

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

DEVONTE DEVON JACKSON, ET AL.

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

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 (plaintiff-appellant/cross-appellee below) is the United States of America.

Respondents (defendants-appellees/cross-appellants below) are Devonte Devon Jackson, Giann Icob Salazar Del Real, and Jorge Enriquez, Jr.

Shamar Tyrell Garcia was also a defendant-appellee/cross-appellant below.

RELATED PROCEEDINGS

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United States v. Jackson, No. 25-cr-240 (Sept. 30, 2025)

United States v. Salazar Del Real, No. 25-cr-227 (Sept. 30, 2025)

United States v. Enriquez, No. 25-cr-26 (Sept. 30, 2025)

United States v. Garcia, No. 25-cr-230 (Sept. 30, 2025)

United States Court of Appeals (9th Cir.):

United States v. Jackson, Nos. 25-6214, 25-6470 (Aug. 17, 2026)

United States v. Salazar Del Real, Nos. 25-6223, 25-6475 (Aug. 17, 2026)

United States v. Enriquez, Nos. 25-6224, 25-6465 (Aug. 17, 2026)

United States v. Garcia, Nos. 25-6229, 25-6468 (Aug. 17, 2026)

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OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-34a) is available at 2026 WL 2387099. The order of the court of appeals granting a stay of the mandate and denying a stay of the judgment (App., *infra*, 78a-80a) is unreported. The opinion of the district court (App., *infra*, 35a-77a) is available at 2025 WL 2784640. The order of the district court granting a stay pending appeal (App., *infra*, 82a-86a) is available at 2025 WL 2985284.

JURISDICTION

The judgment of the court of appeals was entered on August 17, 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*, 87a-100a.

INTRODUCTION

Often, when there is a vacancy in an executive-branch office that requires Senate confirmation, there is either no incumbent first assistant to the vacant office or the incumbent first assistant is not suitable to serve as an acting replacement. When faced with that situation—which is frequent after presidential transitions—the Executive Branch has several well-established alternatives to ensure that the functions and duties of the vacant Senate-confirmed office continue to be performed.

Under the Federal Vacancies Reform Act of 1998 (FVRA), 5 U.S.C. 3345 *et seq.*, the Executive Branch has multiple options in selecting an acting official. For decades, a commonly selected option has been that, after the vacancy arises, the agency head appoints a new first assistant, thus making that person the acting officer under 5 U.S.C. 3345(a)(1). For example, David Barron served as Acting Assistant Attorney General for the Office of Legal Counsel (OLC) in the Obama Administration after being appointed Principal Deputy Assistant Attorney General when there was no confirmed OLC head. Likewise, Noel Francisco, Jeffrey Wall, Elizabeth Prelogar, Brian Fletcher, and Sarah Harris each served as Acting Solicitor General after being appointed Principal Deputy Solicitor General when there was no confirmed Solicitor General.

Even in circumstances when the FVRA does not permit a person to serve as an acting officer, the Executive Branch has long followed a practice of delegating some or all of the delegable powers of the vacant office to that person if such delegations are otherwise authorized by the statutes governing the office. For example, Steven Bradbury led OLC during the end of the George W. Bush Administration as Principal Deputy Assistant At-

torney General. And Brian Boynton led the Civil Division for the entire Biden Administration, much of it as Principal Deputy Assistant Attorney General. While individuals receiving such delegations may not use the “Acting” title or exercise any powers of the vacant office that are exclusive or nondelegable, they otherwise can provide day-to-day leadership and supervision, ensuring that the work of government carries on. That is particularly true at the Department of Justice, where the Attorney General not only has statutory authority to delegate virtually all of the powers of his subordinates, but also has his own authority to conduct, direct, and supervise litigation on behalf of the United States.

Notably, the Executive Branch’s longstanding positions about the scope of the FVRA do not reflect unilateral aggrandizement. The Government Accountability Office (GAO)—the legislative-branch entity tasked with enforcing the FVRA, 5 U.S.C. 3349; 31 U.S.C. 702—expressly endorsed these positions during the George W. Bush Administration. And the Federal Circuit rejected a challenge to the delegation position on one of the rare occasions when it was challenged during past Administrations.

During the current Administration, however, three courts of appeals have upended that longstanding consensus. According to the Second, Third, and Ninth Circuits, a first assistant may serve as the acting officer under Section 3345(a) *only* if she was already 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.

The Ninth Circuit below therefore disqualified Sigal Chattah, the First Assistant U.S. Attorney for the District of Nevada, from supervising these criminal cases. It reasoned that she cannot serve as Acting U.S. Attorney because she was designated as First Assistant after the last Senate-confirmed U.S. Attorney left office. And it held that she could not exercise the Attorney General’s delegated authority to supervise cases in Nevada because that would make her a “de facto” Acting U.S. Attorney. Each holding is incorrect.

First, nothing in the FVRA’s text limits acting service to the pre-vacancy first assistant. To the contrary, the statute uses the present tense. It allows the first assistant to “perform” the office’s functions and duties on an ongoing basis when an officer “dies, resigns, or is otherwise unable to perform the functions and duties of the office.” 5 U.S.C. 3345(a) and (a)(1) (emphasis added). And rather than being limited to the individual who was the first assistant to the outgoing officer, it uses office-centric language that covers any person serving in the position of first assistant: “the first assistant *to the office* of such officer.” 5 U.S.C. 3345(a)(1) (emphasis added).

While the FVRA also authorizes the President to designate a limited set of other individuals to serve as acting officers when the first assistant is not available or suitable, see 5 U.S.C. 3345(a)(2) and (a)(3), those provisions in no way prohibit the agency head from instead appointing a new first assistant under Section 3345(a)(1). Rather, they give the Executive flexibility in selecting acting officers and also fill a critical gap when Section 3345(a)(1) is not available—for example, when the first-assistant post itself is vacant and requires Senate confirmation.

Second, nothing in the FVRA’s text bars an agency head from delegating a vacant office’s delegable duties to another official, particularly when those powers are not exclusive to the vacant office but instead vested independently in the agency head. Although the FVRA is “the exclusive means for temporarily authorizing *an acting official* to perform the functions and duties” of an office, 5 U.S.C. 3347(a) (emphasis added), a person exercising delegated powers is not “an acting official,” as the FVRA itself makes clear. Rather than wielding all the power of the vacant office by virtue of standing in the shoes of the absent officer, she exercises whatever powers have been granted to her own position by virtue of the delegation from the agency head.

The contrary holdings below warrant this Court’s review. On the second question presented, the Second, Third, and Ninth Circuits have avowedly split from the Federal Circuit, which has approved the total delegation of a vacant office’s delegable duties in analogous circumstances. And on both questions presented, the courts have disabled a critical tool that the Executive Branch has used without meaningful objection for 25 years.

The lower courts’ holdings risk chaos at the next presidential transition when officers and their first assistants typically resign together, leaving the new Administration with few good options for acting officers to safeguard critical posts pending confirmation of permanent replacements. More immediately, the decision below threatens to inject mass confusion into five U.S. Attorney’s Offices in the Ninth Circuit that collectively handle over 8000 civil and criminal cases annually. This Court’s swift intervention is warranted to put that uncertainty to rest.

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 Depart-

ment 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 OLC—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 FVRA, 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 January 17, 2025, the U.S. Attorney for the District of Nevada—a PAS officer appointed by President Biden—resigned. See App., *infra*, 3a. “During the first year of President Trump’s second term, the Senate was especially slow to confirm U.S. Attorneys”—confirming *no* nominees for the first nine months of the Administration. *In re Grand Jury Subpoenas*, No. 26-156, 2026 WL 2450485, at *18 (2d Cir. Aug. 21, 2026) (Park, J., dissenting). The Attorney General therefore turned to other authorities to ensure that U.S. Attorney’s Offices had leadership aligned with the President’s priorities.

In March 2025, Attorney General Bondi appointed Sigal Chattah as U.S. Attorney for the District of Nevada under 28 U.S.C. 546(a). App., *infra*, 36a. On July 28, 2025, before her 120-day term expired, Ms. Chattah resigned. *Id.* at 4a. Invoking authority under statutes including 28 U.S.C. 509, 510, and 515, the Attorney General appointed Ms. Chattah as a “Special Attorney” and designated her as the First Assistant U.S. Attorney for the District of Nevada. App., *infra*, 37a. Ms. Chattah then began serving as Acting U.S. Attorney under the FVRA. *Id.* at 4a. President Trump has since nominated George Kelesis to serve as the U.S. Attorney for Nevada, but his nomination remains pending in the Senate. See *id.* at 6a; Congress.gov, *PN805 – George Kelesis – Department of Justice*, <https://www.congress.gov/nomination/119th-congress/805>.

2. After Ms. Chattah assumed her new role, Assistant U.S. Attorneys in the District of Nevada obtained indictments against each respondent. App., *infra*, 4a. Devonte Devon Jackson was charged with Hobbs Act robbery, in violation of 18 U.S.C. 1951, and brandishing a firearm during a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(ii), after he allegedly robbed \$327,620 from an armored truck. 25-cr-240 Indictment 1-2. Giann Icob Salazar Del Real was charged with distributing methamphetamine and fentanyl, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); possessing cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(B)(ii); possessing several firearms as an alien unlawfully in the United States, in violation of 18 U.S.C. 922(g)(5)(A) and 924(a)(8); and possessing a firearm during and in relation to a drug-trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A)(i). 25-cr-227 Indictment 1-4. Jorge Enriquez, Jr., was charged with vehicular assault in Indian country, in violation of 18 U.S.C. 113(a)(3), 1151, and 1153. 25-cr-26 Indictment 1-2.

Each respondent challenged Ms. Chattah's service as Acting U.S. Attorney, seeking dismissal of the indictment or her disqualification from supervising the case. App., *infra*, 4a. Chief Circuit Judge Murguia designated an out-of-district judge to sit in Nevada, and the motions were assigned to him. *Id.* at 5a.

3. The district court denied the motions to dismiss the indictments. App., *infra*, 68a-74a. But it held that Ms. Chattah was not validly serving as Acting U.S. Attorney and disqualified her from supervising the cases. *Id.* at 43a-68a, 75a. The court concluded that only the incumbent first assistant at the time the vacancy arises—not a later designee like Ms. Chattah—is eligible to be the acting officer under Section 3345(a)(1). *Id.* at 46a.

Although the court acknowledged that the FVRA did “not explicitly say” as much, it found that limit implicit in the statute’s text, structure, and legislative history. *Id.* at 55a; see *id.* at 43a-60a.

The district court also rejected the government’s alternative argument that Ms. Chattah could supervise these cases because she has been delegated authority from the Attorney General to supervise federal prosecutions in Nevada. App., *infra*, 60a-68a. The court held that the delegation violated the FVRA’s provision making it the “‘exclusive means’” for designating “‘an acting official to perform the functions and duties’ of a PAS office.” *Id.* at 61a (quoting 5 U.S.C. 3347(a)).

On the government’s motion, the district court stayed the disqualification orders pending appeal. App., *infra*, 85a.

4. The government appealed the disqualification orders, and respondents cross-appealed the denial of the motions to dismiss. App., *infra*, 6a. The court of appeals dismissed the cross-appeals for lack of appellate jurisdiction, *id.* at 32a-34a, but affirmed the disqualification orders, *id.* at 1a-32a.

The court of appeals 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*, 12a-27a. Because that provision automatically elevates the first assistant, the court asserted, the elevation can occur only the moment the vacancy begins. *Id.* at 13a. Further, the court noted, the time limit on acting service runs from the date of the vacancy, which the court took as confirmation that Section 3345(a)(1) is a one-time automatic-succession provision. *Id.* at 14a. The court also stated that allowing the Executive to designate a new first assistant would render the President’s alter-

native methods in Section 3345(a)(2) and (a)(3) “largely irrelevant.” *Id.* at 20a. And the court read the FVRA’s legislative history to support its interpretation. *Id.* at 20a-25a. The court gave “no weight” to the fact that OLC and GAO have both approved acting service by post-vacancy first assistants since 2001. *Id.* at 26a.

The court of appeals also held that Section 3347(a)’s exclusivity provision forbade the Attorney General from making Ms. Chattah a “de facto Acting U.S. Attorney” by delegating to her all of a U.S. Attorney’s powers. App., *infra*, 3a. The court agreed that “the Attorney General has broad authority to designate individuals ‘to perform certain functions and duties’ of a vacant office.” *Id.* at 31a. But the Attorney General’s delegation went too far, the court reasoned, because it gave Ms. Chattah *all* of a U.S. Attorney’s powers. *Ibid.* The court did not decide whether a “more limited delegation[] might be permissible.” *Id.* at 32a.

On the government’s motion, the court of appeals stayed its mandate pending this petition but declined to stay entry of the judgment. App., *infra*, 79a-80a.

REASONS FOR GRANTING THE PETITION

The court of appeals held that, under the FVRA, the Executive Branch may neither designate a new first assistant to serve as an acting officer under Section 3345(a)(1) nor delegate all delegable duties of a vacant office to a single individual in light of Section 3347(a). Those holdings misconstrue the text and structure of the statute. They upend a quarter-century of practice. They threaten chaos for the next presidential transition. And they cast a pall over prosecutions in 14 judicial districts nationwide, including five in the Ninth Circuit. In addition, the second holding deepens an acknowledged circuit conflict. This case warrants review.

A. The Decision Below Is Wrong

The court of appeals erred in rejecting Ms. Chattah’s authority to supervise these prosecutions, either as Acting U.S. Attorney or as the Attorney General’s delegee.

1. *Section 3345(a)(1) makes the first assistant the acting officer even if designated after the vacancy arises*

The FVRA provides that when 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) and (a)(1). Thus, “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 acting officer.” *In re Grand Jury Subpoenas*, No. 26-156, 2026 WL 2450485, at *19 (2d Cir. Aug. 21, 2026) (Park, J., dissenting). The application of that rule is “straightforward” here, *ibid.*: (1) The office of U.S. Attorney for the District of Nevada is vacant; (2) Ms. Chattah is the first assistant to that office; and (3) the FVRA’s time limits have not expired. Ms. Chattah is thus the Acting U.S. Attorney under Section 3345(a)(1).

a. The court of appeals held otherwise on the theory that Section 3345(a)(1) applies only to the incumbent first assistant at the time the vacancy arose. App., *infra*, 13a. But as the district court candidly admitted, *id.* at 55a, that artificial limitation is nowhere stated in the text. To the contrary, several textual and structural features, as well as historical practice, confirm that Section 3345(a)(1) applies on an ongoing basis to whoever is serving as first assistant while the vacancy persists.

First, Section 3345(a)(1) refers to “the first assistant to *the office* of such officer.” 5 U.S.C. 3345(a)(1) (emphasis added). That office-centric language makes clear that

the relevant first assistant is not simply the person who happened to be the first assistant to the outgoing *officer*. It is the first assistant to the *office*, whoever that person may be and whenever she was designated. While Ms. Chattah was not the first assistant under the outgoing U.S. Attorney, she is indisputably the first assistant to the *office* of U.S. Attorney for the District of Nevada. App., *infra*, 37a.

In enacting Section 3345(a)(1), Congress deviated from the FVRA’s predecessor, which provided that, in an officer’s absence, “*his* first assistant” would perform his duties. 5 U.S.C. 3345, 3346 (1994) (emphasis added). That language might have supported an incumbency requirement, because it at least could be argued that only the pre-vacancy first assistant is *the outgoing officer’s* first assistant. But the FVRA jettisoned that language, broadening the statute’s scope to cover any “first assistant to the *office* of such officer.” 5 U.S.C. 3345(a)(1) (emphasis added). That change in the statutory text presumptively changes the statute’s meaning. See *FS Credit Opportunities Corp. v. Saba Capital Master Fund, Ltd.*, 608 U.S. 608, 620 (2026). In particular, it renders irrelevant the question whether the current first assistant served under the prior PAS officer.

Second, Section 3345(a)(1) uses the present tense. It is triggered when a PAS official “dies, resigns, or *is* otherwise unable to perform the functions and duties of the office.” 5 U.S.C. 3345(a) (emphasis added). So long as that vacancy persists, “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) (emphasis added). That present-tense formulation means that Section 3345(a) has a “continuing,” prospective effect. *Kennedy v. Braidwood Mgmt., Inc.*, 606 U.S. 748, 789 (2025). The

first assistant does not perform the functions and duties of the office for just the instant the vacancy arises. Rather, a vacancy is “a continuing state,” *NLRB v. Noel Canning*, 573 U.S. 513, 539 (2014), and during that entire period, the first assistant “shall perform” those responsibilities, whoever the first assistant may be at any given moment.

Third, when Congress wanted to impose an incumbency restriction elsewhere in the FVRA, it did so expressly. In Section 3345(a)(3), Congress allowed the President to bypass the first assistant and designate a different senior official as the acting officer. But that other official must have served 90 days at the agency “during the 365-day period preceding the date of death, resignation, or beginning of inability to serve” of the PAS officer. 5 U.S.C. 3345(a)(3)(A). Similarly, the acting officer generally may not be the nominee for the permanent position unless she served 90 days as first assistant “during the 365-day period preceding the date of death, resignation, or beginning of inability to serve.” 5 U.S.C. 3345(b)(1)(A).

Congress could have easily pegged Section 3345(a)(1) to the date of the vacancy using parallel language. For example, Congress could have provided that “the first assistant to the office *as of the date of such officer’s death, resignation, or beginning of inability to serve* shall perform the functions and duties of the office.” Yet Congress omitted such language from Section 3345(a)(1) even though it appears twice just a few lines later. That difference in language—particularly within the same section—presumptively conveys a difference in meaning. See *Bowe v. United States*, 607 U.S. 13, 36–37 (2026).

Indeed, Congress included precisely such language in a different statute governing vacancies in the office of Inspector General, which is not subject to the FVRA. 5 U.S.C. 403 note. That statute provides a similar default rule: When “an Inspector General dies, resigns, or is otherwise unable to perform the functions and duties of the position, * * * the first assistant to the position of Inspector General shall perform the functions and duties of the Inspector General temporarily in an acting capacity.” *Ibid.* Critically, however, that statute defines “‘first assistant’” as the first assistant “as of the day before the date on which the Inspector General dies, resigns, or otherwise becomes unable to perform.” *Ibid.* That limiting language simply and unambiguously restricts acting service to the pre-vacancy first assistant. Its absence from the FVRA—a law that “handle[s] much the same task” of designating acting officers—is telling. *Wisconsin Cent. Ltd. v. United States*, 585 U.S. 274, 279 (2018).

Fourth, “the political branches have endorsed this understanding in opinion and practice.” *In re Grand Jury Subpoenas*, 2026 WL 2450485, at *20 (Park, J., dissenting). In 2001—just three years after the FVRA’s enactment, and following the first presidential transition since its passage—OLC thoroughly analyzed the FVRA’s text and structure to explain why the “most natural reading” is that any first assistant, not just the one “in place at the time the vacancy occurred,” is the acting officer. 25 Op. O.L.C. 177, 180 (2001). And the GAO—the arm of Congress headed by the Comptroller General and tasked with enforcing the FVRA, 5 U.S.C. 3349; 31 U.S.C. 702—“concur[red]” in that view. See Letter from Victor S. Rezendes to Sen. Joseph I.

Lieberman 2 (Dec. 7, 2001), <https://www.gao.gov/assets/gao-02-272r.pdf>.*

In the ensuing 25 years, the Executive Branch has routinely designated new first assistants to serve as acting officers. OLC has identified 31 such examples since the George W. Bush Administration at the Department of Justice alone—a number that this Office is informed is likely a substantial undercount given inconsistent recordkeeping. See *In re Grand Jury Subpoenas*, 2026 WL 2450485, at *20 & n.9 (Park, J., dissenting).

