.Pet.24. But the history on which DOJ relies is hardly so clear. The insertion of the phrase "to the office" was not "intended to alter case law on the meaning of the term 'first assistant.'" 144 Cong. Rec. S12822 (daily ed. Oct. 21, 1998) (statement of Sen. Thompson). And multiple Senators explained that concerns about the FVRA's rigidity were alleviated by the introduction of a "third category of 'acting officer'" in paragraph (a)(3). 144 Cong. Rec. S12822 (daily ed. Oct. 21, 1998) (statement of Sen. Thompson); see *id*. at S12861 (statement of Sen. Lieberman). No one ever suggested that the insertion of "to the office" (or any purported elimination of the incumbency requirement) changed their views.

time when the officer "is otherwise unable" to fulfill his duties. Jackson.Pet.15-16 (citation omitted). But that argument ignores every other aspect of the provision's text and structure that together establish that the existing First Assistant automatically assumes the duties of the office. The other triggering events—"'dies' and 'resigns'"—"are both present-tense verbs that refer to a 'single instance,'" and so "is otherwise unable" should be construed in the same manner. Jackson.Pet.App.15a-16a; see pp. 14-15, *supra*. DOJ offers no sound reason to conclude that merely because "is otherwise unable" might be read to refer to an ongoing state, "dies" and "resigns" likewise must also be read (ungrammatically) to refer to ongoing states, such that a First Assistant may be newly appointed well after the vacancy occurs. Jackson.Pet.App.15a. Nor does DOJ explain how that phrase can overcome the fact that Section 3345(a)(1) (unlike the other paragraphs) does not contemplate any designation by the President or agency head, but instead provides that "if" one of the triggering events occurs, the First Assistant "shall" automatically assume the office's duties—raising a strong inference that paragraph (a)(1) is referring only to the existing First Assistant already in place.

Next, DOJ attempts to raise a negative inference from Section 3345(a)(3), which contains temporal language specifying that to be eligible to be an acting officer, an agency employee must have been in his position for 90 days during the "365-day period preceding the date of death, resignation, or beginning of inability to serve" of the PAS officer. Jackson.Pet.16 (citing 5 U.S.C. 3345(a)(3), (b)(1)). But that language serves a distinct function. It restricts the President's ability to name acting officials based in part on how long the candidate served before the vacancy, and therefore

must specify the date certain from which to count back 90 days. Paragraph (a)(1), by contrast, focuses exclusively on the state of the world when the vacancy occurs, establishing an automatic assumption of duties that requires no express temporal language. The difference in language indicates only that Congress used different wording in different contexts.[5] Cf. *Bartenwerfer* v. *Buckley*, 598 U.S. 69, 78 (2023) ("Context counts, and it is sometimes difficult to read much into the absence of a word that is present elsewhere in a statute.").

Turning to structure, DOJ barely disputes that its reading would render paragraphs (a)(2) and (a)(3) nearly "superfluous"—and certainly "insignificant"—by enabling the Executive to use paragraph (a)(1) to circumvent the limitations on paragraphs (a)(2) and (a)(3). *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001); see pp. 15-16, *supra*. DOJ protests that there are "several scenarios" where paragraphs (a)(2) and (a)(3) would remain necessary, including when the First Assistant position itself happens to require Senate confirmation, or where the First Assistant must be appointed by the agency head but both the agency head and the First Assistant positions are vacant. Jackson.Pet.22. In short, DOJ's view is that the President would need to resort to paragraphs (a)(2) and (a)(3)

---

[5] DOJ's attempt to find clearer language in a different vacancies statute is also unpersuasive. That "Congress could have expressed itself more clearly" is no reason to depart from the best reading of a statute. *Pulsifer* v. *United States*, 601 U.S. 124, 137-138 (2024) (citation omitted). And more than respondent's argument, it is DOJ's arguments, resting as they do on sweeping inferences from the words "office" and "is unable," that are vulnerable on this ground. Congress could have specified that the automatic-succession provision applies whenever an office "is vacant," as it did in 28 U.S.C. 546(a), but it did not.

only if there were some extremely unusual obstacle to installing whomever he wants as First Assistant. Jackson.Pet.App.20a. Thus, as the Ninth Circuit observed, DOJ's reading would render the FVRA's protection of the Senate's advice and consent power illusory except where some agency-specific statute or rule prevented the Executive from using Section 3345(a)(1) to appoint whomever it wants. Jackson.Pet.App.20a. It strains credulity to think that Congress enacted so ineffectual a statute when Congress's very point was to limit the Executive Branch's end-runs around the Constitution's advice-and-consent requirement. *SW Gen.*, 580 U.S. at 293-295; see *Exxon Mobil*, 146 S. Ct. at 1919.

