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

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

REPLY BRIEF FOR THE PETITIONER

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Consistent with the government's usual practice when multiple circuits resolve the same issue against it around the same time, the government seeks a hold of this petition pending the disposition of its petition in *United States* v. *Jackson*, No. 26-304 (filed Sept. 8, 2026). Respondent principally argues (Br. in Opp. 12-27) that both petitions should be denied. That contention is unsound for the reasons explained in the government's petition and reply brief in *Jackson*. In the last year, three circuits have held that the Federal Vacancies Reform Act of 1998 (FVRA), 5 U.S.C. 3345 *et seq.*, does not permit acting service by post-vacancy first assistants or the delegation of all of an office's delegable duties. Those decisions created a circuit conflict; upended decades of executive-branch practice; risk chaos during future presidential transitions; and have cast a pall over roughly a dozen U.S. Attorney's Offices nationwide. Certiorari in *Jackson* is plainly warranted.

Respondent alternatively proposes (Br. in Opp. 28-33) that this Court grant plenary review and consolidate both cases. There is no sound basis for that disposition. Respondent would naturally prefer to participate in *Jackson* as a party. But it is free to file an amicus brief or coordinate with the *Jackson* respondents—as it evidently did for the briefs in opposition, which were filed minutes apart, three days before the *Jackson* respondents' deadline. Respondent identifies no valid reason why this Court would benefit from granting it party status, let alone one compelling enough to incur the costs of consolidation, duplicative bottom-side briefing, and an inevitable divided-argument motion.

1. When the government seeks review of a common question in multiple circuits, this Court's typical practice is to grant review in the government's proposed vehicle and hold the other petitions pending the disposition of that case. For example, the Court granted the government's petition in *United States* v. *Hemani*, 608 U.S. 772 (2026), to address whether 18 U.S.C. 922(g)(3) comports with the Second Amendment as applied, and held other government petitions presenting the same question. See, *e.g.*, *United States* v. *Sam*, 146 S. Ct. 2805 (2026) (No. 24-1249); *United States* v. *Daniels*, 146 S. Ct. 2792 (2026) (No. 24-1248). The Court took a similar course in *United States* v. *Davis*, 588 U.S. 445 (2019), and *Sessions* v. *Dimaya*, 584 U.S. 148 (2018).[1] It should do the same here.

Respondent's purported counterexamples (Br. in Opp. 28) are inapposite. All involve *different* petitioners

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[1] See, *e.g.*, *United States* v. *Salas*, 588 U.S. 921 (2019) (No. 18-428) (held for *Davis*); *Sessions* v. *Miranda-Godinez*, 584 U.S. 976 (2018) (No. 16-398) (held for *Dimaya*); *Sessions* v. *Lopez-Islava*, 584 U.S. 976 (2018) (No. 15-1496) (same).

who could not unilaterally recommend a proposed vehicle. And in each of them, there was some affirmative reason to consolidate—a recusal, in *Loper Bright Enterprises* v. *Raimondo*, 603 U.S. 369 (2024); a dispute over which of two alternative fora had jurisdiction, in *Learning Resources, Inc.* v. *Trump*, 607 U.S. 229 (2026); and a question about how the analysis would apply to distinct, albeit similar, statutory schemes, in *Moody* v. *NetChoice, LLC*, 603 U.S. 707 (2024), and *Axon Enterprise, Inc.* v. *FTC*, 598 U.S. 175 (2023). There is no analogous justification here. The questions presented in both cases are identical, and the Court's decision in *Jackson* will resolve this case. There is no reason to hear two identical cases when one will do.

2. Respondent's case-specific reasons for consolidation are unsound.

First, respondent claims (Br. in Opp. 29) that this case has less "anodyne" facts that "offer[] critical context." But those facts indisputably have no *legal* relevance to the pure statutory-interpretation questions presented. Respondent is free to offer whatever "context" it wants in an amicus brief, as are the *Jackson* respondents in their own brief (as they already have, see Br. in Opp. at 2, 11-12, 15, 17, *Jackson*, *supra*). This Court does not need to grant and consolidate this case just to remember that it exists.

Second, respondent asserts (Br. in Opp. 30) that the questions presented have a "far greater impact" here than in *Jackson* because Mr. Sarcone was the sole attorney who obtained the quashed subpoenas, while there are Assistant U.S. Attorneys on the *Jackson* prosecutions. That rationale is wrong twice over.