That practice is particularly common during presidential transitions when the outgoing officer and his first assistant typically resign before noon on January 20, and a new first assistant/acting officer arrives after the President is sworn in. At the beginning of the Biden Administration, for example, the Acting Deputy Attorney General, the Acting Associate Attorney General, the Acting Solicitor General, and the Acting Assistant Attorneys General for the Criminal Division, the Civil Division, OLC, and the Office of Legislative Affairs were *all* post-vacancy first assistants. While the text of course controls, that “long-continued,” bipartisan practice, “known to and acquiesced in by Congress,” is a strong indication of the FVRA’s correct meaning. *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981).

b. The Ninth Circuit’s contrary reading of the text is unpersuasive. As a threshold matter, the court all but

* In an earlier document answering 53 initial questions shortly after the FVRA’s enactment, OLC stated its tentative view “that you must be the first assistant when the vacancy occurs.” 23 Op. O.L.C. 60, 64 (1999). As OLC later explained, however, that document did “not thoroughly consider (or definitively resolve) the issue” and “was offered without explanation or, more importantly, any analysis of the Act’s text or structure.” 25 Op. O.L.C. at 179.

ignored the “first assistant to the office” language, burying its response on that critical point in its discussion of legislative history. See App., *infra*, 24a. The court instead emphasized that Section 3345(a)(1) operates “automatically” because it uses the word “shall,” which the court reasoned meant that the elevated first assistant must be the one “serving at the time the vacancy begins.” *Id.* at 13a. And the court reinforced that conclusion by stressing that Section 3345(a)(1) uses “the definite article—*the* first assistant”—which the court took to mean that “only one first assistant is subject to immediate, automatic elevation.” *Ibid.* Both the premises and the conclusion of that argument are flawed.

Section 3345(a)(1) does not provide for a one-time “automatic elevation,” App., *infra*, 14a, of the incumbent first assistant. It provides that the first assistant “shall *perform*” the office’s functions and duties. 5 U.S.C. 3345(a)(1) (emphasis added). And *performance*, unlike elevation, is an ongoing activity. See pp. 15-16, *supra*. The current first assistant performs the duties on a continuing basis while the vacancy persists, regardless of when it began (subject to the FVRA’s time limits and unless an alternative to Section 3345(a)(1) is invoked).

Plus, even if Section 3345(a)(1) were an “automatic elevation” provision, it would not follow that it applies solely to the pre-vacancy first assistant. Just because something happens automatically does not mean it can happen only once. See *In re Grand Jury Subpoenas*, 2026 WL 2450485, at *22 (Park, J., dissenting) (recognizing that, while the verb “shall” makes the operation of Section 3345(a)(1) automatic, it lacks “temporal significance”). Of course, there is only one first assistant at any given time. But during the period while the PAS officer “is * * * unable” to serve, the first assistant

automatically “shall perform” the office’s functions and duties—whenever she assumed that role. 5 U.S.C. 3345(a) and (a)(1).

That ongoing obligation makes sense because the point of Section 3345(a)(1) is to establish a default rule to ensure the performance of the functions and duties of a PAS office during a vacancy. Imagine a terrorist bio-attack kills the Director of the Centers for Disease Control and Prevention (CDC). Section 3345(a)(1) allows the Principal Deputy Director to immediately take over the Director’s critical duties. If the Principal Deputy Director then also succumbs to the attack, the CDC Chief Medical Officer, as the new first assistant, would—in the government’s view—automatically take over. See 89 Fed. Reg. 54,890 (July 2, 2024). But under the Ninth Circuit’s view, Section 3345(a)(1) would stop with the incumbent first assistant due to the fortuity that he died *after* the PAS officer rather than *before* her. The duties of CDC Director would go unfulfilled during the crisis until the President could make a new designation under Section 3345(a)(2) or (a)(3). That threat to the continuity of government turns Section 3345(a)(1) on its head.

The Ninth Circuit dismissed the point that the first assistant shall perform as the acting officer for the continuing period while the PAS officer “*is* otherwise unable” to serve. App., *infra*, 15a. It reasoned that, because the preceding terms (“dies” and “resigns”) refer to a “single instance,” the phrase “is otherwise unavailable” likewise refers to the discrete moment in time at which a validly appointed official *becomes* unable to perform his duties.” *Id.* at 15a-16a. That rewrites the statute and is also a non sequitur. While “dies” and “resigns” refer to a discrete moment when the vacancy *begins*, each term gives rise to a vacancy that *persists*; and

during that continuing period, whoever is the first assistant “shall perform” as the acting officer.

Indeed, the phrase “dies, resigns, or is otherwise unable to perform” cannot have the temporal significance that the court suggested, because it is not specific to first assistants under Section 3345(a)(1). It is located in the umbrella paragraph of Section 3345(a), and thus also triggers the President’s ability under Section 3345(a)(2) and (a)(3) to designate a PAS officer or senior agency official as the acting officer in lieu of the first assistant. Yet neither the Ninth Circuit nor respondents have disputed that the President necessarily makes designations under those provisions *after* the vacancy begins and sometimes *changes* them. There is no textual reason why a new first assistant cannot likewise become the acting officer under Section 3345(a)(1).

The same flaws taint the Ninth Circuit’s observation that Congress pegged the duration of FVRA service to “the date the vacancy occurs,” rather than the date the acting officer assumed his duties. App., *infra*, 14a (quoting 5 U.S.C. 3346(a)(1)). While the court inferred from this that Congress must have wanted only one acting officer whose service would begin on the date of the vacancy, *ibid.*, the conclusion does not follow. Congress limited FVRA service to prevent the Executive Branch from designating new acting officers indefinitely. If an acting officer resigns 209 days after the vacancy, the Executive may not designate a new acting officer for another 210 days; any new designee may serve only one more day (unless an extension applies). See 5 U.S.C. 3346(a)(1). But if the acting officer dies only one day into his service, there is no reason to think that Congress wanted there to be *no* acting officer for the remaining 209 days. Again, no one claims the fact that the

FVRA’s time limits are pegged to the date the vacancy arises precludes the President from designating a new acting officer under Section 3345(a)(2) or (a)(3) if the initial one leaves before the vacancy is filled.

c. The Ninth Circuit also heavily relied on a structural objection that the government’s reading would render Section 3345(a)(2) and (a)(3) “largely irrelevant” because the Executive could use Section 3345(a)(1) to make anyone a new first assistant, bypassing the qualifications required to serve under Section 3345(a)(2) and (a)(3). App., *infra*, 20a; see *id.* at 17a-20a. But as the court ultimately conceded, *id.* at 18a-19a, there are several scenarios in which the President would need to use those provisions and adhere to their limits.

Most obviously, the first assistants to many agency heads—including the Attorney General and the Secretaries of State, Treasury, War, Interior, Agriculture, Labor, Housing and Urban Development, Transportation, Energy, Education, and Homeland Security—all themselves require Senate confirmation, so the Executive cannot unilaterally appoint a new first assistant to those posts. See *In re Grand Jury Subpoenas*, 2026 WL 2450485, at *22 n.13 (Park, J., dissenting) (cataloging 22 such provisions). Other first assistants must be appointed by the agency head, so those positions too will go unfilled when the agency head is also vacant. See *id.* at *22 n.15. And the President also must use Section 3345(a)(2) or (a)(3) if he concludes that the incumbent first assistant is better suited to continuing to perform second-in-command responsibilities, and thus should not take over the top job even temporarily.

The Ninth Circuit speculated that such circumstances would be “rare.” App., *infra*, 19a. To the contrary, on the first day of this Administration alone, the President

made 31 designations under Section 3345(a)(2) and (a)(3). See The White House, *President Trump Announces Acting Cabinet and Cabinet-Level Positions* (Jan. 20, 2025), <https://perma.cc/79PA-GJFQ>. Regardless, rarity is not the same thing as superfluity. Courts have no license to rewrite statutes based on speculation about how frequently Congress might have expected alternative provisions to be invoked.

In all events, the Ninth Circuit’s reading fails to accomplish its stated objective. Even if Section 3345(a)(1) were limited to incumbent first assistants, the Executive still could select as acting officers persons who lacked the qualifications required under Section 3345(a)(2) and (a)(3), so long as it made them the first assistant *one minute before* the PAS officer vacated office—which it easily could do in cases where the PAS officer is fired or resigns with advance notice. To be sure, that could not be done where, as here, the PAS officer leaves before a presidential transition (or dies or resigns unexpectedly). But those are the circumstances when it is most important that the Executive have flexibility in selecting an acting officer and when Section 3345(a)(2) and (a)(3) are likely to be inadequate. For example, after presidential transitions, there will be few suitable PAS officers left in the government, and the senior agency officials remaining may well not support the incoming Administration’s policies. It is thus no surprise that the consistent practice has been to appoint new first assistants to serve as acting officers under Section 3345(a)(1). See pp. 17-18, *supra*.

d. The Ninth Circuit also claimed that the legislative history “reinforce[d]” its reading. App., *infra*, 20a. At the outset, the FVRA’s legislative history is an especially dubious source because legislators seeking to cabin ex-

ecutive power had every incentive to describe the restrictions broadly while loosening the statutory text to win the President’s approval. “But to the extent the history is relevant, it tends to support [the government’s] interpretation.” *In re Grand Jury Subpoenas*, 2026 WL 2450485, at *19 n.8 (Park, J., dissenting).

The Ninth Circuit primarily focused on a Senate report that describes Section 3345(a)(1) as applying to the first assistant “at the time the vacancy arose.” App., *infra*, 23a (quoting S. Rep. No. 250, 105th Cong., 2d Sess. 15 (1998) (Senate Report)) (emphasis omitted). But that report addressed an *earlier* bill that—unlike the enacted bill—applied only to “the first assistant of *such officer*.” Senate Report 25 (emphasis added). Like the FVRA’s predecessor, that language could arguably have been construed to apply only to the incumbent first assistant who personally served under the outgoing officer. See p. 15, *supra*.

That language, however, was changed after Senator Lieberman warned that such a “severe limitation on the universe of individuals who may serve as acting” would be “harmful to the functioning of the executive branch.” 144 Cong. Rec. 22,525 (1998). In the final version, Congress “‘depersonalize[d]’ the first assistant,” inserting the “‘to the office’” language that remains in the FVRA today. *Id.* at 27,496 (statement of Sen. Thompson). The Ninth Circuit’s view that the change from “first assistant of such officer” to “first assistant to the office of such officer” had no substantive effect (see App., *infra*, 25a) violates the rule against superfluity. See *Chevron USA Inc. v. Plaquemines Parish*, 608 U.S. 1, 15 (2026). While that canon is not absolute, it should apply with special force where the language was specifically added to a bill and made the phrase more cumbersome for no

other plausible purpose. See *ibid.* That textual addition thus eliminates any possible doubt that Section 3345(a)(1) applies to the current first assistant, whenever she assumed the role.

2. Section 3347(a) does not prohibit delegating all delegable duties of a vacant office

Even absent an acting U.S. Attorney, the Attorney General may delegate all of the delegable powers of that office to another person serving in the Department of Justice. Under 28 U.S.C. 509, “[a]ll functions of” nearly all “other officers of the Department of Justice,” including U.S. Attorneys, “are vested in the Attorney General.” In addition, the Attorney General has independent personal authority to “supervise all litigation to which the United States * * * is a party” and to “direct all * * * assistant United States attorneys.” 28 U.S.C. 519. And finally, the Attorney General may “authoriz[e] the performance” of those functions “by any other officer, employee, or agency of the Department of Justice,” 28 U.S.C. 510, including by “specially appoint[ing]” attorneys to “conduct any kind of legal proceeding * * * which United States attorneys are authorized by law to conduct,” 28 U.S.C. 515(a). These and other provisions (see pp. 7-8, *supra*) amply authorized Attorney General Bondi’s delegation of power to Ms. Chattah to lead the U.S. Attorney’s Office for the District of Nevada. See *In re Grand Jury Subpoenas*, 2026 WL 2450485, at *24-*26 (Park, J., dissenting).

a. The Ninth Circuit held otherwise on the theory that the delegation was prohibited by the FVRA’s exclusivity provision, 5 U.S.C. 3347. App., *infra*, 28a-32a. That provision states that, unless another statute “expressly” provides otherwise, “Sections 3345 and 3346 are the exclusive means for temporarily authorizing an

acting official to perform the functions and duties of any [PAS] office of an Executive agency.” 5 U.S.C. 3347(a). Section 3347 further states that a “statutory provision providing general authority” to “delegate” or “reassign duties” is not an express provision that can overcome the exclusivity clause. 5 U.S.C. 3347(b).

The Ninth Circuit did not dispute that the Attorney General could have validly delegated authority to supervise these three prosecutions (and perhaps all criminal prosecutions in Nevada) to Ms. Chattah. See App., *infra*, 32a. Instead, the court reasoned that because the Attorney General had delegated *additional* powers to Ms. Chattah—namely, “all” of the powers of the U.S. Attorney—she was serving as “de facto Acting U.S. Attorney” in violation of Section 3347(a). *Id.* at 3a.

Section 3347(a), however, does not limit who can perform duties of a vacant office *through delegation*. Rather, it limits who can “perform the functions and duties of an[] office” as “an acting official.” 5 U.S.C. 3347(a) (emphasis added). That difference is fundamental because an acting officer can also perform any *nondelegable* duties of the PAS office. For example, the Assistant Attorney General for the Civil Rights Division—an office that helped spark the FVRA, see App., *infra*, 21a-22a—must personally certify federal civil-rights prosecutions (unless a more senior official does so), and that duty “may not be delegated.” 18 U.S.C. 245(a)(1). A validly serving Acting Assistant Attorney General can perform that certification function. But a first assistant merely performing the delegable duties of that office may not. The same goes for the power to appoint inferior officers, which may constitutionally be performed by an acting agency head, but not by a person merely exercising delegated powers from the agency head.

The FVRA itself recognizes the distinction between delegable and nondelegable duties. Under the FVRA’s remedies provision, 5 U.S.C. 3348, an action taken by an official not validly serving under the FVRA “in the performance of any function or duty of a vacant office * * * shall have no force or effect” and may not be ratified. 5 U.S.C. 3348(d)(1). For purposes of that provision, a “function or duty” is one that is required by statute or regulation “to be performed by the applicable officer (and only that officer)”—*i.e.*, one that is exclusive and nondelegable. 5 U.S.C. 3348(a)(2)(A)(ii) and (B)(i)(II). While that definition is limited to Section 3348, it confirms the critical distinction between acting officials sanctioned by the FVRA and mere delegees performing an office’s delegable duties.

The Ninth Circuit dismissed that distinction because, in the government’s view, *all* of a U.S. Attorney’s functions and duties are delegable. App., *infra*, 30a-31a. But some lower courts have held otherwise, see *id.* at 30a, and a valid “Acting” title avoids that litigation risk. Regardless, the FVRA applies to virtually all PAS offices in the Executive Branch, see 5 U.S.C. 3345(a), and nothing in its text distinguishes between those offices that happen to have nondelegable duties and those that do not. Either way, the official receiving delegated authority is not an “acting official” and does not violate Section 3347. *In re Grand Jury Subpoenas*, 2026 WL 2450485, at *25 (Park, J., dissenting) (emphasis omitted).

Again, longstanding practice, which the Ninth Circuit disregarded, confirms that understanding. Since the FVRA’s enactment, OLC has maintained that “the Act permits non-exclusive responsibilities to be delegated to other appropriate officers and employees in the agency.” 23 Op. O.L.C. at 72. For example, Brian Boyn-

ton led the Civil Division for the entire Biden Administration, using the title of “Principal Deputy Assistant Attorney General” to authorize countless briefs, lawsuits, and personnel decisions after his service as Acting Assistant Attorney General expired. Likewise, during the George W. Bush Administration, Steven Bradbury led OLC for 25 months as Principal Deputy Assistant Attorney General. See Letter from Gary L. Kepplinger to Sen. Richard J. Durbin 2 (June 13, 2008), <https://perma.cc/VA4L-9G6L>. GAO, Congress’s FVRA watchdog, expressly approved that service, relying on the delegable-versus-nondelegable distinction that the government advances here. See *id.* at 5.

b. The Ninth Circuit’s position is particularly unconvincing because Attorney General Bondi delegated Ms. Chattah her own *independent* power to supervise the U.S. Attorney’s Office for the District of Nevada, wholly apart from the parallel power of the departed U.S. Attorney. See p. 10, *supra*. Indeed, even if there had been no vacancy at all, Attorney General Bondi could have directed all Assistant U.S. Attorneys to report to Ms. Chattah as First Assistant and to disregard any contrary views of the U.S. Attorney. See *United States v. Hilario*, 218 F.3d 19, 22 (1st Cir.) (Assistant U.S. Attorneys’ “ability to act does not hinge on the authority of the local United States Attorney, but derives from the Attorney General’s plenary power over litigation to which the United States is a party.”), cert. denied, 531 U.S. 1014 (2000). Because the office of U.S. Attorney would not be vacant, the FVRA’s exclusivity provision would have nothing to say about that exercise of the chain of command.

Likewise, in a standing delegation dating back four decades, the Attorney General has vested the Deputy Attorney General with “all the power and authority of the Attorney General,” except for the nondelegable powers that the Attorney General must exercise “personally.” 28 C.F.R. 0.15(a); see 50 Fed. Reg. 25,708 (June 21, 1985). The Deputy Attorney General thus possesses all of the powers of a U.S. Attorney for the District of Nevada—and those of every other U.S. Attorney to boot. Yet no one thinks that makes him a “de facto U.S. Attorney” in violation of the FVRA’s exclusivity provision whenever the FVRA’s time limits for an Acting U.S. Attorney have expired.

B. The Decision Below Warrants Review

The court of appeals’ decision joins an acknowledged circuit conflict, threatens chaos during the next presidential transition, and upends federal prosecutions in five districts. This Court’s review is warranted.

1. As the Ninth Circuit recognized (App., *infra*, 31a), its decision on the second question presented conflicts with the Federal Circuit’s holding in *Arthrex, Inc. v. Smith & Nephew, Inc.*, 35 F.4th 1328 (2022), cert. denied, 143 S. Ct. 2493 (2023).

In *Arthrex*, a litigant before the Patent Trial and Appeal Board sought rehearing from the Director of the Patent and Trademark Office, a PAS officer. 35 F.4th at 1332. But the offices of the Director and Deputy Director were vacant, and the Commissioner for Patents—a non-PAS official—had been delegated all “non-exclusive functions and duties of the Director.” *Ibid.* (brackets omitted). Exercising that authority, the Commissioner denied rehearing. *Ibid.*

The litigant argued that the FVRA’s exclusivity provision in Section 3347 barred the Commissioner from

exercising the Director’s delegated authority. *Arthrex*, 35 F.4th at 1335. The Federal Circuit disagreed. *Ibid*. Relying on the FVRA’s remedies provision in Section 3348, the court explained that “[t]he plain language of the statute limits the scope of the FVRA to non-delegable functions and duties.” *Id.* at 1338. It does not “restrict who may perform a PAS officer’s delegable duties when he was absent.” *Ibid*. Because the power to grant or deny rehearing was delegable and had been delegated, the FVRA did not preclude the Commissioner from deciding the rehearing request. *Id.* at 1339. The Federal Circuit thus found no problem with delegating to the Commissioner *all* of the Director’s delegable powers. See *id.* at 1339 & n.5.

Conversely, the Second and Third Circuits have recently reached the same conclusion as the Ninth Circuit on both questions presented, in cases also involving U.S. Attorney’s Offices. See *United States v. Giraud*, 160 F.4th 390, 397-406 (3d Cir. 2025); *In re Grand Jury Subpoenas*, 2026 WL 2450485, at *5-*15. Like the Ninth Circuit, those courts acknowledged the Federal Circuit’s contrary conclusion on the second question presented, but expressly declined to follow it. *Giraud*, 160 F.4th at 405; *In re Grand Jury Subpoenas*, 2026 WL 2450485, at *14. That conflict is entrenched and ripe for this Court’s resolution.

This case is also the best vehicle to resolve the issue. The government did not seek certiorari in the Third Circuit case due to the intervening court appointment of a U.S. Attorney. And while the government intends to file a hold petition in the Second Circuit case in the coming weeks, that case has a lingering mootness issue that could complicate this Court’s merits review. See *In re Grand Jury Subpoenas*, 2026 WL 2450485, at *5.

This case, by contrast, raises no such concerns and involves a prototypical, recurrent fact pattern of criminal defendants seeking a First Assistant U.S. Attorney’s disqualification.