DOJ responds that it could still circumvent the advice and consent power even under the Second Circuit's reading, by making the Executive's chosen candidate the First Assistant as little as "*one minute before* the PAS officer vacate[s] office." Jackson.Pet.23. But the fact that DOJ can dream up creative ways to circumvent advice and consent at the margins is no reason to adopt its reading, which would permit the Executive to use paragraph (a)(1) to circumvent both the requirements of paragraphs (a)(2) and (a)(3) and advice and consent in the overwhelming majority of cases.

Finally, DOJ attempts to shore up its construction by pointing to the Executive Branch's own "opinion and practice." Jackson.Pet.17-18. In fact, both the Office of Legal Counsel and the Government Accountability Office have been inconsistent, initially embracing the Second Circuit's view before reversing course. See Jackson.Pet.App.26a-27a. And although DOJ has managed to identify 31 examples of post-vacancy first assistants since the George W. Bush administration, Jackson.Pet.18, that showing falls well short of the

sort of "overwhelming evidence of acquiescence" necessary to override the "plain text" of the FVRA. *SWANCC* v. *U.S. Army Corps of Eng'rs*, 531 U.S. 159, 169 n.5 (2001); see *SW Gen.*, 580 U.S. at 308 ("'Historical practice' is too grand a title for the Board's" 112 examples). Moreover, DOJ's protests about administrability during presidential transitions, as well as its colorful hypotheticals about bioweapon attacks and the like (Jackson.Pet.20), all rest on a false premise: that the President cannot easily designate an individual to serve under Section 3345(a)(2) or (a)(3) or use other delegation authority to delegate particular delegable duties in appropriate situations. The FVRA is designed to, and does, give the Executive Branch needed flexibility in choosing officials to serve as acting officers. But it does so in a manner that minimizes the risk that a President will install the kind of unfit characters that the Framers designed the Appointments Clause to keep out of office. It certainly does not give the President carte blanche to circumvent the Senate's advice and consent power by appointing any First Assistant of his choice, free of any constraints whatsoever.

B. The Attorney General Cannot Appoint a De Facto Acting U.S. Attorney via Delegation

The Second Circuit also correctly rejected DOJ's fallback argument that the Attorney General permissibly delegated all the authorities of the U.S. Attorney to Sarcone when she designated him a special attorney. The FVRA expressly prohibits agencies from using general delegation statutes to install acting officials. And the statute also necessarily prohibits agencies from evading *that* rule through the workaround that DOJ attempted here—authorizing an official to

exercise all the functions and duties of the office without bestowing the "acting" title.

1. As DOJ does not dispute, the Attorney General has no authority to install an Acting U.S. Attorney through delegation. The FVRA's exclusivity provision specifies that "[s]ections 3345 and 3346 are the exclusive means for temporarily authorizing an acting official" to fill a Senate-confirmed role unless a different statute "expressly" authorizes another designation method or the President makes a recess appointment. 5 U.S.C. 3347(a). The provision also states that a statute "providing general authority * * * to delegate duties" is not sufficient to excuse an agency head from adhering to the FVRA. 5 U.S.C. 3347(b). Those directives prohibit the Attorney General from using her "general authority * * * to delegate duties"—including her authority to designate special attorneys—to install an Acting U.S. Attorney or a U.S. Attorney. DOJ does not argue otherwise. Jackson.Pet.App.29a (noting that concession and stating that "[s]uch an appointment would be plainly contrary to section 3347(b)").