On the one hand, the *Jackson* respondents obviously see value in disqualifying the Acting U.S. Attorney, or

they would not have sought that remedy. As their forceful opposition brief makes clear, they will vigorously defend respondent's position. Indeed, there is no material difference between the merits arguments presented in the two opposition briefs—granting certiorari in both cases will just double the length of the bottom-side briefing.

On the other hand, respondent overstates the impact of the questions presented on this case. Were respondent to prevail, the result here would be the same as in *Jackson*: The First Assistant U.S. Attorney would be disqualified, but the matter would proceed under the direction of other Department of Justice attorneys. Contrary to respondent's insinuations, such attorneys have not already re-sought the subpoenas in this case for the same reason that the AUSAs in the *Jackson* prosecutions have not sought to advance those cases to trial: The government needs clarity about the cross-cutting FVRA holdings and the ongoing authority of the First Assistant U.S. Attorneys.

Third, respondent contends (Br. in Opp. 30-32) that *Jackson* has antecedent vehicle problems, while this case does not. If anything, the opposite is true.

As detailed in the government's *Jackson* reply, respondent's vehicle objections to *Jackson* are meritless. Every circuit to consider the issue has held that the disqualification of government counsel in a criminal case is immediately appealable because double jeopardy would bar the government from appealing a later acquittal on these grounds. See Cert. Reply Br. at 10-11, *Jackson*, *supra* (*Jackson* Cert. Reply Br.). While the confirmation of a new U.S. Attorney for the District of Nevada would moot *Jackson*, there is no reason to think that the Senate will suddenly act on the President's nominee, af-

ter ten months of delay, during the lame-duck session or after it reconstitutes with new members next year. *Id.* at 12.[2]

This case, by contrast, arises in an uncommon subpoena context and is burdened by a fact-bound mootness issue. Pet. 11-12. Respondent contends (Br. in Opp. 31-32) that the case is not moot, and the government agrees. But the issue is not nearly as straightforward as the faux vehicle objections in *Jackson*.

Mr. Sarcone's service as Acting U.S. Attorney has undisputedly expired because he has surpassed the FVRA's time limit for acting service and no extension provision currently applies. See Pet. App. 12a-13a. Thus, ruling for the government on the first question presented—whether post-vacancy first assistants may serve as acting officers under the FVRA—would provide no effectual relief with respect to the disqualification order as things currently stand. Mr. Sarcone may continue to supervise this case only if the government prevails on the *second* question—allowing him to lead the U.S. Attorney's Office via delegated authority.

Respondent insists (Br. in Opp. 31 n.6) that the Second Circuit's answer to the first question presented "informed" its answer to the second question, so a ruling for the government on the first question has "prospective" significance to Mr. Sarcone's disqualification. It is unclear on what basis respondent makes that assertion. The Second Circuit treated the second question as an "alternative" ground for reversal and rejected the government's argument based on what it called "[a]

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[2] Respondent tellingly does not endorse the *Jackson* respondents' flawed assertions that the FVRA's period for acting service has already expired in Nevada and that this merits issue, not reached below, moots the FVRA question. See *Jackson* Cert. Reply Br. at 11.

straightforward application of the FVRA's exclusivity provision," 5 U.S.C. 3347. Pet. App. 29a, 31a. The first question presented does not involve that provision, and the court of appeals does not appear to have treated its answer to the first question as informing or dictating its answer to the second.

Whether the first question presented remains live thus hinges on the district court's separate order quashing the subpoenas. But under Second Circuit precedent, those subpoenas became unenforceable when the issuing grand jury was discharged. Pet. App. 13a-14a. The court of appeals therefore relied on the mootness exception for issues that are capable of repetition yet evading review, emphasizing "the limited duration for which a grand jury sits." *Id.* at 14a. While the government agrees with the court's bottom-line conclusion, its reasoning did not address whether "there is a reasonable expectation that the same complaining party will be subject to the same action again," *Spencer* v. *Kemna*, 523 U.S. 1, 17 (1998) (brackets omitted), especially in light of the fact that Mr. Sarcone's tenure as Acting U.S. Attorney has now lapsed. That fact-bound issue is not one this Court should unnecessarily force itself to decide in the first instance.

The questions presented in this case and *Jackson* are of exceptional importance and warrant this Court's resolution this Term. But there is no need to saddle the straightforward vehicle in *Jackson* with a gratuitous, and messier, companion case.

* * * * *

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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