2. The serious consequences of the decision below further call for review. “To discharge the duties of his trust, the President must have the assistance of officers he can trust.” *Trump v. Slaughter*, 146 S. Ct. 2283, 2310 (2026) (brackets and quotation marks omitted). As noted, Presidents of both parties have used the two tools at issue—designating new first assistants and delegating duties to non-acting officers—dozens of times to select trusted officials to temporarily carry out their priorities, with the Legislative Branch’s imprimatur. See pp. 17-18, 27-28, *supra*. Until this Administration, those practices were almost never challenged, much less successfully. Yet in the last year, three courts of appeals have upended both practices—and have done so in the context of prosecutorial functions, where the President’s Article II interests are at their apex, *Trump v. United States*, 603 U.S. 593, 620 (2024). That rejection of common executive-branch vacancy practices is sufficient to warrant this Court’s review. See *NLRB v. SW General, Inc.*, 580 U.S. 288, 298 (2017).

Further percolation is neither necessary nor prudent. The decision below threatens to hobble the next presidential transition. See p. 23, *supra*. Even more pressingly, it poses an immediate threat to the operations of five U.S. Attorney’s Offices in the Ninth Circuit. In addition to the District of Nevada, the Central District of California, the District of Montana, and the Eastern and Western Districts of Washington are all currently led by a post-vacancy First Assistant U.S. Attorney—either as Acting U.S. Attorney or pursuant to

delegated authority. Nationwide, nine other U.S. Attorney’s Offices have the same leadership structure. In the Ninth Circuit alone, the government has been confronted with dozens of motions challenging those officials’ service. While the court of appeals’ stay of its mandate should hold back the flood while this petition is pending, only this Court can provide ultimate certainty for the thousands of cases those offices handle annually. See Dep’t of Justice, *United States Attorneys’ Annual Statistical Report: Fiscal Year 2020*, Tbls. 1, 4, <https://perma.cc/9URG-MGKE> (documenting over 4400 pending criminal cases and over 4100 pending civil cases handled by the five affected Offices in the Ninth Circuit).

3. The Ninth Circuit purported to reserve judgment on whether the Executive Branch might delegate something less than all of a vacant office’s delegable duties to a single individual. App., *infra*, 32a. That caveat does not diminish the need for this Court’s immediate review.

To start, the Third Circuit also purported to reserve that question, *Giraud*, 160 F.4th at 406, but when the government tried that approach—splitting the duties of the U.S. Attorney for the District of New Jersey across three individuals—it was told that this too supposedly violates the FVRA, see *United States v. Naviwala*, 825 F. Supp. 3d 451, 494-501 (D.N.J. 2026).

Relatedly, the Ninth Circuit provided no guidance on how much the Attorney General would need to diminish a delegee’s authority to no longer qualify as a “de facto Acting U.S. Attorney.” App., *infra*, 3a. If all the Attorney General needs to do is carve out one negligible power—say the power to prosecute violations of the Federal Denture Act, 18 U.S.C. 1821—then the decision below would be more manageable, but it would make lit-

tle sense (and would still be problematic as applied to other PAS offices with important nondelegable duties). Moreover, if the carveouts need to be more significant, then the Attorney General would need to guess at how much would satisfy the relevant courts, and there would be a real risk that the functioning of U.S. Attorney's Offices would be imperiled. Those problems are intolerable when magnified across the thousand-odd PAS offices subject to the FVRA. This Court should not leave unreviewed a decision that imposes such ongoing confusion on the basic operations of the Executive Branch.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 25-6214, 25-6470
(D.C. No. 2:25-cr-00240-GMN-BNW-1)

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLANT / CROSS-APPELLEE

v.

DEVONTE DEVON JACKSON,
DEFENDANT-APPELLEE / CROSS-APPELLANT

Nos. 25-6223, 25-6475
(D.C. No. 2:25-cr-00227-JAD-BNW-1)

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLANT / CROSS-APPELLEE

v.

GIANN ICOB SALAZAR DEL REAL
DEFENDANT-APPELLEE / CROSS-APPELLANT

Nos. 25-6224, 24-6465
(D.C. No. 3:25-cr-00026-MMD-CLB-1)

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLANT / CROSS-APPELLEE

v.

JORGE ENRIQUEZ, JR.,
DEFENDANT-APPELLEE / CROSS-APPELLANT

Appeal from the United States District Court
for the District of Nevada
David G. Campbell, Senior District Judge, Presiding

Argued and Submitted Feb. 12, 2026
San Francisco, California

Filed: Aug. 17, 2026

OPINION

Before: SIDNEY R. THOMAS and ERIC D. MILLER, Circuit Judges, and STANLEY BLUMENFELD, JR., District Judge.*

Opinion by Judge MILLER

MILLER, Circuit Judge:

These cases present the question whether the Attorney General can make someone an Acting United States Attorney—bypassing the usual requirement that a U.S. Attorney be confirmed by the Senate—by designating that person as the first assistant to an already-vacant office of U.S. Attorney. We hold that the Attorney General cannot do so. Although the Federal Vacancies Reform Act of 1998 (FVRA) provides that a first assistant automatically succeeds to a vacant office, that rule of au-

* The Honorable Stanley Blumenfeld, Jr., United States District Judge for the Central District of California, sitting by designation.

tomatic succession applies only to a first assistant who held that position at the time the vacancy arose; it does not apply to a first assistant who never served under a validly appointed official. 5 U.S.C. § 3345(a)(1). Nor can the Attorney General create a de facto Acting U.S. Attorney by delegating all of the functions and duties of the U.S. Attorney to someone else. The FVRA is “the exclusive means for temporarily authorizing an acting official to perform the functions and duties of any office,” so it prohibits a complete delegation of all of the U.S. Attorney’s powers to a single person. *Id.* § 3347.

Applying those principles, we affirm the district court’s order disqualifying Sigal Chattah, the putative Acting U.S. Attorney for the District of Nevada, from supervising the prosecutions of the defendants in these cases. We dismiss defendants’ cross-appeals because we lack appellate jurisdiction to review the district court’s denial of defendants’ motions to dismiss their indictments.

I

On January 17, 2025, Jason Frierson resigned as the U.S. Attorney for the District of Nevada. At that time, First Assistant U.S. Attorney Sue Fahami became the Acting U.S. Attorney by operation of the FVRA, which provides that upon the resignation of a Senate-confirmed officer, “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).

Two months later, the Attorney General invoked 28 U.S.C. § 546 to appoint Sigal Chattah as the interim U.S. Attorney for the District of Nevada, effective April 1. That statute permits the Attorney General to appoint an

interim U.S. Attorney when the position of U.S. Attorney is vacant, *id.* § 546(a), but limits the service of an interim U.S. Attorney to a term of 120 days, *id.* § 546(c)(2). Chattah’s 120-day term would have expired on July 30.

On July 28, Chattah resigned as the interim U.S. Attorney. In her resignation letter, she stated that she “look[ed] forward to continuing to lead the U.S. Attorney’s Office for the District of Nevada.” The same day, the Attorney General designated Chattah as the First Assistant U.S. Attorney for the District of Nevada. In the designation order, the Attorney General asserted that “[a]s First Assistant United States Attorney, Ms. Chattah will have authority to serve as Acting United States Attorney upon a vacancy in that office” by operation of the FVRA. At the same time, the Attorney General also appointed Chattah “as a Special Attorney to the United States Attorney General pursuant to 28 U.S.C. § 515” and authorized her “to conduct in the District of Nevada, any kind of legal proceedings, civil or criminal, . . . which United States Attorneys are authorized to conduct.”

The defendants in these consolidated cases were indicted on felony charges in the District of Nevada on or after July 29, 2025. Each of the indictments was signed by an Assistant U.S. Attorney, not by Chattah herself, but each included her name in the signature block and identified her as the “Acting United States Attorney.” Defendants moved to dismiss their indictments or, in the alternative, to disqualify Chattah and any Assistant U.S. Attorneys working under her supervision from prosecuting their cases. Defendants argued that Chattah’s appointment as the Acting U.S. Attorney violated the

FVRA and therefore that their indictments were invalid.

Chief Circuit Judge Mary H. Murguia designated Senior United States District Judge David G. Campbell of the District of Arizona to sit in the District of Nevada, and the cases were assigned to him.

The district court denied the motion to dismiss the indictments. The district court first concluded that Chattah was not eligible to serve as the Acting U.S. Attorney because she was not the first assistant at the time the position of U.S. Attorney became vacant. Further, because the FVRA's exclusivity clause, 5 U.S.C. § 3347(a), makes the FVRA "the exclusive means for temporarily authorizing an acting official to perform the functions and duties of any office of an Executive agency," the district court concluded that Chattah could not exercise all of the powers of the U.S. Attorney by delegation from the Attorney General. The district court thus disqualified Chattah from participating in or supervising the prosecution of defendants' cases. The district court concluded, however, that the Assistant U.S. Attorneys who signed the indictments derived their power to prosecute "not from the U.S. Attorney but from the Attorney General," and that "Chattah's lack of authority to serve as U.S. Attorney" therefore did not "warrant[] dismissal of the indictments."

The maneuvers used to extend Chattah's time atop the U.S. Attorney's Office are not unique to the District of Nevada. The Attorney General has employed similar—though not always identical—tactics to extend the service of other temporary appointees who have not been confirmed by the Senate. The district court's reasoning was consistent with that of the other courts to

consider those tactics, every one of which has concluded that they violate the limits imposed by the FVRA. *See United States v. Giraud*, 160 F.4th 390, 400-01 (3d Cir. 2025); *United States v. Ramirez*, 807 F. Supp. 3d 1086, 1105 (C.D. Cal. 2025); *United States v. James*, 810 F. Supp. 3d 752, 762-63 (E.D. Va. 2025), *appeal docketed*, No. 25-4673 (4th Cir. Dec. 22, 2025); *United States v. Comey*, 810 F. Supp. 3d 768, 780 (E.D. Va. 2025), *appeal docketed*, No. 25-4674 (4th Cir. Dec. 22, 2025); *In re Grand Jury Subpoenas to Off. of N.Y. State Att’y Gen.*, 814 F. Supp. 3d 284, 292 (N.D.N.Y. 2026), *appeal docketed*, No. 26-156 (2d Cir. argued May 4, 2026); *United States v. Ramirez-Martinez*, No. 22-cr-01721, 2026 WL 113431, at *15 (D.N.M. Jan. 14, 2026).

The government now appeals, challenging the disqualification order. Defendants cross-appeal, challenging the denial of their motions to dismiss. We have jurisdiction to review the disqualification order under 28 U.S.C. § 1291, *see United States v. Williams*, 68 F.4th 564, 570 (9th Cir. 2023), but we lack jurisdiction over the cross-appeals.

The President has not nominated Chattah to serve as the U.S. Attorney for the District of Nevada. On February 11, 2026, the day before we heard oral argument in these appeals, the President nominated George Kelesis for that position. Nominations Submitted to the Senate, 2026 Daily Comp. Pres. Doc. Supp. 7 (updated Feb. 13, 2026), *available at* 2026 WL 487918, at *5.

II

The government argues that when the Attorney General designated Chattah as the first assistant to the vacant office of U.S. Attorney, section 3345(a)(1) automatically elevated her to Acting U.S. Attorney. But section

3345(a)(1) does not apply to an official who, like Chattah, was not serving as the first assistant at the time the vacancy arose. In the alternative, the government argues that Chattah may exercise all of the powers of the U.S. Attorney by delegation from the Attorney General. But the FVRA is “the exclusive means for temporarily authorizing an acting official to perform the functions and duties of any office of an Executive agency.” 5 U.S.C. § 3347(a). The Attorney General therefore cannot rely on general delegation statutes to make Chattah the de facto U.S. Attorney.

A

We begin by reviewing the different sources of law governing the appointment and service of U.S. Attorneys and Acting U.S. Attorneys.

The Appointments Clause provides that the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Officers of the United States . . . but the Congress may by Law vest the Appointment of such inferior Officers, 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. The Appointments Clause “prescribes the exclusive means of appointing ‘Officers,’” the subset of federal personnel who “‘exercis[e] significant authority pursuant to the laws of the United States.’” *Lucia v. SEC*, 585 U.S. 237, 244-45 (2018) (quoting *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (per curiam)).

By dividing responsibility between the President and the Senate, the Appointments Clause functions as “a bulwark against one branch aggrandizing its power at the expense of another branch.” *Ryder v. United States*, 515 U.S. 177, 182 (1995). The Framers vested the Pres-

ident with the power to nominate officers, reasoning that the President “would be less vulnerable to interest-group pressure and personal favoritism than would a collective body.” *Edmond v. United States*, 520 U.S. 651, 659 (1997). But the President’s power “was not left unguarded,” as appointments require the advice and consent of the Senate. *Id.* The Framers feared that the President might seek to appoint “candidates who had 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,” and they saw the Senate’s advice-and-consent function as necessary to “prevent[] the appointment of unfit characters” to federal office. The Federalist No. 76, at 513 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

The Appointments Clause “divides all its officers into two classes”: principal officers and inferior officers. *United States v. Germaine*, 99 U.S. 508, 509 (1879). In general, principal officers are those who “report directly to the President,” such as the Attorney General. *Kennedy v. Braidwood Mgmt., Inc.*, 606 U.S. 748, 761 (2025). Such officers must be nominated by the President and confirmed by the Senate. *Id.* at 759. Inferior officers are those “whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.” *Edmond*, 520 U.S. at 663. The advice-and-consent process is the “default manner of appointment for inferior officers,” *id.* at 660, but Congress may choose to vest the appointment of such officers “in the President alone, in the Courts of Law, or in the Heads of Departments,” U.S. Const. art. II, § 2, cl. 2. This allows Congress to select an alternative manner of appointment if

it finds that “administrative convenience” outweighs “the benefits of the more cumbersome procedure” of advice and consent for that office. *Edmond*, 520 U.S. at 660.

U.S. Attorneys “are clearly ‘officers’ of the United States,” and because the Attorney General has “plenary authority” to supervise them, they are inferior officers. *United States v. Gantt*, 194 F.3d 987, 999 (9th Cir. 1999), *overruled on other grounds by United States v. W.R. Grace*, 526 F.3d 499 (9th Cir. 2008) (en banc); *see Myers v. United States*, 272 U.S. 52, 159 (1926). But Congress has not chosen to vest the appointment of U.S. Attorneys in the President, the courts, or the Attorney General. Instead, it has specified that 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); *accord* Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 92. As then-Attorney General Robert Jackson explained, that choice reflects a recognition that because U.S. Attorneys exercise the “immense power to strike at citizens . . . with all the force of government itself,” they should “win an expression of confidence in [their] character by both the legislative and the executive branches of the government before assuming the responsibilities of a federal prosecutor.” Robert H. Jackson, Att’y Gen., *The Federal Prosecutor*, Address at the Second Annual Conference of United States Attorneys (Apr. 1, 1940).

Because occasional vacancies in office are inevitable, both Congress and the courts have long recognized that a “subordinate officer” may assume the duties of a principal officer “for a limited time, and under special and temporary conditions,” without “transform[ing] into the

superior and permanent official.” *United States v. Eaton*, 169 U.S. 331, 343 (1898); *see, e.g.*, Act of July 23, 1868, ch. 227, §§ 1-2, 15 Stat. 168, 168 (codified as amended at 5 U.S.C. § 3345). As relevant here, Congress has enacted two statutes that allow the temporary filling of vacant U.S. Attorney positions.

First, 28 U.S.C. § 546 allows the Attorney General to appoint an interim U.S. Attorney. Section 546 reflects a balance that Congress has adjusted over time. Between 1863 and 1985, only the federal courts could appoint an interim U.S. Attorney. *See* Act of Mar. 3, 1863, ch. 93, § 2, 12 Stat. 768, 768 (authorizing circuit judges to appoint an interim U.S. Attorney); Act of June 24, 1898, ch. 495, § 2, 30 Stat. 487, 487-88 (transferring this power to the district courts) (codified as amended at 28 U.S.C. § 546(d)). In 1986, Congress granted the Attorney General the authority to appoint interim U.S. Attorneys. Criminal Law and Procedure Technical Amendments Act of 1986, Pub. L. No. 99-646, § 69, 100 Stat. 3592, 3616-17 (codified as amended at 28 U.S.C. § 546). But that authority is limited: Unlike an interim U.S. Attorney appointed by the district court, an interim U.S. Attorney appointed by the Attorney General may serve for a maximum of 120 days. 28 U.S.C. § 546(c). Congress briefly removed that time limit in 2006 but reimposed it in 2007. USA Patriot Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 502, 120 Stat. 192, 246 (2006); Preserving United States Attorney Independence Act of 2007, Pub. L. No. 110-34, § 2, 121 Stat. 224.

After the 120-day appointment expires, section 546 provides that “the district court for such district” may appoint an interim U.S. Attorney to serve “until the vacancy is filled.” 28 U.S.C. § 546(d). The statute does not

contemplate a role for the President or the Attorney General after the expiration of the 120-day appointment. To the contrary, the Executive Branch has long recognized that “[t]he statutory plan discloses a Congressional purpose that after the expiration of the 120-day period further interim appointments are to be made by the court rather than by the Attorney General.” Memorandum from Samuel A. Alito, Jr., Deputy Assistant Att’y Gen., Off. of Legal Couns., to William P. Tyson, Dir., Exec. Off. for U.S. Att’ys 3 (Nov. 13, 1986), *available at* <https://perma.cc/Y3C6-HVMY>.

Section 546(a) ensures that the Attorney General can select someone to fill the role of U.S. Attorney temporarily so that the work of the U.S. Attorney’s Office continues uninterrupted. But the 120-day time limit of section 546(c)(2) ensures that the Senate retains its role in the appointment process despite the occasional designation of temporary officers.

Second, the FVRA creates a general procedure for “temporarily authorizing an acting official to perform the functions and duties” of an office, including that of a U.S. Attorney, if the officeholder “dies, resigns, or is otherwise unable to perform the functions and duties of the office.” 5 U.S.C. §§ 3345, 3347(a). An acting official under the FVRA may serve for 210 days “beginning on the date the vacancy occurs,” with the possibility of extensions in the case of a prolonged Senate confirmation process—longer than an interim U.S. Attorney. *See* 5 U.S.C. § 3346. But unlike an interim U.S. Attorney, who may be almost anyone the Attorney General chooses, *see* 28 U.S.C. § 546(b), an Acting U.S. Attorney must come from one of three categories of individuals.

By default, 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). The FVRA itself does not define “first assistant.” Instead, the first assistant is identified by statute for some positions, *see, e.g.*, 28 U.S.C. § 508(a) (identifying the Deputy Attorney General as the first assistant to the Attorney General), and by regulation for many others, *see, e.g.*, 28 C.F.R. § 0.137 (defining first assistants for other Department of Justice positions). The FVRA also provides that “the President (and only the President)” may select one of two alternatives to the first assistant, both subject to the time limitations in section 3346: either another Senate-confirmed official, 5 U.S.C. § 3345(a)(2), or a senior agency employee, *id.* § 3345(a)(3).

An administration may “elect between [the] two statutory alternatives” of the FVRA and an agency-specific statute like section 546 to designate a temporary official. *Hooks v. Kitsap Tenant Support Servs., Inc.*, 816 F.3d 550, 556 (9th Cir. 2016). But the FVRA makes clear that statutes that provide “general authority to the head of an Executive agency . . . to delegate duties statutorily vested in that agency head to, or to reassign duties among, officers or employees of such Executive agency” do not supplant the procedures prescribed in the FVRA. 5 U.S.C. § 3347(b). In other words, “a department head cannot rely on a general vesting-and-delegation statute to designate the acting officer in the event of a vacancy.” *Gonzales & Gonzales Bonds & Ins. Agency, Inc. v. United States Dep’t of Homeland Sec.*, 107 F.4th 1064, 1078 (9th Cir. 2024).

B

The government’s primary argument on appeal is that Chattah automatically became the Acting U.S. Attorney under the FVRA when the Attorney General designated her as the first assistant to the vacant office of U.S. Attorney. The district court rejected that theory, concluding that “subsection (a)(1) operates only on first assistants in place when vacancies begin.” We agree. The FVRA’s text and structure are unambiguous: The statute does not permit the executive to fill an existing vacancy by designating a new first assistant.