2. DOJ instead offers up a workaround of the FVRA's exclusivity provision, arguing that it can delegate *all* delegable duties of an office to the First Assistant, so long as it does not call that person the "acting officer." Jackson.Pet.27 (an "official receiving delegated authority is not an 'acting official'"). In DOJ's view, there is a "fundamental" difference between an "acting officer" under the FVRA and a "person merely exercising" all delegable powers that an acting officer would exercise. Jackson.Pet.26.

That is no difference at all in this case. DOJ purported to delegate *all* functions and duties of the U.S. Attorney, delegable or not, to Sarcone. C.A.App.2087 (letter of appointment). DOJ has more recently taken

the position in this litigation that the office of U.S. Attorney lacks "exclusive functions." C.A.App.2247 (motion-to-quash hearing transcript). There is thus no way to understand what the Attorney General did here as anything other than an attempt to use delegation to make Sarcone an Acting U.S. Attorney in everything but name. And that is exactly how the Second and Ninth Circuits understood DOJ's gambit. Pet.App.31a; Jackson.Pet.App.31a.

DOJ's interpretation of the FVRA's exclusivity provision would render that provision a virtual nullity. Under DOJ's view, if a vacant PAS office has solely delegable duties, the exclusivity provision permits the agency head to freely delegate all powers of the office to anyone for an indefinite period of time, thereby creating a de facto acting officer and circumventing the FVRA's strict time limits on the service of acting officers. Conversely, if a vacant PAS office has non-delegable duties, the agency head would not be able to delegate those duties, leaving the official able to perform only some of the functions of the office. But that would be true *regardless* of the exclusivity provision—because non-delegable duties by definition cannot be delegated to anyone. So in DOJ's view, the exclusivity provision does no work whatsoever. It has no role to play when an office has only delegable functions, and it is redundant when an office has non-delegable functions.

The sole consequence of the exclusivity provision under DOJ's reading is thus to prohibit a delegee from using the "acting" title. Jackson.Pet.App.32a ("The import of the government's position is * * * the only effect of the FVRA is to prohibit [Chattah] from calling herself 'Acting U.S. Attorney.'"). But nothing in the FVRA supports differentiating between an "acting" official who performs all the functions and duties of an

office and one who does so without that title. Such a formalistic scheme would make little sense given that the principal point of the FVRA was to curtail the Executive Branch's efforts to circumvent the Senate's advice-and-consent power. See *SW Gen.*, 580 U.S. at 294.

That point disposes of DOJ's reliance on Executive Branch delegation practice. Jackson.Pet.27-28; see pp. 21-22, *supra*. DOJ's previous reliance on the formalistic maneuver of delegating all of the functions and duties of a PAS office simply cannot illuminate the proper construction of the FVRA. As the Second Circuit explained, appointments are an area where "the Executive has a documented history of overstepping the bounds Congress proscribed." Pet.App.28a. That presidential administrations from both political parties have repeatedly "pushed the limits of the FVRA since its enactment proves only that the original mischief the statute was enacted to curtail [has] persisted," not that it is lawful. Pet.App.28a.

DOJ's delegation argument should be seen for what it is: an unvarnished attempt at evasion. This Court is generally loath to allow the government to "do indirectly what [it] cannot do directly." *Trump* v. *United States*, 603 U.S. 593, 631 (2024). That principle is all the more important here, where Congress has expressly prohibited the Executive from using delegation to circumvent the FVRA, and DOJ is attempting to circumvent that anti-circumvention provision.

II. There Is No Conflict Among the Courts of Appeals

As DOJ concedes (Jackson.Pet.29), the courts of appeals to consider the first question presented have uniformly held that a non-incumbent First Assistant may not become the acting officer under the FVRA. Every court to consider the issue has decisively rejected

DOJ's arguments for the same reasons that the Second Circuit did here. See *United States* v. *Giraud*, 160 F.4th 390, 400 (3d Cir. 2025); Pet.App.14a-29a; Jackson.Pet.App.6a-28a.

Similarly, with respect to the second question presented, i.e., whether the FVRA's exclusivity provision precludes delegation of the sort DOJ attempted here, the Second, Third, and Ninth Circuits have squarely rejected DOJ's position. See *Giraud*, 160 F.4th at 403; Pet.App.29a-36a; Jackson.Pet.App.28a-32a. Yet DOJ contends that the Federal Circuit disagreed in *Arthrex, Inc.* v. *Smith & Nephew, Inc.*, 35 F.4th 1328 (2022). That is incorrect.

Arthrex concerned whether the Commissioner of Patents, who had not been made the acting Director of the Patent and Trademark Office pursuant to Section 3345(a), could lawfully exercise the delegated authority of the Director to rule on rehearing requests. The court centered its analysis on Section 3348, which governs the effect of "functions or duties" performed by an invalidly appointed acting officer. *Arthrex*, 35 F.4th at 1336-1338. Section 3348 defines those functions or duties as non-delegable duties, but only for purposes of "th[at] section" (i.e., Section 3348). 5 U.S.C. 3348(a)(2). Ignoring that limitation, the Federal Circuit asserted that the "plain language of the statute [i.e., the definition contained in Section 3348] limits the scope of the FVRA to non-delegable functions and duties." *Arthrex*, 35 F.4th at 1338. The court further reasoned that the FVRA's exclusivity provision—its prohibition on using general delegation authority to "evade the FVRA"—was not relevant, because in the court's view the PTO is not an "Executive agency" within the meaning of that provision. *Id*. at 1339. The court then addressed whether the specific duty at is-

sue—the PTO Director's duty to rule on rehearing requests—was delegable, and concluded that it was, such that in the court's view the FVRA did not limit the Commissioner's ability to perform it.

Notably, although DOJ points to *Arthrex* in its effort to identify a circuit split, DOJ does not endorse its reasoning. Even DOJ agrees with the Second, Third, and Ninth Circuits that Section 3348's definition of "function or duty" is "limited to Section 3348." Jackson.Pet.27; see 5 U.S.C. 3348(a). It speaks volumes that to manufacture a circuit conflict, DOJ must rely on a decision that rested on a basic error of statutory construction that DOJ itself disavows.

Even more to the point, the Federal Circuit was not presented with, and did not decide, the circumvention question presented here—namely, whether an agency may purport to delegate all of a PAS officer's duties to another individual in order to create an "acting" officer in all but name, while avoiding the FVRA's exclusivity provision. Instead, the court considered only whether the specific delegation of reviewing rehearing requests was permitted under the FVRA. *Arthrex*, 35 F.4th at 1339 & n.5 (stating that its decision was "limited to a determination that the Director's authority to review rehearing requests is a delegable duty" and "no broader"). And because the court believed that the FVRA's exclusivity provision did not apply to the PTO Director at all, it had no occasion to consider whether the exclusivity provision prohibits any particular delegation of duties—not the specific delegation of rehearing authority that was before the court, and certainly not any purported delegation of *all* of an office's duties. For those reasons, no conflict exists.

III. If the Court Intends to Review the Questions Presented, It Should Grant Certiorari in Both This Case and in *Jackson*

For the reasons explained above, the petition should be denied. The same is true of the petition in *Jackson*, No. 26-304, which presents the same questions. But if the Court decides that the questions presented warrant review, the Court should grant both cases and consolidate them. The Court routinely does so when two cases presenting the same legal questions are contemporaneously decided by the courts of appeals and granting both cases would give the Court the fullest opportunity to address the relevant issues while minimizing any vehicle concerns present in one case. See, *e.g.*, *Learning Res., Inc.* v. *Trump*, 607 U.S. 229, 240 (2026); *Moody* v. *NetChoice, LLC*, 603 U.S. 707, 723 (2024); *Loper Bright Enters.* v. *Raimondo*, 603 U.S. 369, 384 (2024); *Axon Enter., Inc.* v. *FTC*, 598 U.S. 175, 185 (2023). That course is particularly appropriate here for several reasons.