1

“As always, we begin with the text.” *Southwest Airlines Co. v. Saxon*, 596 U.S. 450, 457 (2022). “If an officer . . . dies, resigns, or is otherwise unable to perform the functions and duties of the office,” the FVRA provides that “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.” 5 U.S.C. § 3345(a)(1). Section 3346(a)(1) provides that “the person serving as an acting officer as described in section 3345 may serve in the office . . . for no longer than 210 days beginning on the date the vacancy occurs.” *Id.* § 3346(a)(1).

Section 3345(a)(1) uses a mandatory “shall,” which means that the first assistant is “automatically” elevated in the event of a vacancy. *NLRB v. SW Gen., Inc.*, 580 U.S. 288, 305 (2017). The automatic succession of the first assistant, which the Supreme Court has described as “self-executing,” *id.* at 303, occurs at the “single, immediate” moment at which the vacancy arises, *Giraud*, 160 F.4th at 398. The only first assistant whom

section 3345(a)(1) can automatically elevate is the first assistant serving at the time the vacancy begins.

This understanding of the statute is confirmed by Congress’s use of the definite article—“*the* first assistant”—in section 3345(a)(1), which indicates that only one first assistant is subject to immediate, automatic elevation. See *Rumsfeld v. Padilla*, 542 U.S. 426, 434 (2004). Unlike subsections (a)(2) and (a)(3), which use indefinite articles to refer to an “unspecified” group of potential acting officials, subsection (a)(1) contemplates only one individual: the first assistant serving at the time the vacancy arises. See *McFadden v. United States*, 576 U.S. 186, 191 (2015). Nothing in subsection (a)(1) suggests that the executive has the continuing authority to appoint—and immediately elevate—new first assistants once a vacancy already exists.

Section 3346 reinforces our conclusion that only a first assistant in place when the vacancy arises is automatically elevated. Rather than measuring the permissible period of acting service from the date a particular individual assumes the acting role, Congress measured it from “the date the vacancy occurs.” 5 U.S.C. § 3346(a)(1). Under the government’s reading, section 3345(a)(1) would operate not as a one-time automatic-succession provision, but as a continuing appointment mechanism that permits the successive automatic elevation of post-vacancy first assistants whenever another acting official ceases serving, so long as no new Senate-confirmed officer has been appointed. That reading severs the automatic-succession provision from the event that starts the statutory clock, which begins on a particular date: “the date the vacancy occurs.” This case illustrates the point. The vacancy occurred on January

17, 2025, and the 210-day period prescribed by section 3346(a)(1) began to run on that date. Yet the government contends that the automatic succession contemplated by section 3345(a)(1) did not occur until July 28—192 days later—when Chattah became first assistant. The FVRA provides no textual basis for delaying the automatic succession for so long after the event that triggered both the succession provision and the statutory clock.

The government resists this reading, pointing to the statute’s use of the present tense (“is otherwise unable”) and its lack of what the government calls the “backward-looking language” that is present in other provisions of the FVRA. Neither aspect of the statute supports the government’s interpretation.

First, the government argues that the use of the present tense “*is otherwise unable*” means that the statute elevates the first assistant at any point in time at which a validly appointed officer “is otherwise unable to perform the functions and duties of the office”—not just at the time the vacancy first occurs. 5 U.S.C. § 3345(a). Although we “frequently look[] to Congress’ choice of verb tense to ascertain a statute’s temporal reach,” *Carr v. United States*, 560 U.S. 438, 448 (2010), we cannot read the “is otherwise unable” clause in isolation. The statute automatically elevates the first assistant when an officer “dies, resigns, or is otherwise unable to perform.” 5 U.S.C. § 3345(a). “Dies” and “resigns” are both present-tense verbs that refer to a “single instance.” *Giraud*, 160 F.4th at 398. Although “is otherwise unable” could literally carry a broader meaning, we “discern the reach of an ‘otherwise’ clause” by looking to the “terms linked to it,” which provide “a more focused

meaning.” *Fischer v. United States*, 603 U.S. 480, 487-88 (2024). Here, “dies” and “resigns” suggest that “is otherwise unable” likewise refers to the discrete moment in time at which a validly appointed official *becomes* unable to perform his duties. It is at that moment that the first assistant is automatically elevated by the “mandatory and self-executing” process defined in section 3345(a)(1). *SW Gen.*, 580 U.S. at 303. That is consistent with section 3346, which measures the time limit for active service from “the date the vacancy occurs,” a discrete moment. 5 U.S.C. § 3346(a)(1). Read in context, the use of the present tense throughout the statute suggests there is only one triggering event: the moment at which the office becomes vacant.

Second, the government cites the absence of any “backward-looking language” in section 3345(a)(1). It points out that subsection (a)(3) permits the President to designate, as an acting officer, a senior official of the agency who has held his or her position “for not less than 90 days” in the prior year. 5 U.S.C. § 3345(a)(3). The government reasons that “[i]f Congress were concerned about allowing recently-appointed first assistants to serve as acting officers, it could have similarly limited § 3345(a)(1) as it did (a)(3).” But subsection (a)(3) includes screening requirements precisely because it allows the President to select from a pool of people eligible for the appointment. Subsection (a)(1), by contrast, contemplates no role for the executive; instead, it “automatically” elevates the first assistant at the moment of the vacancy. *SW Gen.*, 580 U.S. at 305. There is no need for “backward-looking language” in a provision that operates automatically and does not allow the President to choose among potential appointees.

Subsection (b), which limits acting service by nominees to an office, does not support the government’s argument either. Section 3345(b)(1)(A)(ii) provides that a person who has been nominated to an office may not serve as an acting officer for “such office” if that person has “served in the position of first assistant . . . for less than 90 days.” The government argues that this language “logically contemplates that someone who was *not* the first assistant at the time of the vacancy can still be serving as the acting official under (a)(1).” We do not see how the possibility of a first assistant appointed less than 90 days *before* a vacancy “logically contemplates” first assistants nominated *after* the vacancy. As the Supreme Court explained in *SW General*, subsection (b)(1)’s prohibition on acting service by nominees “applies to all acting officers,” whether they are acting under subsection (a)(1), (a)(2), or (a)(3). 580 U.S. at 306. Congress’s decision to carve out first assistants who meet certain tenure requirements from that general prohibition does not say anything about whether the statute elevates post-vacancy first assistants.

2

Our reading of section 3345(a)(1) is confirmed by the structure of the FVRA as a whole. Whenever possible, we interpret statutes so that “no clause, sentence, or word shall be superfluous, void, or insignificant.” *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)); accord *City of Chicago v. Fulton*, 592 U.S. 154, 159 (2021). The government’s interpretation of section 3345 would render large portions of the FVRA superfluous.

The FVRA does not expressly give agency heads any power to appoint acting officers, instead providing that

“the President (and only the President)” may select them under section 3345(a)(2) and (a)(3). Those subsections, which include precise eligibility requirements, offer the only “two ways the President may override the automatic operation of (a)(1).” *Hooks*, 816 F.3d at 557.

On the government’s reading, however, any agency head could circumvent the limitations imposed by subsections (a)(2) and (a)(3) simply by designating a preferred appointee as the first assistant to a vacant position. Thus, if the government’s interpretation were correct, the carefully calibrated limits imposed by subsections (a)(2) and (a)(3) would be insignificant, if not entirely superfluous. First assistants elevated under subsection (a)(1) need not hold a Senate-confirmed office, like those designated under (a)(2); they need not have any prior experience in the agency, like those designated under (a)(3); and they need not be selected by the President, like those designated under both (a)(2) and (a)(3). The government’s reading of subsection (a)(1) would allow an agency head “to, in effect, appoint almost anyone” by installing that person as a first assistant, *Giraud*, 160 F.4th at 399, which is more discretion than Congress conferred on the President in subsections (a)(2) and (a)(3). We cannot accept an interpretation that “renders an unnerving amount of statutory text mere surplusage.” *Fischer*, 603 U.S. at 498.

The government suggests that, even under its reading, subsections (a)(2) and (a)(3) would still be useful in a handful of scenarios. If the first assistant must be confirmed by the Senate or appointed by the officer, the executive would not be able to unilaterally select its preferred candidate for that post. *See, e.g.*, 28 U.S.C. § 504 (requiring Senate confirmation of the Deputy Attorney

General); 44 U.S.C. § 2103(c) (providing that the Archivist of the United States “shall” appoint the Deputy Archivist). Or the President might wish to leave the current first assistant in place, in which case it would be necessary to use subsections (a)(2) or (a)(3) to select a different acting officer.

These possibilities “would seem to be a rare circumstance.” *Giraud*, 160 F.4th at 399. Only four statutes expressly assign the title of “first assistant” to Senate-confirmed officers. *See* 6 U.S.C. § 113(a)(1)(A), (F); 7 U.S.C. § 2211; 10 U.S.C. § 137a(b); 28 U.S.C. § 508(a). A few other Cabinet-level officers have Senate-confirmed deputies who function as their first assistants, though the statutes do not use that term. *See, e.g.*, 31 U.S.C. § 301(c)(2) (Deputy Secretary of the Treasury); 43 U.S.C. § 1452 (Deputy Secretary of the Interior). But for the vast majority of Senate-confirmed officers, first assistants are designated by regulation, often with little specificity. For example, of the more than 200 officers of the Department of Justice who must be confirmed by the Senate, only two—the Attorney General and the Administrator of the Drug Enforcement Administration—have first assistants who themselves require Senate confirmation. *See* S. Comm. on Homeland Sec. & Governmental Affs., *United States Government Policy and Supporting Positions* (2025). For many of the remaining offices, the first assistant is simply “the person whom the Attorney General designates.” 28 C.F.R. § 0.137(b). Other offices have no regulation identifying the first assistant or setting out a selection process for that role; instead, the first assistant is identified by internal agency orders or directives. *See, e.g.*, U.S. Dep’t of the Interior, Departmental Manual pt. 135, § 3.2 (July 26, 2016) (designating the Deputy Director, Operations

as the first assistant to the Director of the Bureau of Land Management). For those offices, the government's position would render subsections (a)(2) and (a)(3) largely irrelevant.

Even if the government's interpretation finds a role for subsections (a)(2) and (a)(3) in a handful of cases, it "would in practical effect" render them superfluous "in all but the most unusual circumstances." *TRW*, 534 U.S. at 29. Worse, under the government's reading, the only meaningful limitations on a President's power to appoint temporary officers would come from various agency-specific statutes requiring Senate confirmation for first assistants, not from the FVRA itself. Although Congress enacted the FVRA to because it sought "a reclamation of [its] Appointments Clause power," the government's interpretation suggests that the FVRA itself did nothing to safeguard that power. *SW Gen., Inc. v. NLRB*, 796 F.3d 67, 70 (D.C. Cir. 2015), *aff'd*, 580 U.S. 288 (2017). Instead, pre-existing statutes already imposed the only obstacles that might require a President to resort to subsections (a)(2) and (a)(3) to fill a vacancy. But just as Congress does not "hide elephants in mouseholes," *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 468 (2001), neither does it place mice in elephant-sized holes. We generally presume that Congress, in amending a statute, intends its changes "to have real and substantial effect." *Ross v. Blake*, 578 U.S. 632, 641-42 (2016) (quoting *Stone v. INS*, 514 U.S. 386, 397 (1995)). If the government were correct, the FVRA would fail to do so, leaving it unexplained why Congress bothered to pass it.

Because the statutory text is unambiguous, our analysis could stop here. *See Milner v. Department of the Navy*, 562 U.S. 562, 574 (2011) (“Legislative history, for those who take it into account, is meant to clear up ambiguity, not create it.”). But the parties also extensively discuss the legislative history and executive practice under the statute, so we address those matters for the sake of completeness. The legislative history is fully consistent with our conclusion that only first assistants already in place at the time a vacancy arose can serve as acting officers under subsection (a)(1). Thus, even if we were to consider legislative history, it would only reinforce our reading of the statute. And although the government points to some evidence of contrary Executive Branch practice following the passage of the FVRA, that evidence does not persuade us to depart from the unambiguous meaning of the statutory text.

a

The FVRA was enacted in the wake of a sustained period of “interbranch conflict” over temporary appointments. *SW General*, 580 U.S. at 294-95 (citing Morton Rosenberg, Cong. Rsch. Serv., No. 98-892, *The New Vacancies Act: Congress Acts to Protect the Senate’s Confirmation Prerogative* 2-4 (1998)). Much of that conflict was instigated by the Department of Justice, which had decided it was exempt from the statutes governing acting officials and could instead indefinitely appoint acting officials through the Attorney General’s power to delegate her functions and duties. *See* S. Rep. No. 105-250, at 3 (1998) (rejecting the Department’s position as “wholly lacking in logic, history, or language”). “By 1998, approximately 20 percent” of offices requiring

Senate confirmation “were occupied by temporary designees,” including some who had been installed “in obvious contravention of the Senate’s wishes.” *SW General*, 580 U.S. at 295 (internal quotation marks omitted) (quoting Rosenberg, at 1).

The most high-profile incident leading to the passage of the FVRA was President Clinton’s 1997 appointment of Bill Lann Lee as Acting Assistant Attorney General for Civil Rights. The President first appointed Lee as the Principal Deputy Assistant Attorney General, a position that made him first assistant to the Acting Assistant Attorney General. The Acting Assistant Attorney General then resigned, allowing Lee to become the acting officer. Many commentators objected, pointing out that Lee never served as “a first assistant to a qualified ‘officer’” and arguing that the President could not “‘bootstrap’ one automatic succession on top of another.” Steven J. Duffield & James C. Ho, Note, *The Illegal Appointment of Bill Lann Lee*, 2 Tex. Rev. L. & Pol. 335, 349 (1998). One Senator, who would go on to be one of the original co-sponsors of the FVRA, wrote to the Attorney General to complain that Lee “could not be designated as first assistant after the office was vacant.” Letter from Sen. Strom Thurmond to Att’y Gen. Janet Reno 2 (Jan. 23, 1998), reprinted in *Oversight of the Implementation of the Vacancies Act: Hearing Before the S. Comm. on Governmental Affs.*, 105th Cong. 126 (1998). “Perceiving a threat to the Senate’s advice and consent power,” *SW Gen.*, 580 U.S. at 295, Congress enacted the FVRA and made it the “exclusive means” for temporarily appointing acting officials, 5 U.S.C. § 3347(a).

That history is itself strong evidence against the government’s interpretation of the FVRA, which would allow exactly the kind of maneuver that Congress found objectionable in the case of Bill Lann Lee. And if that were not enough, the Senate committee report accompanying the FVRA made clear that first assistants appointed after a vacancy are not automatically elevated. The report explained that by providing for acting service by the first assistant, subsection (a)(1) allows for “the routine functions of the office . . . to continue for a limited period of time *by that one person*” while the President seeks Senate confirmation of a permanent officer. S. Rep. No. 105-250, at 12 (emphasis added). It went on to state that the FVRA “allows the office to be temporarily filled by ‘the person’ who was originally eligible to be the acting officer *at the time the vacancy arose.*” *Id.* at 15 (emphasis added). This understanding of the FVRA was not limited to the committee majority; the minority views accompanying the report likewise stated that, “aside from another Senate-confirmed Presidential appointee designated by the President, only the ‘first assistant’ to the particular Senate confirmed officer who dies, resigns, or is other[wise] unable to perform the functions and duties of the position, can be an acting officer.” *Id.* at 34 (Minority Views). Nothing in either the report or the minority views suggests that the first assistant elevated by subsection (a)(1) may be anyone other than the “one person” in office at the time the vacancy arose.

A post-committee amendment to the FVRA further confirms that Congress understood the statute to require the first assistant to be in place when the vacancy occurs. As reported out of committee, the FVRA did not include section 3345(a)(3). The report noted the possi-

bility that there might be “no first assistant,” and it acknowledged that in that scenario, “no one is permitted by law to become an acting officer until the President designates a Senate-confirmed individual to be the acting officer” under section 3345(a)(2). S. Rep. No. 105-250, at 13; *see also id.* at 14 (“[I]f there is no first assistant, and no presidential designation, no one may serve as acting officer.”). Some Senators were concerned that, upon a change of administrations, “not many first assistants may be holding over” and “the first assistant slots may be empty,” 144 Cong. Rec. 22514 (1998) (statement of Sen. Carl Levin), but that “transferring another [Senate-confirmed] person would merely create a new vacancy elsewhere,” S. Rep. No. 105-250, at 34 (Minority Views). To address that problem, Congress added subsection (a)(3), which allows the President to appoint senior career staff as acting officers. Senator Fred Thompson, the FVRA’s principal author, explained that the change was intended to address concerns that “there will sometimes be vacancies in first assistant positions.” 144 Cong. Rec. 27496 (1998) (statement of Sen. Fred Thompson). Neither the problem nor the solution would have made sense if agency heads could simply designate a first assistant after a vacancy arose. Yet no Senator even hinted at the possibility of such a designation. The history of subsection (a)(3) strongly suggests that Congress understood (a)(1) to be limited to the first assistant already in place at the time of the vacancy.

The government insists, however, that the legislative history actually supports its position. It points out that after the FVRA was reported out of committee, section 3345(a)(1) was changed to refer to “the first assistant to the office” rather than “the first assistant of such officer.” Citing a floor statement by Senator Thompson,

the government argues that this language was intended to “depersonalize” the first assistant role. 144 Cong. Rec. 27496 (1998). In the government’s view, that means that “the first assistant is not limited to one specific person at one specific time.”

We find that argument unpersuasive. The committee report anticipated the amendment, explaining that the bill’s reference to “the first assistant to the ‘officer’” would not change “the practice under current law” of treating the relevant first assistant for subsection (a)(1) as “the first assistant to the vacant office.” S. Rep. No. 105-250, at 12. And two sentences after the floor statement that the government quotes, Senator Thompson explained that the change to “first assistant to the office” was “not intended to alter case law on the meaning of the term ‘first assistant.’” 144 Cong. Rec. 27496 (1998). The government does not dispute that at the time the FVRA was enacted, there were no examples of post-vacancy appointments of first assistants. *See L.M.-M. v. Cuccinelli*, 442 F. Supp. 3d 1, 27-28 (D.D.C. 2020). The government’s strained reading of the term “depersonalize” is unsupported by the legislative history, which does not suggest that anyone, at any point, understood the addition of “to the office” to mark a break from that historical practice.

b

What the government describes as “longstanding Executive Branch practice” under the FVRA gives us no reason to depart from the text’s unambiguous meaning. The government relies on an opinion of the Justice Department’s Office of Legal Counsel (OLC) interpreting the FVRA to allow for the appointment of a first assistant after a vacancy arises. We recognize that we may

consider the “interpretations of those responsible for implementing particular statutes,” particularly when those interpretations are “issued contemporaneously with the statute” and “have remained consistent over time.” *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 394 (2024). But the OLC opinion is inconsistent with earlier executive interpretations of the statute, and it relies on reasoning that has since been rejected. We therefore accord it—and executive practice following it—no weight.

Shortly after the FVRA was enacted, OLC issued an opinion concluding 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, 64 (1999). The Government Accountability Office (GAO) agreed with OLC’s interpretation, issuing guidance stating that acting officers should be required to produce dated documents “to verify that the position (and individual) was designated as first assistant prior to the occurrence of the vacancy.” U.S. Gov’t Accountability Off., GAO-01-468R, *Eligibility Criteria for Individuals to Temporarily Fill Vacant Positions Under the Federal Vacancies Reform Act of 1998*, at 2 (Feb. 23, 2001).

In 2001, however, OLC reversed course, concluding that first assistants may be elevated at any point after the vacancy arises. *Designation of Acting Associate Attorney General*, 25 Op. O.L.C. 177, 180 (2001). The GAO followed OLC’s reversal, adopting OLC’s new position without independent analysis. U.S. Gov’t Accountability Off., GAO-02-272R, *Changed Interpretation of Require-*

ments Related to First Assistants Under the Federal Vacancies Reform Act of 1998, at 2 (Dec. 7, 2001).

The 2001 OLC opinion relied on two arguments. The first was the reference in the statute to “the first assistant to the office of such officer.” 25 Op. O.L.C. at 179-80 (citing 5 U.S.C. § 3345(a)(1)). We have explained above why this language says nothing about whether a first assistant may be appointed after a vacancy arises. The second was OLC’s view that limiting subsection (a)(1) to the first assistant serving at the time of the vacancy would render superfluous subsection (b)(1)(A)(i), which restricts acting service by individuals who have been nominated for an office. *Id.* at 180. OLC’s argument relied on an assumption that subsection (b)(1)(A)(i) applies only to acting officers appointed under subsection (a)(1), but the Supreme Court squarely rejected that theory in *SW General*, 580 U.S. at 305. Given the “[in]validity of its reasoning” and “its [in]consistency with earlier . . . pronouncements,” we conclude that the 2001 OLC opinion is entitled to no weight. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); see *Loper Bright Enters.*, 603 U.S. at 394.

Apart from the OLC opinion, the government argues that Congress has accepted the executive’s position because it “has made no attempt to amend [section 3345(a)(1)] in the past two decades to curtail this common Executive Branch practice.” To overcome “the plain text and original understanding of a statute,” the government must present “overwhelming evidence of acquiescence.” *Solid Waste Agency of N. Cook Cnty. v. United States Army Corps of Eng’rs*, 531 U.S. 159, 169 n.5 (2001). The government’s evidence here is profoundly underwhelming, consisting of only three exam-

ples. In *SW General*, by contrast, the government pointed to 112 nominations over a 19-year period, but the Supreme Court deemed even that evidence insufficient, concluding that “Congress’s failure to speak up does not fairly imply that it has acquiesced in the [executive’s] interpretation.” 580 U.S. at 308. If “historical practice” was “too grand a title for the [executive’s] evidence” in *SW General*, we cannot imagine what label would be appropriate for the meager evidence the government has marshaled here. *Id.* That the executive has evaded the statute on a handful of occasions does not allow us to conclude that Congress has acquiesced in those violations.

C

Although Chattah was not lawfully serving as the Acting U.S. Attorney, the government argues that the Attorney General validly delegated to her the authority to oversee the U.S. Attorney’s office. That argument is foreclosed by the FVRA’s exclusivity provision. 5 U.S.C. § 3347(a). The general delegation statutes governing the Department of Justice do not allow the Attorney General to appoint Chattah as a de facto U.S. Attorney despite her ineligibility under the FVRA.

We begin, as before, with the statutory text. The FVRA specifies that “Sections 3345 and 3346 [of the FVRA] are the exclusive means for temporarily authorizing an acting official to perform the functions and duties of any office of an Executive agency . . . for which appointment is required to be made by the President, by and with the advice and consent of the Senate.” 5 U.S.C. § 3347(a). It acknowledges that other statutes, such as 28 U.S.C. § 546, may “expressly” authorize an agency head to “designate an officer or employee to perform the

functions and duties of a specified office temporarily.” 5 U.S.C. § 3347(a)(1)(A). But it prohibits an agency head from relying on a statute “providing general authority . . . to delegate duties statutorily vested in that agency head” to designate temporary officers. *Id.* § 3347(b).

Several general delegation statutes apply to the Department of Justice. With a handful of exceptions, all functions of the Department are vested in the Attorney General. 28 U.S.C. § 509. The Attorney General may delegate his authority to “any other officer, employee, or agency of the Department of Justice.” *Id.* § 510. The Attorney General is also authorized to appoint Assistant U.S. Attorneys, *id.* § 542, as well as special attorneys “to assist United States attorneys when the public interest so requires,” *id.* § 543. The Attorney General may direct attorneys “specially appointed by the Attorney General under law” to “conduct any kind of legal proceeding . . . which United States attorneys are authorized by law to conduct.” *Id.* § 515.

The government does not argue that those general delegation statutes allow the Attorney General to appoint Chattah as the U.S. Attorney or Acting U.S. Attorney. Such an appointment would be plainly contrary to section 3347(b). *See Gonzales & Gonzales Bonds*, 107 F.4th at 1078 (“[Section] 3347 clarifies that general vesting-and-delegation statutes are not sufficient to authorize the department to choose the acting officer under the FVRA.”). Instead, the government argues that the Attorney General has delegated to Chattah “prosecutorial and supervisory authority in the District of Nevada” under section 515. That theory fares no better.

As a preliminary matter, the government argues that Chattah was delegated authority “in her capacity as

First Assistant U.S. Attorney.” This designation does not affect our analysis of Chattah’s delegated powers. The title of “first assistant” was created by regulation in 1999 in response to the passage of the FVRA. *Organization of the Department of Justice*, 64 Fed. Reg. 6526 (Feb. 10, 1999) (codified at 28 C.F.R. § 0.137). The only function of the first assistant *qua* first assistant is to be the Acting U.S. Attorney in the event of a vacancy. *See* 28 C.F.R. § 0.137(b). As explained above, Chattah cannot do this, so her designation as “first assistant” is not meaningful here.

The Attorney General’s delegation to Chattah is unlimited. The Attorney General authorized Chattah to “conduct in the District of Nevada, any kind of legal proceedings . . . which United States Attorneys are authorized to conduct,” and stated that Chattah “will have authority to serve as Acting United States Attorney.” The Attorney General’s order does not identify any specific duties Chattah may perform or identify any powers delegated to Chattah in her capacity as a special attorney, as opposed to powers that the Attorney General assumed the FVRA would provide her as the Acting U.S. Attorney. The Attorney General did not even include a “boilerplate limitation” stating that Chattah was not delegated any non-delegable powers, which has been used in some delegations in “an [unsuccessful] attempt to avoid running afoul of the FVRA.” *Bullock v. United States Bureau of Land Mgmt.*, 489 F. Supp. 3d 1112, 1126 (D. Mont. 2020). There is, in short, no way to understand the delegation here as anything other than an attempt to assign Chattah all the functions and duties of the U.S. Attorney.

We agree with the government that the Attorney General has broad authority to designate individuals “to perform certain functions and duties” of a vacant office. But the delegation to Chattah goes well beyond that. Nothing in the Attorney General’s order suggests that Chattah was delegated only a share—even a large share—of the U.S. Attorney’s powers. A few cases have concluded or at least suggested that certain duties of the U.S. Attorney are not delegable. *See, e.g., United States v. Weyhrauch*, 544 F.3d 969, 974-75 (9th Cir. 2008) (certification of interlocutory appeal from an order suppressing evidence under 18 U.S.C. § 3731); *United States v. Doe*, 98 F.3d 459, 461 (9th Cir. 1996) (certification to permit juvenile-delinquency proceeding under 18 U.S.C. § 5032); *In re Application for an Ex Parte Ord. to Authorize Disclosure of Tax Returns & Tax Return Info.*, No. 25-mc-22, 2026 WL 63331, at *3 (N.D.N.Y. Jan. 8, 2026) (authorization to seek order disclosing tax-return information under 26 U.S.C. § 6103(i)(1)(B)). But the government has taken the position in this case that *all* of the U.S. Attorney’s functions and duties are delegable. In the context of these cases, therefore, we disagree with the government’s assertion that “[t]he distinction between an acting official and one exercising a vacant office’s powers by delegation is significant.” In fact, the distinction is meaningless where, as here, an individual is delegated all the functions of an office that the government argues only has delegable functions.

The government relies on the Federal Circuit’s statement in *Arthrex, Inc. v. Smith & Nephew, Inc.* that “the FVRA applies only to functions and duties that a [Senate-confirmed] officer alone is permitted by statute or regulation to perform” and “does not apply to delegable functions and duties.” 35 F.4th 1328, 1336 (Fed. Cir.

2022). The court relied on the definition of “function or duty” set out in 5 U.S.C. § 3348, which governs when an action performed by an invalidly acting officer may be ratified. *Arthrex, Inc.*, 35 F.4th at 1335-36. But that definition, by its own terms, applies only to section 3348 and not to section 3347. 5 U.S.C. § 3348(a)(2). We therefore decline to apply it here. *See Giraud*, 160 F.4th at 405.

The import of the government’s position is that Chattah can *be* the Acting U.S. Attorney, exercising all the functions and powers of that office, and the only effect of the FVRA is to prohibit her from calling herself “Acting U.S. Attorney.” The Attorney General’s unqualified delegation of all of the U.S. Attorney’s functions and duties to a single person is precisely the kind of de facto appointment of an acting officer, premised on the Attorney General’s “general authority . . . to delegate duties,” that section 3347(b) prohibits. 5 U.S.C. § 3347(b); *see Gonzales & Gonzales Bonds*, 107 F.4th at 1078 n.7.

We need not decide what kinds of more limited delegations might be permissible in the absence of a Senate-confirmed U.S. Attorney. To resolve these cases, we hold only that the Attorney General’s authority to delegate does not permit him to vest all of the functions and duties of a vacant office in a single person. *See Giraud*, 160 F.4th at 406.

III

The district court disqualified Chattah from participating in or supervising defendants’ prosecutions, but it denied defendants’ motions to dismiss their indictments. Defendants cross-appeal from the district court’s order, arguing that dismissal is an appropriate remedy. We

dismiss the cross-appeals for lack of appellate jurisdiction.

Federal courts of appeals “have jurisdiction of appeals from all final decisions of the district courts.” 28 U.S.C. § 1291. In general, a final decision is one that “ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.” *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 373 (1981) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978)). But under the collateral-order doctrine, a “small category” of pre-judgment orders are treated as final and thus immediately appealable. *Mohawk Indus. v. Carpenter*, 558 U.S. 100, 106 (2009) (quoting *Swint v. Chambers County Comm’n*, 514 U.S. 35, 42 (1995)); accord *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). “That small category includes only decisions that are conclusive, that resolve important questions separate from the merits, and that are effectively unreviewable on appeal from the final judgment in the underlying action.” *Swint*, 514 U.S. at 42.

An order disqualifying government counsel is generally subject to immediate appeal under the collateral-order doctrine. See *Williams*, 68 F.4th at 570-71. But defendants do not argue that the collateral-order doctrine permits them to appeal the district court’s order denying their motions to dismiss. See *Abney v. United States*, 431 U.S. 651, 663 (1977); *Giraud*, 160 F.4th at 396 n.2. Instead, they argue that we may review the denial of their motions to dismiss in conjunction with our review of the district court’s order disqualifying Chattah. Although the scope of interlocutory jurisdiction is generally limited to the “precise decision independently subject to appeal,” *Swint*, 514 U.S. at 50, they say that

their cross-appeals are “inextricably intertwined” with or “necessary to ensure meaningful review of” the government’s appeals, such that we have pendent appellate jurisdiction over them, *id.* at 51.

The scope of pendent appellate jurisdiction based on “inextricably intertwined” issues is “narrowly construed.” *Meredith v. Oregon*, 321 F.3d 807, 813 (9th Cir. 2003), *amended*, 326 F.3d 1030 (9th Cir. 2003). To be inextricably intertwined, “the legal theories on which the issues advance must either (a) be so intertwined that we must decide the pendent issue in order to review the claims properly raised on interlocutory appeal, or (b) resolution of the issue properly raised on interlocutory appeal necessarily resolves the pendent issue.” *Id.* at 814 (quoting *Cunningham v. Gates*, 229 F.3d 1271, 1285 (9th Cir. 2000)).

Those requirements are not met here. Whether Chattah was lawfully appointed the Acting U.S. Attorney under the FVRA or lawfully delegated the functions of that office does not tell us the remedy to which defendants are entitled for an unlawful appointment, and, conversely, we need not answer the remedial question to conclude that Chattah was not lawfully appointed. *See Gantt*, 194 F.3d at 998. Because “[r]eview of one order does not require review of the other,” we lack jurisdiction over the cross-appeals. *CDK Global LLC v. Brnovich*, 16 F.4th 1266, 1274 (9th Cir. 2021).

AFFIRMED in part and DISMISSED in part.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

No. 2:25-cr-00230-DGC-BNW

No. 2:25-cr-00227-DGC-BNW

No. 2:25-cr-00240-DGC-BNW

No. 3:25-cr-00026-DGC-CLB

UNITED STATES OF AMERICA, PLAINTIFF

v.

SHAMAR TYRELL GARCIA; GIANN ICOB SALAZAR
DEL REAL; DEVONTE DEVON JACKSON; AND
JORGE ENRIQUEZ, JR., DEFENDANTS

Filed: Sept. 30, 2025

ORDER

Defendants Shamar Garcia, Giann Icob Salazar Del Real, Devonte Jackson, and Jorge Enriquez recently were indicted for felony offenses in the District of Nevada. They move to dismiss their indictments on the ground that Sigal Chattah is not validly serving as Acting United States Attorney. If their indictments are not dismissed, Defendants ask the Court to disqualify Ms. Chattah and any lawyers working under her direction from prosecuting their cases, and for the judges of the Nevada District Court to appoint a new U.S. Attorney under 28 U.S.C. § 546(d). The government opposes De-

fendants’ motions. For reasons set forth below, the Court will grant the motions and disqualify Ms. Chattah from supervising these cases.

I. Factual Background.

On January 17, 2025, Jason Frierson resigned as the U.S. Attorney for the District of Nevada. Under procedures established by Congress in the Federal Vacancies Reform Act of 1998, First Assistant U.S. Attorney Sue Fahami automatically became Acting U.S. Attorney. *See* 5 U.S.C. § 3345(a)(1).

About two months later, on March 28, 2025, the Attorney General of the United States, Pam Bondi, appointed Sigal Chattah to be the interim U.S. Attorney under 28 U.S.C. § 546(a). Ms. Chattah’s appointment was made effective April 1, 2025, and § 546(c)(2) limited her service to 120 days. If a permanent U.S. Attorney was not nominated by the President and confirmed by the Senate within that 120-day period, the statute provided that the judges of the Nevada District Court could appoint an interim U.S. Attorney to serve until the vacancy is filled by the President and Senate. 28 U.S.C. § 546(c)(2)-(d).

That procedure was not followed. Instead, on July 28, 2025—one day before Ms. Chattah’s 120-day term expired—Ms. Chattah and Attorney General Bondi took several procedural steps: (1) Ms. Chattah resigned from her position as interim U.S. Attorney under § 546, but said in her resignation letter that “I look forward to continuing to lead the U.S. Attorney’s Office for the District of Nevada” (Doc. 29-2 at 2);¹ (2) Attorney General Bondi

¹ Citations in this order are to briefs filed in the *Garcia* case, No. 2:25-cr-00230-DGC-BNW. Briefing in all the cases is identical. Ci-

appointed Ms. Chattah to be a Special Attorney in the Department of Justice (“DOJ”) under general delegation statutes found in 28 U.S.C. §§ 509, 510, and 515 (Doc. 29-3 at 2); (3) Attorney General Bondi designated Ms. Chattah to be the First Assistant U.S. Attorney “effective upon her resignation” as interim U.S. Attorney (*id.*); (4) the Attorney General stated in her appointment document that Ms. Chattah, as First Assistant, would “have authority to serve as Acting United States Attorney . . . subject to the conditions and time limitations of the Federal Vacancies Reform Act of 1998” (*id.*); and (5) Attorney General Bondi changed the designation of Ms. Fahami from First Assistant to Executive U.S. Attorney, opening the way for Ms. Chattah to fill the First Assistant spot and become Acting U.S. Attorney (Doc. 29-4 at 2).

These steps purported to foreclose the statutory power of the judges in the District of Nevada to appoint an interim U.S. Attorney at the end of Ms. Chattah’s 120-day term, and, according to the government, granted Ms. Chattah several more months as Acting U.S. Attorney under the longer time limits of the Federal Vacancies Reform Act. *See* 5 U.S.C. §§ 3346, 3349a; Doc. 29 at 17. To date, the President has not nominated Ms. Chattah or anyone else to serve as the permanent U.S. Attorney for the District of Nevada.

The Nevada District Court Judges recused from hearing these motions to dismiss, presumably because the motions implicate their own power to appoint an Acting U.S. Attorney. *See* 28 U.S.C. § 546(d). Exercising her authority under 28 U.S.C. § 292(b), Ninth Circuit

tations are to page numbers affixed by the Court’s electronic filing system at the top of each page.

Chief Judge Mary Murguia designated the undersigned judge to hear and decide these motions. Doc. 21.

Defendants and the government have briefed the motions to dismiss, and the Court permitted the Nevada Attorneys for Criminal Justice to file an amicus brief, to which the government responded. Docs. 20, 29-30, 32, 36. The Court held a hearing on September 24, 2025, and took this matter under advisement. The Court now rules.

II. Relevant Statutes.

The Appointments Clause of the Constitution addresses the President’s power to appoint federal officers with the advice and consent of the Senate, U.S. Const. art. II, § 2, cl. 2, but that power applies only to principal officers of the United States. *Edmond v. United States*, 520 U.S. 651, 659 (1997). The Ninth Circuit has held that U.S. Attorneys are not principal officers. *United States v. Gantt*, 194 F.3d 987, 999 (9th Cir. 1999). As a result, the U.S. Attorney position at issue in this case, while tremendously important, need not be filled through presidential appointment and Senate confirmation under Article II of the Constitution.²

The Constitution grants Congress the power to control appointments of non-principal officers. U.S. Const. art. II, § 2, cl. 2 (“Congress may by Law vest the Appointment of such inferior Officers . . . in the President alone, in the Courts of Law, or in the Heads of Depart-

² Defendants ask the Court to find that the Ninth Circuit’s decision in *Gantt* has been effectively overruled by a more recent Supreme Court decision (Doc. 20 at 49-50), but the Court concludes that it need not resolve this issue given the nature of the ruling below. The Court therefore treats *Gantt* as controlling law.

ments.”). Congress has provided (even though the Constitution does not) that U.S. Attorneys must be nominated by the President and confirmed by the Senate. 28 U.S.C. § 541(a). It also has enacted several statutes that bear on the question of how a vacant U.S. Attorney position is filled temporarily until a new U.S. Attorney completes the nomination and confirmation process. Defendants’ motions involve three sets of statutes: (1) the Federal Vacancies Reform Act of 1998, 5 U.S.C. §§ 3345-3349 (“FVRA”), (2) 28 U.S.C. § 546, which is a separate statute that addresses appointments of interim U.S. Attorneys, and (3) 28 U.S.C. §§ 509, 510, and 515, which are general delegation statutes that authorize the Attorney General to share her power with lower level attorneys. The Court begins by describing these statutes.

A. The FVRA.

The FVRA is a general statutory scheme passed by Congress to regulate the temporary filling of vacant Executive Branch positions that require presidential appointment and Senate confirmation (commonly called “PAS” positions). The FVRA provides that if a PAS officer dies, resigns, or otherwise is unable to perform the functions 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). The Supreme Court has called subsection (a)(1) a “default rule” that requires no action by the President or Congress. *See N.L.R.B. v. SW Gen.*, 580 U.S. 288, 293 (2017). The “mandatory language of subsection (a)(1)” fills the vacancy “automatically” with the first assistant. *Id.* at 304-05.

The FVRA creates two additional methods for filling the vacancy. They are restricted to personal action by the President and are carefully confined. First, “the President (and only the President)” may temporarily fill the vacant position with an officer who has already been appointed by the President and confirmed by the Senate to another PAS position. 5 U.S.C. § 3345(a)(2). Second, “the President (and only the President)” may fill the position with an employee of the agency where the vacancy exists, provided the employee served in a senior position for at least 90 days during the year preceding the vacancy. *Id.* § 3345(a)(3).³

A person who temporarily fills a PAS position under one of these FVRA provisions is referred to as an “[a]cting officer.” *Id.* § 3345. To encourage the President to propose permanent nominees to the Senate and not merely rely on acting officers, the FVRA limits the duration of these temporary appointments. An acting officer may serve for 210-days “beginning on the date the vacancy occurs.” *Id.* § 3346(a)(1). If the vacancy exists during “the 60-day period beginning on a transitional inauguration day,” the 210-day clock begins 90 days after the vacancy or inauguration day, whichever is later, effectively granting a 300-day term to the acting officer. *Id.* § 3349a(b). When the President nominates a person to fill the PAS position permanently, the acting officer can continue to serve during the pendency of the nomination. *Id.* § 3346(a)(2). If the nomination is “re-

³ The senior officer is identified as someone at a GS-15 level on the General Schedule, *id.* § 3345(a)(3)(B), which is the highest pay level for federal government employees. See *General Schedule Overview*, U.S. Off. of Pers. Mgmt., <https://www.opm.gov/policy-data-over-sight/pay-leave/pay-systems/general-schedule/> (last visited Sept. 29, 2025).

jected . . . , withdrawn, or returned to the President” by the Senate, a new 210-day period is triggered. *Id.* § 3346(b)(1).