First, this case presents in the starkest possible light the abuse that the Appointments Clause and the FVRA are designed to prevent. Here, a President bent on retaliation appointed an obsequious loyalist for the express purpose of bringing the full prosecutorial power of the United States to bear against a public official who had incurred the President's wrath. And Sarcone did what was expected of him, issuing grand jury subpoenas and threatening a criminal investigation. That retaliatory conduct—conduct in which Sarcone is willing to engage but career officials evidently are not—was made possible only by the Executive Branch's evasion of both the FVRA and the Appointments Clause. That is evident from deliberate steps the Executive Branch has taken to enable Sarcone to

continue to supervise the U.S. Attorney's Office without Senate confirmation. The President could have resolved any issue under the FVRA by nominating Sarcone to the U.S. Attorney position and giving the Senate the opportunity to decide whether to confirm him. But he has not done so. Nor has he nominated anyone else. And when the District Court for the Northern District of New York attempted to fill the vacancy by appointing an interim U.S. Attorney under 28 U.S.C. 546(d), President Trump immediately fired that individual. The Executive Branch quite obviously wants Sarcone to remain in place without being subject to the confirmation process.

This case thus offers critical context for construing the FVRA and the Appointments Clause. The Framers feared that a President who enjoyed an unlimited appointment power "would be governed much more by his private inclinations" than he would if forced to put his nominee to the test of Senate confirmation—that he might choose candidates for their willingness to yield to his whims rather than their merit. The Federalist No. 76, at 457; see *SW Gen.*, 580 U.S. at 293. In other words, they were concerned about precisely what President Trump has done here. And Congress was similarly concerned that the Executive would use temporary appointments exactly like this one to install officials "in obvious contravention of the Senate's wishes." *SW Gen.*, 580 U.S. at 295.

Evidently preferring that its appointment maneuvers be reviewed in a more anodyne factual setting, DOJ asks the Court to hold this case for *Jackson*, which involves what DOJ describes as "typical" criminal procedure. Pet.12. But what distinguishes this case from *Jackson* is precisely what animates the FVRA and the Appointments Clause. And contrary to DOJ's suggestion, DOJ has repeatedly used temporary

appointments of partisan loyalists in other cases to facilitate retaliatory prosecutions against the President's perceived foes. See *United States* v. *James*, 810 F. Supp. 3d 752, 755-757 (E.D. Va. 2025), *appeal docketed*, No. 25-4673 (4th Cir. Dec. 22, 2025); *United States* v. *Comey*, 810 F. Supp. 3d 768, 772-774 (E.D. Va. 2025), *appeal docketed*, No. 25-4674 (4th Cir. Dec. 22, 2025).

Second, this Court's resolution of the questions presented would have a far greater impact on the proceedings in this case than in *Jackson*. Sarcone obtained the subpoenas alone, and no other DOJ employee has attempted to resuscitate the investigation in the months since the district court disqualified him—presumably because career employees are not willing to do so. As a result, the decisions below effectively ended the investigation. In *Jackson*, however, the indictments were signed by career attorneys, leading the district court to deny the defendants' motion to dismiss. See Jackson.Pet.App.5a-6a. Thus, the underlying proceedings in *Jackson* will continue regardless of this Court's decision, and the defendants there might not ultimately benefit from a ruling in their favor. If this Court intends to resolve the questions presented, it should have before it a case like this one, where its ruling will determine whether the retaliatory government conduct may continue and respondent therefore has a great deal riding on the outcome.

Finally, no vehicle issues would complicate the Court's consideration of this case, while the same is not true of *Jackson*. DOJ acknowledges that this case presents a "live dispute." Pet.11. That is unquestionably correct. DOJ suggests, however, that the grand-jury context in which this case arises could complicate the Court's review. Not so. For one thing, the district court granted two forms of relief: it quashed the grand

jury subpoenas, and it disqualified Sarcone from participating in the underlying investigations. The Second Circuit affirmed both. All agree that the propriety of disqualification remains live, and DOJ does not suggest that that question is in any way affected by the grand jury context. For good reason. Resolution of the questions presented in DOJ's favor would vitiate the reason for the disqualification, free Sarcone to resume his retaliatory investigation (subject to other objections respondent preserved below), and allow him to continue serving as the "operative head" of the U.S. Attorney's Office pursuant to the Attorney General's delegation.[6] Pet.App.12a-13a. Conversely, a ruling in respondent's favor would establish that Sarcone's disqualification was appropriate and that he must remain disqualified.[7]