B. 28 U.S.C. § 546.

In addition to the general vacancy-filling provisions of the FVRA, Congress has enacted a specific statute for temporarily filling U.S. Attorney vacancies. Section 546 provides that the Attorney General can appoint a U.S. Attorney to serve until the earlier of a PAS appointment or the expiration of 120 days. 28 U.S.C. § 546(c)(1)-(2). This was the basis for Ms. Chattah’s initial appointment on March 28, 2025. Docs. 29 at 8, 29-1 at 2. If a permanent U.S. Attorney is not nominated and confirmed by the end of this 120-day period, § 546 provides that the judges of “the district court for such district may appoint a United States attorney to serve until the vacancy is filled.” 28 U.S.C. § 546(d). The Nevada judges did not have an opportunity to exercise this power because, on the 119th day of Ms. Chattah’s term, the government purported to switch her appointment to the FVRA and its longer term of service. *See* Doc. 29 at 8.

The meaning of § 546 and its application in this case are not disputed. Everyone agrees the Attorney General had authority to appoint Ms. Chattah to her temporary position for 120 days. The Ninth Circuit has held, and the FVRA confirms, that § 546 and the FVRA are alternative methods from which the President can choose when filling a vacancy temporarily. *See Hooks v. Kitsap Tenant Support Servs., Inc.*, 816 F.3d 550, 556 (9th Cir. 2016); 5 U.S.C. § 3347(a)(1). Defendants argue that the 120-time limit of § 546 should follow Ms. Chattah if the switch is permitted (Doc. 20 at 46), an issue the Court need not resolve given its ruling below.

C. General Delegation Statutes—28 U.S.C. §§ 509, 510, and 515.

Several statutory provisions grant the Attorney General power to delegate authority to U.S. Attorneys, Assistant U.S. Attorneys, and other lawyers working in the DOJ. Section 509 begins by providing that “[a]ll 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,” with a few exceptions not relevant here. 28 U.S.C. § 509. Section 510 then provides that “[t]he Attorney General may from time to time make such provisions as [she] considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General.” *Id.* § 510. And § 515 provides that “[t]he 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[.]” *Id.* § 515. If Ms. Chattah is not serving validly under the FVRA, the government contends she can continue supervising prosecutions in Nevada using authority delegated under these statutes. Doc. 29 at 18.

D. Issues to Be Resolved.

The Court must decide several issues. Is Ms. Chattah validly serving as Acting U.S. Attorney under § 3345(a)(1) of the FVRA? If not, can Ms. Chattah nonetheless supervise criminal prosecutions in Nevada by using powers delegated to her under the general delegation statutes? If Ms. Chattah is not serving validly under

§ 3345(a)(1) or the general delegation statutes, what remedies should Defendants receive? Should their indictments be dismissed, with or without prejudice, or should Ms. Chattah be disqualified from supervising their criminal prosecutions? The Court will address these issues in turn, along with other matters raised by the parties.

III. Ms. Chattah’s Service Under the FVRA.

The government contends that Ms. Chattah is validly serving as Acting U.S. Attorney because Attorney General Bondi designated her as first assistant on July 28, 2025, enabling her to become Acting U.S. Attorney under § 3345(a)(1) of the FVRA. Doc. 29 at 11-12. Defendants disagree, contending that subsection (a)(1) applies only to the first assistant in place when a vacancy in a PAS office initially arises—that it does not apply when, as in this case, a first assistant is designated months after the vacancy occurs. Doc. 20 at 24-25. To resolve this dispute, the Court begins with the text and structure of the statute. *See Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999).

A. Text and Structure of the FVRA.

The FVRA provision primarily at issue is found in 5 U.S.C. § 3345(a). It specifies who may fill a PAS position temporarily. There are three alternatives:

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.

5 U.S.C. § 3345(a)(1)-(3).

The primary focus of this case is subsection (a)(1), which provides, upon a vacancy, that “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.” *Id.* § 3345(a)(1). Defendants contend that the vacancy in this case arose when Mr. Frierson resigned on January 17, 2025. The language of subsection (a)(1) then directed that the first assistant, Ms. Fahami, “shall perform the functions and duties of the office temporarily in an acting capacity.” *See id.* Defendants contend that (a)(1) operates as a simple if-then proposition: if the U.S. Attorney position becomes vacant, then the first assistant performs the duties of office. No provision is made for later-appointed first assistants. Defendants rely on a recent district court decision which held that the subsection (a)(1) vacancy-filling mechanism promotes only incumbent first assistants. *See United States v. Giraud*, - - F. Supp. 3d --, 2025 WL 2416737 (D.N.J. Aug. 21, 2025). The court in *Giraud* found “no textual indication that the President has any choice in invoking the first assistant provision, nor that it is meant to trigger at any time other than the moment that the vacancy occurs.” *Id.* at *14.

Defendants argue that the only statutory alternatives to automatic promotion by subsection (a)(1) are the narrowly drawn provisions Congress placed in subsections (a)(2) and (a)(3): “the President (and only the President)” may select someone who has already been nominated by the President and confirmed by the Senate to another PAS position (5 U.S.C. § 3345(a)(2)), or the President may select someone who recently served for at least 90 days in a high-level position in the agency where the vacancy exists (*id.* § 3345(a)(3)).⁴ These cate-

⁴ The statute specifies that the person in this second category must have served for at least 90 of the 365 days preceding the vacancy. *Id.* § 3345(a)(3)(A).

gories are closely controlled by Congress. They are limited to “officials with both experience and seniority,” and “the President must take personal responsibility for the designation.” *L.M.-M. v. Cuccinelli*, 442 F. Supp. 3d 1, 28 (D.D.C. 2020) (footnote omitted).

Defendants argue that the strict requirements in subsections (a)(2) and (a)(3) would be largely unused if subsection (a)(1) permitted the Attorney General to designate anyone she chooses, regardless of qualification, to become first assistant and fill the vacancy under subsection (a)(1). The Court agrees. There would be no need to satisfy the rigorous requirements of subsections (a)(2) and (a)(3) if the easy path followed by the government in this case was available. And a fundamental rule of statutory construction holds that statutes should not be construed to render any provisions entirely or largely superfluous. *Duncan v. Walker*, 533 U.S. 167, 174 (2001).

The government responds that its broad reading of subsection (a)(1) would still leave room for the operation of subsections (a)(2) and (a)(3) in some situations, such as where both the agency position and the first assistant position require presidential nomination and Senate confirmation, and both are vacant. Doc. 29 at 14-15. In that case, a new first assistant could not simply be appointed by the Executive because Senate confirmation would be required. Subsections (a)(2) and (a)(3) would be the only alternatives available for temporarily filling the vacancy. The government provides no indication of how often this hypothetical scenario might arise, but it seems likely to be rare. The Court should avoid a construction that makes subsections (a)(2) and (a)(3) largely insignificant. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31

(2001) (rejecting an interpretation that would result in the text of a statute lying “dormant in all but the most unlikely situations”); *Duncan*, 533 U.S. at 174 (“[N]o clause, sentence, or word shall be superfluous, void, or insignificant[.]” (quoting *Market Co. v. Hoffman*, 101 U.S. 112, 115 (1879))).⁵

Other courts have reached the same conclusion. After considering the “high bar” established by subsections (a)(2) and (a)(3) for presidential appointment of acting officials, the court in *Giraud* observed that “if the President may simply name anyone as the first assistant at any time and thereby vest them with acting powers, [the subsection (a)(2) and (a)(3)] limitations on acting service are rendered entirely irrelevant.” 2025 WL 2416737, at *15. The President would be “free to select someone from outside the Government, with no experience in the relevant agency, and immediately imbue them with the functions and duties of a PAS office.” *Id.*; see also *L.M.-M.*, 442 F. Supp. 3d at 28-29 (describing § 3345(a)’s three methods of appointing acting officers and reasoning that allowing agency heads to create new post-vacancy officers and designate them as first assistants to assume acting status “would decimate this carefully crafted framework”).

Defendants’ construction of the FVRA is further supported by the statute’s language and structure. Subsection (a)(1) is best understood as a congressional di-

⁵ The same is true for the government’s argument that subsections (a)(2) and (a)(3) would remain relevant because presidents might simply choose to use them for temporary appointments. Why would a president choose those restrained routes if easy appointment was available under the government’s broad reading of subsection (a)(1)? Again, subsections (a)(2) and (a)(3) would be left largely dormant.

rective that fills the PAS office automatically as soon as the vacancy occurs. It provides no room for Executive Branch involvement. It declares that the first assistant “shall perform” the functions and duties of the PAS office. 5 U.S.C. § 3345(a)(1). Reading the subsection as the government suggests would eliminate this congressional mandate, defeat the strict standards for Executive Branch appointments under alternative subsections (a)(2) and (a)(3), and render those subsections meaningless in all but the most unlikely situations.

The government argues that the language of subsection (a)(1) is present-tense, meaning that it can operate at any time during a vacancy, and that a vacancy clearly existed when Ms. Chattah became first assistant.⁶ “Accordingly,” the government argues, “whoever is the first assistant to a vacant office, at any time during the period of the vacancy, automatically becomes the acting officer.” Doc. 29 at 13.

The Court is not persuaded. Subsection (a)(1) is indeed written in the present tense, but it can be read differently than the government suggests. It provides that “[i]f an officer . . . dies, resigns, or is otherwise unable to perform” the duties of a PAS office, “the first assistant . . . shall perform” those duties. 5 U.S.C. § 3345(a)(1). Which first assistant? “[T]he first assistant” when the officer dies, resigns, or is unable to perform. *Id.* The statute does not say “a first assistant

⁶ The vacancy existed, of course, only because Ms. Chattah had resigned from her position under § 546 moments earlier so she could step right back into the position as the newly designated first assistant. That is not the type of vacancy described in subsection (a)(1), which applies only to departure of a PAS officer.

shall perform.” The present tense does more to support Defendants’ reading than the government’s.

The government also points to § 3345(a)(3)(A), noting that it contains backward-looking language (the person chosen by the President must have been a senior officer in the U.S. Attorney’s office for at least 90 of the 365 days that preceded the vacancy) that is not found in subsection (a)(1). The government identifies similar rear-view language in § 3345(b)(1)(A). Doc. 29 at 14. The government argues that “where Congress includes particular language in one section of a statute but omits it in another, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *Id.* at 13 (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)) (citation modified). By imposing no timing requirement in subsection (a)(1), the government contends, Congress indicated that a first assistant may qualify at any time during the vacancy.

This argument would carry some weight if subsection (a)(1) was not a different kind of mechanism than subsections (a)(2) and (a)(3). Subsection (a)(1) is a command by Congress—the first assistant “shall perform” the functions of the PAS office. 5 U.S.C. § 3345(a)(1). It is automatic. The Executive plays no role in its operation. *See N.L.R.B.*, 580 U.S. at 304-05 (explaining the FVRA contains “mandatory language” for “first assistants who automatically assume acting duties under (a)(1)”). Subsections (a)(2) and (a)(3), by contrast, are not automatic. They are narrowly-cabined presidential appointment provisions. Their backward-looking language is included to limit the President’s choices to “officials with both experience and seniority.” *L.M.-M.*, 442 F. Supp. 3d at 28. Viewed from this perspective, the

presence of backward-looking language in subsections (a)(2) and (a)(3) actually supports Defendants' reading of the FVRA. Subsection (a)(1) is not limited like (a)(2) and (a)(3) precisely because the President plays no role in its operation.

The government also argues that the prohibition in § 3345(b)(1)(A) expressly contemplates that a first assistant may serve as an acting official even if, like Ms. Chattah, she did not serve as first assistant before the vacancy. Doc. 29 at 14. Subsection (b)(1) reads:

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.”

5 U.S.C. § 3345(b)(1).

The government's argument can be stated in these terms: Subsection (b)(1) provides that a presidential nominee cannot serve as an acting officer if that person was not a first assistant or was a first assistant for less than 90 days in the year preceding the vacancy. Why would Congress begin subsection (b)(1) with the words “Notwithstanding subsection (a)(1)” unless (a)(1) provided for something different—namely, that a person

could serve as an acting officer even if that person had not previously been a first assistant, like Ms. Chattah?

Stated differently, the government argues that § 3345(b)(1) implies that subsection (a)(1) can include later-appointed first assistants. But the Supreme Court has cautioned that statutory implications must be viewed in context, *N.L.R.B.*, 580 U.S. at 302 (citation omitted), and the context of subsection (b)(1) does not support the government's reading, for several reasons.

First, although the word “notwithstanding” at the start of subsection (b)(1) expressly distinguishes it from (a)(1), there can be more than one reason Congress included this distinction. One possibility is the government's argument—that subsection (b)(1) imposes a condition of prior service that (a)(1) does not. Another possible reason is more general—that Congress wanted to make clear that subsection (a)(1)'s mandatory and automatic promotion of first assistants to acting officers does not control when the first assistant is also the President's nominee for the permanent position.

Second, the government's reading would mean that an Acting U.S. Attorney position could be filled by anyone the Attorney General chooses, at any time during the vacancy. This reading would give the Executive Branch a role in filling subsection (a)(1) positions that the language and structure of § 3345(a) do not. And, again, it would render subsections (a)(2) and (a)(3) largely superfluous.

Third, subsection (b)(1) is not an affirmative statement of who can fill vacancies. The affirmative provisions are found in subsection (a). Subsection (b)(1) imposes limitations on presidential nominees for the permanent office. It describes which nominees “may not

serve as an acting officer.” 5 U.S.C. § 3345(b)(1). Given its location in a subsection other than (a) and the fact that it is a statement of limitation on a specific class of persons, the Court does not find it a persuasive basis for broadening the scope of subsection (a)(1).

The government next argues that specific words in subsection (a)(1) support its view. It notes that the subsection refers to “the first assistant to the office of such officer,” not “the first assistant of such officer.” Doc. 29 at 13 (quoting 5 U.S.C. § 3345(a)(1)). This shows, according to the government, that subsection (a)(1) is not limited to the person who was serving as first assistant to the departed PAS officer, but includes anyone who serves as first assistant to “the office,” even if later appointed. *Id.* As Defendants note, however, this language can be read just as readily to ensure that the “assistant” covered by subsection (a)(1) is the first assistant to the office and not a personal assistant to the departed officer—an important distinction. Furthermore, this small variation in wording does not change the fact that subsection (a)(1) is an automatic mechanism established by Congress to fill the vacancy with no Executive Branch involvement, or the fact that when Congress did choose to give the President a role in filling vacancies under § 3345(a), it carefully limited and controlled his choices in subsections (a)(2) and (a)(3). Nor can this wording choice be reasonably viewed as evidence that Congress intended to grant the Attorney General broad power to choose whomever she wants whenever she wants. The other district court that has addressed this argument has also rejected it. *See Giraud*, 2025 WL 2416737, at *16 (relying in part on the legislative history of the FVRA).

Finally, the government supports its reading of the FVRA by citing Executive Branch opinions from the General Accounting Office (“GAO”) and the DOJ Office of Legal Counsel (“OLC”), both of which opine that Acting U.S. Attorneys under subsection (a)(1) need not have been first assistants when the vacancy arose. Doc. 29 at 14. The Ninth Circuit has explained, however, that because neither the GAO nor OLC “is charged with administering the FVRA, . . . we give no deference” to them. *Hooks*, 816 F.3d at 564. And as Defendants note, the GAO and OLC have answered this question differently at different times, sometimes concluding that only incumbent first assistants may become the acting officer under subsection (a)(1). *Compare* 23 Op. O.L.C. 60, 64 (1999) (adopting Defendants’ interpretation), *with* 25 Op. O.L.C. 177, 179-80 (2001) (adopting the government’s interpretation). Such inconsistency undermines the persuasiveness of agency opinions. *See Kisor v. Wilkie*, 588 U.S. 558, 579 (2019) (explaining that deference is “rarely” appropriate when an agency’s current construction conflicts with a prior one). And in any event, the Supreme Court has recently emphasized that courts need not defer to agency interpretations of statutes. *Loper Bright Enters., Inc. v. Raimondo*, 603 U.S. 369 (2024).

There is another reason to conclude that subsection (a)(1) is meant to work only at the start of a vacancy. Congress passed the FVRA while “[p]erceiving a threat to the Senate’s advice and consent power” from years of Executive Branch disregard of the predecessor statute. *N.L.R.B.*, 580 U.S. at 295 (citation omitted). The FVRA was “a reclamation of the Congress’s Appointments Clause power.” *SW Gen., Inc. v. N.L.R.B.*, 796 F.3d 67, 70 (D.C. Cir. 2015), *aff’d*, 580 U.S. 288 (2017) (citations

omitted). “Congress was concerned, most notably, that the Attorney General and other department heads had made frequent use of organic vesting and delegation statutes to assign the duties of PAS offices to officers and employees, with little or no check from Congress.” *L.M.-M.*, 442 F. Supp. 3d at 29 (citation omitted).

By choosing to make subsection (a)(1) an automatic default mechanism for filling vacancies temporarily, Congress exerted its constitutional power to specify how non-principal officers in the Executive Branch could be appointed. And by placing significant restrictions on the President’s power to fill those vacancies under subsections (a)(2) and (a)(3), Congress largely controlled who could be appointed.

To reinforce its choices, Congress made the FVRA “the exclusive means for temporarily authorizing an acting official to perform the functions and duties” of a PAS office, unless Congress itself has created another agency-specific statute. 5 U.S.C. § 3347(a). The FVRA also makes clear that general delegation powers cannot be used to fill vacancies. *Id.* § 3347(b). And it provides that the acts of persons serving in violation of the FVRA are void. *Id.* § 3348(d).

In short, the FVRA is a carefully crafted assertion of Congress’s power under Article II, section 2, clause 2 of the Constitution. Its purpose would be defeated if the Executive Branch—the very branch Congress was trying to constrain—could choose whomever it wanted, whenever it wanted, and fill the vacancy simply by declaring that person to be first assistant. The better reading of the text is that subsection (a)(1) operates only on first assistants in place when vacancies begin. Only then does

the statute realize Congress’s purpose and avoid superfluous provisions.

Other cases reach the same conclusion. *See, e.g., Giraud*, 2025 WL 2416737, at *14 (“This statutory framework convincingly indicates that a ‘first assistant’ who may take office in an ‘acting capacity’ must be the first assistant at the time the vacancy occurs.” (footnote omitted)); *L.M.-M.*, 442 F. Supp. 3d at 28-29 (“Defendants’ reading of the FVRA would decimate this carefully crafted framework. The President would be relieved of responsibility and accountability for selecting acting officials, and the universe of those eligible to serve in an acting capacity would be vastly expanded. . . . One is left to wonder, if Congress had intended—or even imagined—such a result, why would it have gone to the trouble of requiring that ‘the President (and only the President)’ act in order to overcome the default rule and why would it have limited the pool of potential presidential designees to PAS officials and senior officials who had served in the agency at issue for at least 90 days in the year before the vacancy arose?”).

The Court recognizes, of course, that Congress did not explicitly say that the first assistant addressed in subsection (a)(1) must be serving when the vacancy arises. Because the statute does not include such an unmistakable command, the Court will look to the FVRA’s legislative history to confirm its interpretation. *See Nat’l TPS All. v. Noem*, --- F.4th ----, 2025 WL 2487771, at *9-10 (9th Cir. Aug. 29, 2025) (“The legislative history of the TPS statute confirms our understanding that Congress intended to constrain the authority of the Executive, not to render all aspects of the TPS program unreviewable.” (citation omitted)); *Murphy Co. v. Biden*,

65 F.4th 1122, 1135 (9th Cir. 2023) (“The O & C Act’s legislative history confirms our reading of the statute’s plain language.”).

B. FVRA’s Legislative History.

Issues addressed by the FVRA are not new. “Since President Washington’s first term, Congress has given the President limited authority to appoint acting officials to temporarily perform the functions of a vacant PAS office without first obtaining Senate approval.” *N.L.R.B.*, 580 U.S. at 294. “The earliest statutes authorized the appointment of ‘any person or persons’ to fill specific vacancies in the Departments of State, Treasury, and War.” *Id.* Congress initially allowed acting officers to serve until a successor was appointed, but soon began imposing time limits to reinforce the Senate’s advice and consent powers. *Id.* (citation omitted).

As part of this ongoing effort, Congress passed the Vacancy Act in 1868. The Act expanded the number of covered agencies and imposed new constraints on how the Executive could fill PAS vacancies. “The authority to appoint ‘any person or persons’ as an acting officer gave way to a default rule that the ‘first or sole assistant . . . shall’ perform that function[.]” *Id.*

Today’s version of the law arose from tensions between the Legislative and Executive Branches in the 1970s, 80s, and 90s. The DOJ took the position that heads of Executive agencies could temporarily fill vacant offices without following the Vacancies Act. Indeed, “[b]y 1998, approximately 20 percent of PAS offices in Executive agencies were occupied by ‘temporary designees,’” most of whom were serving beyond the time limits imposed by Congress. *Id.* at 295 (citation omitted).

Congress responded by “replac[ing] the Vacancies Act with the FVRA.” *Id.* It was a two-step process. First, on July 15, 1998, the Senate Governmental Affairs Committee reported out S. 2176, titled the “Federal Vacancies Reform Act.” See Morton Rosenberg, Congressional Research Service Report for Congress, *The New Vacancies Act: Congress Acts to Protect the Senate’s Confirmation Prerogative 1-4* (1998) (“Rosenberg”). A Senate Report described the provisions and intent of the proposed law. See S. Rep. No. 105-250 (1998). When the Senate bill failed to survive a cloture vote, Congress moved to the second step of the FVRA’s creation. “[A] period of intense negotiations between the Senate sponsors and Administration officials followed and an agreement on a compromise measure was reached and included in the FY 1999 Omnibus Consolidated and Emergency Supplemental Appropriations Act.” Rosenberg at 9.

The Court has consulted both the Congressional Research Service Report on the final enactment, by Rosenberg, and, where the final version of the FVRA does not differ significantly from S. 2176, the Senate Report on the legislation. Other cases rely on these same sources. See, e.g., *N.L.R.B.*, 580 U.S. at 295 (citing Rosenberg), 325 (Sotomayor, J., dissenting) (citing S. Rep. No. 105-250); *Hooks*, 816 F.3d at 556 (citing S. Rep. No. 105-250); *SW Gen., Inc.*, 796 F.3d at 70 (citing Rosenberg and S. Rep. No. 105-250); *Giraud*, 2025 WL 2416737, at *17 nn.178-79 (citing S. Rep. No. 105-250).

The Senate version of § 3345(a)(1) provided for the automatic assumption of the vacant PAS office’s duties by the first assistant. S. Rep. No. 105-250, at 19. It also included what is now subsection (a)(2), allowing “the President (and only the President)” to fill the vacancy

temporarily with a confirmed PAS officer. *Id.* Subsection (a)(3), which allows the President to appoint a senior official in the agency, was added during the negotiations that led to the FVRA's enactment. *See* Rosenberg at 8. But it had actually been recommended in the Senate Report. *See* S. Rep. No. 105-250, at 31 (suggesting “a third category of individuals to temporarily fill positions, such as a qualified individuals who have worked within the agency in which the vacancy occurs for a minimum number of days and who are of a minimum grade level”).

The intent and structure of the Senate bill was adopted in the final legislation: automatic elevation of the first assistant when the vacancy arose, presidential power to make alternative appointments under carefully limited criteria, and a statute that was the exclusive means for filling vacancies in PAS offices unless another statute specifically provided otherwise. *See id.* at 11-12.

The Senate Report includes this explanation for § 3345:

When a vacancy arises, the bill provides *an exclusive set of procedures that may be followed. If the vacant officer has a first assistant, the first assistant performs the functions and duties of the office temporarily in an acting capacity, subject to the time limitations of section 3346. . . .* The Vacancies Act provides for the *automatic performance* of the functions and duties of the vacant office by the first assistant because such person is often a career official with knowledge of the office or a Senate-confirmed individual[.]

Id. at 12 (emphasis added). This explanation confirms not only that the § 3345 procedures were intended to be

exclusive and that the existing first assistant was to become the acting official, but why—because the first assistant would have knowledge of the agency’s functioning. None of these objectives would be realized if the Attorney General could designate a person who has no experience with the agency to be the acting officer. The Senate Report further confirms the mandatory and automatic nature of subsection (a)(1), saying that “if a first assistant exists, the President need not take any action for an acting official to serve.” *Id.* But if the President does decide to make the appointment, the FVRA grants him only “limited flexibility” as we have seen in the criteria of subsections (a)(2) and (a)(3). *Id.* at 13.

The Senate also understood that the automatic designation of an acting official in subsection (a)(1) would apply to the first assistant in place when the vacancy arose:

An acting officer may die or resign. In that event, the first assistant, if there is one, or a new presidential designee of a Senate-confirmed officer may become the acting officer, limited in service [to a specific period of time]. *No one else may serve as acting officer. Once again, that means that if there is no first assistant, and no presidential designation, no one may serve as acting officer.*

Id. at 14 (emphasis added). While this statement does not include the subsection (a)(3) appointment provision adopted in the final FVRA, it underscores that if there is no first assistant when the vacancy arises, and if the President does not exercise his narrowly controlled power to appoint, then “[n]o one else may serve as acting officer.” *Id.* The Senate Report repeats this conclusion: “If there is no first assistant, no one is permitted by law

to become an acting officer until the President designates a Senate-confirmed individual to be the acting officer,” or, after the final amendment, designates a senior officer from the agency as allowed in subsection (a)(3). *Id.* at 13. The procedure used by the government to appoint Ms. Chattah was never intended by Congress.

The Congressional Research Service Report for the final legislation confirms this intent. It explains that the FVRA was enacted in response to the Executive Branch’s repeated disregard of previous vacancy statutes. *See* Rosenberg at 3. It confirms that “the President’s choices of action are strictly confined” under the statute. *Id.* at 1. And it directly rejects the DOJ position (asserted in this case and discussed more fully below) that vacancies could be filled through general delegation statutes: “The new Vacancies Act rejects the DOJ position on temporary appointments and makes it clear that the Act is the exclusive vehicle for temporarily filling vacant advice and consent positions unless Congress expressly provides otherwise.” *Id.*

Thus, in response to the Executive Branch’s repeated disregard of previous vacancy statutes, Congress took matters into its own hands, providing an automatic procedure for first assistants to become acting officers and giving only limited alternatives to the President. The Court cannot accept the government’s assertion that the Attorney General has power to designate anyone she chooses as first assistant and have that person become the acting U.S. Attorney under § 3345(a)(1). The FVRA was enacted to put an end to precisely such Executive actions.

IV. The Government’s General Delegation Argument.

If Ms. Chattah is not validly serving under the FVRA, the government nonetheless argues she is authorized to supervise criminal prosecutions in Nevada. Doc. 29 at 18. This is because §§ 509, 510, and 515 empower the Attorney General to delegate power to prosecute federal crimes and supervise Assistant U.S. Attorneys in the discharge of their duties. The government contends the Attorney General delegated such power to Ms. Chattah on July 28, 2025.

This argument runs headlong into the exclusivity provisions of the FVRA. Section 3347(a) states that 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). Subsection (a)(1) includes an exception to this exclusivity for “a statutory provision [that] 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).⁷ Stated differently, the FVRA does not eclipse other statutes that create express methods for filling PAS offices temporarily, like § 546 in this case. *See* 28 U.S.C. § 546.

But this exception to the FVRA’s exclusivity does not include general delegation statutes like those relied on by the government. Section 3347(b) makes this clear: “Any statutory provision providing general authority to the head of an Executive agency . . . to delegate duties statutorily vested in that agency head to . . . officers or

⁷ The exception includes other narrow categories that are not relevant here. *See* § 3347(a)(1)(B)-(a)(2).

employees of such Executive agency, is not a statutory provision to which subsection (a)(1) applies”—in other words, it does not fall within the exception to FVRA exclusivity. 5 U.S.C. § 3347(b). As a result, the DOJ cannot rely on §§ 509, 510, and 515 to temporarily fill the vacant U.S. Attorney position in Nevada.

The government argues that this language in § 3347(b) has a much narrower meaning. Doc. 29 at 19-21. It contends that § 3347(b) applies only to nondelegable authority and has no effect on general powers that can be delegated by the Attorney General. The government relies on three cases: *Gonzales & Gonzales Bonds & Ins. Agency Inc. v. U.S. Dep’t of Homeland Sec.*, 107 F.4th 1064 (9th Cir. 2024); *Kajmowicz v. Whitaker*, 42 F.4th 138 (3d Cir. 2022); and *Arthrex, Inc. v. Smith & Nephew, Inc.*, 35 F.4th 1328 (Fed. Cir. 2022).

The most relevant of these decisions, of course, is the Ninth Circuit’s ruling in *Gonzales*. It addressed the “ratification bar” found in § 3348(d)(2) of the FVRA. That provision states that the actions of a person serving improperly under § 3345 not only lack any force or effect, but also cannot be ratified later by a properly appointed officer. 5 U.S.C. § 3348(d)(1)-(2). *Gonzalez* held that this ratification bar is limited to exercises of nondelegable duties. 107 F.4th at 1067-68. It based this conclusion on the language of § 3348—the section that includes the ratification bar—which defines “function or duty” to mean something that must be performed “by the applicable officer (and only that officer).” § 3348(a)(2)(A)(ii). *Gonzales* concluded that the phrase “and only that officer” refers to functions and duties that are nondelegable—that can be performed only by the officer in question. 107 F.4th at 1073-77.

Significantly, however, the nondelegability definition relied on by *Gonzales* is limited to § 3348. It reads: “*In this section*— . . . the term ‘function or duty’ means any function or duty of the applicable office that . . . is required by statute to be performed by the applicable officer (and only that officer).” 5 U.S.C. § 3348(a)(2)(A)(ii) (emphasis added). The words “In this section” clearly limit § 3348(a)(2)(A)(ii)’s nondelegability definition to § 3348. The provision at issue here, § 3347(b), which prohibits reliance on general delegation statutes, is not found in § 3348.

The Supreme Court has confirmed that Congress was careful in its word selection in the FVRA. *See N.L.R.B.*, 580 U.S. at 300 (“When Congress wanted to refer only to a particular subsection or paragraph, it said so. *See, e.g.*, § 3346(a)(2) (‘subsection (b)’); § 3346(b)(2) (‘paragraph (1)’). But in (b)(1) Congress referred to the entire section—§ 3345—which subsumes all of the ways a person may become an acting officer.”). The D.C. Circuit likewise has recognized that “the phrase ‘this section’ plainly refers to section 3345 in its entirety. Throughout the FVRA, the Congress was precise in its use of internal cross-references.” *SW Gen.*, 796 F.3d at 74. The Court concludes that the words “[i]n this section” mean what they say—the nondelegability definition applies only in § 3348.

The government argues, nonetheless, that the narrow definition of “function or duty” found in § 3348 applies to all of the FVRA, including § 3347(d), and that the ban on using general delegation statutes therefore is limited to nondelegable duties. Because Ms. Chattah is not exercising nondelegable duties, the government

argues, § 3347(b) does not apply. This argument is wrong for three reasons.

First, as already noted, the narrow definition of “function or duty” at issue in *Gonzales* is limited to § 3348 and has no application to § 3347(b). The Ninth Circuit expressly recognized this in *Gonzales*:

[I]nterpreting “function or duty” in § 3348 to include only nondelegable duties does not alter § 3347(b)’s dictate regarding general vesting-and-delegation statutes. . . . That a department head cannot rely on a general vesting-and-delegation statute to designate the acting officer in the event of a vacancy, § 3347(b), answers a question wholly distinct from the consequences of violations of the FVRA under § 3348.

107 F.4th at 1078 (footnote omitted).⁸

Second, if we assume for a moment that § 3347(b) concerns only nondelegable powers, the subsection makes no sense. It applies to “[a]ny statutory provision

⁸ The Third Circuit’s decision in *Kajmowicz*, also cited by the government, is similar to *Gonzales*. It held that the ratification bar in § 3348 is limited to nondelegable duties, but said nothing about the meaning or scope of § 3347(b). See *Kajmowicz*, 42 F.4th at 138-56. The Federal Circuit’s decision in *Arthrex*, on the other hand, concluded that every reference in the FVRA to “functions and duties” is limited to nondelegable duties as defined in § 3348. 35 F.4th at 1338. *Arthrex* candidly admitted that this reading “renders the FVRA’s scope ‘vanishingly small.’” *Id.* at 1337 (citation omitted). Significantly, however, *Arthrex* never even mentions the fact that the nondelegability definition on which it relies in § 3348(a) is expressly limited to “this section”—a significant omission in the opinion. The Court will follow the Ninth Circuit’s correct conclusion that the limitation to nondelegable duties applies only in § 3348 and has no effect on § 3347(b) and its rejection of the government’s reliance on general delegation statutes.

providing general authority to the head of an Executive agency . . . to delegate duties statutorily vested in that agency head to . . . officers or employees of such Executive agency[.]” 5 U.S.C. § 3347(b). In other words, § 3347(b) concerns delegable duties—duties the agency head can delegate to subordinates. It would become meaningless, even nonsensical, if it were confined to nondelegable duties.

Third, even if § 3347(b) did not apply to the Attorney General’s delegation powers in §§ 509, 510, and 515, the government’s argument would fail. These general delegation provisions would still be subject to the FVRA’s exclusivity. Section 3347(b) says only that the statutes it covers are not within the exception to exclusivity found in § 3347(a)(1). So, even if § 3347(b) did not apply to §§ 509, 510, and 515, those provisions would be excepted from the FVRA’s exclusivity only if they fall within the language of the exception—§ 3347(a)(1). And yet that exception applies only to “a statutory provision [that] *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.” § 3347(a)(1)(A) (emphasis added). Sections 509, 510, and 515 are not such statutes. They say nothing expressly about designating officers or employees to perform the functions and duties of a specified office temporarily. Therefore, even if § 3347(b) did not apply to them, these general delegation statutes would not fall within § 3347(a)(1)’s exception and would be foreclosed by the FVRA’s exclusivity. They could not be used to appoint an Acting U.S. Attorney.

There is an even stronger reason the government's argument fails. The FVRA directly targeted the DOJ's reliance on §§ 509 and 510 to appoint temporary PAS officers. As *Gonzales* explains:

§ 3347(b) addresses a specific past practice of the executive branch. Until Congress enacted the FVRA, the Department of Justice maintained that its general “vesting-and-delegation authority . . . permit[ted] the Attorney General to reassign the duties of such Senate-confirmed positions to other officials of the Department, outside the limits of the Vacancies Act.” The general delegation exclusion in § 3347(b) addresses this specific problem of agencies evading the requirements for designating acting officers.

107 F.4th at 1078 n.7.

The legislative history of the FVRA is even clearer:

The bill provides that any statutory provision providing general authority to the head of an executive agency to delegate or reassign duties within that executive agency is not a statutory provision that qualifies within the exception contained in section 3347(a)(2) for existing statutes that provide for the filling of a vacancy in a specific office. *This provision forecloses the argument raised by the Justice Department that sections 28 U.S.C. §§ 509 and 510, rather than the Vacancies Act, apply to vacancies in that department.*

S. Rep. No. 105-250, at 17 (emphasis added).

The Congressional Research Service Report makes the same point: “DOJ asserts that it has such authority under Section 509 of title 28 . . . and under Section

510[.]” Rosenberg at 3. “Section 3347(b) expressly negates the DOJ position[.]” *Id.* at 11. In other words, the argument now made by the government was expressly rejected by Congress in 1998.

One other point should be addressed. The government asserted at oral argument that it is not relying on the delegation statutes to make Ms. Chattah the Acting U.S. Attorney. Rather, the government appeared to argue that Ms. Chattah is only exercising *some* delegated powers and is not functioning as a full Acting U.S. Attorney. But when asked by the Court to identify a single power possessed by a U.S. Attorney that Ms. Chattah is not exercising, the government could name none. The U.S. Attorney’s powers listed in 28 U.S.C. § 547 were reviewed, and it was evident that Ms. Chattah is exercising all of them. Indeed, the appointment document signed by Attorney General Bondi on July 28, 2025, specifically states that “Ms. Chattah will have authority to serve as Acting United States Attorney[.]” Doc. 29-3 at 2. And the government’s brief states she is “fully authorized, by delegation, to supervise criminal prosecutions in Nevada.” Doc. 29 at 18. The Court cannot conclude that Ms. Chattah’s role is anything less than Acting U.S. Attorney, a position she cannot hold under § 3345(a) and cannot perform by delegated powers.⁹

Some may ask what happens if Ms. Chattah cannot serve under the FVRA. There are several possibilities. The President (and only the President) could appoint a

⁹ Having reached this conclusion, the Court need not address Defendants’ argument that Ms. Chattah’s term of service under the FVRA is limited to the 120 days allowed by § 546, nor Defendants’ arguments that U.S. Attorneys and Acting U.S. Attorneys who serve for lengthy periods are subject to the Appointments Clause.

temporary Acting U.S. Attorney who satisfies the strict requirements of § 3345(a)(2) or (a)(3). The judges of the District of Nevada could choose to exercise their power under 28 U.S.C. § 546(d) and appoint an Acting U.S. Attorney until the position is filled. Or the President could nominate a U.S. Attorney and seek quick confirmation by the Senate. But the text and history of the FVRA make clear what cannot happen: the Attorney General cannot designate Ms. Chattah as first assistant and thereby make her Acting U.S. Attorney.

V. Remedy.

A. Dismissal of the Indictment.

Defendants seek dismissal of their indictments because: (1) Ms. Chattah lacked authority to approve filing of the indictments, (2) invalid indictments implicate Defendants' constitutional right to procedural due process, and (3) the Court has inherent supervisory authority to dismiss indictments based on government misconduct. Doc. 20 at 52-54.

1. Ms. Chattah's Lack of Authority.

Defendants assert that U.S. Attorneys decide whether to authorize prosecutions within their districts. *Id.* at 53 (citing 28 U.S.C. § 547; U.S. Dep't of Just., Just. Manual § 9-2.001). Defendants contend that because Ms. Chattah had no power to authorize the indictments, they are invalid and must be dismissed. *Id.* In support, Defendants cite *United States v. Trump*, 740 F. Supp. 3d 1245, 1302-04 (S.D. Fla. 2024). *Id.*

In *Trump*, the Attorney General appointed attorney Jack Smith to serve as Special Counsel for the DOJ. 740 F. Supp. 3d at 1255. A grand jury issued an indictment, signed by the Special Counsel, charging former Presi-

dent Donald Trump with criminal offenses. *Id.* at 1254. Mr. Trump moved to dismiss the indictment based on the allegedly unlawful appointment and funding of the Special Counsel. *Id.* After finding that the Special Counsel’s appointment violated the Appointments Clause, the district court concluded that dismissal of the indictment was required due to Special Counsel Smith’s *ultra vires* exercise of prosecutorial power. *Id.* at 1302-04. The district court explained:

Here, as in *Lucia*, the appropriate remedy is invalidation of the officer’s *ultra vires* acts. Since November 2022, Special Counsel Smith has been exercising power that he did not lawfully possess. All actions that flowed from his defective appointment—including his seeking of the Superseding Indictment on which this proceeding currently hinges—were unlawful exercises of executive power. Because Special Counsel Smith cannot wield executive power except as Article II provides, his attempts to do so are void and must be unwound. Defendants advance this very argument: “any actions taken by Smith are *ultra vires* and the Superseding Indictment must be dismissed.” And the Court sees no alternative course to cure the unconstitutional problem.

Id. at 1303 (citation modified).