Even with respect to the grand jury subpoenas, the dispute remains live. As DOJ explains, the Second Circuit held that although the grand jury that issued

---

[6] Although the 210-day period during which Sarcone could have served as the Acting U.S. Attorney (if the FVRA permitted it) has expired, Sarcone continues to run the U.S. Attorney's Office pursuant to the purported delegation that is the subject of the second question presented. Pet.App.12a-13a. The validity of that delegation implicates the answer to both questions presented. That is, the Second Circuit's holding that the FVRA's exclusivity provision prohibits DOJ from using delegation to circumvent Section 3345 was informed by its holding that Sarcone did not qualify to be appointed under Section 3345(a)(1). Therefore, both questions presented have prospective as well as retrospective significance in this case.

[7] The Second Circuit further held that DOJ had forfeited any challenge to disqualification as an available remedy, Pet.App.39a, and DOJ has not sought to challenge that determination before this Court. The propriety of Sarcone's disqualification therefore turns entirely on the resolution of the questions presented.

the subpoenas has expired, the validity of those subpoenas is not moot because the dispute is capable of repetition yet evading review. That is clearly correct, and consistent with the decisions of other courts of appeals. See, *e.g.*, *Trump* v. *Mazars USA, LLP*, 39 F.4th 774, 787 (D.C. Cir. 2022); *In re Grand Jury Proceedings (Larson)*, 785 F.2d 629, 631 (8th Cir. 1986); *In re Grand Jury Proc.*, 971 F.3d 40, 51, 53 (2d Cir. 2020); *In re Grand Jury Proc.*, 744 F.3d 211, 218 (1st Cir. 2014). Thus, though DOJ suggests (Pet.12) the Court would need to pause over jurisdiction in this case, that pause need not last long. DOJ is also wrong that the propriety of quashing the subpoenas is a "wrinkle." Pet.13. That remedial issue is simply not before this Court: the Second Circuit rejected DOJ's argument that quashing the subpoenas was not an appropriate remedy; DOJ has not sought certiorari on that issue; and it is not fairly included within the questions presented. S. Ct. R. 14.

By contrast, *Jackson* presents potential mootness complications and other jurisdictional questions that strongly militate in favor of granting both of these cases should the Court decide the questions presented warrant review. For one thing, appellate jurisdiction in *Jackson* rests on the proposition that an order disqualifying government counsel is a collateral order subject to immediate appeal, and this Court has never so held. The issue presented in *Jackson* may also become moot. The sole question before the Court there is whether the lower courts properly disqualified Sigal Chattah from the defendants' cases because her appointment violated the FVRA. But in February 2026, the President nominated George Kelesis to serve as U.S. Attorney for the District of Nevada. See Nominations Submitted to the Senate, 2026 Daily Comp. Pres. Doc. Supp. 7 (updated Feb. 13, 2026), *available at* 2026

WL 487918, at *5. That nomination remains pending. If Kelesis is confirmed, there would be a validly appointed U.S. Attorney to supervise the defendants' cases in all respects, and the propriety of Chattah's disqualification would no longer present a live dispute.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied. Alternatively, if the Court determines that the questions presented warrant review, it should grant certiorari in both this case and in *Jackson*, No. 26-304.

Respectfully submitted,

BARBARA D. UNDERWOOD
SOLICITOR GENERAL
KUMIKI GIBSON
OFFICE OF THE NEW YORK STATE ATTORNEY GENERAL
28 Liberty Street
New York, NY 10005
(212) 416-8000

DONALD B. VERRILLI, JR.
Counsel of Record
GINGER D. ANDERS
MUNGER, TOLLES & OLSON LLP
601 Massachusetts Ave. NW
Suite 500E
Washington, DC 20001-5369
(202) 220-1100
Donald.Verrilli@mto.com

HAILYN J. CHEN
VICTORIA A. DEGTYAREVA
MUNGER, TOLLES & OLSON LLP
350 S. Grand Avenue
50th Floor
Los Angeles, CA 90071
(213) 683-9100

Counsel for Respondent
Office of the New York State Attorney General

November 2, 2026