The district court’s decision in *Trump* is not controlling precedent, and the case is distinguishable for at least two reasons. First, unlike the indictments at issue here, which were signed by Assistant U.S. Attorneys, the indictment in *Trump* was signed only by Special Counsel Smith. *See id.* at 1254 (noting that the grand jury returned a superseding indictment signed by the Special Counsel); *see also Giraud*, 2025 WL 2196794, at

*7 (distinguishing *Trump* for this reason). Second, the government in *Trump* “fail[ed] to propose any alternative form of relief or to respond on the substance of the remedial question.” 740 F. Supp. 3d at 1302. Here, the government contends that Ms. Chattah was not involved in approving the challenged indictments, an assertion Defendants do not dispute, and that the Assistant U.S. Attorneys can continue to prosecute these cases pursuant to their authority delegated from the Attorney General. Doc. 29 at 23-24.

Defendants are correct that the U.S. Attorney has a duty to prosecute offenses against the United States within her district. *See* 28 U.S.C. § 547(1). But the power to prosecute is not exclusive to the U.S. Attorney. Assistant U.S. Attorneys also have the power to prosecute offenses against the United States, and their power derives not from the U.S. Attorney but from the Attorney General. *See* 28 U.S.C. § 542; *see also United States v. Hilario*, 218 F.3d 19, 22 (1st Cir. 2000) (“AUSAs are themselves representatives of the government. Because they are appointed directly by the Attorney General, *see* 28 U.S.C. § 542, their ability to act does not hinge on the authority of the local United States Attorney, but derives from the Attorney General’s plenary power over litigation to which the United States is a party, *see id.* § 516.”).

Defendants do not contend that the Assistant U.S. Attorneys who are handling their cases lack authority, nor do they challenge the validity of the indictments. Defendants do not dispute that they were charged by a properly constituted grand jury. *See Costello v. United States*, 350 U.S. 359, 363 (1956) (“An indictment returned by a legally constituted and unbiased grand jury,

... if valid on its face, is enough to call for trial of the charge on the merits.”). Nor do Defendants identify defects in the indictments as ground for dismissal. *See* Fed. R. Crim. P. 12(b)(3)(b).

Under Federal Rule of Criminal Procedure 7, an indictment must contain “the essential facts constituting the offense charged and must be signed by an attorney for the government.” Fed. R. Crim. P. 7(c)(1). An “attorney for the government” includes “an authorized assistant” of a U.S. Attorney or “any other attorney authorized by law to conduct proceedings under these rules as a prosecutor.” Fed. R. Crim. P. 1(b)(1)(B), (D); *see also United States v. Tafoya*, 541 F. Supp. 2d 1181, 1184 (D.N.M. 2008).

Here, each indictment contains the essential facts constituting the offense charged. And each indictment is signed by an Assistant U.S. Attorney, not by Ms. Chattah. *See* Docs. 1 at 1-2 (Garcia), 1 at 1-4 (Salazar Del Real), 5 at 1-2 (Jackson), 17 at 1-2 (Enriquez); *see also United States v. Walls*, 577 F.2d 690, 696 (9th Cir. 1978) (“We hold . . . that the signature of the United States Attorney himself was not essential and that the signature of an Assistant United States Attorney was sufficient to indicate the necessary agreement [of the government] with the action taken by the grand jury.”).¹⁰

¹⁰ Ms. Chattah’s name appears on the signature block of each indictment with the title “Acting U.S. Attorney,” but she did not sign the indictments, and the government asserts that she did not review or approve them because that task falls to the Criminal Chief or one of her deputies. Doc. 29 at 26 n.4 (offering to provide supporting documents for the Court’s *in camera* review). The Court notes that “a defect in the government attorney’s signature is ‘nonjurisdictional’ and subject to ‘harmless error analysis.’” *Giraud*, 2025 WL

What is more, the Ninth Circuit has made clear that an infirmity in a U.S. Attorney's appointment "would not affect the validity of indictments, . . . as indictments need only be signed by an 'attorney for the government.'" *Gantt*, 194 F.3d at 998 (citations omitted). Other courts agree. *See, e.g., United States v. Baldwin*, 541 F. Supp. 2d 1184, 1214 (D.N.M. 2008) ("Assuming that the appointment of an interim U.S. Attorney, pursuant to § 546(d) violated the Constitution, indictments filed during the tenure of the appointee would still be valid if an authorized Assistant U.S. Attorney signed them.").

Defendants argue that the Ninth Circuit's statement in *Gantt*, that an invalid appointment does not render an indictment defective, is mere dicta. Docs. 20 at 54 n.45, 36 at 25-26. Even if true, the Court finds *Gantt*'s reasoning persuasive, as have courts in other jurisdictions. *See e.g., Baldwin*, 541 F. Supp. 2d at 1214; *Tafoya*, 541 F. Supp. 2d at 1184; *United States v. Ruiz Rijo*, 87 F. Supp. 2d 69, 71-72 (D.P.R. 2000).

Defendants have not shown that Ms. Chattah's lack of authority to serve as Acting U.S. Attorney warrants dismissal of the indictments.¹¹

2416737, at *29 (citations omitted). The harmless error standard makes sense because "the grand jury 'is a constitutional fixture in its own right,' which 'belongs to no branch of the institutional Government.' Thus, to dismiss an indictment, a defendant generally must show that some kind of misconduct prejudiced him with regard to the grand jury proceeding." *Id.* (citations omitted).

¹¹ Because Defendants' request to dismiss the indictments is denied, the Court need not address their argument that any dismissal should be with prejudice. *See* Doc. 20 at 56.

2. Due Process.

Defendants contend that their constitutional rights to procedural due process are violated by the invalid indictments. Doc. 20 at 53-54. But Defendants have received all the process they are due—they have been charged by a properly constituted grand jury and their indictments have been signed by authorized attorneys for the government. *See Costello*, 350 U.S. at 363 (explaining that a facially valid “indictment returned by a legally constituted and unbiased grand jury . . . is enough to call for trial of the charge on the merits”).

Nor have Defendants explained the connection between the appointment of Ms. Chattah and their due process rights to a fair trial. It is not enough merely to assert the U.S. Attorney is not validly appointed; Defendants must show that this fact somehow affects the fairness of the proceedings against them. They have not done so. *See United States v. Smith*, 962 F.3d 755, 765-66 (4th Cir. 2020) (“At bottom, Smith has cited no authority—nor could he—for his root-to-branch theory that as long as Whitaker’s tenure as Acting Attorney General was unlawful, then the integrity of his federal prosecution in the Western District of North Carolina was *necessarily* marred. Rather, Smith must show that Whitaker’s tenure somehow affected his proceeding and prejudiced him in some way. Yet Smith can do no such thing.” (citations omitted)). No procedural due process violation requires dismissal of the indictments.¹²

¹² In their reply brief, Defendants assert that “the Due Process Clause should require the prosecution to be impartial and properly appointed.” Doc. 36 at 26 (citing *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 807, 809 n.21 (1987) (discussing the

3. The Court’s Supervisory Authority.

Defendants contend the Court should dismiss the indictments under its inherent supervisory authority to protect the integrity of the federal courts and deter future unlawful conduct. Docs. 20 at 54, 36 at 27. The sole case they cite is *United States v. Bundy*, 968 F.3d 1019 (9th Cir. 2020). *Id.* Dismissal was appropriate in *Bundy*, however, because government misconduct directly affected the fairness of the criminal prosecution. “[T]he government withheld key evidence favorable to the defense until after trial was underway—in clear violation of its duties under *Brady*[.]” *Bundy*, 968 F.3d at 1031. No such violation has occurred in these cases.

Additionally, *Bundy* made clear that a district court must “approach [the remedy of dismissal] with some caution and with a view toward balancing the interests involved,” and must find there is “no lesser remedial action” available before dismissing an indictment. *Id.* (citations omitted). Here, a lesser remedy is available—disqualifying Ms. Chattah from participating in or su-

“requirement of a disinterested prosecutor”); *Erikson v. Pawnee Cnty. Bd. of Cnty. Comm’rs*, 263 F.3d 1151, 1154 (10th Cir. 2001) (“[T]he participation of a privately-retained attorney in a state criminal prosecution does not violate the defendant’s right to due process under federal law unless the private attorney effectively controlled critical prosecutorial decisions.”)). But Defendants present no evidence or legal authority suggesting that Ms. Chattah’s improper appointment renders her partial, or that she has made any prosecutorial decisions in their cases. Nor have Defendants shown that Ms. Chattah has a financial interest in their prosecutions. *See* Doc. 36 at 26 (citing 18 U.S.C. § 208(a)) (prohibiting an Executive employee from “participat[ing] personally and substantially . . . in a judicial or other proceeding” in which such employee “has a financial interest”).

pervising these prosecutions. The Court will not dismiss the indictments under its supervisory authority.¹³

B. Ms. Chattah’s Disqualification.

Defendants argue in the alternative that Ms. Chattah should be disqualified from participating in or supervising their cases. Doc. 20 at 56. The government does not address this argument other than opposing disqualification of the entire U.S. Attorney’s Office for the District of Nevada. Doc. 29 at 7, 23-25.

Defendants do not seek complete disqualification, but instead request that the Court disqualify from their cases any attorney acting under Ms. Chattah’s direction. Doc. 20 at 56. Disqualification of the entire U.S. Attorney’s Office would not be proper. *See United States v. Williams*, 68 F.4th 564, 572 (9th Cir. 2023) (“We run an even greater risk of offending separation-of-powers principles when disqualifying an entire office of Executive branch attorneys. Such sweeping interference is seldom warranted. Indeed, every circuit court that has reviewed an officewide disqualification has reversed.” (citations omitted)).

Given the Court’s conclusion that Ms. Chattah is not validly serving as Acting U.S. Attorney, her involvement in these cases would be unlawful. *See Giraud*, 2025 WL 2196794, at *8-10. The Court will disqualify Ms. Chattah

¹³ At oral argument, defense counsel identified certain risks from Ms. Chattah not validly serving as Acting U.S. Attorney—validity of the indictments, the judiciary’s appointment power, and separation of powers. But none of these potential risks warrants dismissal of the indictments under the Court’s supervisory authority if they have not affected the fairness of Defendants’ prosecutions.

from participating in or supervising Defendants' prosecutions.¹⁴

C. Selection of an Interim U.S. Attorney.

Defendants request that the judges of the District of Nevada select an interim U.S. Attorney under 28 U.S.C. § 546(d). Doc. 20 at 57-58. This provision applies because 120 days have passed since the Attorney General appointed Ms. Chattah under § 546, and no U.S. Attorney has been nominated by the President and confirmed by the Senate under § 541. *See* 28 U.S.C. § 546(c). But the language of the statute is permissive: "the district court for such district *may* appoint a United States attorney to serve until the vacancy is filled." *Id.* § 546(d) (emphasis added). Whether to exercise this permissive power is a decision to be made by the Nevada judges.

IT IS ORDERED:

1. Defendants' motions are granted to the extent they seek disqualification of Ms. Chattah from supervising their criminal prosecutions. Ms. Chattah is disqualified from supervising these cases or any attorneys in the handling of these cases. The government attorneys handling these cases shall, within 7 days of this order, file statements in the docket that they are not being su-

¹⁴ The government contends that Defendants lack standing because other than supervising the response to the motions to dismiss, Ms. Chattah is not directing the litigation against Defendants. Doc. 29 at 26-27. But the government clearly argues that Ms. Chattah is validly serving as Acting U.S. Attorney and otherwise is authorized to supervise criminal prosecutions in the district. *Id.* at 11-23. Her purported supervision of the office includes supervision of the attorneys in the office. The Court concludes Defendants have standing to challenge Ms. Chattah's supervision of the very office that is prosecuting them.

pervised by Ms. Chattah in their prosecution of these cases. They shall amend the filing if that changes at any time during the life of these cases.

2. Defendants' motions are denied to the extent they seek dismissal of their indictments.

3. These cases shall be reassigned to the District Judges in Nevada to whom they were originally assigned. The undersigned judge will remain available to handle similar motions filed in other Nevada cases, if warranted.

Dated this 30th day of September, 2025.

/s/ DAVID G. CAMPBELL
DAVID G. CAMPBELL
Senior United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 25-6214

(D.C. No. 2:25-cr-00240-GMN-BNW-1)

District of Nevada, Las Vegas

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

DEVONTE DEVON JACKSON, DEFENDANT-APPELLEE

No. 25-6223

(D.C. No. 2:25-cr-00227-JAD-BNW-1)

District of Nevada, Las Vegas

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

GIANN ICOB SALAZAR DEL REAL,
DEFENDANT-APPELLEE

No. 25-6224

(D.C. No. 3:25-cr-00026-MMD-CLB-1)

District of Nevada, Las Vegas

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

JORGE ENRIQUEZ, JR., DEFENDANT-APPELLEE

79a

No. 25-6470

D.C. No. 2:25-cr-00240-GMN-BNW-1

District of Nevada, Las Vegas

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

DEVONTE DEVON JACKSON, DEFENDANT-APPELLANT

No. 25-6465

D.C. No. 3:25-cr-00026-MMD-CLB-1

District of Nevada, Reno

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JORGE ENRIQUEZ, JR., DEFENDANT-APPELLANT

No. 25-6475

(D.C. No. 2:25-cr-00227-JAD-BNW-1)

District of Nevada, Las Vegas

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

GIANN ICOB SALAZAR DEL REAL,
DEFENDANT-APPELLEE

Filed: Aug. 21, 2026

ORDER

Before: S.R. THOMAS and MILLER, Circuit Judges, and
BLUMENFELD, District Judge.*

The government's motion to stay the mandate (Dkt. No. 62) is GRANTED. The mandate is stayed until November 16, 2026 to permit the filing of a petition for a writ of certiorari in the United States Supreme Court. *See* Fed. R. App. P. 41(d). If, within that period, the Clerk of the Supreme Court advises the Clerk of this Court that a petition for a writ of certiorari has been filed, then the mandate shall be further stayed until the Supreme Court resolves the petition. *See* Fed. R. App. P. 41(d)(2)(B)(ii). Should the Supreme Court grant certiorari, the mandate will be stayed pending disposition of the case. Should the Supreme Court deny certiorari, the mandate will issue immediately. The parties shall advise this court immediately upon the Supreme Court's decision.

Insofar as the motion also seeks a “stay [of the] judgment and therefore the precedential effect of the panel decision,” the motion is DENIED. The court entered judgment upon the filing of the opinion, *see* Fed. R. App. P. 36(a), and the government did not move to stay entry of judgment until after its entry. *Cf. Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88 (1982) (staying judgment upon issuance of opinion); *Buckley v. Valeo*, 424 U.S. 1, 144 (1976) (per curiam) (same). Because the opinion has already issued, eliminating its precedential effect would effectively require vacating the opinion. The government cites no cases from this or any other circuit vacating or withdrawing an opinion pending the resolution of a petition for a writ

* The Honorable Stanley Blumenfeld, Jr., United States District Judge for the Central District of California, sitting by designation.

of certiorari, and we are aware of none. The government's motion does not "demonstrate . . . equitable entitlement to the extraordinary remedy of vacatur." *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 26 (1994).

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

No. 2:25-cr-00230-RFB-BNW
No. 2:25-cr-00227-JAD-BNW
No. 2:25-cr-00240-GMN-BNW
No. 3:25-cr-00026-MMD-CLB

UNITED STATES OF AMERICA, PLAINTIFF

v.

SHAMAR TYRELL GARCIA; GIANN ICOB SALAZAR
DEL REAL; DEVONTE DEVON JACKSON; AND
JORGE ENRIQUEZ, JR., DEFENDANTS

Filed: Oct. 23, 2025

ORDER

The undersigned judge previously ruled that Acting U.S. Attorney Sigal Chattah was not legally appointed, and disqualified her from supervising these four cases. *United States v. Garcia*, 2025 WL 2784640 (D. Nev. Sept. 30, 2025), *appeal filed*, No. 25-6229 (9th Cir. Oct. 2, 2025). The government now asks the Court to stay its disqualification order until the Ninth Circuit resolves the existing appeal.¹

¹ See *Garcia*, Doc. 43; *Salazar Del Real*, Doc. 45; *Jackson*, Doc. 45; *Enriquez*, Doc. 47.

Courts consider four factors when deciding 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, 425-26 (2009) (citation omitted). The first two factors are the most important, and “fall on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases.” *Mi Familia Vota v. Fontes*, 111 F.4th 976, 981 (9th Cir. 2024) (citation modified). To justify a stay, a moving party must at least show that “serious legal questions are raised” by the appeal. *Leiva-Perez v. Holder*, 640 F.3d 962, 967-68 (9th Cir. 2011) (citation omitted). The Court will address the four stay factors.

1. Serious Questions.

The Court stands by its previous ruling. For reasons already explained at length, the Court concludes that Ms. Chattah’s appointment is not valid under the Federal Vacancies Reform Act (FVRA). *Garcia*, 2025 WL 2784640, at *4-11. The Court also concludes that the government’s alternative argument—that the Attorney General can confer on Ms. Chattah all the powers of a U.S. Attorney by using general delegation statutes—is directly barred by § 3447(a) and (b) of the FVRA. *Id.* at *11-14. The government has not shown it is likely to prevail on its challenge to these conclusions.

The Court also recognizes, however, that the disqualification motions raise novel and important issues. Only one other court has addressed these issues. *See United*

States v. Giraud, --- F. Supp. 3d ----, 2025 WL 2416737 (D.N.J. Aug. 21, 2025). They present important questions of when and how the President or Attorney General can fill a vacancy in a U.S. Attorney position on an acting basis. These issues are sufficiently serious to satisfy the first stay requirement.

2. Irreparable Harm.

The harm at issue in this case is not like the harm encountered in typical civil litigation. The potential harm arises from the Constitution’s division of federal powers and the deference and respect each of the three federal branches should afford each other. The concern, as the Ninth Circuit has noted, is “harm to the separation of powers.” *United States v. Williams*, 68 F.4th 564, 570 (9th Cir. 2023). Such harm is particularly relevant in this case because “[t]he doctrine of separation of powers requires judicial respect for the independence of the prosecutor.” *United States v. Simpson*, 927 F.2d 1088, 1091 (9th Cir. 1991). The separation of powers calls for courts to show “special solicitude” for Executive Branch prerogatives. *Nixon v. Fitzgerald*, 457 U.S. 731, 743 (1982).

The Court’s earlier decision disqualifies an Acting U.S. Attorney, appointed by the Attorney General, from supervising prosecutions initiated by the Executive Branch. While the Court is fully persuaded that its decision is correct as a matter of law, the decision nonetheless intrudes on Executive Branch prerogatives. If the Court’s decision is not correct, such an intrusion is improper. Given the solemn respect our separate branches of government should have for each other, the mere possibility of an improper intrusion is sufficient in the Court’s view to satisfy the irreparable harm prong of the

stay inquiry. And a separation-of-powers harm is great enough to offset the lower showing made by the government on the first prong—serious questions rather than a likelihood of success on the merits.

3. Injury to Defendants.

Defendants express concern that staying the Court's earlier decision and allowing Ms. Chattah to supervise their prosecutions will injure them. The Court is not persuaded. Defendants' cases presumably will continue to be managed primarily by the assigned line prosecutors, and the stay imposed in this order likely will be short-lived given the Ninth Circuit's expedited schedule for deciding the appeal.

4. Public Interest.

The public certainly has an interest in a government that turns square corners and complies with the statutory commands of the FVRA, but it also has an interest in avoiding unnecessary confrontations between the executive and judicial branches of government. Given these contrasting and serious interests, this fourth factor does not persuade the Court to deny the stay request.

5. Conclusion.

The Court still holds that Ms. Chattah has not been validly appointed. But the Court also recognizes the deference and respect it should have for the Executive Branch, just as the Executive Branch should have deference and respect for the Judiciary. To promote that spirit of solicitude, and in light of the relatively fast schedule set by the Ninth Circuit for resolving these matters, the Court will grant the government's motion

to stay. *See Giraud*, 2025 WL 2416737, at *30 (staying similar decision).

IT IS ORDERED that the motion to stay is granted. The Court's earlier decision, *United States v. Garcia*, 2025 WL 2784640 (D. Nev. Sept. 30, 2025), is stayed until completion of the Ninth Circuit's review.

Dated this 23rd day of October, 2025.

/s/ DAVID G. CAMPBELL
DAVID G. CAMPBELL
Senior 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 inabil-

ity 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; and¹

(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 United

¹ So in original. The word “and” probably should not appear.

² So in original. The period probably should be “; and”.

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.